

760 CMR 77.00: SURPLUS REAL PROPERTY

Section

- 77.01: Purpose, Program Overview
- 77.02: Definitions
- 77.03: Residential Development on Surplus Real Property
- 77.04: Reasonable Surplus Property Municipal Regulations
- 77.05: Effective Density

77.01: Purpose, Program Overview

1. St. 2024, c. 150 (the Act) established a plain and explicit authorization for the Division of Capital Asset Management & Maintenance under St. 2024, c. 150, § 121 to convey Surplus Real Property for Housing Purposes and other Reuse Restrictions as defined by the Commissioner of the Division of Capital Asset Management & Maintenance. St. 2024, c. 150, § 122 requires Municipalities to allow as of right Residential Development of Surplus Real Property conveyed pursuant to St. 2024, c. 150, § 121 for Housing Purposes.
2. EOHLC is authorized to promulgate regulations to effectuate St. 2024, c. 150, § 122. 760 CMR 77.00 establishes a framework to guide Municipalities and Developers in the Residential Development of Surplus Real Property and are intended to give full effect to the preemptive and as-of-right requirements of St. 2024, c. 150, § 122, to maximize the production of housing on Surplus Real Property consistent with the Act, and to align with the Commissioner's authority under St. 2024, c. 150, § 121 to incorporate additional requirements through the Conveyance.

77.02: Definitions

Affordable Homes Act (Act). St. 2024, c. 150.

As-of-right. As defined in M.G.L. c. 40A, § 1A.

Building Coverage. Lot Area that may be used for Residential Development including any building, parking structures, or accessory structures.

Bulk and Height. The total volume that a building may occupy on a Lot as expressed by the allowable number of stories, total maximum height in feet and any other restrictions on bulk, such as required step-backs above the first floor.

Commissioner. The Commissioner of the Division of Capital Asset Management and Maintenance.

Conveyance. The deed or other legally binding instrument transferring an interest in Surplus Real Property pursuant to St. 2024, c. 150, § 121, together with any applicable Land Disposition Agreement and Reuse Restrictions imposed by the Commissioner pursuant to St. 2024, c. 150, § 121.

Design Standards. Clear and objective standards or provisions of Municipal Regulations applicable to the exterior design of a building and land area on the lot.

Developer. Any person, entity or governmental body, or their successors and assignees, that acquires an interest in Surplus Real Property, or a portion thereof, pursuant to St. 2024, c. 150, § 121.

Development Agreement. A legally binding agreement between the Municipality and Developer intending to pursue Residential Development of Surplus Real Property conveyed pursuant to St. 2024, c. 150, § 121.

Dwelling Unit. A single unit of housing, providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.

77.02: continued

Effective Density. The total number of Dwelling Units that a Municipality must permit on a particular Lot of Surplus Real Property expressed on a Dwelling Unit per acre basis.

EOHLC. The Executive Office of Housing and Livable Communities.

Federal and State Health and Safety Laws. All mandatory federal and state laws, codes, and regulations concerning building safety, the public's health, the public's safety, utilities, the general welfare, and the environment, including but not limited to those listed in 760 CMR 71.04(3).

Housing Purposes. As defined in St. 2024, c. 150, § 121.

Land Disposition Agreement. An agreement between the Commissioner and Developer.

Lot. As defined in M.G.L. c. 40A, § 1A.

Lot Area. The area of a horizontal plane bounded by the front, side, and rear lot lines of a Lot, measured in acreage or square footage.

Mixed-use Development. The use of Surplus Real Property conveyed pursuant to St. 2024, c. 150, § 121 for development containing a mix of Residential Development and uses that are not Residential Development, including, without limitation, commercial, institutional, industrial or other uses and residential types.

Multi-Family Housing. As defined in M.G.L. c. 40A, § 1A.

Municipality. A city or town where Surplus Real Property is located, in whole or in part.

Municipal Regulations. Zoning, including form-based zoning, general ordinances and by-laws or other local legislative, regulatory or other actions or requirements of a Municipality, including wetlands ordinances or by-laws, subdivision and board of health rules, and other local ordinances, by-laws, codes, regulations, and impact fees.

Open Space. Outdoor area not covered by any parking, building, or accessory structure, including, but not limited to, yards, land to protect existing and future well fields, aquifers and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and saltwater 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 preserve and land for recreational use.

Open Space Coverage. The measure of the allowable total Open Space land coverage of a Lot calculated as a percentage of the total Lot Area.

Residential Development. The use of land and structures on Surplus Real Property by a Developer for the construction or rehabilitation of Dwelling Units.

Residential Development Type. Any sort, class, or building typology that Residential Development may take in form, including but not limited to single-family, two-family, and Multi-Family Housing, and any form, class, or kind of Residential Development, including but not limited to, cluster development, open space residential development, condominium development, and subdivision.

Reuse Restriction. Uses, restrictions and encumbrances as defined by the Commissioner in any Conveyance including, but not limited to, a restriction for Housing Purposes pursuant to St. 2024, c. 150, § 121(d)(4), a restriction requiring the Developer to enter into an affordability restriction, Design Standards, including but not limited to mandating clustering of development so as to preserve portions of a parcel for conservation or recreation purposes, and any other use limitations as may be determined by the Commissioner.

77.02: continued

Setbacks. The minimum linear distance between a boundary of a Lot and a structure located on said Lot as set by the Municipality.

Site Plan Review. A process established by local ordinance or by-law by which a Municipal board or authority may review and impose terms and conditions on the appearance and layout of a proposed use of land or structures prior to the issuance of a building permit.

Surplus Property Municipal Regulations. Municipal Regulations applicable to Residential Development of Surplus Real Property pertaining to any of the following:

- (i) Bulk and Height of structures;
- (ii) Lot Area;
- (iii) Setbacks;
- (iv) Open Space Coverage requirements, including yard size requirements;
- (v) Building Coverage requirements; and
- (vi) Site Plan Review.

Surplus Real Property. As defined in St. 2024, c. 150, § 121(a).

Zoning. As defined in M.G.L. c. 40A, § 1A.

77.03: Residential Development on Surplus Real Property

(1) Notwithstanding any general or special law, Zoning, or general ordinance or by-law to the contrary, a Municipality shall allow and permit As-of-right Residential Development of Surplus Real Property as proposed by a Developer and may reasonably regulate such Residential Development in the following manner:

- (a) A Municipality may impose reasonable Surplus Property Municipal Regulations pursuant to 760 CMR 77.04, provided that such regulations do not directly or indirectly prevent or make physically or financially infeasible the development of the total number of Dwelling Units allowed by the Lot's minimum Effective Density based on the density calculation described in 760 CMR 77.05;
- (b) A Municipality may enforce the terms of a Development Agreement, provided that the Development Agreement does not conflict with the terms of the Conveyance. Nothing in 760 CMR 77.00 should be construed to prevent Development Agreements from addressing Municipal Regulations beyond those allowed as Surplus Property Municipal Regulations;
- (c) A Municipality may impose Municipal Regulations on Residential Development that are necessary to ensure the Developer's compliance with the terms of the Conveyance; and
- (d) Unless authorized pursuant to the Conveyance, Municipal Regulations that are inconsistent or in conflict with or exceed the scope of land-use controls described in St. 2024, c. 150, § 122 or the provisions of 760 CMR 77.00, shall be unenforceable when applied to Residential Development on Surplus Real Property. Such inconsistent and conflicting Municipal Regulations include, but are not limited to, Municipal requirements for specific Design Standards, parking, and impact fees.

(2) Municipally Imposed Use Restrictions. Unless imposed, required or allowed by the Commissioner in the Conveyance or voluntarily agreed to by the Developer in a Development Agreement, a Municipality shall not require the imposition of any occupancy or use restriction on Surplus Real Property, including but not limited to, affordability restrictions and conservation restrictions pursuant to M.G.L. c. 184, § 31.

(3) Additional Uses. A Municipality may allow, but shall not require, additional non-residential uses on Surplus Real Property, such as Mixed-use Development provided that they are primarily residential, and may provide density bonuses, Zoning relief, or additional incentives to encourage such additional uses. The incorporation of uses that are not Residential Development shall not cause the Effective Density to be reduced to fewer than four Dwelling Units per acre.

77.04: Reasonable Surplus Property Municipal Regulations

(1) St. 2024, c. 150, § 122 provides that a Municipality is permitted, but not required, to impose reasonable regulations on Residential Development of Surplus Real Property. Regulations are reasonable where they are Surplus Property Municipal Regulations and are consistent with 760 CMR 77.04 and 760 CMR 77.05. Surplus Property Municipal Regulations shall be deemed unreasonable if, in combination with the enforcement of minimum Federal and State Health and Safety Laws, they result in the prohibition of Dwelling Units required to be permitted by the Surplus Parcel's Effective Density that could otherwise be constructed in compliance with minimum Federal and State Health and Safety Laws.

(2) Residential Development Types. Surplus Property Municipal Regulations shall not explicitly or effectively prohibit, or require, any particular bedroom count or Residential Development Type. This provision is meant to encourage a diversity of Dwelling Unit types and sizes and to provide for Residential Development that is suitable for a diverse population, including households with children and individuals with disabilities.

(3) Building, Health, Safety, Utility, General Welfare, and Environmental Laws.

(a) Nothing contained within these regulations is intended to supersede or conflict with any federal law which may be applicable to Residential Development on Surplus Real Property.

(b) The Massachusetts state building code, 780 CMR, and all Massachusetts health, safety, utility, general welfare, and environmental laws, codes, and regulations shall apply to all Residential Development on Surplus Real Property, including but not limited to, 527 CMR 1.00: *Massachusetts Comprehensive Fire Safety Code*, M.G.L. c. 111, § 189A: *Massachusetts Lead Law*, 310 CMR 15.000: *The State Environmental Code*, M.G.L. c. 131, § 40: *The Wetlands Protection Act*, 310 CMR 10.00: *Wetlands Protection Act Regulations*, M.G.L. c. 40, §§ 81K through 81GG: *The Subdivision Control Law*, and Title 5: *Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage, and Stormwater Management Standards*, provided that:

1. Municipalities may not impose more than the minimum requirements established by, or impose regulations and programs in a manner that exceeds the minimum obligations required by, any Federal and State Health and Safety Law, unless the Developer is required by the Conveyance, or voluntarily agrees in a Development Agreement, to comply with such additional requirements;
2. Municipalities may not prohibit a Developer from using a method of compliance with Federal and State Health and Safety Laws that complies with state and federal law;
3. Municipal enforcement of minimum Federal and State Health and Safety Laws may not be exercised in a way that would directly or indirectly prevent or make physically or financially infeasible the development of the total number of Dwelling Units allowed by the Surplus Real Property's minimum Effective Density where the Developer proposes a method for compliance that satisfies state and federal law;
4. Unless otherwise provided for pursuant to the Conveyance, the municipal opt-in specialized stretch energy code developed pursuant to M.G.L. c. 25A, § 6 shall be considered the minimum required by state law if the Municipality has opted in; and
5. Any additional local or regional requirement shall not apply to Residential Development on Surplus Real Property, unless the Developer is required by the Conveyance, or voluntarily agrees in a Development Agreement, to comply with such additional requirements. For purposes of this subdivision, such local or regional requirements include building, health, safety, utility, general welfare, or environmental law, code, ordinance, by-law, rule, or regulation, including, but not limited to, requirements imposed by local or regional government, planning commission, or other entity.

(4) Site Plan Review.

(a) A Municipal Regulation that imposes Site Plan Review on a Lot of Surplus Real Property shall only regulate:

- (i) aspects of a Residential Development that relate directly to the public's safety, health, and welfare, and

77.04: continued

(ii) any Surplus Property Municipal Regulations, provided, however, that Site Plan Review may regulate additional aspects of the Residential Development if they are provided for by:

- (1) the Developer voluntarily,
- (2) a Reuse Restriction,
- (3) a Land Disposition Agreement, or
- (4) a Development Agreement.

Such aspects of Residential Development which may not be provided for in Surplus Property Municipal Regulations include, but are not limited to, parking requirements, affordable housing requirements, and allowable Residential Development Types.

(b) Site Plan Review shall not unreasonably delay Residential Development, nor impose conditions that directly or indirectly prevent or make the development of the total number of Dwelling Units allowed by the Lot's minimum Effective Density physically or financially infeasible. Site Plan Review approval as applied to Surplus Real Property shall be issued no later than 90 days from the filing of a complete application unless a different time is agreed to by the applicant and the Municipality.

(c) Site Plan Review criteria that apply to Surplus Real Property shall be written, clear, and objective and shall not provide discretionary review or authority to deny approval of any Residential Development.

77.05: Minimum Effective Density

(1) Minimum Effective Density Calculation. The required minimum Effective Density for Surplus Real Property is four Dwelling Units per acre and shall be used to determine the total minimum number of Dwelling Units that a Municipality is required to permit As-of-right on the Surplus Real Property, provided that:

- (a) The Effective Density calculation shall include the entire Lot Area of the Surplus Real Property at the time the Conveyance is recorded, without any exclusions. For example, all open bodies of water and any public or private rights of way shall be included in the entire Lot Area;
- (b) Rounding Acreage. Municipalities may round down to the nearest quarter acre when determining the total Lot Area used for the Effective Density calculation; and
- (c) Rounding Effective Density. Effective Density may not be rounded up to achieve the required minimum Effective Density of not fewer than four Dwelling Units per acre.

(2) Protected Use ADUs. The minimum Effective Density required to be permitted on Surplus Real Property shall not include Protected Use Accessory Dwelling Units developed pursuant to M.G.L. c. 40A, § 6 and 760 CMR 71.00: *Protected Use Accessory Dwelling Units*, and nothing herein shall be construed to prohibit the development of Protected Use ADUs in addition to the Dwelling Units required to be permitted by the Lot of Surplus Real Property's minimum Effective Density.

(3) Dwelling Unit Caps. A Municipality may not directly impose a maximum or minimum density or dwelling unit cap on Residential Development on a per building or per Lot basis, unless separately provided for under the Conveyance.

(4) Surplus Property Municipal Regulations shall be deemed unreasonable if they directly or indirectly prevent or make physically or financially infeasible the development of the total number of Dwelling Units allowed by the Surplus Real Property's minimum Effective Density.

(5) A Mixed-use Development shall provide for an Effective Density of not fewer than four Dwelling Units per acre and be primarily residential.

REGULATORY AUTHORITY

760 CMR 77.00: St. 2024, c. 150, § 122.