

## 760 CMR 59.00: Smart Growth Zoning Overlay District (M.G.L. c. 40R)

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### 59.01: Purpose, Program Overview

(1) 760 CMR 59.00 establishes rules, standards, and procedures for the Smart Growth Zoning Overlay District Program created by M.G.L. c. 40R. The Department of Housing and Community Development (the Department) is the regulatory agency for the program and is authorized to issue regulations to explain and to provide specifics of the program and its operation. It is the purpose of M.G.L. c. 40R and 760 CMR 59.00 to encourage Smart Growth and increased housing production in Massachusetts.

(2) 760 CMR 59.00, as further explained by guidelines issued by the Department, describes the process by which Municipalities may propose, for review and approval by the Department, new Smart Growth Zoning provisions that allow the As-of-right development of high-density housing and Mixed-use development within zoning overlay Districts. To be approvable, overlay Districts shall be located near transit stations, in existing city and town centers, commercial districts, and other Areas of Concentrated Development, and in other eligible Smart Growth locations. The Smart Growth Zoning for an overlay District must require that at least 20% of the housing developed will be affordable. Projects must be developable As-of-right under the Smart Growth Zoning, subject only to the review of plans and the application of design standards by a local Plan Approving Authority.

The proposed Smart Growth Zoning shall be submitted to the Department for its preliminary approval, after which it may be adopted by the Municipality. Once the Municipality has adopted the Smart Growth Zoning and received final approval from the Department, it becomes eligible for two types of payment from a Trust Fund administered by the Commonwealth. First, the Municipality receives an immediate Zoning Incentive Payment, based upon the projected number of additional new units that could be built on Developable or Underutilized Land under the Smart Growth Zoning in excess of what would previously have been allowed As-of-right through the underlying zoning. Second, the Municipality receives a Density Bonus Payment upon the issuance of a building permit for each such additional unit. 760 CMR 59.00 also sets forth procedures for the amendment, repeal, or revocation of an approved overlay District, and for annual reporting by Municipalities to the Department and by the Department to the general court.

Within the boundaries of an overlay District, a developer may elect either to develop a project in accordance with the requirements of the applicable Smart Growth Zoning adopted under M.G.L. c. 40R and 760 CMR 59.00, or to develop a project in accordance with requirements of the applicable underlying zoning adopted under M.G.L. c. 40A. Nothing in M.G.L. c. 40R and 760 CMR 59.00 shall affect a Municipality's authority under M.G.L. c. 40A to amend any provision of its local zoning ordinance or by-law, including the underlying zoning applicable within any area that lies within the boundaries of the Smart Growth Zoning District.

## 59.02: Definitions

Adjacent Area means an area physically contiguous to an Eligible Location as defined under 760 CMR 59.04(1)(a)1. or 2., that is currently served or planned to be served within five years of the application by public sewer(s) and/or private wastewater treatment plant(s) and other Infrastructure, and that provides or will provide Transportation Access, in accordance with requirements for Planned Infrastructure. *See* 760 CMR 59.04(1)(a).

Affordable means housing units that are Affordable to and occupied by individuals and families whose annual income is less than 80 percent of the area-wide median income as determined by the United States Department of Housing and Urban Development (HUD), adjusted for household size and using HUD's rules for attribution of income to assets, for which affordability is assured for a period of no less than 30 years through the use of an Affordable housing restriction as defined in M.G.L. c. 184, § 31, and which meet the standards set out in 760 CMR 56.03(2) and the Department's Comprehensive Permit Guidelines for eligibility for the Subsidized Housing Inventory and other guidelines issued by the Department for the inventory.

Approved District means a District for which Smart Growth Zoning has been adopted by a Municipality and for which a Letter of Approval has been issued by the Department, in accordance with M.G.L. c. 40R and 760 CMR 59.00, subject to any Letter of Noncompliance or Certificate of Revocation in effect pursuant to 760 CMR 59.07.

Area of Concentrated Development means the largest qualifying, contiguous area of a city or town center; an existing substantial, multi-parcel commercial district; or a rural village district; each, in its entirety, the boundaries of which are clearly identified and submitted on a corresponding map:

- (a) That is currently served or scheduled to be served (as shown by sufficient documentation) within five years of the application by public sewer(s) and/or private sewage treatment plant(s);
- (b) Of which at least 50% of the total land area is either Substantially Developed Land or Underutilized Land; and
- (c) Of which the primary current use (or, in the case of Underutilized Land, the primary current zoning) of land and or buildings is commercial (including retail, office, or industrial businesses) or mixed use. Land designated as a commercial center under M.G.L. c. 40, § 60 qualifies as an Area of Concentrated Development. In areas that are not sewered or scheduled to be sewered, an existing rural village district qualifies as an Area of Concentrated Development if:
  - 1. it includes the Municipality's principal road intersection or other civic center point of the Municipality approved by the Department and is characterized by the most Substantially Developed portions of the surrounding village area plus any land that would otherwise qualify as Substantially Developed or Underutilized Land within up to ½ mile distance of such principal road intersection or other approved civic center point;
  - 2. it contains two or more of a town hall, post office, public library, public school, or public safety facility, or it contains an existing village retail district; and

3. at least 50% of the total land area within the existing rural village district is either Substantially Developed Land or Underutilized Land. *See* 760 CMR 59.04(1)(a)2.

As-of-right means allowable development of a unit of housing under the Underlying Zoning or Smart Growth Zoning without recourse to a special permit, variance, zoning amendment, or other form of zoning relief. Units that require Plan Review shall be considered As-of-right, subject to review and approval by the Department of the proposed Smart Growth Zoning and Design Standards under 760 CMR 59.00.

Authorization of Payment means a written authorization by the Department that a Municipality is entitled to a Density Bonus Payment from the Trust Fund, according to the procedure set forth in 760 CMR 59.06(2).

Bonus Unit means any residential housing unit developed as part of a Project within a District under the Smart Growth Zoning, either through new construction, the substantial rehabilitation of an existing building, or the conversion to residential use of an existing building, in excess of the number of Existing Zoned Units for the same parcel. Units that are developed within a District under a comprehensive permit issued pursuant to M.G.L. c. 40B after the submission of an application to the Department under 760 CMR 59.05(2), in excess of the number of Existing Zoned Units for the same parcel, shall be treated as Bonus Units.

Certificate of Compliance means a certificate issued by the Department to a Municipality upon the Department's review and approval of an annual update submitted in accordance with 760 CMR 59.07(1). *See* 760 CMR 59.07(2).

Certificate of Revocation means a certificate issued by the Department to a Municipality if the Department is unable to certify the Municipality's compliance with M.G.L. c. 40R and 760 CMR 59.00. *See* 760 CMR 59.07(3).

Comprehensive Housing Plan or Plan means a document, prepared by a Municipality for review by the Department, providing an assessment of the housing needs within the Municipality, and describing specific strategies, including but not limited to those contained in the Smart Growth Zoning, to address these needs and ensure that the applicable approval standards of 760 CMR 59.04(1)(g), (i) and (j) are satisfied. The Plan shall identify the numbers of Existing Zoned Units, estimated Future Zoned Units, and estimated Incentive Units within the proposed District. A Comprehensive Housing Plan may be a housing production plan approved by the Department under 760 CMR 56.03(4), community development plan or equivalent municipally prepared document that is supplemented as necessary to satisfy these requirements regarding the proposed Smart Growth Zoning, as well as the requirements of 760 CMR 59.03(1)(g).

Density Bonus Payment means a one-time payment made to a Municipality from the Trust Fund for each Bonus Unit within an Approved District for which a building permit has been issued. *See* 760 CMR 59.06(2).

Department means the Department of Housing and Community Development.

Design Standards means provisions of the Smart Growth Zoning, or regulations adopted pursuant to the Smart Growth Zoning, which are made applicable to Projects within the District that are subject to Plan Review by the Plan Approval Authority. *See* 760 CMR 59.04(1)(f).

Developable Land means all land within a District that can be feasibly developed into residential or Mixed-use Development Projects. Developable Land shall not include:

- (a) Substantially Developed Land;
- (b) Open Space;
- (c) Future Open Space;
- (d) The rights-of-way of existing public streets, ways, and transit lines;
- (e) Land currently in use for governmental functions (except to the extent that such land qualifies as Underutilized Land); or
- (f) Areas exceeding ½ acre of contiguous land that are:
  - 1. protected wetland resources (including buffer zones) under federal, state, or local laws;
  - 2. rare species habitat designated under federal or state law, unless granted an exception consistent with requirements established by the Massachusetts Executive Office of Energy and Environmental Affairs and the Department of Fish and Game that all or part of such areas can accommodate development consistent with the proposed Smart Growth Zoning;
  - 3. characterized by steep slopes with an average gradient of at least 15%; or
  - 4. subject to any other local ordinance, by-law, or regulation that would prevent the development of residential or Mixed-use Development Projects at the As-of-right residential densities set forth in the Smart Growth Zoning.

District means an overlay district within a Municipality that is subject to Smart Growth Zoning. A District may be superimposed over one or more zoning districts (as defined by the Underlying Zoning) in an Eligible Location. Within a District, the Smart Growth Zoning shall allow residential Projects As-of-right, and it may also permit Mixed-use Development Projects As-of-right. Within the boundaries of a District, a developer may elect either to develop a Project in accordance with the requirements of the Smart Growth Zoning, or to develop a project in accordance with requirements of the Underlying Zoning.

Eligible Location means:

- (a) an area near a rapid transit or commuter rail station, or a bus or ferry terminal, plus any qualifying Adjacent Area;

- (b) an Area of Concentrated Development, including a city or town center, an existing commercial district, or an existing rural village district, plus any qualifying Adjacent Area; or
- (c) another Highly Suitable Location;

in each case that qualifies under the criteria set forth in 760 CMR 59.04(1)(a). If a portion of a parcel of land falls within an Eligible Location, then all of such land, to the extent of its legal boundaries, may also be deemed an Eligible Location.

Existing Zoned Units means for a given parcel or area of Developable Land within a District, the maximum number of housing units that could feasibly be developed As-of-right under the Underlying Zoning through new development, the substantial rehabilitation of existing buildings, or the conversion to residential use of existing buildings. Units that are developable within the geographic area of a District under a comprehensive permit issued pursuant to M.G.L. c. 40B prior to the submission of an application to the Department under 760 CMR 59.05(2) shall be included as Existing Zoned Units. For purposes of determining the Zoning Incentive Payment and the Density Bonus Payment, and absent any application of the Smart Growth Zoning to Substantially Developed areas, the Existing Zoned Units within any District or Project site shall presumptively be determined upon the basis of the allowable As-of-right residential density per acre shown on the plan submitted under 760 CMR 59.03(1)(c), multiplied by the acreage of Developable Land area. As provided by 760 CMR 59.04(1)(d), where the Smart Growth Zoning is further applied to Substantially Developed areas, qualifying Project units developed in excess of the Existing Zoned Units for the same parcel(s) of land will be treated as Bonus Units for the purposes of Density Bonus Payments.

Future Open Space means a Municipality may designate or require to be designated certain areas within a District to be set aside in the future as dedicated perpetual Open Space through the use of a conservation restriction as defined in M.G.L. c. 184, § 31 or other qualifying means. Such Future Open Space may include requirements under the Smart Growth Zoning for Projects to set aside a fixed percentage of the site area as Open Space, and allowing such Projects to deduct the dedicated Open Space when calculating housing densities. Notwithstanding the foregoing, the total Future Open Space within a District may not exceed 10% of what would otherwise be the Developable Land area if the Developable Land would be less than 50 acres; it may not exceed 20% of what would otherwise be the Developable Land area if the Developable Land area would be 50 acres or more; and it shall be consistent with the current local Open Space plan.

Future Zoned Units means for a given parcel or area of Developable Land within a District, the maximum number of housing units that could be developed As-of-right under the Smart Growth Zoning through new development, the substantial rehabilitation of existing buildings, or the conversion to residential use of existing buildings.

Highly Suitable Location means a location that, as determined by the Department based on satisfactory evidence provided by the Municipality, is consistent with the statutory goals for Smart Growth set forth in M.G.L. c. 40R, § 1 and 760 CMR 59.00, and qualifies as an Eligible Location under the criteria set forth in 760 CMR 59.04 (1)(a)3.

Historic District means a district in a Municipality characterized by the historic and or architectural significance of buildings, structures, and sites, and in which exterior changes to and the construction of buildings and structures are subject to regulations adopted by the Municipality pursuant to M.G.L. c. 40C or other state law. Within any such Historic District, the provisions and requirements of the local

Historic District regulations may apply to existing and proposed buildings. A District may include all or part of one or more existing Historic Districts, and it may be coterminous or non-coterminous with the Historic District. A Municipality may establish or enlarge a Historic District within an Approved District with the approval of the Department, provided that the Historic District does not render the District non-compliant with the provisions of M.G.L. c. 40R and 760 CMR 59.00. The Department must approve such new or enlarged Historic District within an Approved District prior to its adoption by the Municipality, in accordance with 760 CMR 59.05(5). The Department's review of such a new or enlarged Historic District shall be limited to compliance with M.G.L. c. 40R, 760 CMR 59.00. *See also the definition of Substantially Developed Land.*

Incentive Units means for a given parcel or area of Developable Land within a District, the number of Future Zoned Units, less the number of Existing Zoned Units for the same parcel or area of land.

Infrastructure means the basic facilities, services, and installations needed for the functioning of the area of the Municipality within which the District is to be located, including: pedestrian and vehicular access; public and private facilities for storm water and wastewater transport, treatment and disposal; and water and power supply lines. Planned Infrastructure means Infrastructure for which adequate reliable documentation has been submitted to establish the timing for completion of the improvements (to be within five years of the application date, or other reasonable time period approved by the Department) and the identity of the entities responsible for completing the improvements.

Letter of Approval means a letter issued by the Department to a Municipality upon the adoption of its Smart Growth Zoning for a District, confirming final approval of the District under M.G.L. c. 40R and 760 CMR 59.00. *See 760 CMR 59.05(4).*

Letter of Conditional Approval means a letter issued by the Department to a Municipality upon the adoption of its Smart Growth Zoning for a District, that approves the District designation but does not authorize the Zoning Incentive Payment in accordance with 760 CMR 59.05(4)(c) because the Municipality has not met all of the criteria for final approval of the District under 760 CMR 59.04(1), including, for example, Infrastructure requirements under 760 CMR 59.03(1)(i) and 59.04(1)(k). *See 760 CMR 59.05(4).*

Letter of Eligibility means a letter issued by the Department to a Municipality, finding that a proposed District would meet the approval requirements set forth in 760 CMR 59.04(1). *See 760 CMR 59.05(2).*

Letter of Noncompliance means a letter from the Department finding that a Municipality has failed to demonstrate compliance with M.G.L. c. 40R and 760 CMR 59.00. *See 760 CMR 59.07(3).*

Mixed-use Development means a Project containing a mix of some or all of Multi-family Residential, two- and three-family residential, and single-family residential uses, together with commercial, institutional, industrial, or other non-residential uses, in which the applicable residential densities set forth in 760 CMR 59.04(1)(d)1. through 3. apply proportionally to the residential portion of the Mixed-use Development Project in accordance with 760 CMR 59.04(1)(d)3.

Multi-family Residential Use means apartment or condominium units in buildings that contain or will contain more than three such units, provided that the Smart Growth Zoning may treat attached townhouses on separate lots as single-family residential use. *See 760 CMR 59.04(1)(d).*

Municipality means any Massachusetts city or town, including without limitation the City of Boston.

Open Space means land dedicated in perpetuity to protect one or more of the following: land for existing and future well fields, aquifers, and recharge areas; watershed land; agricultural land; grasslands; fields; forest land; fresh and salt water marshes and other wetlands; ocean, river, stream, lake and pond frontage; beaches, dunes, and other coastal lands; lands to protect scenic vistas; land for wildlife or nature preserves; land for recreational use; parklands, plazas, playgrounds, and reservations; and cemeteries. Open Space may be in public, private, or non-profit ownership. Any land subject to protection under Article 97 of the Massachusetts Constitution shall be deemed Open Space for the purposes of 760 CMR 59.00.

Plan Approving Authority or Plan Approval Authority means a unit of Municipal government designated by the city or town to review projects and issue approvals under M.G.L. c. 40R, § 11. *See* 760 CMR 59.04(1)(f).

Plan Review means the standards and procedures by which a proposed Project within a District is made subject to review by the Plan Approval Authority under the provisions of the Smart Growth Zoning, in accordance with M.G.L. c. 40R, § 11 and 760 CMR 59.00. *See* 760 CMR 59.04(1)(f).

Project means a residential or Mixed-use Development undertaken within a District in accordance with the requirements of the Smart Growth Zoning. Within the boundaries of a District a developer may elect either to develop a Project in accordance with the requirements of the Smart Growth Zoning, or to undertake development in accordance with the requirements of the Underlying Zoning. *See* 760 CMR 59.04(1)(f).

Smart Growth – means a principle of land development that furthers, on balance, the following goals set forth in M.G.L. c. 40R, § 1 and 760 CMR 59.00:

- (a) Increasing the availability of Affordable housing by creating a range of housing opportunities in neighborhoods;
- (b) Emphasizing mixing land uses;
- (c) Taking advantage of compact design;
- (d) Fostering distinctive and attractive communities;
- (e) Preserving open space, farmland, natural beauty and critical environmental areas;
- (f) Strengthening existing communities;
- (g) Providing a variety of transportation choices;
- (h) Making development decisions predictable, fair and cost effective; and
- (i) Encouraging community and stakeholder collaboration in development decisions.

Smart Growth Zoning means the local zoning overlay requirements for a District adopted or changed by amendment by the Municipality pursuant to M.G.L. c. 40R, in accordance with the procedures for zoning adoption and amendment as set forth in M.G.L. c. 40A for communities other than Boston, or by

other applicable law in the case of the City of Boston, and approved by the Department pursuant to M.G.L. c. 40R and 760 CMR 59.00. *See* further the approval criteria for Smart Growth Zoning set forth in 760 CMR 59.04(1).

Start of Construction means, with respect to an Approved District, that construction activity, such as the pouring of foundations or footings, utility relocation, or the remediation of hazardous materials on the site, has occurred in good faith within an Approved District on a Project or on a Planned Infrastructure upgrade identified in the Municipality's application under 760 CMR 59.03(1), and further provided that such construction is continued through to completion. *See* 760 CMR 59.07(1)(f).

Substantially Developed Land means land within a District that is currently used for commercial, industrial, institutional, or governmental use, or for residential use consistent with or exceeding the densities allowable under the Underlying Zoning, and which does not qualify as Underutilized Land. Any land located within a Historic District shall be presumed to be Substantially Developed, unless the Municipality can show that all or a portion of such land qualifies as Developable Land.

Transportation Access means safe, practical and continuous pedestrian access to at least one destination that pedestrians frequently use, such as an elementary or high school; a college or university; a hospital; a municipal office building, public library, post office, public safety facility, or other civic facility; a general or neighborhood commercial or business area with substantial employment, retail or entertainment activity; a recreational facility open to the public; or a bus stop along a route serving an Eligible Location or Adjacent Area at a minimum of hourly frequency during peak periods.

Trust Fund means the Smart Growth Housing Trust Fund established by M.G.L. c. 10, § 35AA. *See* 760 CMR 59.06.

Underlying Zoning means the local zoning requirements adopted pursuant to M.G.L. c. 40A (or, in the case of the City of Boston, other applicable law) that are otherwise applicable to the geographic area where a District is located or proposed. Solely for the purposes of calculating existing residential densities under 760 CMR 59.03(1), the Underlying Zoning shall be deemed to be the zoning which was in effect one year prior to the date upon which the application was submitted to the Department under 760 CMR 59.05(2). Nothing in M.G.L. c. 40R and 760 CMR 59.00 shall affect a Municipality's authority under M.G.L. c. 40A to amend any provision of its local zoning ordinance or by-law, including the Underlying Zoning applicable within any area that lies within the boundaries of an Approved District.

Underutilized Land means Developable Land within a District that would otherwise qualify as Substantially Developed Land, but which:

- a) is characterized by improvements that have a marginal or significantly declining use, as measured by such factors as residual Floor Area Ratio (FAR), vacancy rates, extent of operation, current and projected employment levels, market demand for the current uses or the uses to which the existing improvements could readily be converted, and low value of improvements in relation to land value; and
- b) as demonstrated by existing or anticipated market conditions, may have reasonable potential to be developed, recycled, or converted into residential or Mixed-use Development consistent with Smart Growth.

Unduly Restrict means to add unreasonable costs or unreasonably impair the economic feasibility of proposed Projects in a District by means of a provision of Smart Growth Zoning or a Design Standard.



Zoning Incentive Payment means a one-time payment to a Municipality from the Trust Fund that is made upon submission by the Municipality to the Trust Fund of the Department's Letter of Approval. *See* 760 CMR 59.06(1).

### 59.03: Contents of Applications to the Department

(1) Application for Preliminary Determination of Eligibility. The chief executive of a Municipality desiring to adopt Smart Growth Zoning for a proposed District shall submit to the Department the following application materials, and such other materials as may be required by guidelines issued by the Department, for its Preliminary Determination of Eligibility under 760 CMR 59.05(2):

(a) A locator map of the Municipality showing the location of the proposed District in relation to existing and planned transit stations, existing and planned water and sewer lines and other Infrastructure, Areas of Concentrated Development, and Highly Suitable Locations pertinent to qualification of the location as an Eligible Location, along with such other information as the Department may require to support its finding of an Eligible Location.

(b) A developable land plan that identifies and describes the boundaries of the proposed District, and that identifies on a parcel-by-parcel basis (unless another method has been previously approved by the Department) those areas within the District that qualify as Developable Land (including any Underutilized Land), Substantially Developed Land, and each of the other categories of land excluded from the definition of Developable Land, along with a calculation, in acres, of the area of each such category of land within the proposed District.

(c) An existing zoned units plan and accompanying data spreadsheet that clearly identifies on a parcel-by-parcel basis (unless another method has been previously approved by the Department) the maximum As-of-right residential density or densities achievable throughout the District in accordance with the Underlying Zoning. The existing As-of-right residential densities for Substantially Developed Land need not be included unless the proposed Smart Growth Zoning will be applied to these areas as provided for under 760 CMR 59.04(1)(d). This plan shall be used in calculating applicable Existing Zoned Units, Zoning Incentive Payments, and Density Bonus Payments.

(d) A Smart Growth residential density plan and accompanying data spreadsheet that clearly identifies on a parcel-by-parcel basis (unless another method has been previously approved by the Department) the allowable As-of-right residential density or densities achievable throughout the District on Developable Land and, if requested by the Department, Substantially Developed Land, in accordance with the Smart Growth Zoning, and any other local ordinance, by-law, or regulation. This plan shall be used in calculating Future Zoned Units, Incentive Units, and Zoning Incentive Payments.

(e) A copy, including both text and map(s), of the proposed Smart Growth Zoning and Design Standards (if not contained in the Smart Growth Zoning) for the District. The zoning map(s) shall show all sub-districts, including any Substantially Developed Land sub-districts.

(f) A copy, including both text and map(s), of the Underlying Zoning for the District.

(g) A Comprehensive Housing Plan, providing an assessment of the housing needs within the Municipality, and describing specific strategies, including but not limited to those contained in the Smart Growth Zoning, to address these needs and ensure that the applicable approval standards of 760 CMR 59.04(1)(g), (i), and (j) are satisfied. The Plan shall identify the number of Existing Zoned Units, estimated Future Zoned Units, and estimated Incentive Units within the proposed District. The Plan shall include an assessment of local housing needs for households in protected classes identified in state and federal law, and it shall address how housing choice for such households will be served. The Plan shall provide for affirmative fair marketing of the Affordable units and for the collection of relevant data from applicants and occupants of the Affordable units in compliance with their privacy rights.

A Comprehensive Housing Plan reviewed and approved pursuant to 760 CMR 59.00 shall be valid for any future application or amendment for a period of five years from the date of its first submission to the Department. If the Municipality has submitted such a Plan to the Department earlier than within the past five years and has updated such Plan with the latest available census data, in accordance with guidelines issued by the Department, the Department may in its discretion accept such document to satisfy 760 CMR 59.03(1)(g). In either case, the Municipality shall submit with its application to the Department a description of how the proposed District relates to and will further the goals of such Plan, along with sufficient information to satisfy the other requirements of 760 CMR 59.03(1)(g). In such cases the application must identify the specific sections or page numbers of any such Plan or other documents that satisfy the specific requirements of 760 CMR 59.03(1)(g), and it must identify the number of Existing Zoned Units, estimated Future Zoned Units, and estimated Incentive Units within the proposed District.

(h) Evidence that the Municipality has complied with the public notice and hearing requirements of 760 CMR 59.05(1). A Municipality may submit with its application any letters of support issued by the planning board, board of health, conservation commission, or other interested parties.

(i) Sufficient information, certified by a municipal engineer or public works official, to demonstrate that the impacts of the build-out of the Future Zoned Units within the District will not overburden Infrastructure (which for the purposes of 760 CMR 59.03(1)(i) shall also include improvements to public open space and public recreational facilities) as it exists or may be practicably upgraded to provide adequate accommodation of the demands of the District's existing and future residents and uses. Such material shall describe any such Planned Infrastructure upgrades, including the timing for completion of the improvements (to be within five years of the application date, or other reasonable time period approved by the Department, taking into consideration the anticipated build-out schedule or timeline) and the identity of the entities responsible for completing the improvements.

If, at the time of the application, the Municipality does not have information to demonstrate that the impacts of the build-out of the Future Zoned Units within the District will not overburden Infrastructure as described in 760 CMR 59.03(1)(i), it may request a Letter of Conditional Approval, subject to its subsequent compliance with 760 CMR 59.03(1)(i) as provided in 760 CMR 59.05(4).

(j) Additional materials, including narrative and exhibits as required, upon the form of application or in the format determined by the Department, demonstrating that the proposed District satisfies the approval requirements of 760 CMR 59.04(1).

(2) Review of Existing District. A Municipality may apply to the Department for approval of an existing zoning district adopted prior to its application pursuant to M.G.L. c.40A as a District under M.G.L. c. 40R and 760 CMR 59.00. The application shall be the same as for a newly proposed District, and the existing zoning district must meet the approval requirements set forth in 760 CMR 59.04(1)(a) through (k). Following the Department's issuance of a Letter of Eligibility under 760 CMR 59.05(2), and a Municipality's satisfaction of all conditions in such a Letter of Eligibility pursuant to 760 CMR 59.05(4), the Municipality will become entitled to Density Bonus Payments under 760 CMR 59.06(2), but it will not be eligible for a Zoning Incentive Payment under 760 CMR 59.06(1).

(3) Transition Rule. If a Municipality issues a comprehensive permit for a project pursuant to M.G.L. c. 40B after July 1, 2004 and prior to March 25, 2005, the Municipality may treat such project as a part or the whole of an existing zoning district, and, if it satisfies the approval requirements set forth in 760 CMR 59.04(1)(a) through (k), it shall be eligible for approval as a District under 760 CMR 59.03(2).

(4) Coordinated Review Procedures. The Department may cooperate with other agencies in developing procedures by which the review of an application for a proposed District under M.G.L. c. 40R and 760 CMR 59.00 may be coordinated with the review of a proposed commercial center under M.G.L. c. 40, § 60, and/or the review of a proposed development district under M.G.L. c. 40Q.

#### 59.04: Approval Requirements

To issue a Letter of Eligibility under 760 CMR 59.05(2), or a Letter of Approval under 760 CMR 59.05(4), the Department must find that a proposed District satisfies each of the relevant requirements set forth in 760 CMR 59.04(1), and that no uncured Letter of Noncompliance has been issued to the Municipality under 760 CMR 59.07(3). Any area waiver request by a Municipality under 760 CMR 59.04(2) or any density reduction request under 760 CMR 59.04(3) must have been previously approved by the Department under the procedure set forth in 760 CMR 59.05(6), no more than three years prior to the date of the application. The Department may approve, disapprove, or approve with conditions, a request for the determination of eligibility for a District.

(1) Mandatory Requirements. The applicant shall establish, by narrative and exhibits, that a proposed District satisfies each of the following requirements. Any presumption set forth in 760 CMR 59.04(1)(a) through (l) shall be upheld in the absence of credible evidence to the contrary.

(a) Eligible Location. The proposed District shall be located in an Eligible Location. The Department shall find that a proposed District is located in an Eligible Location if it meets one or more of the following criteria:

1. the District comprises part or all of the land located within ½ mile distance of any rapid transit or commuter rail station, bus or ferry terminal (measured from the entry point(s) to the passenger platforms), plus any qualifying Adjacent Area. The District may also include additional contiguous areas located within ¾ of a mile distance of any

rapid transit or commuter rail station, bus or ferry terminal (measured from the entry point(s) to the passenger platforms);

2. the District comprises part or all of the land located within an Area of Concentrated Development, plus any qualifying Adjacent Area, if applicable, and:

a. unless qualified as within a rural village district, it is currently served or scheduled to be served (as shown by sufficient documentation) within five years of the application by public sewer(s) and/or private sewage treatment plant(s);

b. at least 50% of the total land area within the proposed District is either Substantially Developed Land or Underutilized Land; and

c. the primary current use (or, in the case of Underutilized Land, the primary current zoning) of land and or buildings in the proposed District is commercial (including retail, office, or industrial businesses) or mixed use, or in the case of a rural village district, commercial, mixed use or residential.

3. the District comprises part or all of the land located within a Highly Suitable Location, as designated by the Department. The Municipality must provide satisfactory evidence that the proposed District, although it does not qualify under either of the other two categories of Eligible Location, nevertheless is a location where development would promote Smart Growth. Such evidence may include, but would not be limited to, the degree to which:

a. the location is near (though not within ½ mile of) a rapid transit or commuter rail station or bus or ferry station terminal;

b. the location has Transportation Access;

c. proposed zoning in the location and existing zoning near the location will encourage compact, land-use-efficient design, and Mixed-use Development;

d. infill and redevelopment of previously-developed areas with Infrastructure are likely to occur that will help to preserve Open Space, farmland, natural beauty, and critical environmental areas elsewhere in the Municipality; and

e. prior identification as an appropriate locus for higher-density housing or higher-density Mixed-use Development in an adopted Municipal, regional or state plan.

(b) The total land area (excluding open water bodies) of the proposed District does not exceed 15% of the total land area in the Municipality, unless the Department has previously approved an area waiver under 760 CMR 59.04(2).

(c) The aggregate total land area (excluding open water bodies) of all approved or proposed Districts in the Municipality does not exceed 25% of the total land area in the Municipality.

(d) Density.

1. The Smart Growth Zoning for the District shall provide for any one or more of the following minimum allowable As-of-right density requirements, as applicable, unless the Department has previously approved a density reduction under 760 CMR 59.04(3):

- a. allowing a density of at least eight units per acre for Developable Land zoned for single-family residential use;
- b. allowing a density of at least 12 units per acre for Developable Land zoned for two- and/or three-family residential use; or
- c. allowing a density of at least 20 units per acre for Developable Land zoned for Multi-family Residential Use.

2. A District may contain two or more sub-districts, zoned separately for single-family, two- and/or three-family, and/or Multi-family Residential Uses, or with varying allowable densities for the same residential use, so long as each sub-district individually meets the applicable minimum allowable density requirement set forth in 760 CMR 59.04(1)(d)1. through 3.

3. The Smart Growth Zoning may allow Mixed-use Development Projects As-of-right in part or all of the District, so long as the applicable residential densities set forth in 760 CMR 59.04(1)(d)1. through 3. apply to the Mixed-use Development Project so that the number of units allowed in the Project is equal to the number of units that would otherwise be allowed on the parcel if the Project was entirely residential multiplied by the percentage of the land or redevelopable building area of the Project occupied by the residential portion of the Project. For the purposes of calculating the Zoning Incentive Payment, the Smart Growth Zoning shall specify the minimum portion of such Mixed-use Development Project that shall be devoted to residential uses.

4. The Smart Growth Zoning may apply the applicable residential densities set forth in 760 CMR 59.04(1)(d)1. through 3. to some or all of the Substantially Developed Land within the proposed District. Alternatively, for some or all of the Substantially Developed Land, the Smart Growth Zoning need not satisfy the minimum As-of-right density requirements set forth in 760 CMR 59.04(1)(d)1. through 3. The allowable residential densities in such Substantially Developed sub-district shall be no less than those in the Underlying Zoning, and the Smart Growth Zoning shall differ from the dimensional and other applicable standards of the Underlying Zoning as necessary to permit As-of-right within such Substantially Developed sub-district the construction of infill housing on existing vacant lots, and of additional housing units in existing residential buildings or additions thereto or replacements thereof. The Smart Growth Zoning may impose reasonable lot area, frontage, setback and other dimensional requirements within such Substantially Developed sub-districts, consistent with neighborhood building and use patterns, and building, fire, and safety codes. If a Project within a Substantially Developed sub-district contains units in excess of the number of Existing Zoned Units for the site, those units shall qualify as Bonus Units for the purposes of the Density Bonus Payments, and the Project shall be subject to all applicable Affordability and other standards of the Smart Growth Zoning.

(e) Affordability. The Smart Growth Zoning for the proposed District shall provide that not less than 20 percent of all units constructed within Projects of more than 12 units shall be Affordable. In addition, the Smart Growth Zoning and the Comprehensive Housing Plan shall contain mechanisms to ensure that the total number of Affordable units constructed in the District equals not less than 20% of the total number of all units constructed within Projects in the District and that Affordable units are equitably integrated and dispersed throughout the District and Project (including by unit type and construction phase). The Smart Growth Zoning shall contain provisions to ensure that Projects are not segmented to evade the size threshold for Affordability, and that there shall be effective monitoring and enforcement of the Affordable housing restriction during the term of Affordability. The Smart Growth Zoning shall provide that the Affordable housing restriction on an Affordable unit shall ensure that it is occupied by an eligible household paying an Affordable rent or Affordable purchase price during the term of the restriction. The Smart Growth Zoning shall provide that Affordability shall be assured for a period of no less than 30 years through the use of an Affordable housing restriction as defined in M.G.L. c. 184, § 31. The Smart Growth Zoning shall contain provisions specifying the method by which such Affordable rents or Affordable purchase prices shall be computed. The Smart Growth Zoning may specify decreased maximum income limits of eligible households (below 80 percent of the area-wide median income as determined by HUD).

The Municipality shall be required to prove to the Department in its submission that its use of such mechanisms, or any decrease it proposes in the maximum income levels of households eligible for the Affordable units, will not Unduly Restrict opportunities for development within the proposed District under the Smart Growth Zoning. For the purposes of satisfying the 20% overall Affordability requirement in the second sentence of 760 CMR 59.04(1)(e), any project located within the geographic boundaries of the District, and which receives a comprehensive permit under M.G.L. c. 40B after the date upon which the application was submitted to the Department under 760 CMR 59.05(2), shall be treated as if such project were a Project within the meaning of 760 CMR 59.00.

(f) Plan Review. Plan Review is the procedure by which a proposed Project within a District is made subject to review by the Plan Approval Authority under the provisions of the Smart Growth Zoning, in accordance M.G.L. c. 40R, § 11 and 760 CMR 59.00.

1. If the Smart Growth Zoning provides for Plan Review of Projects within the District, it shall specify:

- a. the composition of the Plan Approval Authority;
- b. the categories of Projects that will be subject to Plan Review;
- c. the procedures for such review, including the contents of an application for approval of a Project;
- d. the criteria upon which the Plan Approval Authority may disapprove a proposed Project, or condition its approval;
- e. the criteria upon which the Plan Approval Authority may grant waivers from dimensional and other restrictions (other than Affordability); and

f. the Design Standards to which a Project will be subject. If the Design Standards are not contained within the Smart Growth Zoning, such Design Standards must be submitted to and reviewed by the Department pursuant to 760 CMR 59.00 prior to their adoption by the Plan Approval Authority before they can take effect.

2. The Plan Review provisions of the Smart Growth Zoning and any separate Design Standards must be clearly written, fairly and consistently applied, and allow for flexibility and creativity, consistent with the goals of M.G.L. c. 40R, 760 CMR 59.01, 59.02 and 59.04(1)(f). With respect to 760 CMR 59.04(1)(f)4., a proposed Project may be denied only on the grounds that:

a. the Project does not meet the conditions and requirements set forth in the Smart Growth Zoning;

b. the applicant failed to submit information and fees required by the Smart Growth Zoning and necessary for an adequate and timely review of the design of the Project or potential Project impacts; or

c. it is not possible to adequately mitigate significant adverse Project impacts on nearby properties by means of suitable conditions.

3. A Municipality may adopt Design Standards to ensure that the physical character of Projects within the District:

a. will be complementary to nearby buildings and structures;

b. will be consistent with the Comprehensive Housing Plan, an applicable master plan, an area specific plan, or any other plan document adopted by the Municipality; and

c. will provide for high-density quality development consistent with the character of building types, streetscapes, and other community features traditionally found in densely settled areas of the Municipality or in the region of the Municipality. Design Standards may address the scale, proportions, and exterior appearance of buildings; the placement, alignment, width, and grade of streets and sidewalks; the type and location of Infrastructure; the location of building and garage entrances; off-street parking; the protection of significant natural site features; the location and design of on-site open spaces, landscaping, and exterior signs; and buffering in relation to adjacent properties, to achieve the goals of 760 CMR 59.04(1)(f)3.

4. The Municipality must demonstrate to the satisfaction of the Department that its Design Standards will not Unduly Restrict the development of Projects in the District. The Department may disapprove a request for the determination of eligibility for a District on account of Design Standards for which the requisite demonstration has not been made.

5. For purposes of the Plan Review of a Mixed-use Development Project, provisions of the Smart Growth Zoning and the Design Standards must ensure that the non-residential elements of any Mixed-use Development Project are planned and designed in an integral manner to complement the residential uses, and help foster vibrant, workable, livable, and attractive neighborhoods consistent with the Smart Growth goals set forth in M.G.L. c. 40R and 760 CMR 59.00.

6. The Smart Growth Zoning may allow the Plan Approval Authority, through the Plan Review process, to waive specific dimensional and other standards (other than Affordability requirements) otherwise applicable to a Project, if it finds that such waiver will allow the Project to achieve the density, Affordability, mix of uses, or physical character allowable under the Smart Growth Zoning, and is consistent with the Design Standards.

(g) The Smart Growth Zoning for the proposed District shall require the development of housing which is appropriate for diverse populations, including households with children, other households, individuals, households including individuals with disabilities, and the elderly.

(h) Projects within the proposed District shall not be subject to limitation of the issuance of building permits for residential uses or a local moratorium on the issuance of such permits. The Smart Growth Zoning may permit the Plan Review approvals of proposed Projects to be phased for the purpose of coordinating development with the construction of Planned Infrastructure upgrades that are identified in the application under 760 CMR 59.03(1) or that are required to mitigate any extraordinary adverse Project impacts on neighboring properties. For Projects that are approved and developed in phases, unless otherwise approved by the Department the proportion of Affordable units shall be at least 20% of all units constructed in each phase.

(i) The Smart Growth Zoning for the proposed District shall not impose restrictions on age or any other forms of occupancy restrictions upon the District as a whole. 760 CMR 59.04(1)(i) does not preclude the development of specific Projects within the District that may be exclusively for the elderly, persons with disabilities, or for assisted living, provided that any such Project shall be in compliance with all applicable fair housing laws. Not less than twenty-five percent (25%) of the housing units in such a Project shall be Affordable housing.

(j) Projects within the proposed District shall comply with federal, state, and local fair housing laws. *See* 760 CMR 59.07(2)(e). Affordable units within Projects shall be subject to an affirmative fair housing marketing plan that complies with DHCD Comprehensive Permit Guidelines.

(k) The impacts of Future Zoned Units within the District will not overburden Infrastructure (which for the purposes of 760 CMR 59.04(1)(k) shall also include improvements to public open space and public recreational facilities) as it exists or may be practicably upgraded. *See* 760 CMR 59.03(1)(i).

(l) Smart Growth Zoning to be All-inclusive. The development of a Project within a District shall be governed solely by the Smart Growth Zoning, without any reference to the standards or procedures of the Underlying Zoning that would otherwise be applicable to developments within the same geographic area as the District. Without limitation, the Smart Growth Zoning shall set out the dimensional, use, parking, and other standards applicable to Projects within the



District (including, as applicable, within any Substantially Developed sub-district, in compliance with 760 CMR 59.04(1)(d)), including but not limited to height limits, setbacks, lot areas, lot dimensions, unit to lot ratios, floor area ratios, lot coverage ratios, open space ratios, parking ratios, parking locations, and roadway design standards. Such provisions may differ from the dimensional and other standards contained in the Underlying Zoning in order to allow the densities, Affordability, mix of uses, and physical character of Projects which are permitted As-of-right under the Smart Growth Zoning. The Smart Growth Zoning may allow the Plan Approval Authority, through the Plan Review process, to waive specific dimensional and other standards (other than Affordability requirements) otherwise applicable to a Project.

(2) Area Waiver. Any Municipality may request that the total land area of a proposed District (calculated as the sum of the Developable Land Area, the Substantially Developed Land Area, and other land excluded from the definition of Developable Land pursuant to 760 CMR 59.02) be allowed to exceed 15 percent of the total land area in the Municipality. The burden shall be on the Municipality to reliably demonstrate to the Department, by narrative and exhibits, that such an increased size is consistent with the Comprehensive Housing Plan, that it will help to meet the anticipated regional demand for housing, and that it will be consistent with the Smart Growth goals set forth in M.G.L. c. 40R and 760 CMR 59.00.

(3) Density Reduction. Any Municipality with a population of fewer than 10,000 persons, as determined by the most recent federal decennial census, may request that the Department reduce the minimum allowable density standards required by 760 CMR 59.04(1)(d), provided that its submission is filed in accordance with 760 CMR 59.05(6). The burden shall be on the Municipality to demonstrate to the Department, by narrative and exhibits, that compliance with the minimum density criteria would constitute a hardship because development at the required minimum density would either:

- (a) Be highly inconsistent with the existing physical environment of the community; or
- (b) Create significant risks for water pollution due to poor soils, or create other significant health and safety risks; or
- (c) Be unable feasibly to be served by a piped water supply system.

In its submission, the Municipality must also demonstrate that the District as developed at the proposed reduced density will be consistent with the Smart Growth goals set forth in M.G.L. c. 40R and 760 CMR 59.00. Approval of a density reduction will not be withdrawn by the Department solely because, in a future census, the population of the Municipality exceeds 10,000.

#### 59.05: Procedures for Approvals, Amendments, and Repeals

(1) Preliminary Municipal Review Procedure. The chief executive of the Municipality or designee shall hold a preliminary public hearing on whether the provisions of the proposed Smart Growth Zoning should be adopted by the Municipality. Notice of the hearing shall be given in a newspaper of general circulation in the Municipality in each of two successive weeks, the last publication being at least three days prior to the hearing. Following the hearing, comments shall be considered, and the proposed Smart Growth Zoning and other application materials shall be finalized for submission to the Department.

(2) Preliminary Determination of Eligibility by the Department. Upon receipt of an application by a Municipality, the Department shall make a preliminary determination, before the Municipality votes on its proposed Smart Growth Zoning, whether the application satisfies the approval requirements set forth in 760 CMR 59.04(1). The Department's review shall be an informal, non-adjudicatory procedure.

(a) The Department will accept applications on the last day of each month. Upon its receipt of an application, the Department will conduct a completeness review. The Department will notify a Municipality in writing or by electronic communication within 30 days after receipt if any required element of its application is missing or incomplete. Such notification shall constitute a denial of the application unless the missing or incomplete elements are addressed within 30 days after the notification or other reasonable time period established at the Department's discretion. Applications shall be deemed complete if such written notice is not given within the 30-day completeness review time period. The 30-day period may be extended only with the written consent of the Municipality.

(b) Upon expiration of the completeness review period, the Department will conduct a review as to whether the application satisfies the approval requirements set forth in 760 CMR 59.04(1). The Department shall issue its decision upon an application within 60 days of the start of this review period. The 60-day period may be extended only with the written consent of the Municipality. If the Department does not act upon a complete and approvable application within the 60-day period, subject to any extension, the application shall be deemed approved.

(c) The Department will communicate its determination on an application to the Municipality by issuing one of the following:

1. a Letter of Eligibility, approving the application without conditions;
2. a Letter of Eligibility, approving the application with conditions that must be satisfied prior to final approval under 760 CMR 59.05(4); or
3. a Letter of Denial, denying approval of the application, and informing the Municipality of the deficiencies in its submission.

(d) A Letter of Eligibility with conditions may, among other matters, require modifications to the proposed Smart Growth Zoning, require modification of the calculation of Incentive Units, require the reclassification of Developable Land, or require a Municipality to demonstrate that the impacts of Future Zoned Units within the District will not overburden Infrastructure (which for the purposes of 760 CMR 59.05(2)(d) shall also include improvements to public open space and public recreational facilities) as it exists or may be practicably upgraded to provide adequate accommodation of the demands of the District's existing and future residents and uses. *See* 760 CMR 59.03(1)(i).

(e) In the event of issuance of a Letter of Denial, a Municipality may re-apply for approval after addressing any deficiencies in a prior application, provided that such reapplication shall be treated as a new application under 760 CMR 59.00.

(f) In the event of a constructive approval of an application under 760 CMR 59.05(2)(b), due to the Department's failure to act within the specified time period, the Municipality may

request in writing the issuance of a Letter of Eligibility within 60 days of the date of constructive approval, and the Department shall issue such Letter within 21 days of its receipt of the request. The Municipality must thereafter comply with the requirements of 760 CMR 59.05(3) and (4).

(3) Municipal Adoption of Smart Growth Zoning. After issuance of a Letter of Eligibility, if the Municipality chooses to proceed it shall make any changes to its Smart Growth Zoning and other elements of the application as may have been required by the Department. The Municipality may then adopt the Smart Growth Zoning pursuant to M.G.L. c. 40A, § 5, provided that the local vote occurs within three years of the date of the Letter of Eligibility.

(4) Final Smart Growth Zoning Approval by the Department.

(a) Submission by Municipality. Upon adoption of the Smart Growth Zoning, the Municipality shall submit to the Department proof of such adoption. If the Department had required any amendment to the Smart Growth Zoning, the Comprehensive Housing Plan, or any other element of the application, or any other related matter, in a Letter of Eligibility with conditions, the Municipality's submission shall confirm and demonstrate that all such amendments have been made and incorporated. If any element of the application subject to a condition in the Letter of Eligibility, including the requirements of 760 CMR 59.03(1)(i), has not been amended as required by that letter, the Municipality shall identify those elements remaining unaddressed and may request a Letter of Conditional Approval from the Department.

(b) Department Review. The Department will accept submissions on the last day of each month. The Department's review of the submission shall be an informal, non-adjudicatory procedure. The Department shall confirm its final approval by issuance of a Letter of Approval, or shall issue a Letter of Conditional Approval or Letter of Denial within 30 days of receipt of the submission. The 30-day period may be extended only with the written consent of the Municipality.

(c) Letter of Approval. If the submission satisfies all of the approval criteria set forth in 760 CMR 59.04(1), as well as all conditions in the Letter of Eligibility, the Department shall issue a Letter of Approval which shall specify, among other matters, the number of Incentive Units and the amount of the Zoning Incentive Payment that shall be made by the Trust Fund to the Municipality.

(d) Letter of Conditional Approval. If a Letter of Conditional Approval is issued, it shall specify all conditions necessary to ensure consistency with M.G.L. c. 40R and 760 CMR 59.00 which must be met and demonstrated to the Department before the Municipality is eligible to receive a Final Approval. A Letter of Conditional Approval will not entitle a Municipality to receive a Zoning Incentive Payment for the District. Upon satisfaction of any outstanding conditions specified in the Letter of Conditional Approval pertaining to Infrastructure, Smart Growth or other matters necessary to ensure consistency with M.G.L. c. 40R and 760 CMR 59.00, a Municipality shall submit to the Department proof of such satisfaction for review pursuant to 760 CMR 59.05(4)(a).

(e) Changes to Application. The Municipality shall identify in its submission under 760 CMR 59.05(4) all differences between the proposed Smart Growth Zoning that had been submitted as part of the original application under 760 CMR 59.05(2), and the Smart Growth

Zoning as adopted by the Municipality (*see* 760 CMR 59.05(3)), as well as any other changes to the original application. If there has been any change to the Smart Growth Zoning or any other element of the original application, other than changes that the Department had required in a Letter of Eligibility with conditions, then the Department may treat the submission as an amendment to the application, and it shall notify the Municipality of its decision to do so in writing. In such event the Department shall conduct its review under 760 CMR 59.05(4) within 60 days of receipt of the submission. The 60-day period may be extended only with the written consent of the Municipality.

(f) Constructive Approval. In the event of a constructive approval of a final submission due to the Department's failure to act within the specified time period, the Municipality may request in writing the issuance of a Letter of Approval within 60 days of the date of constructive approval, and the Department shall issue such Letter within 21 days of its receipt of the request.

(5) Amendments and Repeals. With respect to an Approved District, any proposed amendment or repeal of the Smart Growth Zoning, any Design Standards, or the boundary of the District or any sub-districts, or amendment or adoption of the Plan Approval Authority's administrative rules, or any adoption or enlargement of a Historic District within the boundary of the District, in each case if taken after issuance of a Letter of Approval, shall not be effective without the written approval by the Department in accordance with 760 CMR 59.05(5). Each request for an amendment, enlargement, repeal or adoption must be submitted to the Department on the last day of each month, upon the form of application or in the format determined by the Department. The Department's review shall be an informal, non-adjudicatory procedure, to be conducted in accordance with 760 CMR 59.05(2). The Department shall, as applicable, issue an amended Letter of Eligibility for a proposed amendment only if, and to the extent that, the Department finds in its discretion that the Approved District as amended will remain in compliance with the approval criteria set forth in 760 CMR 59.04(1). An amendment that would have the effect of decreasing the number of Incentive Units within an Approved District shall not take effect under M.G.L. c. 40R and 760 CMR 59.00 until the Department has issued written confirmation that all repayment of monies required under 760 CMR 59.06(3) has occurred.

(a) Except as otherwise provided in 760 CMR 59.05(5)(b) through (d), a proposed amendment shall be treated as a new application pursuant to 760 CMR 59.03, 59.04, and 59.05(1) through (4). A proposed amendment that would increase the area of an Approved District, increase the minimum allowable As-of-right density requirements, adopt or enlarge a Historic District or substantially modify its regulations, or otherwise increase the number of Incentive Units or Bonus Units within the District, must undergo review pursuant to 760 CMR 59.05(2). A proposed amendment shall include an evaluation of its effect upon the Municipality's Comprehensive Housing Plan.

(b) Non-substantial Modifications. The Department may, upon written request of the Municipality, review and approve within 30 days after the date of receipt of such request a non-substantial modification to the Smart Growth Zoning, Design Standards, local Historic District regulations, or a District or sub-district boundary that the Department determines does not constitute an amendment. The Municipality shall, in its request, certify to the Department that the proposed modification will not have the effect of increasing or decreasing the number of Incentive Units or Bonus Units, reducing consistency with the Comprehensive Housing Plan, or unduly restricting the development of Projects within the Approved District. Failure of the Department to issue a decision on a request for approval of a non-substantial modification

within such 30-day period shall be deemed a denial. By mutual agreement, the 30-day time period may be extended.

(c) Boundary Change Amendments. A Municipality may at any time propose an amendment that solely would change the boundary of an Approved District and decrease its area, pursuant to the following review procedure. The Municipality shall provide 60 days prior written notice to the Department that such boundary change amendment has been proposed for action by the Municipal legislative body, together with a calculation of the decrease in the number of Incentive Units within the District, an evaluation of the effect upon the Municipality's Comprehensive Housing Plan, and certification by the Municipality that there will be no other modification to the Smart Growth Zoning or the Design Standards. The Municipality shall provide subsequent written notice to the Department if it adopts such boundary change amendment. The amendment will not take effect under M.G.L. c. 40R and 760 CMR 59.00 until the Department has issued an amended Letter of Approval, to become effective upon its confirmation that all repayment of monies required under 760 CMR 59.06(3)(a) has occurred.

(d) Repeals. A Municipality may at any time repeal the Smart Growth Zoning for an Approved District, pursuant to the following review procedure. The Municipality shall provide 60 days prior written notice to the Department that such repeal has been proposed for action by the local legislative body under applicable law, and it shall provide subsequent written notice to the Department if such local repeal action is taken. Such prior written notice shall include a recalculation of the number of Incentive Units still developable within the District if the Smart Growth Zoning is repealed. This recalculation shall count as Incentive Units all Bonus Units already constructed or approved within the District, and all Bonus Units for which applications have been submitted to the Plan Approval Authority prior to the date upon which the request for repeal is submitted to the Department. The repeal shall not take effect under M.G.L. c. 40R and 760 CMR 59.00 until the Department has issued an amended Letter of Approval, to become effective upon its confirmation that all repayment of monies required under 760 CMR 59.06(3)(b) has occurred.

(6) Area Waiver and Density Reduction Requests. A Municipality may request that the Department approve an area waiver under 760 CMR 59.04(2) or a density reduction under 760 CMR 59.04(3), according to the following procedure. The Municipality shall submit such request in writing to the Department prior to its submission of an application, along with such supporting material as the Department may require. The Department's review of the request shall be an informal, non-adjudicatory procedure. If the Department has not approved in writing a request within 30 days of its receipt, such request shall be deemed denied.

#### 59.06: Payments and Repayments of Trust Fund Monies

Each Municipality with an Approved District shall be entitled to payments as described below.

(1) Zoning Incentive Payments. Upon the issuance by the Department to the Municipality of a Letter of Approval, the Municipality may present that Letter to the Trust Fund at any subsequent time, requesting payment, according to the following schedule, of the amount of Zoning Incentive Payment set forth in the Letter of Approval:

<u>Incentive Units</u>	<u>Payment</u>
Up to 20	\$10,000
21 to 100	\$75,000
101 to 200	\$200,000
201 to 500	\$350,000
501 or more	\$600,000

Letters of Approval shall remain valid indefinitely for purposes of Municipal collection of the Zoning Incentive Payment, subject only to a repeal pursuant to 760 CMR 59.05(5)(d), or payment suspension or revocation pursuant to 760 CMR 59.06 or 59.07.

The Department may in its discretion, for purposes of calculating the Zoning Incentive Payment in the Letter of Approval, treat two or more simultaneously Approved Districts within proximity of each other as a single District, or treat a newly Approved District as an amendment to a nearby existing Approved District.

(2) Density Bonus Payments. Upon issuance of a building permit for a Bonus Unit within an Approved District, the Municipality may apply to the Department for authorization of payment from the Trust Fund of a one-time Density Bonus Payment of \$3,000 for each Bonus Unit. The Municipality shall submit in its application for payment:

- (a) A certified copy of the building permit(s) for the Project;
- (b) A site plan that indicates building(s) location (and if available, address(es)) within the District;
- (c) A certified copy, by the building official, of the Smart Growth residential density plan;
- (d) If the Smart Growth Zoning District contains sub-districts, a certified copy, by the building official, of the Smart Growth residential density spreadsheet;
- (e) If there are Existing Zoned Units, a calculation of the number of Bonus Units for the Project (*i.e.*, subtract Existing Zoned Units from the Project's total number of units).
- (f) A copy of the Plan Approval Authority's decision approving the Project;
- (g) A copy of a recorded affordability covenant or deed restriction in accordance with the requirements of M.G.L. c. 40R;
- (h) A copy of the approved affirmative fair housing marketing plan applicable to the Bonus Unit; and
- (i) A completed original of the Department's Density Bonus Payment application form.

The Department will accept applications on a quarterly basis, on a schedule to be determined by the Department. The Department's review of the application shall be an informal, non-adjudicatory procedure. The Department shall confirm its approval of an application for payment within 30 days after receipt, provided that the Municipality has provided all the information required in 760 CMR

59.06(2)(a) through (i), by issuing a written authorization of payment to the Trust Fund, with a copy to the Municipality.

The Department may approve an alternative method of documenting Bonus Units in an Approved District during its review of the Municipality's application under 760 CMR 59.05(2) through (4).

(3) Suspension of Payments; Repayment of Monies. Payments under 760 CMR 59.06(1) or 59.06(2) shall be suspended or repaid under the following circumstances. All monies repaid to the Department under 760 CMR 59.06 shall be returned to the Trust Fund.

(a) If the Department has approved pursuant to 760 CMR 59.05(5) an amendment to an Approved District that decreases the number of Incentive Units, the Department shall state in its Letter of Approval whether the Zoning Incentive Payment that would have been due using the schedule in 760 CMR 59.06(1) upon the aggregate number of Incentive Units within the Approved District, as amended, is exceeded by the amount of all Zoning Incentive Payments previously received from the Trust Fund with respect to that District. If there is such an excess, the Letter of Approval shall be conditioned so that it shall not take effect until the Municipality has repaid to the Department the amount of such excess payments and received a final Letter of Approval.

(b) If a Municipality has submitted to the Department the proposed repeal of an Approved District pursuant to 760 CMR 59.05(5)(d), the repeal shall not take effect until the Municipality has repaid to the Department any excess Zoning Incentive Payments received by the Municipality from the Trust Fund. Using the schedule in 760 CMR 59.06(1) and the number of Incentive Units set forth in the Department's amended Letter of Approval issued pursuant to 760 CMR 59.05(5)(d), the Municipality will be entitled to retain the portion of the Zoning Incentive Payment that would have been due upon the number of Incentive Units still developable within the District. The Municipality need not repay any Density Bonus Payments received with respect to that District.

(c) If the Department has issued a Letter of Noncompliance to a Municipality pursuant to 760 CMR 59.07(3), no further payments shall be made to that Municipality from the Trust Fund until the Department confirms through issuance of a Certificate of Compliance that the noncompliance has been cured.

(d) If the Department has issued a revocation of a Municipality's certification pursuant to 760 CMR 59.07(3) on the grounds that there has not occurred the Start of Construction of a Project or Planned Infrastructure upgrade (*see* 760 CMR 59.07(1)(b)) within an Approved District within three years of the date upon which the Municipality received the Zoning Incentive Payment, consistent with 760 CMR 59.07(1)(f), the Municipality shall immediately repay to the Department all Zoning Incentive Payments and Density Bonus Payments received from the Trust Fund with respect to that District.

#### 59.07: Annual Updates; Certification of Compliance; Report to Legislature

The Department shall be responsible for administration, review, and reporting on the Smart Growth Zoning District program as provided in M.G.L. c. 40R and 760 CMR 59.00. To enable the

Department to undertake an annual review and the preparation of a report on the program, and to ensure certification of compliance, the Department will require each Municipality with an Approved District to provide information in the form of an annual update, as described below.

(1) Annual Update by Municipality. On or before July 31 of each year, each Municipality that either contains a District that had been Approved by the end of the previous fiscal year ending on June 30, or had filed an application for a proposed District within that fiscal year, shall file its annual update with the Department, in a form to be prescribed by the Department. Unless otherwise permitted by guidelines issued by the Department, the Municipality shall provide the following information in the annual update:

(a) A list of all Approved and currently proposed Districts within the Municipality, with a tabulation for each District of the total land area, the Developable Land area and the Substantially Developed Land area, the number of Incentive Units, and the amount of Developable and Substantially Developed Land zoned at various allowable As-of-right residential densities under the Smart Growth Zoning.

(b) For Projects in each Approved District, the total number of units and the number of Bonus Units:

1. for which building permits had been issued during the previous fiscal year;
2. completed during the previous fiscal year; and
3. completed in total since the District was Approved, as evidenced by issuance of occupancy permits, with a tabulation in each case of the types of such Bonus Units (Affordable, market rate, accessible, and bedroom-size). The annual update shall also contain a written narrative describing whether each Approved District is being developed in a manner that reasonably complies with the residential density and Affordability standards for such District.

(c) For each Approved District, the amounts of the Zoning Incentive Payment and Density Bonus Payments received during the prior fiscal year, and for each Approved or proposed District, the amounts and anticipated timing of any Zoning Incentive Payment and Density Bonus Payments anticipated to be received during the current fiscal year.

(d) For each Approved District, the number and category of Projects for which the Plan Review procedure was completed during the previous fiscal year, including:

1. the number of Projects both approved and disapproved; and
2. the total number and types of proposed total units and Bonus Units in each category of Projects. For each proposed Project that was disapproved, the annual update shall contain sufficient evidence to demonstrate that the Approving Authority did not unreasonably deny its approval, and that it only denied its approval in a reasonable manner consistent with the Smart Growth Zoning, the Comprehensive Housing Plan, M.G.L. c. 40R, and 760 CMR 59.00. The annual update shall also indicate the number and category of Projects currently under review and the total number and types of proposed total units and Bonus Units in such Projects.



- (e) For the then-current and the subsequent fiscal years, an estimate of:
  - 1. the number and size (both total land area and Developable Land area) of any new Districts anticipated to be submitted to the Department;
  - 2. the potential number of Incentive Units in each new District; and
  - 3. the anticipated number of Bonus Units for which building permits would be issued within those years.

(f) If no building permit has been issued for the Bonus Units in an Approved District within three years of the date of the Zoning Incentive Payment, or if a building permit was issued within such three-year period, but no certificate of occupancy for such Bonus Unit was issued within two years after issuance of the building permit, then the Municipality must submit satisfactory evidence, in the form of certification by the Plan Approval Authority, local zoning enforcement officer, or public works official, of the Start of Construction within that two-year time period of one or more Projects, or of a Planned Infrastructure upgrade identified in the application under 760 CMR 59.03(1) or a related utility relocation, or it shall be subject to revocation under 760 CMR 59.07(3) and the repayment of monies under 760 CMR 59.06(3).

Proof of Start of Construction shall require evidence satisfactory to the Department that construction activity has occurred in good faith on the Project or a Planned Infrastructure upgrade, such as the pouring of foundations or footings, or utility relocation, or the remediation of hazardous materials on the site, and that such construction has continued or is continuing in good faith through to completion. The three-year time period shall be extended by the time that a Project or Planned Infrastructure upgrade on which construction would otherwise have started within the three-year time period shall be subject to legal or administrative appeal or challenge, or if the proponent is actively pursuing other required permits or there is other good cause for the failure to start construction.

(g) At the request of the Department, the Municipality shall provide for each Approved District the number of children residing in Bonus Units and actually attending grades K through 12 public schools or charter schools, and copies of submissions to the Department of Education and Department of Revenue pursuant to M.G.L. c. 40S, § 3.

(h) Data regarding income and any protected class status of households occupying Affordable units and of households assigned Affordable units during the year, provided that the Municipality shall comply with M.G.L. c. 66A with respect to personal data of each household and each household member.

(2) Certification by Department. Upon its review of a timely annual update submitted in accordance with 760 CMR 59.07(1), on or before October 1 of each year the Department shall send to each Municipality with an Approved District a Certificate of Compliance, unless it finds that either:

(a) A prior Certificate of Compliance had previously been revoked by the Department, and the cause for such revocation had not been cured;

(b) The Approved District is not being developed in a manner that reasonably complies with the requirements set forth in 760 CMR 59.04(1)(d), (e) and (g) for housing density, Affordability, and accessibility;

(c) The Plan Approval Authority has unreasonably denied or conditioned Plan Review applications for Projects, in a manner inconsistent with the Smart Growth Zoning, M.G.L. c. 40R, or 760 CMR 59.00;

(d) The Start of Construction has not occurred for any Project or Planned Infrastructure upgrade within an Approved District t, consistent with 760 CMR 59.07(1)(f); or

(e) The Municipality has been found responsible for a violation of federal, state, or local fair housing laws with respect to a Project within an Approved District, as determined by a state or federal court, the U.S. Department of Housing and Urban Development, the Massachusetts Commission Against Discrimination, or a local fair housing commission.

(3) Letter of Noncompliance; Revocation of Certification. If the Department is unable to certify compliance, either because it has made any of the findings specified under 760 CMR 59.07(2) or because the Municipality has failed to submit a timely annual update as required under 760 CMR 59.07(1), the Department shall issue a Letter of Noncompliance, stating the grounds for noncompliance, and granting the Municipality 60 days in which to furnish the Department with satisfactory evidence that the grounds for noncompliance set forth in the letter have been cured or measures to cure have been commenced and that such measures will be prosecuted with diligence to completion within a reasonable period. If the Department finds within a further 30 days that the evidence provided by the Municipality is satisfactory, the Department shall issue a Certificate of Compliance.

If the Municipality has failed to show within the 60-day period that it has cured or has commenced measures to cure its noncompliance, then the Department shall give notice of an adjudicatory hearing to be conducted subject to M.G.L. c. 30A. If upon the conclusion of the hearing the Department concludes that the Municipality is in substantial non-compliance with the requirements set forth in 760 CMR 59.07(2), the Department may revoke a Letter of Approval or Certificate of Compliance by issuing a Certificate of Revocation.

A Certificate of Revocation shall be filed with the town or city clerk of the Municipality. Any issuance of a Letter of Noncompliance or Certificate of Revocation by the Department will not affect the validity of the Smart Growth Zoning, or the application of such Smart Growth Zoning to any land or Project within the Approved District, but there shall be no Zoning Incentive Payment for any Approved District or Density Bonus Payments for any units while a Letter of Noncompliance or Certificate of Revocation is in effect.

(4) Annual Reports to Legislature. No later than November 15 of each year, the Department will submit to the general court and make available to the general public a report on the status of the program through the end of the prior fiscal year. The report shall contain the following information:

(a) A list of each Municipality that contains an Approved District, or that had applied to the Department for a proposed District during the prior year (and the status of such applications), along with the total number of Approved Districts and currently proposed Districts.

- (b) The aggregate size of all Approved and all proposed Districts (including for each category the aggregate total land area, Developable Land area, Substantially Developed Land area, and the total amount of such land zoned at the allowable residential densities set out in 760 CMR 59.04(1)(d)), and the aggregate number of Incentive Units for each category.
- (c) The number of Bonus Units:
1. for which building permits had been issued during the previous fiscal year;
  2. completed during the previous fiscal year; and
  3. completed since the inception of the program, as evidenced by issuance of occupancy permits, with a tabulation in each case of the types of such Bonus Units (Affordable, market rate, accessible, and bedroom-size).
- (d) The total amounts of all Zoning Incentive Payments and Density Bonus Payments made by the Trust Fund during the prior fiscal year, and the amounts and anticipated timing of any Zoning Incentive Payments and Density Bonus Payments anticipated to be made during the current fiscal year.
- (e) The number of Projects currently being reviewed, indicating the number and type of proposed residential units and Bonus Units, and the number of Projects for which the Plan Review procedure was completed during the previous fiscal year, including:
1. the number of Projects both approved and disapproved; and
  2. the number and types of proposed residential units and Bonus Units in each category of Projects.
- (f) For the then-current and the subsequent fiscal years, an estimate of:
1. the number and size (both total land area and Developable Land area) of all new Districts anticipated to be submitted to the Department;
  2. the aggregate potential number of Incentive Units in such new Districts; and
  3. the anticipated number of Bonus Units for which building permits would be issued within those time frames.
- (g) At the discretion of the Department, the number of children residing in Bonus Units within Approved Districts and actually attending grades K-through-12 public schools or charter schools.
- (h) Data regarding income and any protected class status of households occupying Affordable units and of households assigned Affordable units during the year, provided that the Department shall comply with M.G.L. c. 66A with respect to personal data of each household and each household member.

59.08: Waiver

The Director of the Department may waive, in writing, any provision of 760 CMR 59.00 not required by statute on findings that such waiver is consistent with the purposes set out in M.G.L. c. 40R and 760 CMR 59.00 and that desirable relief in the public interest will be accomplished through such waiver. A request for waiver shall be in writing to the Director, Department of Housing and Community Development, 100 Cambridge Street, Suite 300, Boston, MA 02114 and shall contain a reliable showing that the waiver meets all the requirements of 760 CMR 59.08.

REGULATORY AUTHORITY 760 CMR 59.00: St. 2004, c. 149 and M.G.L. c. 40R and M.G.L. c. 23B