

AS OF RIGHT ZONING

What does “as of right” mean?

Section 3A requires that “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.”

“As of right” means development may proceed in that district under a zoning ordinance or by-law without the need for a discretionary process such as a special permit, variance, zoning amendment or other discretionary zoning approval. While on its face as of right may seem like a straightforward concept, there are many nuances to consider, and the Executive Office of Housing and Livable Communities (EOHLC) will review submitted zoning text to determine whether zoning provisions allow for multi-family housing as of right.

Why is allowing multi-family housing as of right important?

In many cities and towns, when multi-family housing is allowed it is often subject to an expensive, unpredictable, and time-consuming review process. Special permits are discretionary and can require multiple public hearings, resulting in additional requirements for the project proponents. The time and materials needed to attain a special permit, variance or zoning amendment increases the cost of development, and these costs are passed on to buyers and renters.

By requiring multi-family housing to be allowed as of right, Section 3A removes some of the zoning barriers to multi-family housing development. Other barriers may remain, however zoning restrictions may cease to be the limiting factor for new housing in 3A compliant districts.

Does as of right zoning allow site plan review?

The Zoning Act (MGL c40A) does not establish nor recognize site plan review as an independent method of regulating land use. However, Massachusetts courts have recognized site plan review as a permissible regulatory tool, including for uses that are permitted as of right. These 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.

The 3A Guidelines similarly recognize that site plan review may be required for multifamily 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.