EXECUTIVE OFFICE OF

HOUSING & LIVABLE COMMUNITIES

GOVERNOR MAURA T. HEALEY | SECRETARY EDWARD M. AUGUSTUS, JR. | LT. GOVERNOR KIMBERLEY DRISCOLL

Affordable Homes Act - Section 122
Surplus Land Guidance

Date of Publication: June 2, 2025

The Massachusetts Affordable Homes Act (AHA) was enacted to promote housing development throughout the Commonwealth. In furtherance of this purpose, Sections 121 and 122 of AHA establishes a streamlined process for the disposition of surplus state land for housing purposes (Surplus Land).[1] The disposition process is administered by the Division of Capital Asset Management and Maintenance (DCAMM). AHA authorizes DCAMM, in consultation with the Secretary of Administration & Finance (ANF) and the Secretary of the Executive Office of Housing and Livable Communities (EOHLC), to determine if property of the Commonwealth should be disposed of for housing purposes.[2]

All state-owned land not subject to Article 97 is eligible to be declared Surplus Land and sold under Section 121. DCAMM has currently identified a subset of surplus parcels that would be appropriate for residential development and intends to identify more parcels in the future. If DCAMM identifies a parcel as being surplus state land that is suitable for residential development, then DCAMM will notify and engage the host municipality.

As part of this disposition process, Section 121 of the AHA requires DCAMM to notify municipal officials, including the chairs of the local zoning board and planning board, and elected officials before making a site available for sale. DCAMM must provide at least a 30-day comment period and consider all comments received in good faith. DCAMM will endeavor to provide as much advance notice as possible to affected municipalities. After this public comment period, DCAMM may dispose of the property using a competitive

[1] Section 121 of AHA defines "Housing Purposes" as, "development of housing for use as the primary residence of the occupant including, but not limited to, market rate housing, affordable housing and public housing; provided, however, that housing purposes may include subsequent conveyance by a public agency, other than a state agency, with a restriction for housing purposes; provided further, that housing purposes shall include affordable housing purposes.

[2] The streamlined process also authorizes the Governor to identify public agency land as surplus for disposition for housing purposes; authorizes public institutions of higher education to determine if property is surplus and should be made available for housing purposes; and authorizes public agencies, in consultation with DCAMM, ANF, and EOHLC to determine that their land is surplus and should be made available for housing purposes.

process such as a request for proposals or an auction. Housing development may be single or multi-family, rental or owned.

Surplus Land conveyed by DCAMM pursuant to Section 121 must be valued by DCAMM and calculated for the highest and best use of the property as may be encumbered and subject to uses, restrictions and encumbrances as defined by DCAMM. As noted above, DCAMM must also provide written notice to municipalities. This written notice will include a statement about the proposed reuse of the property. When making Surplus Land available for disposition, DCAMM will also identify all reuse restrictions, and must ensure that any deed, lease or other disposition agreement will set forth such reuse restrictions.

Section 122 of the AHA limits a municipality's ability to control the permitting of housing developed on Surplus Land conveyed through DCAMM's streamlined process and provides that EOHLC may promulgate regulations to implement the section. EOHLC is planning to promulgate regulations at a later date to further assist communities and administer Section 122's implementation.

Section 122 of the AHA states in relevant part:

> ***Notwithstanding*** *chapter 40A of the General Laws or any other general or special law or local zoning or municipal ordinance or by-law to the contrary, a city or town shall permit the residential use of real property conveyed by the commissioner pursuant to section 121 for housing purposes as of right, as defined in section 1A of said chapter 40A,* ***notwithstanding*** *any use limitations otherwise applicable in the zoning district in which the real property is located including, but not limited to, commercial, mixed-use development or industrial uses. A city or town* ***may impose reasonable regulations*** *concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space and building coverage requirements and a city or town may require site plan review; provided however, that the city or town shall permit not less than 4 units of housing per acre. [emphasis added].*

I. Housing Allowed by Right

Section 122 of AHA requires municipalities to allow as-of-right the residential use of Surplus Land for housing purposes as conveyed by DCAMM. Generally, the as of right residential use requirements and zoning limitations for Surplus Land imposed by Section 122 preempt local zoning. This preemption is articulated in the statute's provision that *"**[n]otwithstanding** [MGL c. 40A] . . . or local zoning or municipal ordinance or by-law to the contrary . . . [and] **notwithstanding** any use limitations otherwise applicable in the zoning district in which the real property is located. . ."* (emphasis added).

A municipality must, therefore, comply with the minimum provisions required by the statute. Namely, that a municipality *"**shall permit** the residential use of real property conveyed by the commissioner pursuant to section 121 for housing purposes **as of right, as defined in section 1A of said chapter 40A** . . ."* (emphasis added). As of right is defined in M.G.L. c. 40A, § 1A as *"development that may proceed **under a zoning ordinance or by-law** without the need for a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval."* (emphasis added).

Taken as a whole, Section 122 requires a municipality to allow residential development of Surplus Land conveyed pursuant to the streamlined process administered by DCAMM without requiring a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval, ***even if*** local zoning does not otherwise allow for residential use or does not allow for as of right residential development (e.g., requires a special permit) on the Surplus Land.

Any requirements imposed on the use of the Surplus Land, whether contained within a zoning bylaw, approval or a legally binding agreement, must allow for residential use as of right, at a minimum of at least 4 units of housing per acre, and conforms to any forthcoming EOHLC regulations. Any requirements imposed on Surplus Land are also limited to the five categories of allowable reasonable regulations specified in the AHA and discussed in Section II below.

Section 122 generally does not prohibit a municipality from entering into a legally binding development agreement instead of relying on zoning or approvals. Municipalities are encouraged to negotiate agreements before application for permits or other approvals are filed by the developer, and, if possible, the municipality should identify to DCAMM early on any areas that they would seek to negotiate so that DCAMM can provide that information to developers during the competitive selection process. Cooperation early in the disposition process allows the municipality to negotiate additional requirements beyond the five zoning controls under Section 122 (such as parking and affordable housing requirements), so long as the effective minimum density of 4 units per acre is permitted. This kind of cooperative approach provides the developer greater certainty over what can be built and allows both the municipality and developer to explore different incentive and grant programs to aid development, such as Community Preservation Act or Affordable Housing Trust Fund monies controlled by the municipality. EOHLC may provide additional information in forthcoming regulations.

II. Reasonable Regulation

Although Section 122, at its most basic, preempts zoning that conflicts with DCAMM conveyances under Section 121 for as-of-right development of residential uses, the statute also gives municipalities the right to "impose reasonable regulations concerning" five specifically enumerated zoning powers, so long as doing so would not effectively reduce

viable development to a density of "less than 4 units of housing per acre." Those five zoning powers are as follows:

1. Bulk and height of structures and determining yard sizes
2. Lot area
3. Setbacks
4. Open space and building coverage requirements
5. Site plan review

EOHLC is planning to promulgate regulations to more fully define "reasonable regulations," but municipalities should note that if they wish to regulate any of the five categories of allowable reasonable regulations outside of a negotiated agreement with the developer, they must do so "as of right" as defined by M.G.L. c. 40A, §1A. This requires that the development "may proceed under a zoning ordinance or by-law . . ." and that it not require a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval.

One alternative approach would be for the municipality and developer to voluntarily negotiate a legally binding agreement, which would govern any permits or approvals the developer then seeks. With an agreement, a municipality would not need to adopt amendments to their zoning by laws or ordinances but would have input into dimensional and other aspects of the development including those that are otherwise not granted by the statute.

III. Site Plan Review

Site plan review is expressly allowed by Section 122 of the AHA. This provides an opportunity for municipalities that have authorized site plan review to regulate additional aspects of a residential development related to the health, safety, and welfare of the residents. However, any site plan review must be done carefully so as not to impose discretionary decisions on an as of right use. This means that requirements must be clear and objective and the review conducted without discretion. One appropriate example often seen with site plan review, for example, would be in ensuring that curb cuts provide for a safe and efficient traffic flow. An example of an inappropriate use of site plan review in this context would be a general subjective requirement that the building be "aesthetically pleasing."

It is also important that site plan review not be used to impose requirements that would otherwise not be allowed by the statute. For example, the statute does not allow a municipality to require off-street parking so site plan review may not be used to impose a parking requirement. It may, however, ensure that the parking requirements are followed regarding such things as parking stall dimensions and screening requirements to ensure

the health, safety, and general welfare of municipal residents where parking is nevertheless provided by the developer.