MBTA COMMUNITIES LAW
PERTINENT INFORMATION

I. THE STATUTE:

The MBTA Communities Law provides the following:

> Section 3A(a)(1) 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.
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> (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; (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.
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> (c) The 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.

M.G.L. Ch. 40A, §3A.[1]

II. THE GUIDELINES:

The Guidelines referenced in §3A(1)(c) can be found here:

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

Pursuant to the Guidelines, and given a 25 unit per acre density, Hamilton is required to have a by-right district with a land area of 49 acres with a unit capacity of 731. Wenham is required to have a district with a land area of 24 acres with a unit capacity of 365.

III. EOHLC'S SUMMARY OF AMENDED GUIDELINES (August 17, 2023):

On August 17, 2023, the Secretary of the Executive Office of Housing and Livable Communities (EOHLC), Edward M. Augustus, Jr., sent the following Memorandum to Municipal Officials in

[1] The MBTA was enacted in 2020 and has been amended in 2021 and 2023.

MBTA Communities regarding revisions to Section 3A Compliance Guidelines. He stated the following:

> On August 10, 2022, EOHLC released Compliance Guidelines for Multi-Family Zoning Districts Under Section 3A of the Zoning Act (the "Guidelines"). One revision was made in October 2022. This is a summary of the second change. In response to feedback from municipal leaders in several MBTA communities, EOHLC is revising the Guidelines to offer MBTA communities a path to receive some credit for mixed-use development zoning districts. The revision also specifies how Section 3A compliance may affect certain discretionary grant award decisions. These revisions:
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> 1. Allow an MBTA community to "offset" the minimum multi-family unit capacity requirement in certain multi-family zoning district(s) by up to 25%, based on the unit capacity of a mixed-use zoning district that meets key requirements of Section 3A and the Guidelines, but for requiring a ground floor non-residential component. Such "offset" – only available where existing village-style or downtown development is essential to preserve pedestrian access to amenities – still requires a municipality to demonstrate the same total amount of unit capacity.
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> 2. Protect the financial feasibility of achieving housing goals where mixed-use zoning requires ground-floor non-residential uses by (i) setting forth location criteria for mixed-use development districts and requiring that EOHLC has pre-approved the location before the MBTA community's vote on its zoning changes; (ii) capping the percentage floor area of each development that may be required to be non-residential (ground floor only); (iii) requiring a broad mix of non-residential uses allowed as of right; and (iv) prohibiting minimum parking requirements for non-residential uses.
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> 3. Allow MBTA communities to locate more housing in walkable and transit-oriented neighborhoods without jeopardizing existing non-residential resources and amenities. Many MBTA communities expressed a desire to locate districts in village-style or downtown neighborhoods but feared that allowing multi-family housing as of right in those areas could risk a loss of existing businesses and buildings. Many residents expressed a desire to live in village-style, downtown, and transit-oriented neighborhoods.
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> 4. Add a list of thirteen discretionary grants programs to Section 9 to alert MBTA communities of additional grant programs that will consider compliance with Section 3A in making grant awards.
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> These revisions to the Guidelines are intended to provide greater flexibility to MBTA communities to adopt new zoning districts in mixed-use neighborhoods, and to promote housing opportunities for residents in such neighborhoods. The revisions do not reduce the total unit capacity required by the Guidelines.

IV. The Attorney General's Advisory Concerning Enforcement of the MBTA Communities Zoning Law:

The Office of the Attorney General issued the following advisory to MBTA Communities:

> The Office of the Attorney General is issuing this Advisory to assist cities, towns, and residents in understanding the requirements imposed by the MBTA Communities Zoning Law (G.L. c. 40A, § 3A) (the "Law"). The Law was enacted to address the Commonwealth's acute need for housing by facilitating the development of transit-oriented, multifamily housing. By any measure, Massachusetts is in a housing crisis that is inflicting unacceptable economic, social, and environmental harms across our state – particularly on working families and people of color. The Law directly responds to this crisis by implementing zoning reforms that require MBTA Communities to permit reasonable levels of multifamily housing development near transit stations.
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> Massachusetts cities and towns have broad authority to enact local zoning ordinances and by-laws to promote the public welfare, so long as they are not inconsistent with constitutional or statutory requirements. The MBTA Communities Zoning Law provides one such statutory requirement: that MBTA Communities must allow at least one zoning district of reasonable size in which multifamily housing is permitted "as of right." The district must generally be located within half a mile of a transit station and allow for development at a minimum gross density of fifteen units per acre.[4] MBTA Communities cannot impose age-based occupancy limitations or other restrictions that interfere with the construction of units suitable for families with children within the zoning district. For example, the zoning district cannot have limits on the size of units or caps on the number of bedrooms or occupants. The required zoning district must also allow for the construction of multifamily units without special permits, variances, waivers or other discretionary approvals. These measures can prevent, delay, or significantly increase the costs of construction. As directed by the Legislature, the Department of Housing and Community Development has promulgated guidelines regarding compliance. These guidelines provide additional information and benchmarks to be utilized in determining whether MBTA Communities are complying with the Law.
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> All MBTA Communities must comply with the Law. Communities that do not currently have a compliant multi-family zoning district must take steps outlined in the DHCD guidelines to demonstrate interim compliance. Communities that fail to comply with the Law may be subject to civil enforcement action. Non-compliant MBTA Communities are also subject to the administrative consequence of being rendered ineligible to receive certain forms of state funding. Importantly, MBTA Communities cannot avoid their obligations under the Law by foregoing this funding. The Law requires that MBTA Communities "shall have" a compliant zoning district and does not provide any mechanism by which a town or city may opt out of this requirement.
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> MBTA Communities that fail to comply with the Law's requirements also risk liability under federal and state fair housing laws. The Massachusetts Antidiscrimination Law and federal Fair Housing Act prohibit towns and cities from using their zoning power for a discriminatory purpose or with discriminatory effect. An MBTA Community may violate these laws if, for example, its zoning restrictions have the effect of unfairly limiting housing

opportunities for families with children, individuals who receive housing subsidies, people of color, people with disabilities, or other protected groups.

(footnotes omitted). *See* Section VI with respect to litigation commenced against the Town of Milton.

V. MYTHS ABOUT THE MBTA COMMUNITIES LAW:

The Massachusetts Housing Partnership (MHP) published an article, on April 13, 2022, by Katy Lacy,[2] addressing misconceptions about new MBTA communities zoning law. In the article, Ms. Lacy stated in pertinent part the following:

> Myth: Law requires the production of multi-family housing
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> **Fact:** Compliance with Section 3A requires that cities and towns create zoning districts where multi-family housing will be permitted. While it is the goal of the law to produce more housing opportunities in smart locations, attaining and remaining in compliance will not require the production of new housing. Whether new housing will be produced in the new district or not will depend on market conditions, the availability of land, and suitable development proposals.
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> Myth: Law requires cities, towns to provide infrastructure for new housing
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> **Fact:** Section 3A requires the creation of at least one zoning district that allows for the creation of housing at a gross density of at least 15 units per acre. State building code requires the provision of adequate basic utilities, including water and wastewater, before a building permit can be issued. It is typically the responsibility of a developer to provide utilities. If current infrastructure capacity would not allow for new development, none will occur. If, in the future, infrastructure capacity is expanded, or new technologies emerge, the new zoning could provide the groundwork for new development. Towns should try to align these zoning changes with locations that have the most suitable infrastructure for moderate density multifamily.
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> Myth: Law requires cities, towns to permit development on environmentally sensitive land
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> **Fact:** Section 3A does not override state or local environmental regulations. New development that may occur within the multi-family district still needs to comply with all applicable state and local provisions.

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[2] Katy Lacy is a Senior Planner at MHP. MHP Director of Analytics and Research Tom Hopper contributed to this explainer.

Myth: Law says currently developed areas cannot be included in new district

Fact: Areas that are currently developed may be included in the new multi-family district. Public comments included concerns that a city or town is "already built out," and that there is no available vacant land where new housing could be built. However, compliant districts need only to provide for a gross density of 15 units per acre notwithstanding what already exists on the ground. Modifying zoning in an area with existing development is an excellent way to create opportunities for redevelopment in places that already have some housing or a mix of uses, and these locations may be the best site for further development.

Myth: Areas with existing multi-family development that have a density of 15 units per acre or higher will "count" or "not count" if included in the new district

Fact: Compliance with the new zoning provision does not and will not entail "counting" existing housing units. Whether the proposed new district is currently undeveloped or "built out" with multi-family will have no bearing on compliance. For the district to comply with Section 3A, the underlying zoning must allow for a gross density of at least 15 units per acre. That said, communities understandably want to understand and plan for potential community impact resulting from the new zoning, whether development occurs right away or decades from now. A full understanding of existing conditions within the new district will allow planners to determine potential new growth.

Myth: Multi-family housing means apartment buildings or "high-density" development

Fact: Section 3A requires communities to create districts where multi-family housing is permitted by right. Related changes to Section 40A define multi-family housing as "a building with 3 or more residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building." A variety of building types, including townhomes, triple-deckers, single-family cluster developments and townhouses could all meet this definition.

Myth: New law will not result in the creation of affordable housing

Fact: Section 3A does not require the inclusion of affordable housing provisions in the zoning district. However, municipalities may incorporate minimum affordability requirements as long as they are financially feasible and do not unduly impede the construction of new multi-family housing in the district.

Myth: Senior housing is not permitted in the new district

Fact: In order to comply with Section 3A, multi-family districts cannot require the creation of senior housing or restrict the development of housing that would be suitable for families with children. But the new law does not prohibit senior housing, which can

be included in the new district as long as it complies with all applicable state and local regulations.

Myth: Mixed-use development not be permitted

Fact: Any mix of uses may be permitted in the new district so long as a gross density of at least 15 dwelling units per acre is allowed. Many communities are considering the use of mixed-use 40R Districts (which also require 20 percent affordability) to meet the Section 3A requirement.

Myth: "By-Right" means developers can build whatever they want

Fact: Zoning districts adopted under Section 3A can include use restrictions (commercial, residential, industrial) and intensity limits (setbacks, height limitations, FAR) as long as a district-wide gross density of 15 units per acre is provided. By-right uses can also be subject to site plan review standards. Finally, uses that are permitted by right are still subject to other applicable state and local regulations.

Myth: New law overrides local zoning

Fact: Section 3A requires cities and towns to use the local authority granted to them by state law to adopt or amend their zoning to create the new district just as they would normally adopt new zoning provisions. While the proposed amendment must comply with the final guidelines, cities and towns have a lot of flexibility in terms of the size of the district, where the district will be located, dimensional requirements, and what uses are permitted.

VI. LITIGATION PENDING BEFORE THE SUPREME JUDICIAL COURT:

The Town of Milton conducted a referendum with respect to its adoption of Section 3A compliant districts and voted to rescind the vote that had been held at a prior Town Meeting creating two compliant districts (Milton has a representative Town Meeting). In response to that vote, on February 27, 2024, the Attorney General commenced a legal action against the Town of Milton owing to its failure to comply the MBTA Communities Law in which she sought the following forms of relief:

A. Reserve decision on the merits of this complaint and report the case to the Supreme Judicial Court for the Commonwealth for adjudication of the issues of law presented herein;

B. Declare that § 3A(a) affirmatively obligates the Town to have a zoning by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right and that satisfies the other criteria set forth in § 3A(a) and the Guidelines;

C. Declare that the Town has failed to meet its obligations under § 3A(a) and the Guidelines;

D. Declare that the Attorney General is entitled to injunctive remedies to secure the Town's compliance with § 3A(a) and the Guidelines;

E. Enter an injunction requiring the Town to create a zoning district that complies with § 3A(a) and the Guidelines within three months after entry of such injunction;

F. If, and to the extent that, the Town does not comply with said injunction, enter a further injunction prohibiting the Town and Mr. Atchue from enforcing any aspect of the Town's zoning by-law, rules, or regulations, to the extent that such enforcement is inconsistent with the Town's obligations under § 3A(a) and the Guidelines; and

G. Order such other relief as the Court may deem just and proper. In the event that the Town proves unable or unwilling to comply with the injunctive relief sought above, this may include, but is not limited to, appointment of a Special Master to propose a zoning by-law that complies with § 3A(a) and the Guidelines, or imposition of fines on the Town.

The Town of Milton answered the Complaint, and stated the following in its defense:

Wherefore, Town of Milton respectfully requests that the Court enter judgment awarding it the following declaratory relief:
a. a declaration that the Town of Milton is not in violation of § 3A because § 3A is not self-executing and there are no "guidelines to determine …compliance" that have been properly promulgated under G.L. c. 30A;
b. a declaration that the declaratory and injunctive relief sought by the AGO is not available to enforce § 3A;
c. a declaration that the Guidelines are ultra vires and therefore unlawful and unenforceable, or in the alternative a declaration that § 3A violates Article 30 of the Declaration of Rights;
d. a declaration that the Guidelines' designation of Milton as a "rapid transit community" was arbitrary and capricious;
e. such other and further relief as the Court may provide.

The Supreme Judicial Court granted the Attorney General's request for ezpedited review of the issues of law and likely will be determining those issues in October of 2024.