

## 760 CMR 72.00 MULTI-FAMILY ZONING REQUIREMENT FOR MBTA COMMUNITIES

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### 72.01: Background and Purpose

G.L. c 40A, §3A provides: 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.

The purpose of G.L. c. 40A, § 3A is to encourage the production of Multi-family housing by requiring MBTA communities to adopt zoning districts where Multi-family housing is allowed As of right, and that meet other requirements set forth in the statute. 760 CMR 72.00 establishes rules, standards, and procedures to set forth how MBTA communities may achieve compliance with G.L. c. 40A, §3A. Pursuant to G.L. c. 40A, § 3A(c), the Executive Office of Housing and Livable Communities (EOHLC) is the regulatory agency for the program and is expressly authorized to issue guidelines, in consultation with the Executive Office of Economic Development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, to determine if an MBTA community is in compliance with G.L. c. 40A, § 3A. EOHLC is adopting these regulations pursuant to its authority under G.L. c. 6A, §16G ½ and pursuant to the Decision issued by the Supreme Judicial Court in Attorney General v. Town of Milton, et al. SJC-13580, slip op. (Jan. 8, 2025), holding that the guidelines issued by EOHLC on August 17, 2023 are unenforceable and must be promulgated in accordance with G.L. c. 30A, § 3.

### 72.02: Definitions

“Adjacent community” means an MBTA community that (i) has within its boundaries less than 100 acres of Developable station area, and (ii) is not an Adjacent small town.

“Adjacent small town” means an MBTA community that (i) has within its boundaries less than 100 acres of Developable station area, and (ii) either has a population density of less than 500 persons per square mile, or a population of not more than 7,000 year-round residents as determined in the most recently published United States Decennial Census of Population and Housing.

“Affordable unit” means a Multi-family housing unit that is subject to a restriction in its chain of title limiting the sale price or rent, or limiting occupancy to an individual or household of a specified income, or both. Affordable units may be, but are not required to be, eligible for inclusion on EOHLC’s Subsidized Housing Inventory. Nothing in 760 CMR 72.00 changes the Subsidized Housing Inventory eligibility criteria, and no affordable unit shall be counted on the Subsidized Housing Inventory unless it satisfies the requirements for inclusion under 760 CMR 56.03(2) or any other regulation or guidance issued by EOHLC.

“Age-restricted housing” means any housing unit encumbered by a title restriction requiring a minimum age for some or all occupants.

“As of right” means development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval.

“Bus station” means a location with a passenger platform and other fixed infrastructure serving as a point of embarkation for the Massachusetts Bay Transportation Authority Silver Line. Upon the request of an MBTA community, EOHLC, in consultation with the Massachusetts Bay Transportation Authority, may determine that other locations qualify as a bus station if (i) such location has a sheltered platform or other fixed infrastructure serving a point of embarkation for a high-capacity Massachusetts Bay Transportation Authority bus line, and (ii) the area around such fixed infrastructure is highly suitable for Multi-family housing.

“Commuter rail community” means an MBTA community that (i) does not meet the criteria for a Rapid transit community, and (ii) has within its borders at least 100 acres of Developable station area associated with one or more Commuter rail stations.

“Commuter rail station” means any Massachusetts Bay Transportation Authority Commuter rail station with year-round, rather than intermittent, seasonal, or event-based, service, including stations and any extensions to such lines under construction and scheduled to begin service before the end of 2025.

“Compliance model” means the model created by EOHLC to determine compliance with G.L. c. 40A, § 3A’s reasonable size, gross density, and location requirements. The compliance model is described in further detail in the Compliance Methodology Model, which is a model prescribed by EOHLC.

“Determination of compliance” means a determination made by EOHLC as to whether an MBTA community has a Multi-family zoning district that complies with the requirements of G.L. c. 40A, § 3A. A Determination of compliance may be a determination of interim compliance or a determination of district compliance, as described in 760 CMR 72.09.

“Developable land” means land on which Multi-family housing can be permitted and constructed. For purposes of 760 CMR 72.00, Developable land consists of: (i) all privately-owned land except Lots or portions of Lots that meet the definition of Excluded land, and (ii) Developable public land.

“Developable public land” means any Publicly-owned land that (i) is used by a local housing authority; (ii) has been identified as a site for housing development in a housing production plan approved by EOHLC; or (iii) has been designated by the public owner for disposition and redevelopment. Other Publicly-owned land may qualify as Developable public land if EOHLC determines, at the request of an MBTA community and after consultation with the public owner, that such land is the location of obsolete structures or uses, or otherwise is suitable for conversion to Multi-family housing, and will be converted to or made available for Multi-family housing within a reasonable period of time.

“Developable station area” means Developable land that is within 0.5 miles of a Transit station.

“EOED” means the Executive Office of Economic Development.

“EOHLC” means the Executive Office of Housing and Livable Communities.

“Excluded land” means land areas on which it is not possible or practical to construct Multi-family housing. For purposes of 760 CMR 72.00, Excluded land is defined by reference to the ownership, use codes, use restrictions, and hydrological characteristics in MassGIS and consists of the following:

- (1) All Publicly-owned land, except for Lots or portions of Lots determined to be Developable public land.
- (2) All rivers, streams, lakes, ponds and other surface waterbodies.
- (3) All wetland resource areas, together with a buffer zone around wetlands and waterbodies equivalent to the minimum setback required by title 5 of the state environmental code.
- (4) Protected open space and recreational land that is legally protected in perpetuity (for example, land owned by a local land trust or subject to a conservation restriction), or that is likely to remain undeveloped due to functional or traditional use (for example, cemeteries).
- (5) All Public rights-of-way and Private rights-of-way.
- (6) Privately-owned land on which development is prohibited to protect private or public water supplies, including, but not limited to, Zone I wellhead protection areas and Zone A surface water supply protection areas.
- (7) Privately-owned land used for educational or institutional uses such as a hospital, prison, electric, water, wastewater or other utility, museum, or private school, college or university.

“Ferry terminal” means the location where passengers embark and disembark from regular, year-round Massachusetts Bay Transportation Authority ferry service.

“Gross density” means a units-per-acre density measurement that includes land occupied by Public rights-of-way and any recreational, civic, commercial, and other nonresidential uses.

“Housing suitable for families” means housing comprised of residential dwelling units that are not age-restricted housing, and for which there are no zoning restriction on the number of bedrooms, the size of bedrooms, or the number of occupants.

“Listed funding sources” means (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 G.L. c. 29, § 2EEEE; and (iii) the MassWorks infrastructure program established in G.L. c. 23A, § 63.

“Lot” means an area of land with definite boundaries that is used or available for use as the site of a building or buildings.

“MassGIS data” means the comprehensive, statewide database of geospatial information and mapping functions maintained by the Commonwealth's Bureau of Geographic Information, within the Executive Office of Technology Services and Security, including the lot boundaries and use codes provided by municipalities.

“MBTA Community Categories and Requirements” means the table of MBTA communities adopted and updated by EOHLC, identifying the community category assignment, minimum land area, minimum Multi-family unit capacity, Developable station area, and percentage of the Multi-family zoning district to be located in the Developable station area, applicable to MBTA communities.

“MBTA community” means a city or town that is: (i) one of the 51 cities and towns as defined in G.L. c. 161A, § 1; (ii) one of the 14 cities and towns as defined in G.L. c. 161A, § 1; (iii) other served communities as defined in G.L. c. 161A, § 1; or (iv) a municipality that has been added to the Massachusetts Bay Transportation Authority under G.L. c. 161A, § 6 or in accordance with any special law relative to the area constituting the authority.

“Mixed-use development” means development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.

“Mixed-use development zoning district” means a zoning district where multiple residential units are allowed as of right if, but only if, combined with non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.

“Multi-family housing” means a building with three or more Residential dwelling units or two or more buildings on the same Lot with more than one Residential dwelling unit in each building.

“Multi-family unit capacity” means an estimate of the total number of Multi-family housing units that can be developed As of right within a Multi-family zoning district, made in accordance with the requirements of 760 CMR 72.05(1)(b).

“Multi-family zoning district” means a zoning district, including a base district or an overlay district, in which Multi-family housing is allowed As of right; provided that the district shall be in a fixed location or locations, and shown on a map that is part of the zoning ordinance or by-law.

“One Stop Application” means the single application portal for the Community One Stop for Growth through which (i) EOED considers requests for funding from the MassWorks infrastructure program; (ii) EOHLC considers requests for funding from the Housing Choice Initiative, (iii) EOED, EOHLC and other state agencies consider requests for funding from other discretionary grant programs.

“Private rights-of-way” means land area within which private streets, roads and other ways have been laid out and maintained, to the extent such land areas can be reasonably identified by examination of available tax parcel data.

“Publicly-owned land” means (i) any land owned by the United States or a federal agency or authority; (ii) any land owned by the Commonwealth of Massachusetts or a state agency or authority; and (iii) any land owned by a municipality or municipal board or authority.

“Public rights-of-way” means land area within which public streets, roads and other ways have been laid out and maintained, to the extent such land areas can be reasonably identified by examination of available tax parcel data.

“Rapid transit community” means an MBTA community that has within its borders at least 100 acres of Developable station area associated with one or more Subway stations, or Massachusetts Bay Transportation Authority Silver Line bus rapid transit stations.

“Residential dwelling unit” means a single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.

“Sensitive land” means Developable land that, due to its soils, slope, hydrology, or other physical characteristics, has significant conservation values that could be impaired, or vulnerabilities that could be exacerbated, by the development of Multi-family housing. It also includes locations where Multi-family housing would be at increased risk of damage caused by flooding. Sensitive land includes, but is not limited to, wetland buffer zones extending beyond the title 5 setback area; land subject to flooding that is not a wetland resource area; priority habitat for rare or threatened species; Department of Environmental Protection-approved wellhead protection areas in which development may be restricted, but is not prohibited (Zone II and interim wellhead protection areas); and land areas with prime agricultural soils that are in active agricultural use.

“Site plan review” means a process established by local ordinance or by-law by which a local board reviews, and potentially imposes conditions on, the appearance and layout of a specific project prior to the issuance of a building permit.

“Subway station” means any of the stops along the Massachusetts Bay Transportation Authority Red Line, Green Line, Orange Line, or Blue Line, including but not limited to the Mattapan High Speed Line and any extensions to such lines.

“Transit station” means a Massachusetts Bay Transportation Authority Subway station, Commuter rail station, Ferry terminal or Bus station.

“Transit station area” means the land area within 0.5 miles of a Transit station.

#### 72.03: General Principles of Compliance

(1) 760 CMR 72.00 describes how an MBTA community can comply with the requirements of G.L. c. 40A, § 3A. 760 CMR 72.00 specifically addresses:

- (a) What it means to allow Multi-family housing “As of right.”
- (b) The metrics that determine if a Multi-family zoning district is “of reasonable size.”
- (c) How to determine if a Multi-family zoning district has a minimum gross density of 15 units per acre, subject to any further limitations imposed by G.L. c. 131, § 40 of and title 5 of the state environmental code.
- (d) The meaning of G.L. c. 40A, § 3A’s mandate that “such multi-family housing shall be without age restrictions and shall be suitable for families with children.”
- (e) The extent to which MBTA communities have flexibility to choose the location of a Multi-family zoning district.

(2) The following general principles have informed the more specific compliance criteria that follow:

- (a) MBTA communities with Subway stations, Commuter rail stations and other Transit stations benefit from having these assets located within their boundaries and should provide opportunity for Multi-family housing development around these assets. MBTA communities with no Transit stations within their boundaries benefit from proximity to Transit stations in nearby communities.
- (b) The Multi-family zoning districts required by G.L. c. 40A, § 3A should encourage the development of Multi-family housing projects of a scale, density and aesthetic that are compatible with existing surrounding uses, and minimize impacts to Sensitive land.
- (c) “Reasonable size” is a relative rather than an absolute determination. Because of the diversity of MBTA communities, a Multi-family zoning district that is “reasonable” in one city or town may not be reasonable in another city or town.
- (d) When possible, Multi-family zoning districts should be in areas that have safe, accessible, and convenient access to Transit stations for pedestrians and bicyclists.

#### 72.04: Allowing Multi-Family Housing “As of Right”

(1) To comply with G.L. c. 40A, § 3A, a Multi-family zoning district must allow Multi-family housing As of right, meaning that the construction and occupancy of multi-family housing is allowed in that district without the need for a special permit, variance, zoning amendment, waiver, or other discretionary approval. EOHLC will determine whether zoning provisions allow for Multi-family housing as of right consistent with the following requirements.

(a) Site plan review. G.L. c. 40A does not establish nor recognize site plan review as an independent method of regulating land use. However, the Massachusetts courts have recognized Site plan review as a permissible regulatory tool, including for uses that are permitted as of right. The court decisions establish that when Site plan review is required for a use permitted As of right, site plan review involves the regulation of a use and not its outright prohibition. The scope of review is therefore limited to imposing reasonable terms and conditions on the proposed use, consistent with applicable case law. 760 CMR 72.00 similarly recognizes that Site plan review may be required for Multi-family housing projects that are allowed As of right, within the parameters established by the applicable case law. Site plan approval may regulate matters such as vehicular access and circulation on a site, architectural design of a building, and screening of adjacent properties. Site plan review should not unreasonably delay a project nor impose conditions that make it infeasible or impractical to proceed with a project that is allowed As of right and complies with applicable dimensional regulations.

(b) Affordability requirements. G.L. c. 40A, § 3A does not include any express requirement or authorization for an MBTA community to require Affordable units in a Multi-family housing project that is allowed As of right. It is a common practice in many cities and towns to require Affordable units in a Multi-family project that requires a special permit, or as a condition for building at greater densities than the zoning otherwise would allow. These inclusionary zoning requirements serve the policy goal of increasing affordable housing production. If affordability requirements are excessive, however, they can make it economically infeasible to construct new Multi-family housing.

1. For purposes of making compliance determinations with G.L. c. 40A, § 3A, EOHLC will consider an affordability requirement to be consistent with As of right zoning as long as the zoning requires not more than ten percent of the units in a project to be Affordable units, and the cap on the income of families or individuals who are eligible to occupy the Affordable units is not less than eighty percent of area median income. Notwithstanding the foregoing, EOHLC may, in its discretion, approve a greater percentage of affordable units, or deeper affordability for some or all of the affordable units, in either of the following circumstances:

- a. The affordability requirements applicable in the Multi-family zoning district are reviewed and approved by EOHLC as part of a smart growth district under G.L. c. 40R, or under another zoning incentive program administered by EOHLC; or
- b. The affordability requirements applicable in the Multi-family zoning district are supported by an economic feasibility analysis, prepared for the municipality by a

qualified and independent third party acceptable to EOHLC, and using a methodology and format acceptable to EOHLC. The analysis must demonstrate that a reasonable variety of Multi-family housing types can be feasibly developed at the proposed affordability levels, taking into account the densities allowed As of right in the district, the dimensional requirements applicable within the district, and the minimum number of parking spaces required.

2. In no case will EOHLC approve alternative affordability requirements that require more than 20 percent of the units in a project to be Affordable units, except in a smart growth zoning district under G.L. c. 40R with a 25 percent affordability requirement approved and adopted prior to August 10, 2022 (the date of issuance by EOHLC of Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act which have been superseded by 760 CMR 72.00), including any such existing district that is expanded or amended to comply with G.L. c. 40A, § 3A and 760 CMR 72.00.

(c) Other requirements that do not apply uniformly in the Multi-family zoning district. Zoning will not be deemed compliant with G.L. c. 40A, § 3A's requirement that Multi-family housing be allowed As of right if the zoning imposes requirements on Multi-family housing that are not generally applicable to other uses. The following are examples of requirements that would be deemed to be inconsistent with As of right use: (i) a requirement that Multi-family housing meet higher energy efficiency standards than other uses; (ii) a requirement that a Multi-family use achieve a third party certification that is not required for other uses in the district; and (iii) a requirement that Multi-family use must be combined with commercial or other uses on the same Lot or as part of a single project. Mixed use projects may be allowed As of right in a Multi-family zoning district, as long as Multi-family housing is separately allowed As of right.

#### 72.05: Determining "Reasonable Size"

(1) In making determinations of "reasonable size," EOHLC will take into consideration both the land area of the Multi-family zoning district, and the Multi-family zoning district's Multi-family unit capacity.

(a) Minimum land area. A zoning district is a specifically delineated land area with uniform regulations and requirements governing the use of land and the placement, spacing, and size of buildings. For purposes of compliance with G.L. c. 40A, § 3A, a Multi-family zoning district should be a neighborhood-scale district, not a single development site on which the municipality is willing to permit a particular Multi-family project. EOHLC will certify compliance with G.L. c. 40A, § 3A only if an MBTA community's Multi-family zoning district meets the minimum land area applicable to that MBTA community, if any, as set forth in the MBTA Community Categories and Requirements. The minimum land area for each MBTA community has been determined as follows:

1. In Rapid transit communities, Commuter rail communities, and Adjacent communities, the minimum land area of the Multi-family zoning district is 50 acres, or 1.5% of the



Developable land in an MBTA community, whichever is less. In certain cases, as set forth in the MBTA Community Categories and Requirements a smaller minimum land area applies.

2. In Adjacent small towns, there is no minimum land area. In these communities, the Multi-family zoning district may comprise as many or as few acres as the community determines is appropriate, as long as the district meets the applicable minimum Multi-family unit capacity and the minimum Gross density requirements.

3. In all cases, at least half of the Multi-family zoning district land areas must comprise contiguous Lots of land. No portion of the district that is less than 5 contiguous acres land will count toward the minimum size requirement. If the Multi-family unit capacity and Gross density requirements can be achieved in a district of fewer than 5 acres, then the district must consist entirely of contiguous Lots.

(b) Minimum Multi-family unit capacity. A reasonably sized Multi-family zoning district must also be able to accommodate a reasonable number of Multi-family housing units As of right. For purposes of determinations of compliance with G.L. c. 40A, § 3A, EOHLC will consider a reasonable Multi-family unit capacity for each MBTA community to be a specified percentage of the total number of housing units within the community, with the applicable percentage based on the type of Transit service in the community, as shown on Table 1:

Table 1.

<u>Category</u>	<u>Percentage of total housing units</u>
Rapid transit community	25%
Commuter rail community	15%
Adjacent community	10%
Adjacent small town	5%

1. To be deemed in compliance with G.L. c. 40A, § 3A, each MBTA community must have a Multi-family zoning district with a Multi-family unit capacity equal to or greater than the minimum unit capacity as determined by EOHLC in accordance with the MBTA Community Categories and Requirements. The minimum Multi-family unit capacity for each MBTA community has been determined as follows:

a. First, by multiplying the number of housing units in that community by 0.25, 0.15, 0.10, or .05 depending on the MBTA community category. For example, a Rapid transit community with 7,500 housing units is required to have a Multi-family zoning district with a Multi-family unit capacity of  $7,500 \times 0.25 = 1,875$  Multi-family units. For purposes of 760 CMR 72.00, the number of total housing units in each MBTA community has been established by reference to the most recently published United States Decennial Census of Population and Housing.

b. Second, when there is a minimum land area applicable to an MBTA community, by multiplying that minimum land area (up to 50 acres) by G.L. c. 40A, § 3A's minimum gross density requirement of 15 units per acre. The product of that multiplication creates a floor on Multi-family unit capacity. For example, an MBTA community with a minimum land area of 40 acres must have a district with a Multi-family unit capacity of at least 600 (40 x 15) units.

c. The minimum unit capacity applicable to each MBTA community is the greater of the numbers resulting from steps (i) and (ii) above, but subject to the following limitation: In no case does the minimum Multi-family unit capacity exceed 25% of the total housing units in that MBTA community.

Example: The minimum multi-family unit capacity for an Adjacent community with 1,000 housing units and a minimum land area of 50 acres is determined as follows:(i) first, by multiplying  $1,000 \times .1 = 100$  units; (ii) second, by multiplying  $50 \times 15 = 750$  units;(iii) by taking the larger number, but adjusting that number down, if necessary, so that unit capacity is no more than 25% of  $1,000 = 250$  units. In this case, the adjustment in step (iii) results in a minimum unit capacity of 250 units.

(c) Unit Capacity in Mixed-Use Development Districts

1. In making determinations of whether an MBTA community has a Multi-family zoning district of "reasonable size" under this section, EOHLC shall also take into consideration the existence and impact of Mixed-use development zoning districts, subject to the requirements below.

2. EOHLC shall take these Mixed-use development districts into consideration as reducing the unit capacity needed for a Multi-family zoning district to be "reasonable" (in accordance with the MBTA Community Categories and Requirements) where:

- a. the Mixed-use development zoning district is in an eligible location where existing village-style or downtown development is essential to preserve pedestrian access to amenities;
- b. there are no age restrictions or limits on unit size, number of bedrooms, bedroom size or number of occupants and the residential units permitted are suitable for families with children;
- c. Mixed-used development in the district is allowed As of right as that phrase has been interpreted by EOHLC (for example, in 760 CMR 72.04(1)(b) with respect to affordability requirements);
- d. the requirement for non-residential uses is limited to the ground floor of buildings, and in no case represents a requirement that more than thirty-three percent of the floor area of a building, Lot, or project must be for non-residential uses;
- e. the requirement for non-residential uses does not preclude a minimum of three residential dwelling units per Lot;
- f. the requirement for non-residential uses allows a broad mix of non-residential uses As-of-right in keeping with the nature of the area; and

g. there are no minimum parking requirements associated with the non-residential uses allowed As of right.

2. An MBTA community asking to reduce the unit capacity requirement for its Multi-family zoning district(s) based on the unit capacity for one or more Mixed-use development districts shall submit to EOHLC, on a form to be provided by EOHLC, a request for a determination that the Mixed-use development district is in an eligible location meeting the requirements of 760 CMR 72.05(1)(c)2.a. This request must be submitted at least 90 days prior to the vote of the MBTA community's legislative body. An MBTA community also may submit a broader inquiry as to G.L. c. 40A, § 3A compliance in accordance with 760 CMR 72.09(5). EOHLC shall respond prior to the vote of the MBTA community's legislative body if the request is timely submitted.

3. In any community with both a Multi-family zoning district and a Mixed-use development district that meets these considerations, the unit capacity requirement for the Multi-family zoning district, as stated in the MBTA Community Categories and Requirements, shall be reduced by the lesser of:

- a. the unit capacity of Residential dwelling units in the Mixed-use development district or subdistrict (as calculated by EOHLC using a methodology similar to that in 760 CMR 72.05(1)(d) which takes into account the impact of non-residential uses), or
- b. twenty five percent of the unit capacity requirement as stated in the MBTA Community Categories and Requirements. This consideration shall not affect the minimum land area acreage or contiguity requirements for a Multi-family zoning district otherwise required by 760 CMR 72.00.

(d) Methodology for determining a Multi-family zoning district's multi-family unit capacity.

1. MBTA communities seeking a determination of compliance must use the EOHLC Compliance model to provide an estimate of the number of Multi-family housing units that can be developed As of right within the Multi-family zoning district. The Multi-family unit capacity of an existing or proposed district shall be calculated using the unit capacity worksheet described in the Compliance Methodology Model. This worksheet produces an estimate of a district's Multi-family unit capacity using inputs such as the amount of Developable land in the district, the dimensional requirements applicable to Lots and buildings (including, for example, height limitations, lot coverage limitations, and maximum floor area ratio), and the parking space requirements applicable to Multi-family uses.

2. Minimum unit capacity is a measure of whether a Multi-family zoning district is of a reasonable size, not a requirement to produce housing units. Nothing in G.L. c. 40A, § 3A or 760 CMR 72.00 should be interpreted as a mandate to construct a specified number of housing units, nor as a housing production target. Demonstrating compliance with the minimum multi-family unit capacity requires only that an MBTA community show that the zoning allows multi-family housing as of right and that a sufficient number of multi-

family housing units could be added to or replace existing uses and structures over time—even though such additions or replacements may be unlikely to occur soon.

3. If an MBTA community has two or more zoning districts in which Multi-family housing is allowed As of right, then two or more districts may be considered cumulatively to meet the minimum land area and minimum Multi-family unit capacity requirements, as long as each district independently complies with G.L. c. 40A, § 3A's other requirements and 760 CMR 72.00.

(e) Water and wastewater infrastructure within the multi-family zoning district

1. MBTA communities are encouraged to consider the availability of water and wastewater infrastructure when selecting the location of a new Multi-family zoning district. Compliance with G.L. c. 40A, § 3A does not require a municipality to install new water or wastewater infrastructure, or add to the capacity of existing infrastructure, to accommodate future Multi-family housing production within the Multi-family zoning district. In most cases, Multi-family housing can be created using private septic and wastewater treatment systems that meet state environmental standards. Where public systems currently exist, but capacity is limited, private developers may be able to support the cost of necessary water and sewer extensions. While the zoning must allow for gross average density of at least 15 units per acre, there may be other legal or practical limitations, including lack of infrastructure or infrastructure capacity, that result in actual housing production at lower density than the zoning allows.

2. The Multi-family unit capacity analysis does not need to take into consideration limitations on development resulting from existing water or wastewater infrastructure within the Multi-family zoning district, or, in areas not served by public sewer, any applicable limitations under title 5 of the state environmental code. For purposes of the unit capacity analysis, it is assumed that housing developers will design projects that work within existing water and wastewater constraints, and that developers, the municipality, or the Commonwealth will provide funding for infrastructure upgrades as needed for individual projects.

72.06: Minimum Gross Density

(1) G.L. c. 40A, § 3A expressly requires that a Multi-family zoning district—not just the individual lots of land within the district—must have a minimum Gross density of 15 units per acre, subject to any further limitations imposed by G.L. c. 131 and title 5 of the state environmental code established pursuant to G.L. c. 21A. G.L. c. 40A, § 1A defines “Gross density” as “a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses.”

(2) District-wide Gross density.

(a) To meet the district-wide Gross density requirement, the dimensional restrictions and parking requirements for the Multi-family zoning district must allow for a Gross density of

15 units per acre of land within the district. By way of example, to meet that requirement for a 40-acre Multi-family zoning district, the zoning must allow for at least 15 multi-family units per acre, or a total of at least 600 Multi-family housing units.

(b) For purposes of determining compliance with G.L. c. 40A, § 3A's Gross density requirement, the EOHLC Compliance model will not count in the denominator any excluded land located within the Multi-family zoning district, except public rights-of-way, private rights-of-way, and publicly-owned land used for recreational, civic, commercial, and other nonresidential uses. This method of calculating minimum Gross density respects G.L. c. 40A, § 1A's definition of Gross density—"a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses"—while making it unnecessary to draw patchwork Multi-family zoning districts that carve out wetlands and other types of excluded land that are not developed or developable.

(3) Achieving district-wide gross density by sub-districts. Zoning ordinances and by-laws typically limit the unit density on individual lots. To comply with G.L. c. 40A, § 3A's Gross density requirement, an MBTA community may establish reasonable sub-districts within a Multi-family zoning district, with different density limits for each sub-district, provided that the Gross density for the district as a whole meets the statutory requirement of not less than 15 Multi-family units per acre. EOHLC will review sub-districts to ensure that the density allowed As of right in each sub-district is reasonable and not intended to frustrate the purpose of G.L. c. 40A, § 3A by allowing projects of a such high density that they are not likely to be constructed.

(4) Wetland and septic considerations relating to density. G.L. c. 40A, § 3A provides that a district of reasonable size shall 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 G.L. c. 21A, § 13." This directive means that even though the zoning district must permit 15 units per acre As of right, Multi-family housing produced within the district is subject to, and must comply with, the state wetlands protection act and title 5 of the state environmental code—even if such compliance means a proposed project will be less dense than 15 units per acre.

#### 72.07: Determining Suitability for Families with Children

G.L. c. 40A, § 3A states that a compliant Multi-family zoning district must allow Multi-family housing As of right, and that such multi-family housing shall be without age restrictions and shall be suitable for families with children. EOHLC will deem a Multi-family zoning district to comply with these requirements as long as the zoning does not require Multi-family uses to include units with age restrictions, and does not limit or restrict the size of the units, cap the number of bedrooms, the size of bedrooms, or the number of occupants, or impose a minimum age of occupants. Limits, if any, on the size of units or number of bedrooms established by state law or regulation are not relevant to G.L. c. 40A, §3A or to determinations of compliance made pursuant to 760 CMR 72.00.

#### 72.08: Location of Districts

(1) General rule for determining the applicability of G.L. c. 40A, § 3A's location requirement.

(a) A Multi-family zoning district shall "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." When an MBTA community has only a small amount of Transit station area within its boundaries, it may not be possible or practical to locate all of the Multi-family zoning district within 0.5 miles of a Transit station. Transit station area may not be a practical location for a Multi-family zoning district if it does not include Developable land where Multi-family housing can actually be constructed. Therefore, for purposes of determining compliance with G.L. c. 40A, § 3A and 760 CMR 72.00, EOHLC will consider the statute's location requirement to be "applicable" to a particular MBTA community only if that community has within its borders at least 100 acres of Developable station area. A Multi-family zoning district shall be located within transit station areas depending on how much total developable station area is in that community, in accordance with Table 2:

Table 2.

<u>Total Developable station area within the MBTA community (acres)</u>	<u>Portion of the Multi-family zoning district that must be within a transit station area</u>
0-100	0%
101-250	20%
251-400	40%
401-600	50%
601-800	75%
801+	90%

(b) The percentages specified in this table apply to both the minimum land area and the minimum Multi-family unit capacity. For example, in an MBTA community that has a total of 500 acres of Transit station area within its boundaries, a Multi-family zoning district will comply with G.L. c. 40A, § 3A's location requirement if at least 50 percent of the district's minimum land area is located within the Transit station area, and at least 50 percent of the district's minimum Multi-family unit capacity is located within the Transit station area.

(c) A community with Transit station areas associated with more than one Transit station may locate the Multi-family zoning district in any of the Transit station areas. For example, a Rapid transit community with Transit station area around a Subway station in one part of town, and Transit station area around a Commuter rail station in another part of town, may locate its Multi-family zoning district in either or both Transit station areas.

(d) MBTA communities with limited or no Transit station area. When an MBTA community has less than 100 acres of Developable station area within its boundaries, the MBTA community may locate the Multi-family zoning district anywhere within its boundaries. To encourage transit-oriented Multi-family housing consistent with the general intent of G.L. c. 40A, § 3A, MBTA communities are encouraged to consider locating the Multi-family zoning

district in an area with reasonable access to a Transit station based on existing street patterns, pedestrian connections, and bicycle lanes, or in an area that qualifies as an “eligible location” as defined in G.L. c. 40A—for example, near an existing downtown or village center, near a regional transit authority bus stop or line, or in a location with existing under-utilized facilities that can be redeveloped into new Multi-family housing.

(2) General guidance on district location applicable to all MBTA communities. When choosing the location of a new Multi-family zoning district, every MBTA community should consider how much of a proposed district is Sensitive land on which permitting requirements and other considerations could make it challenging or inadvisable to construct Multi-family housing. For example, an MBTA community should avoid including in a Multi-family zoning district areas that are subject to flooding, or are known habitat for rare or threatened species, or have prime agricultural soils in active agricultural use.

#### 72.09: Determinations of Compliance

(1) G.L. c. 40A, §3A provides that any MBTA community that fails to comply with G.L. c. 40A, § 3A’s requirements will be ineligible for funding from any of the Listed funding sources. EOHLC will make determinations of compliance with G.L. c. 40A, § 3A in accordance with 760 CMR 72.00 to inform state agency decisions on which MBTA communities are eligible to receive funding from the Listed funding sources. The following discretionary grant programs will take compliance with G.L. c. 40A, § 3A into consideration when making grant award recommendations:

- (a) Community Planning Grants, EOHLC,
- (b) Massachusetts Downtown Initiative, EOED,
- (c) Urban Agenda, EOED,
- (d) Rural and Small Town Development Fund, EOED,
- (e) Brownfields Redevelopment Fund, MassDevelopment,
- (f) Site Readiness Program, MassDevelopment,
- (g) Underutilized Properties Program, MassDevelopment,
- (h) Collaborative Workspace Program, MassDevelopment,
- (i) Real Estate Services Technical Assistance, MassDevelopment,
- (j) Commonwealth Places Programs, MassDevelopment,
- (k) Land Use Planning Grants, EOEEA,
- (l) Local Acquisitions for Natural Diversity (LAND) Grants, EOEEA, and
- (m) Municipal Vulnerability Preparedness (MVP) Planning and Project Grants, EOEEA

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

(3) EOHLC will recognize both interim compliance, which means an MBTA community is taking active steps to enact a Multi-family zoning district that complies with G.L. c. 40A, § 3A, and District compliance is achieved when EOHLC determines that an MBTA community has a Multi-family zoning district that complies with G.L. c. 40A, § 3A and the requirements set forth

below. Table 3 includes deadlines, shown with an asterisk, established under prior guidelines that many municipalities have met, and prospective deadlines for certain categories of municipalities as shown without an asterisk.

Table 3.

Transit Category	Deadline to Submit Action Plan	Deadline to Submit District Compliance Application
Rapid transit community	January 31, 2023*	December 31, 2023*
Commuter rail community	January 31, 2023*	December 31, 2024*
Adjacent community	January 31, 2023*	December 31, 2024*
Adjacent small town	January 31, 2023*	December 31, 2025
Rapid transit community that has not submitted a district compliance application to EOHLC as of December 31, 2023	February 13, 2025	July 14, 2025
Commuter rail community that has not submitted a district compliance application to EOHLC as of December 31, 2024	February 13, 2025	July 14, 2025
Adjacent community that has not submitted a district compliance application to EOHLC as of December 31, 2024	February 13, 2025	July 14, 2025

(4) Process to achieve interim compliance. Prior to achieving district compliance (but no later than the deadlines set forth in Table 3), these MBTA communities can achieve interim compliance by taking the following affirmative steps towards the creation of a compliant Multi-family zoning district.

(a) Creation and submission of an action plan. An MBTA community seeking to achieve interim compliance must first submit an action plan on a form to be provided by EOHLC. An MBTA community action plan must provide information about current zoning, past planning for Multi-family housing, if any, and potential locations for a Multi-family zoning district. The action plan also will require the MBTA community to establish a timeline for various actions needed to create a compliant Multi-family zoning district.

(b) EOHLC approval of an action plan. EOHLC will review each submitted action plan for consistency with 760 CMR 72.00, including but not limited to the timelines in Table 3. If EOHLC determines that the MBTA community's action plan is reasonable and will lead to district compliance in a timely manner, EOHLC will issue a determination of interim



compliance. EOHLC may require modifications to a proposed action plan prior to approval.

(c) Implementation of the action plan. After EOHLC approves an action plan and issues a determination of interim compliance, an MBTA community must diligently implement the action plan. EOHLC may revoke a determination of interim compliance if an MBTA community has not made sufficient progress in implementing an approved action plan. EOHLC and EOED will review an MBTA community's progress in implementing its action plan prior to making an award of funds under the Housing Choice Initiative and Massworks infrastructure program.

(d) Deadlines for submitting action plans. An MBTA community that does not submit an action plan by the applicable deadline set forth in Table 3 may not receive a EOHLC determination of interim compliance in time to receive an award of funds from the listed funding sources. An MBTA community that does not achieve interim compliance in time for the Community One Stop for Growth Application deadline may submit an action plan to become eligible for a subsequent round of the One Stop Application, provided that an action plan must be submitted by no later than the applicable deadline of the year in which the MBTA community seeks to establish grant eligibility; and provided further that no action plan may be submitted or approved after the applicable district compliance application deadline set forth in Table 3.

(5) Assistance for communities implementing an action plan. MBTA communities are encouraged to communicate as needed with EOHLC staff throughout the process of implementing an action plan, and may inquire about whether a proposed Multi-family zoning district complies with G.L. c. 40A, § 3A prior to a vote by the municipal legislative body to create or modify such a district. Such requests shall be made on a form to be provided by EOHLC. If a request is submitted at least 90 days prior to the vote of the legislative body, EOHLC shall respond prior to the vote.

(6) Requests for determination of district compliance. An MBTA community must request a determination of district compliance from EOHLC by submitting an application form required by EOHLC and shall include, at a minimum, the following information:

- (a) A certified copy of the municipal zoning ordinance or by-law and zoning map, including all provisions that relate to uses and structures in the multi-family zoning district.
- (b) An estimate of multi-family unit capacity using the compliance model.
- (c) GIS shapefile for the multi-family zoning district.
- (d) In the case of a by-law enacted by a town, evidence that the clerk has submitted a copy of the adopted multi-family zoning district to the office of the Attorney General for approval as required by state law, or evidence of the Attorney General's approval.

(7) After receipt of a request for determination of district compliance, EOHLC will notify the requesting MBTA community within 30 days if additional information is required to process the request. Upon reviewing a complete application, EOHLC will provide the MBTA community a written determination stating one of the following:

- (a) that the existing Multi-family zoning district complies with G.L. c. 40A, § 3A and 760 CMR 72.00;
- (b) that the Multi-family zoning district has been determined to be conditionally compliant with G.L. c. 40A, §3A and 760 CMR 72.00, provided that the MBTA community meets the conditions expressed by EOHLC in its determination; or
- (c) that the Multi-family zoning district fails to comply with G.L. c. 40A, § 3A and 760 CMR 72.00 and the steps that must be taken to achieve compliance.

(8) An MBTA community that has achieved interim compliance prior to requesting a determination of district compliance shall remain in interim compliance for the period during which a request for determination of district compliance, with all required information, is pending at EOHLC.

#### 72.10: Ongoing Obligations; Rescission of a Determination of Compliance

(1) After receiving a determination of compliance, an MBTA community must notify EOHLC in writing of any zoning amendment or proposed zoning amendment that affects the compliant Multi-family zoning district, or any other by-law, ordinance, rule or regulation that limits the development of Multi-family housing in the Multi-family zoning district.

(2) EOHLC may rescind a determination of district compliance, or require changes to a Multi-family zoning district to remain in compliance, if EOHLC determines that:

- (a) The MBTA community submitted inaccurate information in its application for a determination of compliance;
- (b) The MBTA community failed to notify EOHLC of a zoning amendment that affects the Multi-family zoning district;
- (c) The MBTA community enacts or amends any by-law or ordinance, or other rule or regulation, that materially alters the minimum land area and/or the Multi-family unit capacity in the Multi-family zoning district;
- (d) A board, authority or official in the MBTA community does not issue permits, or otherwise acts or fails to act, to allow construction of a Multi-family housing project that is allowed As of right in the Multi-family zoning district (or any Mixed-use zoning development district taken into account in determining the required Multi-family unit capacity in the Multi-family zoning district);
- (e) The MBTA community takes other action that causes the Multi-family zoning district to no longer comply with G.L. c. 40A, § 3A; or
- (f) An MBTA community with an approved Multi-family zoning district has changed transit category as a result of a newly opened or decommissioned Transit station, or the establishment of permanent, regular service at a Transit station where there was formerly intermittent or event-based service.

#### 72.11: Changes to MBTA Service

(1) G.L. c. 40A, § 3A applies to the MBTA communities identified in G.L. c. 40A, § 1A and G.L. c. 161A, § 1. When MBTA service changes, the list of MBTA communities and/or the

transit category assignments of those MBTA communities in the MBTA Community Categories and Requirements may change as well.

(2) The community category assignments identified in the MBTA Community Categories and Requirements reflect certain MBTA service changes that are expected to result from the South Coast Rail and Green Line Extension projects. Affected MBTA communities are noted in the MBTA Community Categories and Requirements.

(3) Municipalities that are not now identified as MBTA communities and may be identified as such in the future are not addressed in 760 CMR 72.00 or included in the MBTA Community Categories and Requirements. New MBTA communities will be addressed with revisions to the MBTA Community Categories and Requirements, and separate compliance timelines.

(4) Future changes to Silver Line routes or stations may change district location requirements when expanded high-capacity service combined with new facilities creates a bus station where there was not one before. Changes to other bus routes, including the addition or elimination of bus stops or reductions or expansions of bus service levels, do not affect the transit categories assigned to MBTA communities and will not affect location requirements for Multi-family zoning districts. Any future changes to MBTA transit service, transit routes and transit service levels are determined by the MBTA Board of Directors consistent with the MBTA's Service Delivery Policy.

## REGULATORY AUTHORITY

760 CMR 72.00: M.G.L. c. 23B, M.G.L. c. 40A, § 3A