

MBTA COMMUNITIES: MUNICIPALITIES & COMPLIANCE

Monday, February 26, 2024

Massachusetts Municipal Association

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Recap: MGL Chapter 40A, Section 3A

(a)(I) An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children. For the purposes of this section, a district of reasonable size shall:

- (i) have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A; and**
- (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.**

(b) An MBTA community that fails to comply with this section shall not be eligible for funds from:

- (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017;**
- (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; or**
- (iii) the MassWorks infrastructure program established in section 63 of chapter 23A; or**
- (iv) the HousingWorks infrastructure program established in section 27 of chapter 23B.**

(c) The department, in consultation with **executive office of housing and livable communities, in consultation with the executive office of economic development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section.**

Effective 1/14/2021, Section 18 of Chapter 358 of the Acts of 2020

Amended effective 7/29/2021, Section 10 of Chapter 29 of the Acts of 2021 (subsection (c): “department” changed to “department of housing and community development”)

Amended effective 5/2/2023, Chapter 7 of the Acts of 2023: Sections 152, 153 & 154

Recap: Compliance Guidelines

Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act

<https://www.mass.gov/info-details/section-3a-guidelines>

1. Overview

- **Purpose:** “Promulgate guidelines to determine if an MBTA community is in compliance with Section 3A.”

2. Definitions: Defines terms used in the Guidelines that are either not used in Section 3A or not defined in Chapter 40A, Section 1A

3. General Principles of Compliance

4. Allowing Multi-Family Housing “As of Right”

- Site plan review
- Affordability requirements ([Revised October 21, 2022](#))

5. Determining Reasonable Size

- Minimum Land Area & Minimum multi-family unit capacity
- Mixed-Use Development Districts ([Added August 17, 2023](#))
- Water and wastewater infrastructure within the district

6. Minimum Gross Density

7. Determining Suitability for Families with Children

8. Location of Districts

9. Determination of Compliance

- Additional discretionary grant programs that will take compliance into consideration ([List expanded August 17, 2023](#))

10. Ongoing Obligations; Rescission of a Determination of Compliance

11. Changes to MBTA Service

12. Appendix 1: MBTA Community Categories & Appendix 2: Compliance Methodology/Model

Issued by the Executive Office of Housing and Livable Communities (“EOHLC”) [formerly known as the Department of Housing and Community Development (“DHCD”)]

Issue Date: August 10, 2022

[Revised: October 21, 2022](#)

[Revised: August 17, 2023](#)

Guidelines: Revised Affordability Provisions

Section 4.b. Affordability Requirements [Revisions 10/21/2022]

- 1. There is no requirement that affordable units be eligible for listing on the Subsidized Housing Inventory. Communities have the option to require a percentage of “workforce housing” units occupied by households earning more than 80% of area median income (AMI).**
- 2. May require that more than 10% of the units in a project be affordable units (but not more than 20%), provided that the community demonstrates that a reasonable variety of multi-family housing types can be feasibly developed at the higher percentage.**
- 3 A community may set income limits for affordable units below 80% AMI, provided that it demonstrates that a reasonable variety of multi-family housing types can be feasibly developed at the proposed affordability levels.**

Under scenarios 2 and 3, the increased affordability requirements must be supported by an economic feasibility analysis prepared by a qualified and independent third party acceptable to EOHLC.

- 4. For previously approved and adopted 40R “smart growth” zoning districts, a community may amend an existing 40R district to comply with the Guidelines and retain an existing 25% affordable unit requirement.**

Guidelines: Mixed-Use Development Districts

Section 5.c. Reasonable Size-Consideration Given to Unit Capacity in Mixed-Use Development Districts

[Revisions 8/17/2023]

- These provisions apply when a community wishes to require mixed-uses in a particular district.
"Mixed-use development zoning district" means a zoning district where multiple residential units are allowed as of right if, but only if, combined with non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.
- If the proposed mixed-use development district meets the criteria set forth in the Guidelines, a community may apply to EOHLC to have mixed-use unit capacity credited toward the community's minimum unit capacity requirement.
- The criteria include an "eligible location" where village or downtown development is essential, there are no limits on unit or bedroom size, the development is allowed "as of right", non-residential uses are capped at 33% of the floor area of the project and limited to the first floor, and there are no parking requirements for the non-residential uses.
- Request for the unit capacity credit must be submitted on EOHLC's approved form at least 90 days prior to the zoning amendment vote.
- The reduction in MBTA community multi-family unit capacity based on mixed-use development unit capacity cannot exceed 25% of the MBTA community's multi-family unit capacity requirement.
- Mixed-use development districts will not count toward a community's minimum land acreage requirement.

MBTA Community Multi-family Zoning District Quantum of Vote

M.G.L. C. 40A, §5 - ADOPTION OR CHANGE OF ZONING
ORDINANCES OR BY-LAWS; PROCEDURE
(Amended as part of Chapter 358 of the Acts of 2020)

M.G.L. C. 40A, §1A
DEFINITIONS

The following shall be adopted by a vote of a simple majority [rather than 2/3] of all members of the town council or of the city council where there is a commission form of government or a single branch or of each branch where there are 2 branches or by a vote of a simple majority of town meeting:

(I) an amendment to a zoning ordinance or by-law to allow any of the following as of right:

- (a) multifamily housing or mixed-use development in an eligible location;
- (b) accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot; or
- (c) open-space residential development.

“**Eligible locations**”, areas that by virtue of their infrastructure, transportation access, existing underutilized facilities or location make highly suitable locations for residential or mixed-use smart growth zoning districts or starter home zoning districts, including without limitation:

- (i) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; or
- (ii) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns and existing rural village districts.

Timeline For Compliance

Deadlines to adopt zoning and *submit District Compliance Application

- ✓ December 31, 2023 Rapid Transit Communities
- ✓ December 31, 2024 Commuter Rail and Adjacent communities
- ✓ December 31, 2025 Adjacent small towns

***Note:** *This deadline is for submitting the District Compliance Application. Adoption of the zoning alone is not sufficient to meet the deadline and retain interim compliance status.*

Attorney General, Municipal Law Unit Approval

In addition to compliance with the Guidelines, zoning amendments adopted by Towns must also submit and receive approval of the zoning amendment pursuant to Chapter 40, Section 32.

Important Note

Receipt of approval from the Municipal Law Unit does not constitute compliance with Section 3A and the Guidelines.

Likewise, a compliance determination from EOHLC does not constitute approval under Chapter 40, Section 32.

If a zoning amendment receives MLU approval, the zoning change will go into effect in accordance with the provisions of Chapter 40, Section 32, even if the zoning amendment does not receive a determination of compliance from EOHLC.

Current Status of MBTA Community Zoning Adoption

Update from EOHLC (as of 2/22/2024):

- Arlington, Lexington, and Salem have approved districts
- Approximately 20 other communities have applied for district compliance
- Several communities have submitted an economic feasibility analysis to support zoning that would require more than 10% of units to meet affordability requirements. These are under review with no determinations yet made.
- A number of communities have submitted draft zoning amendments to EOHLC for pre-adoption review. Approximately 11 have received feedback and 20+ are currently under review.

According to the Municipal Law Unit Decision (MLU) website, approximately seven towns have received Attorney General approval of their MBTA Community zoning bylaws, with notes that such zoning must also receive a determination of compliance from EOHLC.

A handful of other decisions advise towns regarding the need to comply with Section 3A.

MLU Decisions Regarding MBTA Community Zoning

Some of the MLU decisions which discuss compliance with Section 3A provide guidance which may be of interest to other MBTA Communities:

- A town proposed to extend an existing building moratorium on multi-family housing. The MLU decision stated that the town could not comply with the Section 3A with the moratorium in place. For this reason, the proposed extension of the building moratorium was not approved.
- A town established its district within existing industrial zoning districts. The MLU approved the zoning amendment but encouraged the town to consider whether the chosen locations are “suitable for families with children”.
- A town’s bylaw included provisions that may not be permitted under the Compliance Guidelines. For example, the zoning requires 20% of the units in any project over 8 units to be affordable. This exceeds the Guidelines unless an economic feasibility analysis is submitted to and approved by EOHLC.

In addition, the MLU decision questioned whether certain existing provisions of the bylaw are consistent with MBTA Community requirements:

- Existing site plan review provisions may require: “Any other information, materials, reports or studies deemed necessary by the Planning Board, due to the special nature of the proposed use/activity or the subject property.” *The MLU noted that the town cannot require additional site plan review submissions for a by-right multi-family use that the town does not require for all other uses.*
- Existing site plan provisions set forth the possible basis for denial of, or conditions to a, site plan approval. *The MLU noted that denial of, or conditioning, a site plan is limited by Massachusetts case law and the town should consult with counsel before denying or conditioning a site plan.*
- It is unclear whether existing bylaw provisions for a water supply protection overlay district will apply to the new multi-family housing use. *The MLU noted that a further clarifying amendment may be necessary.*

Effects of Noncompliance

- Ineligible for state funds set forth in Section 3A
- Ineligible for additional state discretionary grant programs listed in the Compliance Guidelines
- Possible ineligibility for other state funds
- Potential litigation

State Funds Affected By Noncompliance: Under Section 3A

(i) **The Housing Choice Initiative**

(Summary of FY2025 Program) <https://www.mass.gov/doc/fy25-housing-choice-grant-program-guidelines/download>

*“The Housing Choice Community Grant Program rewards municipalities that have produced a significant number of housing units in the **last five years** and that have adopted or established Best Practices that encourage housing production Grant funds may be used for a variety of activities related to planning and zoning, site preparation for development, housing development, and infrastructure.”*

Awards range from up to \$150,000 for planning and zoning and up to \$500,000 for site preparation, buildings and infrastructure.

(ii) **Local Capital Projects Fund established in section 2EEEE of chapter 29**

There shall be established and set up on the books of the commonwealth a Local Capital Projects Fund. The fund shall be credited with any funds transferred from the Gaming Revenue Fund established in section 59 of chapter 23K and any monies credited to or transferred to the fund from any other fund or source.

Notes:

- a. The Local Capital Project Fund is a state budget source, not a grant program.
- b. These funds have been used to fund appropriations in the state budget for local housing authorities.

State Funds Affected By Noncompliance: Under Section 3A

(iii) The MassWorks infrastructure program established in section 63 of chapter 23A.

<https://www.mass.gov/doc/fy2025-massworks-program-guidelines/download>

Per M.G.L. ch. 23A, §63, the primary purpose of the MassWorks Program is: to issue grants to municipalities and other public instrumentalities for design, construction, building, land acquisition, rehabilitation, repair and other improvements to publicly-owned infrastructure including, but not limited to, sewers, utility extensions, streets, roads, curb-cuts, parking, water treatment systems, telecommunications systems, transit improvements, public parks and spaces within urban renewal districts, and pedestrian and bicycle ways.

For Fiscal Year 2025, the typical grant ranges include \$1,000,000-\$5,000,000 for Infrastructure, \$1,000,000 for Small Town Road Improvements, and \$100,000-\$500,000 for Pre-Development costs.

(iv) The HousingWorks infrastructure program established in section 27½ of chapter 23B.

<https://www.mass.gov/doc/fy25-hwip-guidelines/download>

Grant funds may be used for a variety of activities related to infrastructure projects associated with housing development.

Per the Fiscal Year 2025 Guidelines, “There is no set minimum or maximum amount that an eligible applicant may request. Historically, awards have ranged from \$300,000 to \$5 million with an average award of \$2.5 million.”

State Funds Affected By Noncompliance: Under the Guidelines

The following discretionary grant programs will take compliance with Section 3A into consideration when making grant award recommendations:

1. Community Planning Grants, EOHLC,
2. Massachusetts Downtown Initiative, EOED,
3. Urban Agenda, EOED,
4. Rural and Small Town Development Fund, EOED,
5. Brownfields Redevelopment Fund, MassDevelopment,
6. Site Readiness Program, MassDevelopment,
7. Underutilized Properties Program, MassDevelopment,
8. Collaborative Workspace Program, MassDevelopment,
9. Real Estate Services Technical Assistance, MassDevelopment,
10. Commonwealth Places Programs, MassDevelopment,
11. Land Use Planning Grants, EOEEA,
12. Local Acquisitions for Natural Diversity (LAND) Grants, EOEEA, and
13. Municipal Vulnerability Preparedness (MVP) Planning and Project Grants, EOEEA

Determinations of compliance also may inform other funding decisions by EOED, EOHLC, the MBTA and other state agencies which consider local housing policies when evaluating applications for discretionary grant programs or making other discretionary funding decisions.

Other Impacts of Noncompliance

In addition to the loss of eligibility for the state funds and grants set forth in Section 3A and the Guidelines, the following are examples of other potential impacts on MBTA Communities who do not comply with Section 3A and the Guidelines:

- A Seaport Economic Council grant award to an MBTA Community to fund a sea wall repair was made subject to timely compliance with Section 3A.
- During an interview in December 2023, Governor Healey stated: “If you don’t comply with the act, then you’re going to see us withholding state money for any number of programs that you’re used to receiving money for” ... “That includes for schools, it includes for roads and bridges, it includes for a whole host of things that are important to communities.” <https://www.wbur.org/news/2023/12/08/maura-healey-mbta-communities-act-zoning-law>
- Attorney General Andrea Campbell issued an advisory to MBTA Communities on March 15, 2023, which stated, in part: “Communities that fail to comply with the Law may be subject to civil enforcement action.” [Attorney General Advisory on MBTA Community Compliance; AG Letter to Town of Milton](#) (Jan. 2024)

Tips To Maintain Interim Compliance and Achieve Full Compliance

- **Keep track of the schedule set forth in your municipality's approved Action Plan.** Per the Guidelines, "EOHLC may revoke a determination of interim compliance if an MBTA community has not made sufficient progress in implementing an approved action plan. EOHLC and EOED will review an MBTA community's progress in implementing its action plan prior to making an award of funds under the Housing Choice Initiative and MassWorks infrastructure program."
- **Do not wait until too close to your municipality's compliance deadline to schedule a vote.** Municipalities need sufficient time to complete and timely submit the District Compliance Application. Also, in the event the proposed zoning does not receive a determination of compliance or is not adopted by the legislative body on the first attempt, a municipality will need sufficient time to revise the zoning and repeat the zoning adoption process in advance of its compliance deadline.
- **Re-review your municipality's entire zoning ordinance or bylaw** to flag any other provisions that may need to be amended for compliance with Section 3A and the Guidelines. For example, if the ordinance or bylaw already has site plan review provisions, but requires a special permit for site plan approval, this section must also be amended to allow "as of right" site plan review. An otherwise technically compliant MBTA Community zoning district (e.g. location, size, unit capacity) may not receive a determination of compliance if these types of changes are missed.
- **Request pre-adoption review of the proposed zoning from EOHLC 90 days** before the scheduled vote.
- **The Attorney General's Municipal Law Unit has also offered to review a town's draft MBTA Communities by-laws** before town meeting. It is recommended that towns wishing to request such review check with the MLU on timing for submission to confirm there will be adequate time for MLU review.

HELPFUL LINKS

1. EOHLC Resources: <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities#review-the-draft-guidelines->
2. Mass Housing Partnership MBTA Zoning Compliance Technical Assistance: <https://www.mhp.net/community/complete-neighborhoods-initiative>
3. MAPC Materials: <https://www.mapc.org/resource-library/mbta-multifamily-zoning/>
4. Municipal Law Unit Decision Lookup
(use “Topic” drop-down menu for “MBTA Community Zoning”):
<https://massago.hylandcloud.com/203ngpublicaccess/MLU.html>

Q & A