

760 CMR 59.00: SMART GROWTH ZONING DISTRICTS AND STARTER HOME ZONING DISTRICTS

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59.01: Purpose, Program Overview

(1) 760 CMR 59.00 establishes rules, standards, and procedures for the Smart Growth Zoning District and Starter Home Zoning District Programs created by M.G.L. c. 40R. DHCD 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 guidance issued by DHCD, describes the process by which Municipalities may propose, for review and approval by DHCD, new 40R Zoning provisions that allow the As-of-right development of high-density housing, Starter Homes and Mixed-use Development within zoning overlay Districts.

59.02: Definitions

40R Zoning. A zoning overlay adopted by a Municipality pursuant to M.G.L. c. 40R that conforms to Smart Growth Zoning or Starter Home Zoning requirements.

40R Zoning Application. An application for a preliminary determination of eligibility of 40R Zoning submitted by a Municipality to DHCD pursuant to 760 CMR 59.03(1).

Accessory Dwelling Unit. A dwelling unit of 600 square feet or less on the same lot as a Starter Home. An Accessory Dwelling Unit shall not qualify as a Future Zoned Unit or an Incentive Unit, but shall qualify as a Bonus Unit.

Additional Municipal Standards. A Municipal environmental or health ordinance, bylaw or regulation that exceeds applicable requirements of state law or regulation.

Adjacent Area. An area that:

- (a) is physically contiguous to an Eligible Location qualifying as a Highly Suitable Location under 760 CMR 59.04(1)(a)1. through 3.;
- (b) extends to a distance no more than ½ mile from an Eligible Location, except that if only a portion of a parcel of land lies within such a distance, the entire parcel may be included in the Adjacent Area; and
- (c) provides Pedestrian Access to a qualifying Eligible Location.

To qualify as an Adjacent Area, the area must be currently served by Infrastructure or planned to be served within five years of the 40R Zoning Application by Planned Infrastructure. With respect to Starter Home Zoning Districts only, the Infrastructure or Planned Infrastructure required in an Adjacent Area need not include public sewer(s) or private wastewater treatment plant(s).

Affordable and Affordability. A housing unit will be considered Affordable if:

- (a) It is subject to an affordable housing restriction as defined in M.G.L. c. 184, § 31, with a term of no less than 30 years which meets the standards set out in 760 CMR 56.02: Use Restriction and guidance issued by DHCD for eligibility for the Subsidized Housing Inventory;

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(b) For a rental unit, the tenant is required to be an individual or household whose annual income is less than or equal to 80% of the Area Median Income and the monthly rent plus a reasonable allowance for applicable utilities is less than or equal to 30% of $\frac{1}{12}$ of the Area Median Income; and

(c) For a homeownership unit, the purchaser is required to be an individual or household whose annual income is less than or equal to 80% of the Area Median Income and the maximum sale price at initial sale and resale is less than or equal to the maximum purchase price limit which meets the standards set out in guidance issued by DHCD.

Approved District. A District for which 40R Zoning has been adopted by a Municipality and for which a Letter of Approval has been issued by DHCD, 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(3).

Area Median Income. The area-wide median income as determined by HUD, adjusted for household size and using HUD's rules for attribution of income to assets.

Area of Concentrated Development.

(a) An area:

1. That includes a city or town center; contiguous, previously developed portions of an existing commercial district that are substantial in the context of the Municipality; or a rural village district; the boundaries of which are clearly identified and submitted on a corresponding map;
2. That, except in the case of an existing rural village district as set forth in 760 CMR 59.02: Area of Concentrated Development(b) is currently served or scheduled to be served (as shown by sufficient documentation) within five years of the 40R Zoning Application by public sewer(s) and/or private sewage treatment plant(s) (applicable to Smart Growth Zoning Districts only);
3. Of which at least 50% of the total land area is either Substantially Developed Land or Underutilized Land; and
4. 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.

(b) Notwithstanding anything to the contrary in Area of Concentrated Development, in areas that are not sewered or scheduled to be sewered, an existing rural village district will still qualify 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 DHCD and is characterized by the most Substantially Developed portions of the surrounding village area plus any land that would otherwise qualify as Substantially Developed Land or Underutilized Land within up to $\frac{1}{2}$ 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. Housing development allowed under the Underlying Zoning or 40R Zoning without recourse to a special permit, variance, zoning amendment, discretionary waiver, or other form of zoning relief. Units that require Plan Review shall be considered As-of-right, subject to review and approval by DHCD of any Municipal 40R regulations, guidelines, forms of application materials, or other requirements applicable to review of Projects by the Plan Approval Authority under 760 CMR 59.00.

Authorization of Payment. A written authorization by DHCD that a Municipality is entitled to a Bonus Payment, according to the procedure set forth in 760 CMR 59.06(2).

Bonus Payment. A one-time payment made to a Municipality for each Bonus Unit within an Approved District for which a building permit has been issued, including either a Density Bonus Payment or Production Bonus Payment. *See* 760 CMR 59.06(2).

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Bonus Unit. A housing unit developed as part of a Project within a District, either through new construction, the substantial rehabilitation of an existing residential 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 proposed or developed under a comprehensive permit pursuant to M.G.L. c. 40B for which the project eligibility letter was issued to the developer prior to the Municipality's 40R Zoning Application to DHCD shall not qualify as Bonus Units if the development that is the subject of the comprehensive permit comprises all or substantially all of the Developable Land within the proposed 40R District. Otherwise, units developed within a District under a Comprehensive Permit issued pursuant to M.G.L. c. 40B after the submission of a 40R Zoning Application, in excess of the number of Existing Zoned Units for the same parcel, shall qualify as Bonus Units.

Capital Funds. Monies required by law to be used for capital expenditures including, without limitation, for acquisition, rehabilitation and construction of real and personal property, including items such as environmental remediation, park improvements, drainage and irrigation projects, and deferred maintenance projects. A determination of what constitutes capital expenditures is subject to any regulations and guidance issued by DOR. DHCD may issue additional guidance to assist Municipalities, but in the event of any conflict between DHCD's guidance and DOR's regulations or guidance, DOR's regulations or guidance, as applicable, will govern.

Certificate of Compliance. A certificate issued by DHCD to a Municipality upon DHCD'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. A certificate issued by DHCD to a Municipality if, after an adjudicatory hearing, DHCD determines that the Municipality is in substantial non-compliance with M.G.L. c. 40R and 760 CMR 59.07(2). *See* 760 CMR 59.07(3).

Cluster Development. Development in which the buildings and associated roadways or parking are clustered together into one or more groups separated from adjacent property and/or other groups within the development by intervening Dedicated Open Space usable for passive or active recreational activities.

Cluster Zoning. Zoning in which:

- (a) development density is determined for an entire specified area, rather than on a per-lot basis; and
- (b) dimensional requirements such as lot area, frontage, setbacks of structures from lot lines and/or other structures and minimum lot area per dwelling unit are reduced for individual lots to allow concentration of construction on part of the land through Cluster Development, and which requires permanent conservation of Dedicated Open Space usable for passive or active recreational activities, including without limitation, Future Open Space, as provided in DHCD guidance.

Comprehensive Housing Plan. A document, prepared by a Municipality for review by DHCD, providing an assessment of the housing needs within the Municipality, and describing specific strategies, including but not limited to those contained in the 40R Zoning, to address these needs and ensure that the applicable approval standards of 760 CMR 59.04(1)(g), (i), (j) and (k) are satisfied. The Comprehensive Housing 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 community development plan, master plan, area specific plan, or equivalent Municipally prepared document that is supplemented as necessary to satisfy these requirements, as well as the requirements of 760 CMR 59.03(1)(h)1. regarding the proposed 40R Zoning.

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Dedicated Open Space. 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 active or passive recreational use; parklands, plazas, playgrounds, and reservations; and cemeteries. Dedicated 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 Dedicated Open Space for the purposes of 760 CMR 59.00. In any case where such Dedicated Open Space is not conveyed to the Municipality, a restriction enforceable by the Municipality shall be recorded providing that such land be preserved as Dedicated Open Space pursuant to a conservation restriction as defined in M.G.L. c. 184, § 31.

Density Bonus Payment. A one-time payment made to a Municipality for each Bonus Unit within a Smart Growth Zoning District for which a building permit has been issued. *See* 760 CMR 59.06(2).

DEP. The Massachusetts Department of Environmental Protection.

Design Standards. Provisions of, or regulations adopted pursuant to, 40R 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. 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) Dedicated Open Space;
- (c) Future Open Space;
- (d) The rights-of-way of existing public streets, ways, and transit lines and, in a Starter Home Zoning District, new public and private roadways that would be necessary to meet minimum applicable requirements under Municipal law including the proposed 40R Zoning and, to the extent applicable within the proposed District, Municipal subdivision control requirements;
- (e) Land currently in use for governmental functions (except to the extent that such land qualifies as Underutilized Land); or
- (f) Areas exceeding $\frac{1}{2}$ acre of contiguous land that are:
 1. protected wetland resources (including buffer zones) under federal or state laws plus any additional areas that are protected wetlands resources (including buffer zones) under applicable Additional Municipal Standards, if any, but not federal or state 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 40R Zoning;
 3. characterized by steep slopes with an average gradient of at least 15%; or
 4. subject to any other Municipal 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 40R Zoning.
- (g) Areas of state-owned land that contain Prime Farmland Soils.

Developer Certificate of Feasibility. Certification by a developer with Site Control, or by an architect, engineer or other professional with appropriate expertise certifying on behalf of such developer, that:

- (a) any Additional Municipal Standards applicable to development under the Starter Home Zoning do not Render Development Infeasible; and/or
- (b) any Design Standards do not Unreasonably Impair development within the District.

DHCD. The Massachusetts Department of Housing and Community Development.

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District. An overlay district within a Municipality that is subject to 40R 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 40R 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 40R Zoning, or to undertake development in accordance with requirements of the Underlying Zoning.

DOR. The Massachusetts Department of Revenue.

Eligible Location. An area within a Highly Suitable Location 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 parcel, to the extent of its legal boundaries, may also be deemed an Eligible Location in the discretion of DHCD.

Existing Underutilized Facilities. Facilities within or serving a District that have substantial potential for redevelopment in accordance with Smart Growth principles, including:

- (a) Existing buildings, structures and Infrastructure that:
 1. would provide greater potential use than the existing use if rehabilitated or repurposed as or in support of a residential or mixed-use development in a 40R Zoning District;
 2. have become of diminished use and/or benefit to the community; and
 3. relative to other development opportunities in the Municipality, offer substantially greater opportunities for rehabilitation and/or repurposing for or in support of residential use.
- (b) Previously developed, non-agricultural land substantially characterized by existing impervious or disturbed surfaces such as parking lots, sand and gravel operations, and/or the foundations or remains of structures that have deteriorated or been demolished.

Existing Zoned Units. 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 residential buildings, or the conversion to residential use of existing buildings. Units that are proposed or developable within the geographic area of a District under a comprehensive permit pursuant to M.G.L. c. 40B for which the project eligibility letter was issued to the developer prior to the Municipality's 40R Zoning Application shall be included as Existing Zoned Units if:

- (a) the comprehensive permit is issued prior to the date of the Municipality's 40R Zoning Application; or
- (b) the subject land makes up all or substantially all of the Developable Land within the proposed 40R District. For purposes of determining the Zoning Incentive Payment and the Bonus Payment:
 1. absent any application of the 40R Zoning to Substantially Developed areas, the Existing Zoned Units within any District or Project site shall 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; and
 2. Existing Zoned Units shall include any existing occupied housing units within a District regardless of whether they could be developed As-of-right under currently applicable Underlying Zoning (for example, lawfully nonconforming existing occupied housing units).

Future Open Space. Areas within a District which a Municipality may designate or require to be designated to be set aside in the future as Dedicated 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 be subject to requirements under the 40R Zoning for Projects to set aside a fixed percentage of the site area as Dedicated Open Space, and, for Districts other than Starter Home Zoning Districts eligible pursuant to 760 CMR 59.04(1)(a)3., allowing such Projects to deduct the Dedicated Open Space when calculating housing densities. Notwithstanding the

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foregoing, the total Future Open Space 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 Municipal Dedicated Open Space plan.

Future Zoned Units. 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 40R Zoning through new development, the substantial rehabilitation of existing residential buildings, or the conversion to residential use of existing buildings, except that an Accessory Dwelling Unit shall not qualify as a Future Zoned Unit.

Highly Suitable Location. A location that, as determined by DHCD based on satisfactory documentation provided by the Municipality, is consistent with the statutory goals for Smart Growth, including the production of Starter Homes, set forth in M.G.L. c. 40R, § 1 and 760 CMR 59.00.

- (a) To qualify as a Highly Suitable Location, an area must, at a minimum, be one of the following:
1. within a Substantial Transit Access Area;
 2. within an Area of Concentrated Development;
 3. for Starter Homes, an area zoned for residential use that is not otherwise eligible to be a Highly Suitable Location, only if all or a portion of the Starter Home Zoning District has Pedestrian Access within a distance of no more than $\frac{3}{4}$ mile to a Pedestrian Destination and the Starter Home Zoning incorporates Cluster Zoning so as to permit Cluster Development, and requires all development under the Starter Home Zoning to utilize Low Impact Development Techniques and to include features that encourage walking within Starter Home Projects; or
 4. a location, not otherwise eligible to be a Highly Suitable Location, where residential or Mixed-use Development would nonetheless promote Smart Growth, as demonstrated by the Municipality through documentation satisfactory to DHCD, demonstrating the degree to which:
 - a. the location is near a rapid transit or commuter rail station or bus or ferry station terminal, though not within a Substantial Transit Access Area;
 - b. the location has Pedestrian Access within a distance of $\frac{3}{4}$ mile to a Pedestrian Destination;
 - 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 regional or state plan.
- (b) Factors DHCD may consider in determining whether a location that does not qualify under 760 CMR 59.04(1)(a) as being either within a Substantial Transit Access Area or an Area of Concentrated Development is nonetheless a Highly Suitable Location for a District include, without limitation, the extent to which the area is characterized by:
1. Infrastructure, including access to public facilities for storm water and wastewater transport, treatment and disposal and public water supply;
 2. Multi-modal Access;
 3. Existing Underutilized Facilities; or
 4. a location within or immediately adjacent to a Priority Development Area.
- (c) An area will not qualify as a Highly Suitable Location if more than 50% of the proposed District contains Prime Farmland Soils on state-owned land. If more than 50% of a proposed District has Prime Farmland Soils that are not state-owned, DHCD may take into account the availability of other potential Highly Suitable Locations in the Municipality, and may request additional information from the Municipality, to determine whether the proposed District qualifies as a Highly Suitable Location.
- (d) DHCD may from time to time issue guidance as to other factors that are relevant to the determination of whether a location is Highly Suitable.

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Historic District. 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 Municipal 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 an Historic District within an Approved District, but whether such Historic District renders the District non-compliant with the provisions of M.G.L. c. 40R and 760 CMR 59.00 shall be subject to DHCD review in accordance with 760 CMR 59.05(5). DHCD's review of such a new or enlarged Historic District shall be limited to compliance with M.G.L. c. 40R and 760 CMR 59.00. *See* also 760 CMR 59.02: Substantially Developed Land.

Housing Production Plan. An affordable housing plan adopted by a Municipality and approved by DHCD in accordance with 760 CMR 56.03(4).

Housing Production Summary. A detailed summary, consistent with guidance and/or templates issued by DHCD regarding format and content, of the Municipality's:

- (a) affordable housing production history;
- (b) housing needs and housing demand assessment;
- (c) analysis of development constraints and capacity;
- (d) current housing goals and strategy for achieving those goals; and
- (e) proposed locations for affordable housing production.

HUD. The United States Department of Housing and Urban Development.

Incentive Units. 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, except that an Accessory Dwelling Unit shall not qualify as an Incentive Unit.

Income-restricted and Income-restriction. A housing unit will be considered Income-restricted if:

- (a) It is subject to an affordable housing restriction as defined in M.G.L. c. 184, § 31, with a term of no less than 30 years, and which meets the standards set out in 760 CMR 56.02: Use Restriction and guidance issued by DHCD;
- (b) For a rental unit, the tenant is required to be an individual or household whose annual income is less than or equal to 100% of the Area Median Income and the monthly rent plus a reasonable allowance for applicable utilities is less than or equal to 30% of $1/12$ of the Area Median Income; and
- (c) For a homeownership unit, the purchaser is required to be an individual or family whose annual income is less than or equal to 100% of the Area Median Income and the maximum sale price at initial sale or resale is equal to or less than the maximum purchase price limit which meets the standards set out in guidance issued by DHCD.

Infrastructure. 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 Access and vehicular access; public and private facilities for storm water and wastewater transport, treatment and disposal; and water and power supply lines. For purposes of a Starter Home Zoning District only, Infrastructure shall not be required to include public sewer and/or public water supply.

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

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Letter of Conditional Approval. A letter issued by DHCD to a Municipality upon the adoption of its 40R Zoning for a District, that approves the District designation but withholds authorization of all or part of the Zoning Incentive Payment in accordance with 760 CMR 59.05(4)(d) because the Municipality has not met all of the criteria for payment of the Zoning Incentive Payment for the entire District under 760 CMR 59.04(1), including, for example, Infrastructure or Planned Infrastructure requirements under 760 CMR 59.03(1)(j) and 59.04(1)(k) and all requirements to be considered an Eligible Location pursuant to 760 CMR 59.04(1)(a). The identified conditions may pertain to all or part of the District. *See* 760 CMR 59.05(4)(d).

Letter of Conditional Eligibility. A letter issued by DHCD to a Municipality, finding that a proposed District would meet the approval requirements set forth in 760 CMR 59.04(1) if certain identified conditions were satisfied, including, for example, Infrastructure or Planned Infrastructure requirements under 760 CMR 59.03(1)(j) and 59.04(1)(k) or a provision in Starter Home Zoning specifying that Additional Municipal Standards shall not apply under the Starter Home Zoning District. *See* 760 CMR 59.05(2).

Letter of Denial. A letter issued by DHCD to a Municipality, finding that a proposed District would not meet the approval requirements set forth in 760 CMR 59.04(1), and informing the Municipality of the deficiencies in its 40R Zoning Application. *See* 760 CMR 59.05(2).

Letter of Eligibility. A letter issued by DHCD 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. A letter from DHCD 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).

Low Impact Development Techniques. Development techniques suitable to a particular site that protect the natural features of the site, including, without limitation:

- (a) natural resource oriented site design;
- (b) appropriately scaled and decentralized stormwater management techniques that limit the rate of off-site storm water runoff (both peak and non-peak flows) to levels substantially similar to natural hydrology (or, in the case of a redevelopment site, that reduce such flows from pre-existing conditions), through means including, bioretention/rain gardens, infiltration/permeable pavements, stormwater planters, vegetated swales, vegetated buffers, cisterns, rain barrels, and green roofs; and
- (c) appropriately scaled roads.

MassGIS. The Massachusetts Office of Geographic Information.

Mixed-use Development. A Project containing:

- (a) for Smart Growth Zoning Districts, a mix of Multi-family Residential, two- and three-family residential, or single-family residential uses, together with commercial, institutional, industrial, or other non-residential uses; or
- (b) for Starter Home Zoning Districts, a mix of any Starter Home units with commercial, institutional, industrial, or other non-residential uses; in which the applicable residential densities set forth in 760 CMR 59.04(1)(d)3. and 760 CMR 59.04(1)(d)4., respectively, apply proportionally to the residential portion of the Mixed-use Development Project in accordance with 760 CMR 59.04(1)(d)1.

Multi-family Residential Use. Apartment or condominium units in individual buildings each of which contains or will contain more than three such units, provided that the 40R Zoning may treat attached dwelling units on separate lots as single-family residential use. *See* 760 CMR 59.04(1)(d).

Multi-modal Access. Access by two or more alternative modes of transport, of which one means of access is non-motorized. Such modes may include:

- (a) direct Pedestrian Access over a distance of no more than ½ mile to public transit serving a Pedestrian Destination with a minimum of hourly frequency during peak periods; or

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(b) use of a sidewalk, shared-use path, marked bicycle lane or cycle track providing, or connecting to, safe, practical and continuous non-motorized access to a Pedestrian Destination.

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

Pedestrian Access. Safe, practical and continuous access for walking by means of a sidewalk, path, or a roadway with a design speed of 20 miles per hour or less.

Pedestrian Destination. A location 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; an active recreational facility open to the public; public transit or a bus stop along a route serving an Eligible Location or Adjacent Area at a minimum of hourly frequency during peak periods.

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

Plan Review. 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 40R Zoning, in accordance with M.G.L. c. 40R, § 11 and 760 CMR 59.00. *See* 760 CMR 59.04(1)(f).

Planned Infrastructure. Infrastructure for which certification by a Municipal engineer or public works, board of health or conservation commission official or other person with similar expertise pursuant to 760 CMR 59.03(1)(j) has been submitted to establish the timing for completion of the improvements (to be within five years of the 40R Zoning Application date, or other reasonable time period approved by DHCD), the identity of the entities responsible for completing the improvements, and that the District will not be overburdened by the build-out of the Future Zoned Units within the District as the Infrastructure exists or may be practicably upgraded.

Prime Farmland Soils. Land with soils identified in data released by MassGIS that has been in active agricultural use within the past five years that have not been granted an exception consistent with requirements established by the Executive Office of Environmental Affairs and the Department of Agricultural Resources.

Priority Development Area. A location that is all or part of an area designated as a "priority development area" or equivalent in the most current regional plan(s) adopted by the district or planning commission or regional planning and economic development commission established pursuant to M.G.L. c. 40B, § 4 or § 12, for the district or region in which the Municipality is located.

Production Bonus Payment. A one-time payment to a Municipality for each Bonus Unit within a Starter Home Zoning District for which a building permit has been issued.

Project. A residential development or Mixed-use Development undertaken within a District pursuant to the approval of a Plan Approval Authority in accordance with the requirements of the 40R Zoning. Within the boundaries of a District a developer may elect either to develop a Project in accordance with the requirements of the 40R Zoning, or to undertake development in accordance with the requirements of the Underlying Zoning.

Render Development Infeasible. To prevent or make physically or economically impracticable the development of residential or Mixed-use Development Projects at the As-of-right residential density set forth in the Starter Home Zoning.

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Site Control. Fee ownership of, a long-term leasehold interest in, or a right to develop one or more sites that, in the aggregate, comprise at least 50% of the Developable Land Area of a proposed Starter Home Zoning District. Site Control shall be demonstrated, as to each such site, by means of one or more of the following: a recorded deed; a lease with a term of at least 30 years, as to which a notice of lease has been recorded; or an executed, legally enforceable purchase agreement or option to purchase.

Smart Growth. 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. The Municipal zoning overlay requirements 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 set forth in M.G.L. c. 40A for communities other than the City of Boston, or by other applicable law in the case of the City of Boston, and approved by DHCD which provide for the development of Smart Growth Projects pursuant to M.G.L. c. 40R and 760 CMR 59.00 and in accordance with DHCD guidance.

Smart Growth Zoning District. A District adopted by a Municipality pursuant to its Smart Growth Zoning, that is superimposed over one or more zoning districts in an Eligible Location.

Start of Construction. With respect to an Approved District, the commencement of construction activity, such as the pouring of foundations or footings, utility relocation, or the remediation of hazardous materials within an Approved District on a Project or on a Planned Infrastructure upgrade identified in the Municipality's 40R Zoning Application, provided that such construction is continued through to completion of a Project, in accordance with 760 CMR 59.07(1)(f).

Starter Home. A single-family home not exceeding 1,850 square feet in heated living area, not including any associated Accessory Dwelling.

Starter Home Zoning. The Municipal zoning overlay requirements 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 set forth in M.G.L. c. 40A for communities other than the City of Boston, or by other applicable law in the case of the City of Boston, and approved by DHCD, which provide for the development of Starter Homes pursuant to M.G.L. c. 40R and 760 CMR 59.00 and in accordance with DHCD guidance.

Starter Home Zoning District. A District consisting of not less than three contiguous acres of Developable Land area, adopted by a Municipality pursuant to its Starter Home Zoning, that is superimposed over one or more zoning districts in an Eligible Location.

Substantial Transit Access Area. A location that comprises:

- (a) In the case of a Smart Growth Zoning District, 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); and
- (b) In the case of a Starter Home Zoning District, part or all of the land located within a one mile distance of any rapid transit or commuter rail station, bus or ferry terminal (measured from the entry point(s) to the passenger platforms).

59.02: continued

Substantially Developed Land. 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.

Underlying Zoning. The Municipal 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. The Underlying Zoning shall include all zoning and existing overlays applicable to such geographic area and shall not be limited to the base zoning layer. 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 40R Zoning Application was submitted to DHCD.

Underutilized Land. Developable Land within a District that would otherwise qualify as Substantially Developed Land, consistent with guidance issued by DHCD, but which:

- (a) is characterized by improvements that have a marginal or significantly declining use, as measured by such factors as 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, low value of improvements in relation to land value, and low floor area ratio in relation to the floor area ratio that would be permitted under the applicable Underlying Zoning;
- (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; and
- (c) for a Starter Home Zoning District, solely for purposes of determining whether the District consists of not less than three contiguous acres of Developable Land area, DHCD may also include in the calculation of Underutilized Land certain additional land that would otherwise qualify as Substantially Developed Land, where DHCD determines that there is reasonable potential for such land to be more intensively developed in accordance with Starter Home Zoning.

Unreasonably Impair. To add unreasonable costs or unreasonably diminish the economic feasibility of proposed Projects in a District by means of a provision of 40R Zoning or a Design Standard.

Zoning Incentive Payment. A one-time payment to a Municipality that is made after DHCD issuance of a Letter of Approval or Letter of Conditional Approval authorizing such payment. *See* 760 CMR 59.06(1).

59.03: Contents of 40R Zoning Applications to DHCD

(1) Application for Preliminary Determination of Eligibility for 40R Zoning. The chief executive of a Municipality or duly authorized designee desiring to adopt 40R Zoning for a proposed District shall submit to DHCD the following application materials, and such other materials as may be required by guidance or forms issued by DHCD, for its preliminary determination of eligibility under 760 CMR 59.05(2):

- (a) An application in the form prescribed by DHCD.
- (b) A copy of the proposed 40R Zoning, 40R Zoning map and Design Standards (if not contained in the 40R Zoning) for the District.
- (c) One or more plans or maps that collectively are sufficient to show:
 1. The location of the proposed District and any sub-Districts, and the relevant features (*e.g.*, associated Area of Concentrated Development) to enable DHCD to determine whether it qualifies as a Highly Suitable Location;
 2. The areas within the proposed District that qualify as Developable Land including Underutilized Land (if any), and areas excluded from Developable Land pursuant to 760 CMR 59.02: Developable Land, with the total acreage of each area;
 3. On a parcel-by-parcel basis, as applicable, the existing residential units and existing As-of-right residential densities within the proposed District;

59.03: continued

4. Proposed As-of-right densities in any sub-District as well as documentation of any concurrently proposed 40R developments; and
 5. If development of the proposed District will require the creation of new roadways, a concept plan showing how residential density would be achieved with the inclusion of roadways meeting applicable Municipal standards.
- (d) A 40R density data spreadsheet on a form provided by DHCD.
 - (e) Any Municipal and developer certifications required pursuant to 760 CMR 59.03(1)(j) and 760 CMR 59.03(1)(k), as applicable.
 - (f) For a proposed Starter Home Zoning District, a statement whether any Additional Municipal Standards will apply to development under the Starter Home Zoning.
 - (g) A copy, including both text and map(s), of the Underlying Zoning for the District.
 - (h) A demonstration of the Municipality's housing history and strategy by means of:
 1. A Comprehensive Housing Plan adopted by the Municipality within the past five years (or a longer period if the Municipality submitted updates to such Comprehensive Housing Plan in accordance with DHCD guidance); a Housing Production Plan previously adopted by the Municipality and still in effect; or a Housing Production Summary; and
 2. For Smart Growth Zoning Districts only, a description of other residential development opportunities for infill housing and the residential re-use of existing buildings and underutilized buildings; and
 3. An assessment of Municipal housing needs for households in protected classes identified in state and federal law, addressing how housing choice for such households will be served. The Municipality shall submit a statement that it will comply with the requirements for affirmative fair housing marketing of any Affordable or Income- Restricted units, as applicable, pursuant to 760 CMR 59.04(1)(j).
 - (i) Documentation 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.
 - (j) Sufficient information, certified by a Municipal engineer, or public works, board of health or conservation commission official or other person with similar expertise, to demonstrate that the impacts of the build-out of the Future Zoned Units within the District are consistent with Smart Growth and will not overburden Infrastructure (which for the purposes of 760 CMR 59.03(1)(j) shall also include improvements to public Dedicated 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 40R Zoning Application date, or other reasonable time period approved by DHCD, 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 40R Zoning 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)(j), it may request a Letter of Conditional Approval, subject to its subsequent compliance with 760 CMR 59.03(1)(j) as provided in 760 CMR 59.05(4).
 - (k) For Starter Home Zoning Districts only:
 1. copies of any Additional Municipal Standards that will apply to development under the Starter Home Zoning, together with one of the following:
 - a. A Developer Certificate of Feasibility with respect to Additional Municipal Standards;
 - b. Documentation demonstrating that such Additional Municipal Standards do not Render Development Infeasible, certified by a Municipal official, civil engineer or other individual with appropriate expertise to evaluate and opine as to the feasibility of such development; or
 - c. Documentation substantiating the circumstances the Municipality asserts warrant the imposition of Additional Municipal Standards on development under the Starter Home Zoning in the proposed District, which shall be certified by a Municipal engineer or by a public works, board of health or conservation commission official with relevant expertise, unless otherwise substantiated in accordance with guidance issued by DHCD.

59.03: continued

2. If required pursuant to 760 CMR 59.03(2)(a)6., a Developer Certificate of Feasibility with respect to Design Standards.
 - (l) Additional materials, including narrative and exhibits as required, upon the form of application or in the format determined by DHCD, demonstrating that the proposed District satisfies the approval requirements of 760 CMR 59.04(1).
 - (m) If applicable, the Municipality's request for an area waiver under 760 CMR 59.04(2) or (with respect to Smart Growth Districts only) density reduction under 760 CMR 59.04(3).
- (2) Application for Expedited Review for Certain Starter Home Zoning Districts.
 - (a) Eligibility. To qualify for the expedited eligibility determination process, a proposed Starter Home Zoning District must meet the following requirements:
 1. The Starter Home Zoning must conform substantially to the DHCD Starter Home Zoning template and be submitted with the 40R Application with all changes from the template indicated.
 2. The Starter Home Zoning District shall allow for no more than 30 Starter Homes in the District.
 3. The Starter Home Zoning District shall require that each Starter Home in the District contain at least three bedrooms.
 4. The Starter Home Zoning District shall utilize Low Impact Development Techniques best practices for development. DHCD may issue guidance from time to time identifying the standards that will apply.
 5. The Starter Home Zoning District shall utilize best practices for roadway and subdivision design. DHCD may issue guidance from time to time identifying the standards that will apply.
 6. Unless the 40R Application is accompanied by Developer Certificate of Feasibility:
 - a. Design Standards shall address no more than the size and location of garages/ carports, decks or other non-living area structures associated with a Starter Home or Accessory Dwelling Unit, as applicable, and the basic roof style; and
 - b. No Additional Municipal Standards shall apply to development under the Starter Home Zoning.
 - (b) Procedure for Review. Within 15 days of DHCD's receipt of a Municipality's 40R Application under 760 CMR 59.03(2), DHCD will notify the Municipality in writing or by electronic communication if any required element of its 40R Application is missing or incomplete. Such notification shall constitute a denial of the 40R Application unless the missing or incomplete elements are addressed within 30 days after the notification, or other reasonable time period established at DHCD's discretion. DHCD will issue a preliminary determination of eligibility pursuant to 760 CMR 59.05(2) on the later to occur of:
 1. 60 days from the date on which DHCD received a Municipality's 40R Application; or
 2. 45 days from DHCD's receipt of the last missing or incomplete element of the application.
- (3) Review of Existing District. A Municipality may apply to DHCD for approval of an existing zoning district adopted pursuant to M.G.L. c. 40A prior to its application 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). Following DHCD's issuance of a Letter of Eligibility or Letter of Conditional Eligibility under 760 CMR 59.05(2), and a Municipality's satisfaction of all conditions in such a Letter of Conditional Eligibility pursuant to 760 CMR 59.05(4), the Municipality will become entitled to 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).
- (4) Coordinated Review Procedures. DHCD 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), DHCD 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 DHCD under the procedure set forth in 760 CMR 59.05(6), no more than three years prior to the date of the 40R Zoning Application. DHCD may approve, disapprove, or approve with conditions, a request for the determination of eligibility for a District.

(1) Requirements. The Municipality shall establish, by narrative and exhibits, that a proposed District satisfies each of the following requirements.

(a) Eligible Location. The proposed District shall be located in an Eligible Location. DHCD shall find that a proposed District is located in an Eligible Location if it is in a Highly Suitable Location by virtue of meeting one or more of the following criteria:

1. Substantial Transit Access Area.

a. The District comprises part or all of a Substantial Transit Access Area, plus any qualifying Adjacent Area, if applicable; and

b. For Smart Growth Zoning Districts only, Pedestrian Access to transit within a distance of ½ mile must be existing Infrastructure or Planned Infrastructure. The District may also include additional contiguous areas with comparable Pedestrian Access 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) that would not otherwise constitute a qualifying Adjacent Area; and

c. For Starter Home Zoning Districts only, the District may also include additional contiguous areas located within 1½ 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. Area of Concentrated Development.

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

b. A District itself does not need to meet all of the criteria for an Area of Concentrated Development as long as it is located within an Area of Concentrated Development and meets the applicable criteria set forth in 760 CMR 59.02: Area of Concentrated Development.

c. A Municipality may have multiple qualifying Areas of Concentrated Development.

3. Starter Home Additional Criteria. For Starter Homes only, the District meets the criteria for a Highly Suitable Location under 760 CMR 59.02: Highly Suitable Location (a)3.

4. Other Highly Suitable Location. The proposed District otherwise qualifies as a Highly Suitable Location where development would promote Smart Growth pursuant to 760 CMR 59.02: Highly Suitable Location(a)4.

(b) Land Area of District. 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 DHCD has previously approved an area waiver under 760 CMR 59.05(6).

(c) Land Area of All Districts. 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. 40R Zoning may allow Mixed-use Developments As-of-right in part or all of the District (excluding all sub-Districts in which the only permitted use is commercial) provided that at least 51% of the gross floor area of any such Mixed-use Development must be devoted to residential use. The minimum number of residential units that must be provided in a Mixed-use Development is determined by multiplying the minimum number of housing units that would have been required if the Mixed-use Development were an entirely residential Project as set forth in 760 CMR 59.04(1)(d)3. or 760 CMR 59.04(1)(d)4., as applicable, by the higher of the minimum percentage of residential use required under 760 CMR 59.04(1)(d)1. or the minimum percentage of residential use required by the 40R Zoning, rounded up to the next highest integer.

59.04: continued

The 40R Zoning shall specify the minimum percentage of each Mixed-use Development that shall be devoted to residential use, which shall be no less than 51%. Zoning Incentive Payments for Mixed-use Developments shall be based on the applicable minimum residential density using the formula in 760 CMR 59.04(1)(d)1. Municipalities may mandate a certain percentage of commercial use in 40R Zoning as long as Mixed-use Developments meet the applicable minimum residential densities set forth in 760 CMR 59.04(1)(d)3. and 760 CMR 50.04(1)(d)4. as affected by the requirements set forth in 760 CMR 59.04(1)(d)1.

Example. A Mixed-use Development in a Smart Growth Zoning District is located on two acres of Developable Land (87,120 square feet) on which at least 40 Multi-family Residential units would be permitted if it were an entirely residential Project. The applicable Smart Growth Zoning requires a minimum residential density of 51% for Mixed-use Developments in the District.

Calculating the minimum number of residential units. If the Mixed-use Development were entirely residential, the minimum allowable density for the Project would provide for at least 40 Multi-family Residential units (two acres x 20 Multi-family Residential units). The applicable minimum residential density in this Mixed-use Development is 51%. A minimum of 21 residential units must be provided (40 residential units x 51% = 20.4, rounded up to the next highest integer).

2. 40R Zoning may apply the residential densities set forth in 760 CMR 50.04(1)(d)3. or 760 CMR 59.04(1)(d)4., as applicable, to some or all of the Substantially Developed Land within a proposed District. The allowable residential densities in such Substantially Developed sub-district shall be no less than those in the Underlying Zoning, and the 40R 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 lots, and of additional housing units in existing residential buildings or additions thereto or replacements thereof. The 40R 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. 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 Bonus Payments, and the Project shall be subject to all applicable Affordability, Income-Restricted and other standards of the 40R Zoning.
3. For Smart Growth Zoning Districts only:
 - a. A Smart Growth Zoning District shall provide for any one or more of the following minimum allowable As-of-right density requirements, as applicable, unless DHCD has previously approved a density reduction under 760 CMR 59.04(3):
 - i. allowing a density of at least eight units per acre for Developable Land zoned for single-family residential use;
 - ii. allowing a density of at least 12 units per acre for Developable Land zoned for two- and/or three-family residential use; or
 - iii. allowing a density of at least 20 units per acre for Developable Land zoned for Multi-family Residential Use.
 - b. A Smart Growth Zoning 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, as long as each sub-district individually meets the applicable minimum allowable density requirement set forth in 760 CMR 59.04(1)(d)3.a.i. through iii.
4. For Starter Home Zoning Districts only:
 - a. A Starter Home Zoning District shall provide for a minimum allowable As-of-right density of no less than four units per acre of Developable Land.
 - b. A Starter Home Zoning District shall provide for the utilization of either Cluster Development or Low Impact Development Techniques, except that in an area zoned for residential use that is not otherwise eligible to be a Highly Suitable Location, the District must comply with the requirements of 760 CMR 59.02: Highly Suitable Location(a)3.

59.04: continued

- c. A Starter Home Zoning shall provide that at least 50% of the Starter Homes to be developed in a proposed Starter Home Zoning District, excluding Accessory Dwelling Units, must contain three or more bedrooms. These three or more-bedroom units shall be equitably integrated and dispersed among the Starter Homes throughout the Starter Home Zoning District and within each Project including by unit type and construction phase.
- (e) Affordable and Income-restricted Units.
1. In a Smart Growth Zoning District, the Smart Growth Zoning shall provide that not less than 20% of all units constructed within Projects of more than 12 units shall be Affordable. In addition, the Smart Growth Zoning 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% of the area-wide median income as determined by HUD). Units in a project located within the geographic boundaries of the Smart Growth District which receives a project eligibility letter under M.G.L. c. 40B after the date upon which the Municipality submitted a 40R Zoning Application to DHCD, shall be counted toward the 20% overall Affordability requirement in the second sentence of 760 CMR 59.04(1)(e)1. unless such units are required to be treated as Existing Zoned Units under 760 CMR 59.02: Existing Zoned Units.
 2. In a Starter Home Zoning District, the Starter Home Zoning shall provide that not less than 20% of all units constructed within any Project shall be Income-restricted units and that all Income-restricted units are equitably integrated and dispersed throughout the District and Project (including by unit type and construction phase). In addition, the Starter Home Zoning shall contain provisions to ensure that there shall be effective monitoring and enforcement of the Income-restricted requirements during the required term. The Starter Home Zoning shall provide that the affordable housing restriction on an Income-restricted unit shall ensure that it is occupied by an eligible household paying an Income-restricted rent or Income-restricted purchase price during the term of the restriction. The Starter Home Zoning shall provide that Income-restricted requirements 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 Starter Home Zoning shall contain provisions specifying the method by which such restricted rents or purchase prices shall be computed. The Starter Home Zoning may specify decreased maximum income limits of eligible households (below 100% of the Area Median Income).
 3. If the Municipality is proposing income, rent, or sale price requirements for Affordable or Income-restricted units requiring rents, purchase prices, or income limits lower than the applicable requirements of 760 CMR 59.04(1)(e), or conversely, significantly limiting opportunities for Affordable Housing, the Municipality shall be required to prove to DHCD in its 40R Zoning Application that its use of such mechanisms will not unduly restrict opportunities for development within the proposed District under the applicable 40R Zoning by impairing the economic feasibility of proposed Projects in the District, or, as applicable, unreasonably excluding publicly-subsidized or similar types of affordable housing development.
- (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 40R Zoning, in accordance M.G.L. c. 40R, § 11 and 760 CMR 59.00.

59.04: continued

1. If the 40R 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 or Income-restriction); and
 - f. any Design Standards to which a Project will be subject including, if applicable, Design Standards pursuant to 760 CMR 59.03(2). If the Design Standards are not contained within the 40R Zoning, such Design Standards must be submitted to and approved by DHCD prior to their adoption by the Plan Approval Authority.
2. The Plan Review provisions of the 40R 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). The Plan Review provisions of the 40R Zoning and any separate Design Standards may only provide for denial of a proposed Project on the grounds that:
 - a. the Project does not meet the conditions and requirements set forth in the 40R Zoning;
 - b. the applicant failed to submit information and fees required by the 40R 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. Provided such standards are otherwise consistent with M.G.L. c. 40R and 760 CMR 59.00, 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, current Housing Production Plan, or Housing Production Summary, as applicable; and
 - c. will provide for higher-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 Dedicated 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 DHCD that its Design Standards will not Unreasonably Impair the development of Projects in the District. Design Standards must clearly distinguish standard requirements from recommendations or guiding principles. Design Standards requirements must be articulated objectively so that compliance can be reasonably interpreted and measured. Design Standards that fail to define standard requirements that are reasonably clear, objective and measurable will be deemed to Unreasonably Impair the development of a Project in the District. DHCD may disapprove or conditionally approve 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 40R 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.

59.04: continued

6. The 40R Zoning may allow the Plan Approval Authority, through the Plan Review process, to waive specific dimensional and other standards (other than Affordability or Income-Restriction requirements) otherwise applicable to a Project, if it finds that such waiver will allow the Project to achieve the density, Affordability, Income-restriction, mix of uses, or physical character allowable under the 40R Zoning, and that it is consistent with the Design Standards.

(g) Diverse Populations. Subject to 760 CMR 59.04(1)(i), the 40R 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) No Moratorium. Projects within the proposed District shall not be subject to limitation of the issuance of building permits for residential uses or a Municipal moratorium on the issuance of such permits. The 40R 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 40R Zoning Application 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 DHCD the proportion of Affordable or Income-restricted units, as applicable, shall be at least 20% of all units constructed in each phase.

(i) Occupancy Restrictions.

1. Any proposed 40R Zoning shall not impose restrictions on age or any other forms of occupancy restrictions upon the District as a whole unless otherwise required or permitted in 760 CMR 59.04(1)(i)2. or 3., as applicable.

2. For Smart Growth Zoning only:

i. A proposed Smart Growth Zoning shall impose occupancy restrictions upon Affordable units to ensure occupancy by an eligible individual or household pursuant to 760 CMR 59.04(1)(e)1.

ii. A proposed Smart Growth Zoning may allow the development of specific Projects within a Smart Growth Zoning 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. In an age-restricted Project within a Smart Growth Zoning District, not less than 25% of the housing units shall be Affordable units and the Smart Growth Zoning shall conform to the requirements of 760 CMR 59.04(1)(e) in all other respects.

3. For Starter Home Zoning Only:

i. A proposed Starter Home Zoning shall impose occupancy restriction upon Income-restricted units to ensure occupancy by an eligible individual or household pursuant to 760 CMR 59.04(1)(e)2.

ii. No restrictions on age shall be imposed in any Project developed under Starter Home Zoning.

(j) Fair Housing. Projects within the proposed District shall comply with federal, state, and Municipal fair housing laws. *See* 760 CMR 59.07(2)(e). Affordable and Income-restricted units within Projects shall be subject to an affirmative fair housing marketing plan and affordable housing restrictions that are approved by DHCD, in accordance with DHCD guidance.

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

(l) 40R Zoning to Be All-inclusive. The development of a Project within a District shall be governed solely by the 40R 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 40R 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

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from the dimensional and other standards contained in the Underlying Zoning in order to allow the densities, Affordability, Income-restriction, mix of uses, and physical character of Projects which are permitted As-of-right under the 40R Zoning. The 40R Zoning may allow the Plan Approval Authority, through the Plan Review process, to waive specific dimensional and other standards (other than Affordability and Income-restriction requirements) otherwise applicable to a Project.

(m) No Disqualifying Factors. A proposed District that DHCD has determined to be disqualified as a Highly Suitable Location based on the factors set forth in 760 CMR 59.02: Highly Suitable Location(b) through (d) shall not qualify as an Eligible Location.

(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 pursuant to 760 CMR 59.02: Developable Land) be allowed to exceed 15% of the total land area in the Municipality. The burden shall be on the Municipality to reliably demonstrate to DHCD, by narrative and exhibits, that such an increased size is consistent with the documentation submitted under 760 CMR 59.03(1)(h), 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 DHCD reduce the minimum allowable density standards required by 760 CMR 59.04(1)(d) for a Smart Growth Zoning District, provided that its 40R Zoning Application complies with 760 CMR 59.05(6). The burden shall be on the Municipality to demonstrate to DHCD, 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, shallow aquifers or other factors specific to the existing physical environment, or create other significant health and safety risks specific to the existing physical environment where such risks cannot reasonably be ameliorated by appropriate septic system design; or
- (c) Be unable feasibly to be served by a piped water supply system.

In its 40R Zoning Application, 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 DHCD solely because, in a future census, the population of the Municipality exceeds 10,000.

59.05: Procedure for Approval, Review, Amendment, and Repeal

(1) Preliminary Municipal Review Procedure. The chief executive of the Municipality or duly authorized designee shall hold a preliminary public hearing on whether the provisions of the proposed 40R Zoning should be adopted by the Municipality. Notice shall be given in accordance with M.G.L. c. 40A, § 11 and by posting on the Municipality's website, if any, on the date of the first newspaper publication through the date of the hearing. Following the hearing, comments shall be considered by the Municipality in preparation of the proposed 40R Zoning Application.

(2) Preliminary Determination of Eligibility by DHCD. Upon receipt of a 40R Zoning Application by a Municipality, DHCD will make a preliminary determination, before the Municipality votes on its proposed 40R Zoning, whether the application satisfies the approval requirements set forth in 760 CMR 59.04(1). DHCD's review will be an informal, non-adjudicatory procedure.

- (a) DHCD will accept 40R Zoning Applications on the last day of each month. Upon its receipt of a 40R Application, DHCD will conduct a completeness review, except that DHCD 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 DHCD'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.

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(b) Upon expiration of the completeness review period, DHCD will conduct a review as to whether the 40R Zoning Application satisfies the approval requirements set forth in 760 CMR 59.04(1). DHCD will 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 DHCD 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) DHCD will communicate its determination on a 40R Zoning Application to the Municipality by issuing one of the following:

1. a Letter of Eligibility, approving the application without conditions;
2. a Letter of Conditional Eligibility, approving the application with conditions that must be satisfied prior to final approval under 760 CMR 59.05(4) and, as applicable, subject to a Letter of Conditional Approval; or
3. a Letter of Denial.

(d) A Letter of Conditional Eligibility may, among other matters, require modification to the proposed 40R Zoning; require modification of the calculation of Incentive Units; require the reclassification of Developable Land; or condition the issuance of the Letter of Approval upon submission of sufficient documentation that:

1. the development of a proposed 40R Zoning District is feasible;
2. such proposed District otherwise satisfies the threshold approval criteria set forth in 760 CMR 59.04(1);
3. 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 Dedicated 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)(j); or
4. the Municipality takes the actions contemplated under 760 CMR 59.05(2)(e).

(e) Additional Municipal Standards Applicable to Development Under Starter Home Zoning. If DHCD determines that the Municipality has not shown that Additional Municipal Standards applicable in a Starter Home District do not Render Development Infeasible, DHCD will not issue an unconditional Letter of Eligibility. Any Letter of Conditional Eligibility pursuant to 760 CMR 59.05(2)(d) will, in addition to any conditions under 760 CMR 59.05(2)(d)1. through 3., condition the issuance of a Letter of Approval on either:

1. modification of the Additional Municipal Standards, through the Starter Home Zoning or otherwise, so that no Additional Municipal Standards will apply to development under the Starter Home Zoning, or
2. demonstration that the Additional Municipal Standards applicable in a Starter Home District do not Render Development Infeasible. DHCD will also inform the Municipality that it may seek DEP determination that the Municipality has demonstrated the existence of specific local conditions that warrant imposition of such Additional Municipal Standards to development under the Starter Home Zoning.

(f) DEP Review of Additional Municipal Standards Applicable to Development Under Starter Home Zoning.

1. Upon receipt of a Letter of Conditional Eligibility pursuant to 760 CMR 59.05(2)(e), a Municipality may request a review and determination by DEP regarding whether the Municipality has demonstrated a reasonable, objective basis, based on the documentation of specific local conditions, for imposition of Additional Municipal Standards to development under the Starter Home Zoning.
2. Promptly following receipt of such request, DHCD will forward to DEP a copy of the Municipality's 40R Zoning Application for a Starter Home Zoning District, including any supporting materials pertaining to Additional Municipal Standards.
3. DEP's review will be an informal, non-adjudicatory procedure. DEP may elect, in its discretion, to request that DHCD request additional information from the Municipality, which the Municipality shall submit to DHCD within 30 days thereafter for forwarding to DEP for its review and determination. DEP will provide its determination concurrently to both DHCD and the Municipality.
4. If DEP determines that the Municipality has not demonstrated that local conditions warrant imposition of Additional Municipal Standards to development under the Starter Home Zoning, the requirements of the initial Letter of Conditional Eligibility remain in effect unchanged.

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5. If DEP determines that the Municipality has demonstrated that local conditions warrant imposition of Additional Municipal Standards to development under the Starter Home Zoning, DHCD will issue a revised preliminary determination of eligibility in accordance with 760 CMR 59.05(2)(c) within 30 days, which may include as an alternative condition that the Municipality submit any additional information needed to demonstrate compliance with statutory requirements as set out in DHCD guidance.

(g) 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 59.03.

(h) In the event of a constructive approval of a 40R Zoning Application due to DHCD'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 DHCD will 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 40R Zoning. Following receipt of DHCD's preliminary determination of eligibility, the Municipality must formally adopt its 40R Zoning pursuant to M.G.L. c. 40A, § 5 prior to final 40R Zoning approval by DHCD. If the Municipality is proceeding based on receipt of a Conditional Letter of Eligibility, it shall make any changes to its 40R Zoning and other elements of the 40R Zoning Application that have been required by DHCD prior to formally adopting the 40R Zoning pursuant to M.G.L. c. 40A, § 5. The Municipal vote to adopt the 40R Zoning must occur within three years of the date of the Letter of Eligibility or Letter of Conditional Eligibility, as applicable.

(4) Final 40R Zoning Approval by DHCD.

(a) Submission by Municipality. Upon adoption of the 40R Zoning, the Municipality shall submit to DHCD proof of such adoption. If DHCD had required any amendment to the 40R Zoning or any element of the 40R Zoning Application, or any other related matter, in a Letter of Conditional Eligibility, 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 Conditional Eligibility, including the requirements of 760 CMR 59.03(1)(j), 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 DHCD.

(b) DHCD Review. DHCD will accept submissions on the last day of each month. DHCD's review of the submission will be an informal, non-adjudicatory procedure. DHCD will confirm its final approval by issuance of a Letter of Approval, or will 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 a Letter of Conditional Eligibility, DHCD will issue a Letter of Approval which will specify, among other matters, the number of Incentive Units and the amount of the Zoning Incentive Payment that shall be made to the Municipality.

(d) Letter of Conditional Approval. If a Letter of Conditional Approval is issued, it will 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 DHCD before the Municipality is eligible to receive a Letter of Approval. A Letter of Conditional Approval may provide that, with respect to an identified geographic area within the District, DHCD has determined that a Municipality has met all conditions necessary to ensure minimum compliance with M.G.L. c. 40R and 760 CMR 59.00, and therefore may be entitled to receive a partial Zoning Incentive Payment based on the number of Incentive Units within the identified geographic area that can be developed prior to satisfaction of any outstanding conditions and, if so, the amount of such partial Zoning Incentive Payment. 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 DHCD proof of such satisfaction for review pursuant to 760 CMR 59.05(4)(a). The Letter of Conditional Approval will specify the amount of Zoning Incentive Payment that is conditioned upon satisfaction of outstanding conditions.

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(e) Changes to 40R Zoning. The Municipality shall identify in its submission under 760 CMR 59.05(4) all differences between the proposed 40R Zoning that had been submitted to DHCD for review as part of DHCD's preliminary determination of eligibility under 760 CMR 59.05(2), and the 40R 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 40R Zoning or any other element of the original 40R Zoning Application, other than changes that DHCD had required in a Letter of Conditional Eligibility, then DHCD may treat the submission as an amendment to the application, and it will notify the Municipality of its decision to do so in writing. In such event DHCD will 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 DHCD'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 DHCD will 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 40R Zoning, any Design Standards, or the boundary of the District or any sub-districts; or any amendment or adoption of the Plan Approval Authority's administrative rules, if adopted after issuance of a Letter of Approval, shall not take effect under M.G.L. c. 40R and 760 CMR 59.00 without written approval by DHCD in accordance with 760 CMR 59.05(5). In addition, any proposed adoption or enlargement of an Historic District within the boundary of the District, if adopted after issuance of a Letter of Approval, shall be subject to DHCD review to determine whether the adoption or enlargement of the Historic District would cause the Approved District to fail to comply with the approval criteria set forth in 760 CMR 59.04. Each request for an amendment, enlargement, repeal or adoption must be submitted to DHCD on the last day of a month, upon the form of application or in the format determined by DHCD. DHCD's review will be an informal, non-adjudicatory procedure, to be conducted in accordance with 760 CMR 59.05(2). DHCD will, as applicable, issue an amended Letter of Eligibility for a proposed amendment only if, and to the extent that, DHCD 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 to the 40R Zoning, any Design Standards, or the boundary of the District or any sub-districts, or any amendment or adoption of the Plan Approval Authority's administrative rules 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 DHCD has issued written confirmation that all repayment of monies required under 760 CMR 59.06(3) has occurred. DHCD may, in its discretion, determine that it is appropriate to issue a Letter of Conditional Eligibility based on the changes to the Approved District as amended. If DHCD determines that the adoption or enlargement of the Historic District would cause the Approved District to fail to comply with the approval criteria set forth in 760 CMR 59.04, DHCD may, in its discretion, determine that it is appropriate to issue a Letter of Noncompliance or Certificate of Revocation in accordance with 760 CMR 59.07(3).

(a) Treatment of Proposed Amendment. Except as otherwise provided in 760 CMR 59.05(5)(b) through (d), a proposed amendment shall be treated as a new 40R Zoning Application pursuant to 760 CMR 59.03, 59.04, and 59.05(1) through (4). The amendment will not take effect under M.G.L. c. 40R and 760 CMR 59.00 until:

1. DHCD has issued an amended Letter of Approval or Letter of Conditional Approval; and
2. if DHCD issues a Letter of Conditional Approval, DHCD confirms that all conditions have been satisfied. A proposed amendment shall include an evaluation of its effect upon the Municipality's Comprehensive Housing Plan.

(b) Non-substantial Modifications. DHCD 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 40R Zoning, Design Standards, Municipal Historic District regulations, or a District or sub-district boundary. The Municipality shall, in its request, certify to DHCD that the proposed modification will not have the effect of increasing or decreasing the area of an Approved District or the number of Incentive Units or Bonus Units, adopting or enlarging a Historic District or substantially modifying the requirements applicable in an

59.05: continued

Historic District within the 40R District, reducing consistency with the Comprehensive Housing Plan, or Unreasonably Impairing the development of Projects within the Approved District. Failure of DHCD 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 DHCD 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 40R Zoning or the Design Standards. The Municipality shall provide subsequent written notice to DHCD 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 DHCD has issued an amended Letter of Conditional Approval, conditioned 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 40R Zoning for an Approved District, pursuant to the following review procedure. The Municipality shall provide 60 days prior written notice to DHCD that such repeal has been proposed for action by the Municipal legislative body under applicable law, and it shall provide subsequent written notice to DHCD if such Municipal 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 40R 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 DHCD. The repeal shall not take effect under M.G.L. c. 40R and 760 CMR 59.00 until DHCD has issued an amended Letter of Conditional Approval, conditioned 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. For a Smart Growth Zoning District, a Municipality may request that DHCD 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 DHCD with its 40R Zoning Application, along with such supporting material as DHCD may require. DHCD's review of the request will be an informal, non-adjudicatory procedure. If DHCD has not approved a request in writing within 30 days of its receipt, such request shall be deemed denied.

59.06: Payments and Repayments

Each Municipality with an Approved District shall be entitled to payments as described in 760 CMR 59.06(1).

(1) Zoning Incentive Payments. Upon the issuance by DHCD to the Municipality of a Letter of Approval or a Letter of Conditional Approval, as applicable, the Municipality may present that Letter to DHCD at any subsequent time, requesting payment of the amount of Zoning Incentive Payment or partial Zoning Incentive Payment set forth in the Letter of Approval or Letter of Conditional Approval. A Letter of Approval will entitle a Municipality to receive a total Zoning Incentive Payment for a District in accordance with the following schedule, less any previous Zoning Incentive Payments received for the District. A Letter of Conditional Approval will state the partial Zoning Incentive Payment to which the Municipality is entitled based on the number of Incentive Units in the area of the District for which the Municipality has met all conditions necessary to ensure consistency with M.G.L. c. 40R and 760 CMR 59.00, in accordance with the following schedule:

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| <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.

DHCD 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) **Bonus Payments.** Upon issuance of a building permit for a Bonus Unit within an Approved District, the Municipality may apply to DHCD for authorization of payment of a one-time Bonus Payment of \$3,000 for each Bonus Unit on a Bonus Payment application form designated by DHCD. Unless DHCD approves an alternative method of documenting Bonus Units in an Approved District, 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 or Starter Home residential density plan required pursuant to 760 CMR 59.03(1)(c)4.;
- (d) For a Smart Growth Zoning District that contains sub-districts, a certified copy, by the building official, of the Smart Growth residential density spreadsheet required pursuant to 760 CMR 59.03(1)(d);
- (e) If there are Existing Zoned Units, a calculation of the number of Bonus Units for the Project (*i.e.*, subtracting Existing Zoned Units from the Project's total number of units);
- (f) A copy of the Plan Approval Authority's decision approving the Project, if applicable;
- (g) A copy of a recorded affordable housing restriction meeting the requirements of M.G.L. c. 184, § 31;
- (h) A copy of the approved affirmative fair housing marketing plan applicable to the Bonus Unit(s); and
- (i) A completed original of DHCD's Bonus Payment application form.

DHCD will accept applications on a regular basis in accordance with a schedule to be determined by DHCD. DHCD's review of an application will be an informal, non-adjudicatory procedure. Provided that the Municipality has submitted all of the information required in 760 CMR 59.06(2)(a) through (i), DHCD will confirm its approval of an application for payment within 30 days after receipt by issuing a written authorization of payment to the Municipality.

(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.

- (a) If DHCD approves, pursuant to 760 CMR 59.05(5), an amendment to an Approved District that decreases the number of Incentive Units, and DHCD determines that the Zoning Incentive Payment that would have been due using the schedule in 760 CMR 59.06(1) based upon the revised aggregate number of Incentive Units within the Approved District, as amended, is less than the amount of all Zoning Incentive Payments previously received with respect to that District, DHCD will issue a Letter of Conditional Approval requiring that the Municipality repay to DHCD the amount of such excess payments pursuant to 760 CMR 59.05(5)(c).
- (b) If a Municipality has submitted to DHCD 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 DHCD any excess Zoning Incentive Payments received by the Municipality. Using the schedule in 760 CMR 59.06(1) and the number of Incentive Units set forth in DHCD'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 Bonus Payments received with respect to that District.

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(c) If DHCD has issued a Letter of Noncompliance to a Municipality pursuant to 760 CMR 59.07(3), no further Zoning Incentive Payment or Bonus Payment will be made to that Municipality until DHCD confirms through issuance of a Certificate of Compliance that the noncompliance has been cured.

(d) If DHCD has issued a revocation of a Municipality's certification pursuant to 760 CMR 59.07(3) for the reason that there has not occurred the Start of Construction of a Project or Planned Infrastructure upgrade 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 pay to DHCD all Zoning Incentive Payments and Bonus Payments received with respect to that District.

(e) If DHCD approves a new District within a Municipality that has an existing District in which construction has not yet commenced and for which DHCD has not issued a Letter of Noncompliance, DHCD may issue a Letter of Conditional Eligibility and condition the payment of the Zoning Incentive Payment for the new District upon the Municipality's documentation that construction has commenced in either the new District or the existing District.

(4) Use of Zoning Incentive Payments and Bonus Payments.

(a) Zoning Incentive Payments and Bonus Payments may be made from Capital Funds with a requirement that payments be used by Municipalities only for capital expenditures. Municipalities receiving such Capital Funds will agree in contracts with DHCD to comply with funding restrictions and to provide reporting to DHCD as required by DHCD.

(b) No restrictions set forth in 760 CMR 59.06(4)(a) apply to Zoning Incentive Payments or Bonus Payments made to Municipalities by DHCD from sources other than Capital Funds.

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

DHCD will be responsible for administration, review, and reporting on the 40R Zoning District Programs as provided in M.G.L. c. 40R and 760 CMR 59.00. To enable DHCD to undertake an annual review and the preparation of a report on the program, and to ensure certification of compliance, DHCD will require each Municipality with an Approved District to provide information in the form of an annual update, as described in 760 CMR 59.07(1).

(1) Annual Update by Municipality. On or before July 31st 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 30th, or had filed a 40R Zoning Application for a proposed District within that fiscal year, shall file its annual update with DHCD, in a form to be prescribed by DHCD. Unless otherwise permitted by guidance issued by DHCD, the Municipality shall provide the following information in the annual update:

(a) A list of all Approved Districts and proposed new 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 applicable 40R 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 documented by issuance of occupancy permits, with a tabulation in each case of the types of such Bonus Units (Affordable, Income-Restricted, 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, Affordability and Income-restriction standards for such District.

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

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(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 Project. For each proposed Project that was disapproved, the annual update shall contain sufficient documentation to demonstrate that the Plan Approval Authority did not unreasonably deny its approval, and that it only denied its approval in a reasonable manner consistent with M.G.L. c. 40R, 760 CMR 59.00, the 40R Zoning and the Comprehensive Housing Plan or current Housing Production Plan, or Housing Production Summary, as applicable. 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 DHCD;
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 documentation, in the form of certification by the Plan Approval Authority, Municipal 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 40R Zoning Application 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)(d).

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 DHCD, the Municipality shall provide for each Approved District the number of children residing in 40R Projects and attending grades K through 12 public schools or charter schools, or receiving Municipal school district financial assistance to attend out-of-district schools, and copies of submissions to the Department of Education and DOR pursuant to M.G.L. c. 40S, § 3.

(h) Data regarding income and any protected class status of households occupying Affordable and Income-restricted units and of households assigned Affordable and Income-restricted 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.

(i) A list and copies of text and maps of any adopted amendments of the 40R Zoning, any Design Standards, or the boundary of any Districts or sub-districts; any amendment to or adoption of the Plan Approval Authority's administrative rules; or any adoption or enlargement of a Historic District within the boundary of any Districts, which the Municipality has not submitted to DHCD for review pursuant to 760 CMR 59.05(5).

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

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

(b) The Approved District is not being developed or permitted to be developed as a result of subsequent Municipal actions that restrict development in the Approved District, in a manner that would preclude compliance with the requirements set forth in M.G.L. c. 40R and 760 CMR 59.04(1)(d), (e) and (g) for housing density, Affordability, Income-restriction, and accessibility;

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- (c) The Plan Approval Authority has unreasonably denied or conditioned Plan Review applications for Projects, in a manner inconsistent with the 40R 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, consistent with 760 CMR 59.07(1)(f);
- (e) The Municipality has been found responsible for a violation of federal, state, or Municipal fair housing laws with respect to a Project within an Approved District, as determined by a state or federal court, HUD, the Massachusetts Commission Against Discrimination, or a Municipal fair housing commission; or
- (f) The Municipality has adopted amendments to the 40R Zoning, any Design Standards, or the boundary of any Districts or sub-districts; amended or adopted the Plan Approval Authority's administrative rules; or adopted or enlarged a Historic District within the boundary of any Districts which render(s) an Approved District noncompliant with M.G.L. c. 40R and 760 CMR 59.00.

(3) Letter of Noncompliance; Revocation of Certification. If DHCD 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), DHCD will issue a Letter of Noncompliance, stating the grounds for noncompliance, and granting the Municipality 60 days in which to furnish DHCD with satisfactory documentation 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 DHCD finds within a further 30 days that the documentation provided by the Municipality is satisfactory, DHCD will 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 DHCD will give notice of an adjudicatory hearing to be conducted subject to M.G.L. c. 30A. If upon the conclusion of the hearing DHCD concludes that the Municipality is in substantial non-compliance with the requirements set forth in 760 CMR 59.07(2), DHCD 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 DHCD will not affect the validity of the 40R Zoning, or the application of such 40R Zoning to any land or Project within the Approved District, but no Zoning Incentive Payment for any Approved District or Bonus Payment for any units shall be made while a Letter of Noncompliance or Certificate of Revocation is in effect.

(4) Annual Reports to Legislature. No later than November 15th of each year, DHCD 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 DHCD 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 documented by issuance of occupancy permits, with a tabulation in each case of the types of such Bonus Units (Affordable, Income-restricted, market rate, accessible, and bedroom-size).
- (d) The total amounts of all Zoning Incentive Payments and Bonus Payments made during the prior fiscal year, and the amounts and anticipated timing of any Zoning Incentive Payments and Bonus Payments anticipated to be made during the current fiscal year.

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- (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 DHCD;
 - 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 DHCD, the number of children residing in 40R Projects within Approved Districts and attending grades K-through-12 public schools, charter schools, or receiving Municipal school district financial assistance to attend out-of district schools.
- (h) Data regarding income and any protected class status of households occupying Affordable and Income-restricted units and of households assigned Affordable and Income-restricted units during the year, provided that DHCD will 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 DHCD 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; St. 2016, c. 219, §§ 37 through 54; M.G.L. c. 40R; M.G.L. c. 23B.