COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-13580

THE ATTORNEY GENERAL,
Plaintiff / Counterclaim Defendant – Appellant,

v.

TOWN OF MILTON,
Defendant / Counterclaim Plaintiff / Third Party Plaintiff – Appellee, AND
JOE ATCHUE,
Defendant – Appellee,

v.

THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,
Third Party Defendant – Appellant

ON A RESERVATION AND REPORT BY A JUSTICE OF
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

REPLY BRIEF OF THE ATTORNEY GENERAL AND THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES

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ARGUMENT

As the Town suggests (p. 9),[1] this case is about who holds government power. The Legislature, exercising authority that it undisputedly possesses under the state Constitution, has enacted an undisputedly mandatory provision that applies to over 170 municipalities. Milton alone not only has refused to comply with that mandate, but also insists that the Commonwealth is powerless to make it comply. But Milton cannot wall itself off from the Legislature's attempt to begin to remediate a housing crisis that affects the entire Commonwealth. Milton is bound to comply with § 3A(a), the Attorney General is empowered to bring suit to obtain compliance, and this Court is authorized to declare that Milton must comply.[2]

I. The Attorney General May Enforce § 3A(a) Against Milton.

A. The Attorney General Has a Right of Action to Bring this Suit.

The Attorney General enjoys both a "general statutory mandate" and a "common law duty" to "represent the public interest and enforce public rights." Commonwealth v. Mass. CRINC, 392 Mass. 79,

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[1] This brief cites the appellants' blue brief and the Town's red brief by page, and the two-volume Record Appendix as "RA [vol.]:[page]."

[2] As was said in the blue brief (p. 56 n.28), it is presumed that the Town will comply with the law as declared by this Court, and that an injunction will be necessary only in the unlikely event that it does not.

88 (1984); see G.L. c. 12, § 10 (authorizing Attorney General to bring suit to address "violations of law . . . affecting the general welfare of the people"); Blue Br. at 53-59. These sources grant her a right of action that is "exceedingly broad." Commonwealth v. Kozlowsky, 238 Mass. 379, 385, 388 (1921).

Indeed, the Attorney General's prerogatives to safeguard the public interest are "so numerous and varied that it has not been the policy of the Legislatures of the states of this country to attempt specifically to enumerate them." Id. at 390 (quoting State v. Robinson, 101 Minn. 277, 288 (1907)). Rather, the Attorney General "may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may . . . require" to "institute, conduct, and maintain" suit to enforce state law.[3] Id. at 390-91 (emphasis added); accord Sec'y of Admin. & Fin. v.

[3] This requirement that the Legislature must act "express[ly]" to restrict the Attorney General's authority accords with other interpretative principles that, if a legislature wishes to modify fundamental attributes of governmental structure, it must do so clearly. See, e.g., Woodbridge v. Worcester State Hosp., 384 Mass. 38, 42 (1981) (Legislature may waive Commonwealth's sovereign immunity only if "expressed by the terms of a statute, or appear[ing] by necessary implication from them"); Quern v. Jordan, 440 U.S. 332, 343-44 (1979) (Congress may abrogate state's Eleventh Amendment immunity only by "explicit[]" and "clear" langauge); Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (Congress may subject President's decisions to APA review only by "express statement").

Att'y Gen'l, 367 Mass. 154, 164-65 (1975) (Legislature "has power to" limit Attorney General's authority to decline Governor's request to pursue appeal). Indeed, the Legislature has often authorized agencies to refer cases affecting the public interest to the Attorney General for "appropriate action," an exhortation that presumes that the preexisting § 10 and common law provide her the right to initiate such action.[4]

The Town fails to identify any express limitation on the Attorney General's power to bring suit for compliance with § 3A(a). That failure is dispositive.

The Town attempts to muster up an implicit limitation but, even if an implicit limitation could suffice to restrict the Attorney General's authority (it cannot), these attempts do not succeed. First, the Town argues (pp. 29-30) that the Attorney General's right to bring suit is displaced whenever the Legislature specifies a remedy for violation of a

[4] See, e.g., G.L. c. 11, § 17(7) (director of state auditor's bureau of special investigations shall refer cases of fraudulent claim or payment against/by DTA, DCF, or MassHealth to Attorney General "for such action as [she] may deem proper"); G.L. c. 12A, § 11 (inspector general shall refer fraudulent acts to Attorney General, who may, among other things "institute whatever proceedings [she] deems appropriate"); G.L. c. 32, § 24 (PERAC shall refer noncompliance with public retirement laws to Attorney General, "who shall take appropriate action"); G.L. c. 69, § 1B (BESE shall refer local school committee's noncompliance with education laws to Attorney General "for appropriate action to obtain compliance").

particular state law. But--looking past the fact that the Legislature has not specified a remedy here, see pp. 12-14 below--"the question whether a litigant has a cause of action is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive" from the courts. Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 69 (1992) (quoting Davis v. Passman, 442 U.S. 228, 239 (1979)).

Second, the Town argues (pp. 24-25, 28) that § 10 must be read narrowly because, if it were read to afford the Attorney General a general right of action to bring suit to vindicate public rights, other statutes that expressly grant her a specific right of action would be rendered "surplusage." But this Court has recognized that § 10's "general statutory mandate . . . to protect the public interest" is "in addition to any specific statutory mandate." Mass. CRINC, 392 Mass. at 88-89 (emphasis added). Against this backdrop, the canon against surplusage has no force. E.g., Marx v. Gen'l Revenue Corp., 568 U.S. 371, 385-86 (2013) (declining to apply canon where statute "simply confirms" preexisting "background rule"; "[r]edundancies across statutes are not unusual events in drafting"); Commonwealth v. Hughes, 364 Mass. 426, 430 n.4 (1973) (recognizing that some legislation simply re-states preexisting law and is enacted merely "with an abundance of caution").

Third, the Town argues (p. 28 n.1) that the Attorney General's right of action under § 10 is confined to unfair and anticompetitive business practices. But, because that interpretation contravenes the plain language of § 10, this Court long ago rejected it. Kozlowsky, 238 Mass. at 388-89.

In sum, this Court's precedents and G.L. c. 12, § 10, establish a right of action for the Attorney General to obtain compliance with state law where the public interest so demands. Of course, that right has limits; she may not bring suit where only non-public interests are at stake.[5] See, e.g., Att'y Gen'l v. Pitcher, 183 Mass. 513 (1903). But the Town cannot and does not suggest that is the case here.

B. The Courts May Remedy Noncompliance Through Declaratory and Injunctive Relief.

The Town argues (pp. 22-23) that, applying the principle of expressio unius, the grant ineligibility consequence that § 3A(b) imposes on a noncompliant municipality is "exclusive" and the "only remedy" for a failure to have a § 3A(a)-compliant district. This argument fails for at least three reasons.

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[5] For this reason, the Town's characterization (pp. 9,20,27,29) that the Attorney General claims the right to bring suit to enforce "any statute as she deems it necessary" is a straw man; she claims only the rights afforded her office by G.L. c. 12, § 10, extensive precedent, and the common law, which assuredly encompass the bringing of this action.

1. The grant ineligibility consequence specified by § 3A(b) is not a "remedy" at all. A "remedy" is "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." Black's Law Dictionary (12th ed. 2024); accord Laycock, Modern American Remedies, at 1 (4th ed. 2010) (remedy is "anything a court can do for a litigant who has been wronged or is about to be wronged"). "[R]emedies are means of carrying into effect the substantive right. Subject to certain qualifications, the remedy should reflect the right or the policy behind that right as precisely as possible." Dobbs, The Law of Remedies, at 21 (3d ed. 2018).

Here, the grant ineligibility consequence of § 3A(b) is incongruent with the right that § 3A(a) seeks to effectuate. That right, which belongs to the public, is the enjoyment of a housing market in which every MBTA community has a zoning district in which multifamily housing is allowed as of right. Cf. Att'y Gen'l v. Inhabitants of Town of Dover, 327 Mass. 601, 606 (1951) (recognizing "the interest which the public as a whole, represented by the Attorney General, has in keeping the zoning regulations of municipalities within lawful bounds"). In the Town's telling, some MBTA communities--presumably those that are wealthier and less dependent on state grant funding--might buy their way out of compliance with § 3A(a) by simply

accepting grant ineligibility under § 3A(b). That § 3A(b) is powerless to "prevent[] or redress[]" such an injury to the public shows that it is not a "remedy" comparable to, or capable of precluding, effectual remedies like a declaration or injunction.[6] Cf. Shriver v. Woodbine Sav. Bank, 285 U.S. 467, 478-79 (1932) (interpreting Iowa banking statute not to preclude common law remedies; "[t]he very fact that the [statutory] remedy is on its face inadequate to compel full performance of the obligation declared is persuasive that it was not intended to be exclusive of applicable common-law remedies, by which complete performance might be secured").

Moreover, the grant ineligibility consequence of § 3A(b) is merely administrative in nature. None of the Town's cited authorities (p. 22) suggest that an administrative consequence like that of § 3A(b) can displace judicial remedies and, indeed, this Court's precedents establish that it cannot. In Board of Education v. City of Boston, 386 Mass. 103 (1982), this Court declared that Boston must provide a 180-day school year--and, earlier in the litigation, the Superior Court issued an injunction to the same

[6] Indeed, interpreting § 3A(b) to exclude more effectual remedies would undermine the undisputedly mandatory nature of § 3A(a). See Blue Br. at 33-34 (contrasting § 3A(a) with true "opt-in" statutes).

effect[7]--despite the presence of a statute (G.L. c. 71, § 4A) subjecting a noncompliant municipality to reductions in its state school aid. This Court reasoned that the statutory scheme "indicates a legislative determination that every city and town must provide a minimum number of school days," 386 Mass. at 109, and, without expressly addressing § 4A, awarded declaratory relief capable of vindicating that mandate. The Town (p. 31) suggests that one statute governing that case expressly empowered the Attorney General to bring suit to obtain compliance. But, even if this were so,[8] it misses the point: Board of Education demonstrates that a statute prescribing a funding consequence for a municipality's noncompliance with mandatory state law does not preclude other remedies to obtain the municipality's compliance with the mandate. This proposition does not depend on the source of the Attorney General's right of action.

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[7] This Court's rescript mentioned only declaratory relief presumably because, by the time this Court's opinion issued in May 1982, the 1980-81 school year had ended and enjoining the City to provide 180 days of instruction during that year could have no effect.

[8] In fact, the version of G.L. c. 15, § 1G, that was in effect at the time of Board of Education--which is quoted at 386 Mass. at 112 n.14 and is substantially similar to a provision of the current G.L. c. 69, § 1B--was of the type, discussed at page 9 above, that does not create a new right of action for the Attorney General, but rather authorizes her to initiate an "appropriate action to obtain compliance" on the strength of her preexisting statutory and common law authority.

2. Even if the consequence of § 3A(b) were deemed a "remedy," it is not exclusive for the simple reason that Chapter 40A provides an independent remedy: "The superior court and the land court shall have the jurisdiction to enforce the provisions of this chapter . . . and may restrain by injunction violations thereof." G.L. c. 40A, § 7 (final para.). The existence of this paragraph refutes any contention that § 3A(b) forms the only consequence for a municipality's failure to comply with § 3A(a). The Town argues (pp. 28-29), without citing any authority, that this paragraph of § 7 applies only to "disputes over specific parcels of land." But the paragraph by its terms applies to "the provisions of this chapter" without limitation, and decisional law confirms that it provides a "general grant of jurisdiction" to enforce the provisions of Chapter 40A. Castelli v. Bd. of Selectmen of Seekonk, 15 Mass. App. Ct. 711, 716 (1983). Importantly, Chapter 40A provides an administrative process, including a right of judicial review, to adjudicate most disputes concerning the enforcement of zoning bylaws as to specific parcels of land.[9] See G.L. c. 40A, §§ 8, 15, 17. Where that

[9] Even in cases brought through this process, courts have had no problem exercising jurisdiction to enforce the "limitations[s] on municipal zoning power" imposed by Chapter 40A, including by setting aside conflicting bylaws. SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 106 (1984).

process applies, it provides the "exclusive" remedy. G.L. c. 40A, § 17. The final paragraph of § 7 gives the courts authority to grant relief in cases, such as this, that fall beyond the scope of that administrative process. Castelli, 15 Mass. App. Ct. at 715-16; City of Woburn v. McNutt Bros. Equip. Corp., 16 Mass. App. Ct. 236, 238-39 (1983).

3. Expressio unius is a "guide to construction, not a positive command." Halebian v. Berv, 457 Mass. 620, 628 (2010). It "will be disregarded . . . where its application would thwart the legislative intent," id., or "upend[] the common law and fundamentally make[] no sense." Suffolk Constr. Co., Inc. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 458 (2007) (omission of attorney-client privilege from statutory exceptions to Public Records Law does not warrant conclusion that Legislature intended to override "a matter of common law of fundamental and longstanding importance to the administration of justice" by subjecting privileged records to disclosure).

Here, the Town's application of expressio unius would "upend[]" preexisting law, both by impairing the Attorney General's statutory and common law authority to vindicate public rights and by contravening the principle that courts "presume the availability of all appropriate remedies unless [the legislature] has

expressly indicated otherwise." Franklin v. Gwinnett Cty., 503 U.S. at 66-71.

II. The Guidelines Are Valid and Binding on Milton.

A. The Guidelines Were Properly Promulgated.

1. The Guidelines Were Not Subject to the Chapter 30A Procedure.

As discussed in the blue brief (pp. 47-50), the Legislature's choice to use the word "guidelines" in § 3A(c) was purposeful, and indicative of its intent that EOHLC use a promulgation method other than that of Chapter 30A. The Town (pp. 34-35) demeans § 3A(c)'s plain language as "irrelevant" nomenclature, but the Town has no answer for the fundamental principle that "statutory language is the principal source of insight into legislative purpose." Curtatone v. Barstool Sports, Inc., 487 Mass. 655, 658 (2021) (internal quotations and citations omitted).

That the Legislature intended EOHLC to use a promulgation method other than that of Chapter 30A is confirmed by the Legislature's prior experience enacting statutes that instruct an agency to "promulgate guidelines." As detailed in the blue brief (p. 49), the Legislature has repeatedly directed the issuance of "guidelines" and the affected agencies have responded by using promulgation methods other than that of Chapter 30A. The Town suggests (p. 35) that "maybe [these other guidelines] should have been"

promulgated pursuant to the Chapter 30A method, but this misses the point: The fact that the Legislature chose, in the presence of these examples, to use the word "guidelines" in § 3A(c), rather than the well-understood statutory term "regulations," see G.L. c. 30A, § 1(5), confirms that it did not intend EOHLC to promulgate the Guidelines using the Chapter 30A method. See Randall's Case, 331 Mass. 383, 386 (1954) ("[W]here the Legislature . . . used words which had been previously defined by judicial determination it is presumed to have adopted such definitions unless the contrary distinctly appears."); Falmouth v. Civ. Svc. Comm'n, 447 Mass. 814, 820 n.8 (2006) (in interpreting legislative intent, presuming that Legislature was aware of construction of statute adopted by administrative agency).

2. Any Error in the Guidelines' Promulgation Was Harmless.

Even if EOHLC should have used the Chapter 30A method, the method that it did use ensured that all interested parties--including Milton--had an even greater chance to be heard than Chapter 30A required.

The Town argues (p. 38) that "strict compliance" with Chapter 30A is required, but this argument is contradicted by the Town's acknowledgment (p. 38) that a "technical defect" in promulgation can be deemed harmless where it causes no prejudice. See Colby v.

Comm'r of Pub. Welfare, 18 Mass. App. Ct. 767 (1984). And the case that the Town cites as signifying a "strict compliance" requirement bears no resemblance to what EOHLC and Milton did here with respect to the Guidelines. See Kneeland Liquor v. Alcoholic Bevs. Control Comm'n, 345 Mass. 228, 230, 233-35 (1962) (agency promulgated regulations without notice, hearing, or opportunity for public comment).

Indeed, Milton's lack of prejudice from EOHLC's choice of promulgation method is inescapable. The Town does not dispute that: (1) it received actual notice of the Draft Guidelines; (2) its staff attended one of EOHLC's sixteen public hearings, where they had the opportunity to ask questions; (3) it submitted a comment letter on the Draft Guidelines; or (4) EOHLC made substantive changes to the Draft Guidelines directly responsive to the Town's comments. RA I:117-18,160-64; see Conservation Law Found. v. Evans, 360 F.3d 21, 29-30 (1st Cir. 2004) (finding no prejudicial error on nearly identical facts); cf. DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 687, 692, 694-95 (2021) (giving agency subregulatory rules equal weight to regulations, where both went through "similarly rigorous processes" that included "public comment" and "review"). Although the Town argues (p. 39) that it has been prejudiced by the filing of this suit, this suit is not the result of any purported shortcomings

in the way the Guidelines were promulgated, but rather of the Town's conceded failure to have a § 3A(a)-compliant district. RA I:124.

The Town asserts (pp. 38-39) that it "has always highlighted EOHLC's failure to conduct the required small business impact statement." But this assertion is not supported by the record. See RA I:160-647 (Town's comment letter on Draft Guidelines, expressing no concerns about small businesses); RA I:72-98 (Town's counterclaim alleging nothing that Town would have done differently in response to such statement). And, in any event, the Town cannot demonstrate how the omission of such a statement injured any interest of the Town's that "come[s] within the zone of interests arguably protected by [Chapter 30A]." Enos v. Sec'y of Env't'l Affs., 432 Mass. 132, 135 (2000).

B. The Guidelines Are in Accord With § 3A(c).

1. The Legislature Properly Delegated to EOHLC the Selection of a Measure of a District's "Reasonable Size."

Apparently addressing the first inquiry under Goldberg v. Board of Health of Granby, 444 Mass. 627 (2005), the Town argues (pp. 40-41) that EOHLC's choice to measure a district's "reasonable size" in part through unit capacity is unlawful because § 3A(a)'s reference to a "district of reasonable size" "unambiguously is a reference to land area, not total housing stock." But the three features of § 3A(a) the

Town cites (p. 41) as evidence--i.e., its requirement that the district be located not more than 0.5 miles from transit, its requirement that the municipality create "1 district," and its requirement of a minimum gross density for the district--simply do not address how a district's "size" must be measured, and apply equally whether size is measured by physical area, population, both, or something else entirely.

The Town also argues (pp. 44-49) that non-delegation principles prevent § 3A(a) from being interpreted to condone the Guidelines' tandem use of land area and unit capacity to measure a district's "reasonable size." First, the Town argues (p. 45-46) that EOHLC has undertaken a "fundamental policy decision incapable of delegation." But the fundamental policy decision here is the Legislature's command that each MBTA community have a zoning district of reasonable size in which multifamily housing is allowed as of right; defining how the district's size will be measured is akin to what this Court has labeled "the working out of the details."[10] E.g., Robinhood Fin. LLC v. Sec'y of Commonwealth, 492

[10] The Town also argues (p. 45) that, in view of the Home Rule Amendment, all zoning policy is fundamental and non-delegable, but that argument is plainly wrong. See, e.g., Zoning Bd. of App. of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257, 264-68 (2022) (EOHLC authorized to develop standards to govern implementation of G.L. c. 40B, §§ 20-23).

Mass. 708, 715 (2024) (fundamental policy decision is "to protect investors . . . from 'unethical or dishonest conduct or practices'"; upholding delegation of authority to "define the precise conduct or practices proscribed"); Commonwealth v. Clemmey, 447 Mass. 127, 128 (2006) (fundamental policy decision is to exempt "normal maintenance or improvement of land in agricultural use" from certain criminal laws; upholding delegation of authority to define "land in agricultural use" and "normal maintenance or improvement"); Op. of the Justices, 427 Mass. 1211, 1217 (1998) (fundamental policy decision is to "extend[] health care coverage to employees, their household members, and their dependents"; upholding delegation of authority to define "domestic partner" and "dependents").

Second, the Town (pp. 46-47) argues that the statutory requirement that each § 3A(a)-compliant district be of "reasonable size" does not form an "intelligible principle" to guide EOHLC's discretion. But this argument contravenes this Court's holding that "reasonableness" is a sufficiently intelligible principle to avoid a non-delegation problem. Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 226 (2001). And, contrary to the Town's attempt (p. 47) to distinguish Tri-Nel, there are deep roots to the Legislature's delegation of zoning decisions,

both to state agencies, see Zoning Bd. of App. of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257, 264-68 (2022) (concerning G.L. c. 40B, §§ 20-23); St. 1946, c. 592 (creating Emergency Housing Commission with power to reverse local denials of variances related to housing), and, prior to the Home Rule Amendment, to municipalities themselves. See Bd. of App. of Hanover v. Housing App. Comm., 363 Mass. 339, 358-60 (1973).

Third, the Town argues (p. 48) that § 3A "provides no safeguards to control abuses of" EOHLC's "discretion." But this argument rings hollow in light of this very lawsuit, in which the Town has challenged EOHLC's Guidelines as ultra vires and as improperly classifying it as a rapid transit community.

2. EOHLC's Selection of Both a Land Area Measure and a Unit Capacity Measurement is Reasonable.

Without any acknowledgment of the deference that is due under Goldberg, the Town assails (pp. 42-46) the Guidelines' selection of land area and multi-family unit capacity measurements as "aggressive" and "[im]modest." In truth, that selection is both reasonable and consistent with preexisting zoning law.

Unit capacity is an estimate of the number of multi-family units that can be developed within a district, taking into consideration that district's zoning regulations. RA I:282. The Guidelines require

a § 3A(a)-compliant district to accommodate a percentage of the municipality's total housing units. RA I:287. This is reasonable. First, if the Guidelines did not consider unit capacity, existing zoning restrictions (e.g., height maximums, setback requirements, floor area ratios) could result in geographically large districts that cannot actually accommodate many multi-family units, undermining the purpose of § 3A. Second, preexisting law uses both geographic size and number of units to measure municipalities' contributions to housing. E.g., G.L. c. 40B, § 20 (municipalities may attain "safe harbor" by building certain number of affordable housing units or achieving certain land area of lots containing such units). Third, unit capacity allows the Guidelines to use existing housing units as a proxy for population when measuring "reasonable size"--just the kind of "relation to a given municipality's existing population" that the Town argues (p. 48) would be appropriate.

The Town appears to argue (p. 42) that the "reasonable size" requirements are unreasonable because they "transform regulated communities" and that "[o]nly Boston and a handful of mostly adjacent communities currently meet § 3A(a)'s '15 units per acre' benchmark on a citywide basis." But this misconstrues the effects of § 3A(a), which requires a

density of 15 units per acre to be achieved not "citywide," but only in a district comprising the lesser of 50 acres or 1.5% of the municipality's developable land.[11] RA I:286-87.

C. The Guidelines Properly Treat the Mattapan Line as a Subway and Part of the Red Line.

The Town argues (pp. 50-53) that the Legislature intended § 3A(a)'s reference to "subway station[s]" to include only underground stations, with the effect that Mattapan Line stations go unaddressed by § 3A(a). But the only municipalities in the entire MBTA system that host underground rapid transit stations are Boston, Cambridge, and Somerville, see RA I:120-21--and Boston is not subject to § 3A(a) due to the Boston Zoning Enabling Act, St. 1956, c. 665 (as subsequently amended). There is no basis to conclude that the Legislature intended § 3A(a)'s reference to "subway station[s]" to reach only Cambridge and Somerville

[11] The Town argues (p. 49) that the Guidelines are also unlawful because they add 13 grant programs that "will take compliance with § 3A into consideration when making grant award recommendations." But the Town does not develop this argument, including by discussing the details of those 13 grant programs or analyzing what discretion the respective administering agencies enjoy in awarding such grants. Thus, the argument does not rise to the level of appellate argument within the meaning of Rule 16(a)(4). In any event, the Town makes no allegation that it has been injured by any action of any defendant relative to these additional grant programs.

while ignoring the numerous other municipalities that host above-ground rapid transit stations.

Citing a 2015 MBTA slidedeck that purportedly distinguishes between the Red Line and Mattapan Line, the Town also argues (pp. 53-54) that the Guidelines' treatment of the Mattapan Line as part of the Red Line is arbitrary and capricious. But the passages the Town cites concern equipment, ridership, track condition, and other infrastructure features in which the Mattapan Line obviously differs from other parts of the Red Line. As described in the blue brief (pp. 44-45), numerous other official MBTA sources--such as the schedule, the map, the transfer policy, and the Service Delivery Policy--treat the Mattapan Line as "a Red Line extension . . . via light rail." RA I:121-23. Thus EOHLC did not act unreasonably in treating the Mattapan Line as part of the Red Line. E.g., Zoning Bd. of App. of Holliston v. Hous. App. Comm., 80 Mass. App. Ct. 406, 415 (2011) (court "must indulge all rational presumptions in favor of the validity of [agency's] determinations, including its choice between two fairly conflicting views").

CONCLUSION

For all of the foregoing reasons, this Court should award the relief requested in the appellants' blue brief (p. 59).

Respectfully submitted,

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/s/ Eric A. Haskell

Sept. 9, 2024

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CERTIFICATES

Pursuant to Mass. R. App. P. 16(k), I certify that this filing complies with pertinent rules of court. Specifically, I certify that this filing complies with the length limit of Mass. R. App. P. 20(a)(2)(A) by using 12-point "Courier New" font (i.e., 10 cpi) and comprising 20 pages (excepting those excluded by Mass. R. App. P. 20(a)(2)(D)).

Pursuant to Mass. R. App. P. 13(e), I further certify that this filing has been served on the following parties and their representatives by e-mail:

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Statutory Provisions

Compliance Guidelines

Proceedings in Attorney General v. Town of Milton et al., No. SJ-24-78 (SJC for Suffolk County)

Proceedings in Attorney General v. Town of Milton et al., No. SJC-13580 (SJC for the Commonwealth)

G.L. c. 12, § 10

[The Attorney General] shall take cognizance of all violations of law or of orders of courts, tribunals or commissions affecting the general welfare of the people, including combinations, agreements and unlawful practices in restraint of trade or for the suppression of competition, or for the undue enhancement of the price of articles or commodities in common use, and shall institute or cause to be instituted such criminal or civil proceedings before the appropriate state and federal courts, tribunals and commissions as he may deem to be for the public interest, and shall investigate all matters in which he has reason to believe that there have been such violations. Whenever it appears to the attorney general that the commonwealth or any city, town, or other governmental agency, body or authority established under the laws of the commonwealth has been so injured or damaged by any conspiracy, combination or agreement in restraint of trade or commerce or similar unlawful action, as to entitle the commonwealth, a city, town, or other such governmental agency, body or authority to a right to bring any action or proceeding for the recovery of damages under the provisions of any federal anti-trust or other similar law, the attorney general shall have authority to institute and prosecute any such actions or proceedings on behalf of the commonwealth or of any city, town, or other governmental agency, body or authority established under the laws of the commonwealth, and shall have authority to intervene on behalf of the commonwealth or of any city, town or other governmental agency, body or authority in such actions or proceedings. For the purposes of this section, he may appoint necessary assistants, with such compensation as, with the approval of the governor and council, he may fix, and may expend such sums as may be approved by the governor and council. In criminal proceedings hereunder he may require district attorneys to assist him and under his direction to act for him in their respective districts.

G.L. c. 40A, § 1A (excerpt)

As used in this chapter the following words shall have the following meanings:

* * *

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

* * *

G.L. c. 40A, § 3A

(a)(1) An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children. For the purposes of this section, a district of reasonable size shall: (i) have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A; and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.

(b) An MBTA community that fails to comply with this section shall not be eligible for funds from: (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017; (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; (iii) the MassWorks infrastructure program established in section 63 of chapter 23A, or (iv) the HousingWorks infrastructure program established in section 27 of chapter 23B.

(c) The executive office of housing and livable communities, in consultation with the executive office of economic development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section.

G.L. c. 161A, § 1 (excerpt)

As used in this chapter, the following words shall, unless the context otherwise requires, have the following meanings:--

* * *

"51 cities and towns", the cities and towns of Bedford, Beverly, Braintree, Burlington, Canton, Cohasset, Concord, Danvers, Dedham, Dover, Framingham, Hamilton, Hingham, Holbrook, Hull, Lexington, Lincoln, Lynn, Lynnfield, Manchester-by-the-Sea, Marblehead, Medfield, Melrose, Middleton, Nahant, Natick, Needham, Norfolk, Norwood, Peabody, Quincy, Randolph, Reading, Salem, Saugus, Sharon, Stoneham, Swampscott, Topsfield, Wakefield, Walpole, Waltham, Wellesley, Wenham, Weston, Westwood, Weymouth, Wilmington, Winchester, Winthrop and Woburn.

"Fourteen cities and towns", the cities and towns of Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Milton, Newton, Revere, Somerville and Watertown.

* * *

"Other served communities", the cities and towns of Abington, Acton, Amesbury, Andover, Ashburnham, Ashby, Ashland, Attleboro, Auburn, Ayer, Bellingham, Berkley, Billerica, Boxborough, Boxford, Bridgewater, Brockton, Carlisle, Carver, Chelmsford, Dracut, Duxbury, East Bridgewater, Easton, Essex, Fitchburg, Foxborough, Franklin, Freetown, Georgetown, Gloucester, Grafton, Groton, Grove land, Halifax, Hanover, Hanson, Haverhill, Harvard, Holden, Holliston, Hopkinton, Ipswich, Kingston, Lakeville, Lancaster, Lawrence, Leicester, Leominster, Littleton, Lowell, Lunenburg, Mansfield, Marlborough, Marshfield, Maynard, Medway, Merrimac, Methuen, Middleborough, Millbury, Millis, Newbury, Newburyport, North Andover, North Attleborough, Northborough, Northbridge, Norton, North Reading, Norwell, Paxton, Pembroke, Plymouth, Plympton, Princeton, Raynham, Rehoboth, Rochester, Rockland, Rockport, Rowley, Salisbury, Scituate, Seekonk, Sherborn, Shirley, Shrewsbury, Southborough, Sterling, Stoughton, Stow, Sudbury, Sutton, Taunton, Tewksbury, Townsend, Tyngsborough, Upton, Wareham,

Wayland, West Boylston, West Bridgewater, Westborough, West Newbury, Westford, Westminster, Whitman, Worcester, Wrentham, and such other municipalities as may be added in accordance with section 6 or in accordance with any special act to the area constituting the authority.

* * *

Commonwealth of Massachusetts
EXECUTIVE OFFICE OF HOUSING & LIVABLE COMMUNITIES

Maura T. Healey, Governor ◆ Kimberley Driscoll, Lieutenant Governor ◆ Edward M. Augustus, Jr., Secretary

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Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act

1. Overview of Section 3A of the Zoning Act

Section 3A of the Zoning Act provides: *An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children. For the purposes of this section, a district of reasonable size shall: (i) have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A; and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.*

The purpose of Section 3A is to encourage the production of multi-family housing by requiring MBTA communities to adopt zoning districts where multi-family housing is allowed as of right, and that meet other requirements set forth in the statute.

The Executive Office of Housing and Livable Communities (EOHLC), in consultation with Executive Office of Economic Development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, is required to promulgate guidelines to determine if an MBTA community is in compliance with Section 3A. EOHLC promulgated preliminary guidance on January 29, 2021. EOHLC updated that preliminary guidance on December 15, 2021, and on that same date issued draft guidelines for public comment. These final guidelines supersede all prior guidance and set forth how MBTA communities may achieve compliance with Section 3A.

2. Definitions

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

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

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

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

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

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

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

"Commuter rail station" means any MBTA commuter rail station with year-round, rather than intermittent, seasonal, or event-based, service, including stations under construction and scheduled to being service before the end of 2023, but not including existing stations at which service will be terminated, or reduced below regular year-round service, before the end of 2023.

"Compliance model" means the model created by EOHLC to determine compliance with Section 3A's reasonable size, gross density, and location requirements. The compliance model is described in further detail in Appendix 2.

"Determination of compliance" means a determination made by EOHLC as to whether an MBTA community has a multi-family zoning district that complies with the requirements of Section 3A. A determination of compliance may be determination of interim compliance or a determination of district compliance, as described in section 9.

"Developable land" means land on which multi-family housing can be permitted and constructed. For purposes of these guidelines, developable land consists of: (i) all privately-owned land except lots or portions of lots that meet the definition of excluded land, and (ii) developable public land.

"Developable public land" means any publicly-owned land that (i) is used by a local housing authority; (ii) has been identified as a site for housing development in a housing production plan

approved by EOHLC; or (iii) has been designated by the public owner for disposition and redevelopment. Other publicly-owned land may qualify as developable public land if EOHLC determines, at the request of an MBTA community and after consultation with the public owner, that such land is the location of obsolete structures or uses, or otherwise is suitable for conversion to multi-family housing, and will be converted to or made available for multi-family housing within a reasonable period of time.

"Developable station area" means developable land that is within 0.5 miles of a transit station.

"EOHLC" means the Executive Office of Housing and Livable Communities.

"EOED" means the Executive Office of Economic Development.

"Excluded land" means land areas on which it is not possible or practical to construct multi-family housing. For purposes of these guidelines, excluded land is defined by reference to the ownership, use codes, use restrictions, and hydrological characteristics in MassGIS and consists of the following:

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

"Ferry terminal" means the location where passengers embark and disembark from regular, year-round MBTA ferry service.

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

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

“Listed funding sources” means (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017; (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; and (iii) the MassWorks infrastructure program established in section 63 of chapter 23A.

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

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

“MBTA” means the Massachusetts Bay Transportation Authority.

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

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

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

“Multi-family housing” means a building with 3 or more residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building.

“Multi-family unit capacity” means an estimate of the total number of multi-family housing units that can be developed as of right within a multi-family zoning district, made in accordance with the requirements of section 5.b below.

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

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

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

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

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

"Rapid transit community" means an MBTA community that has within its borders at least 100 acres of developable station area associated with one or more subway stations, or MBTA Silver Line bus rapid transit stations.

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

"Section 3A" means section 3A of the Zoning Act.

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

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

"Subway station" means any of the stops along the MBTA Red Line, Green Line, Orange Line, or Blue Line, including any extensions to such lines now under construction and scheduled to begin service before the end of 2023.

"Transit station" means an MBTA subway station, commuter rail station, ferry terminal or bus station.

"Transit station area" means the land area within 0.5 miles of a transit station.

"Zoning Act" means chapter 40A of the Massachusetts General Laws.

3. General Principles of Compliance

These compliance guidelines describe how an MBTA community can comply with the requirements of Section 3A. The guidelines specifically address:

- What it means to allow multi-family housing "as of right."
- The metrics that determine if a multi-family zoning district is "of reasonable size."
- How to determine if a multi-family zoning district has a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code.
- The meaning of Section 3A's mandate that "such multi-family housing shall be without age restrictions and shall be suitable for families with children."
- The extent to which MBTA communities have flexibility to choose the location of a multi-family zoning district.

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

- MBTA communities with subway stations, commuter rail stations and other transit stations benefit from having these assets located within their boundaries and should provide opportunity for multi-family housing development around these assets. MBTA communities with no transit stations within their boundaries benefit from proximity to transit stations in nearby communities.
- The multi-family zoning districts required by Section 3A should encourage the development of multi-family housing projects of a scale, density and aesthetic that are compatible with existing surrounding uses, and minimize impacts to sensitive land.
- "Reasonable size" is a relative rather than an absolute determination. Because of the diversity of MBTA communities, a multi-family zoning district that is "reasonable" in one city or town may not be reasonable in another city or town.
- When possible, multi-family zoning districts should be in areas that have safe, accessible, and convenient access to transit stations for pedestrians and bicyclists.

4. Allowing Multi-Family Housing "As of Right"

To comply with Section 3A, a multi-family zoning district must allow multi-family housing "as of right," meaning that the construction and occupancy of multi-family housing is allowed in that district without the need for a special permit, variance, zoning amendment, waiver, or other discretionary approval. EOHLC will determine whether zoning provisions allow for multi-family housing as of right consistent with the following guidelines.

a. Site plan review

The Zoning Act does not establish nor recognize site plan review as an independent method of regulating land use. However, the Massachusetts courts have recognized site plan review as a permissible regulatory tool, including for uses that are permitted as of right. The court decisions establish that when site plan review is required for a use permitted as of right, site plan review involves the regulation of a use and not its outright prohibition. The scope of review is therefore limited to imposing reasonable terms and conditions on the proposed use, consistent with applicable case law.[1] These guidelines similarly recognize that site plan review may be required for multi-family housing projects that are allowed as of right, within the parameters established by the applicable case law. Site plan approval may regulate matters such as vehicular access and circulation on a site, architectural design of a building, and screening of adjacent properties. Site plan review should not unreasonably delay a project nor impose conditions that make it infeasible or impractical to proceed with a project that is allowed as of right and complies with applicable dimensional regulations.

b. Affordability requirements

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

For purposes of making compliance determinations with Section 3A, EOHLC will consider an affordability requirement to be consistent with as of right zoning as long as the zoning requires not more than 10 percent of the units in a project to be affordable units, and the cap on the income of families or individuals who are eligible to occupy the affordable units is not less than 80 percent of area median income. Notwithstanding the foregoing, EOHLC may, in its discretion, approve a greater percentage of affordable units, or deeper affordability for some or all of the affordable units, in either of the following circumstances:

(i) The affordability requirements applicable in the multi-family zoning district are reviewed and approved by EOHLC as part of a smart growth district under chapter 40R, or under another zoning incentive program administered by EOHLC; or

(ii) The affordability requirements applicable in the multi-family zoning district are supported by an economic feasibility analysis, prepared for the municipality by a qualified and independent third party acceptable to EOHLC, and using a methodology and format acceptable to EOHLC. The analysis must demonstrate that a reasonable

[1] *See, e.g., Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25 (1970); *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997) (Planning Board "may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use").

variety of multi-family housing types can be feasibly developed at the proposed affordability levels, taking into account the densities allowed as of right in the district, the dimensional requirements applicable within the district, and the minimum number of parking spaces required.

In no case will EOHLC approve alternative affordability requirements that require more than 20 percent of the units in a project to be affordable units, except in a smart growth zoning district under chapter 40R with a 25 percent affordability requirement approved and adopted prior to the issuance of these guidelines, including any such existing district that is expanded or amended to comply with these guidelines.

c. *Other requirements that do not apply uniformly in the multi-family zoning district*

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

5. Determining "Reasonable Size"

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

a. *Minimum land area*

A zoning district is a specifically delineated land area with uniform regulations and requirements governing the use of land and the placement, spacing, and size of buildings. For purposes of compliance with Section 3A, a multi-family zoning district should be a neighborhood-scale district, not a single development site on which the municipality is willing to permit a particular multi-family project. EOHLC will certify compliance with Section 3A only if an MBTA community's multi-family zoning district meets the minimum land area applicable to that MBTA community, if any, as set forth in Appendix 1. The minimum land area for each MBTA community has been determined as follows:

(i) In rapid transit communities, commuter rail communities, and adjacent communities, the minimum land area of the multi-family zoning district is 50 acres, or 1.5% of the developable land in an MBTA community, whichever is *less.* In certain cases, noted in Appendix 1, a smaller minimum land area applies.

(ii) In adjacent small towns, there is no minimum land area. In these communities, the multi-family zoning district may comprise as many or as few acres as the community

determines is appropriate, as long as the district meets the applicable minimum multi-family unit capacity and the minimum gross density requirements.

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

b. *Minimum multi-family unit capacity*

A reasonably sized multi-family zoning district must also be able to accommodate a reasonable number of multi-family housing units as of right. For purposes of determinations of compliance with Section 3A, EOHLC will consider a reasonable multi-family unit capacity for each MBTA community to be a specified percentage of the total number of housing units within the community, with the applicable percentage based on the type of transit service in the community, as shown on Table 1:

Table 1.

Category	**Percentage of total housing units**
Rapid transit community	25%
Commuter rail community	15%
Adjacent community	10%
Adjacent small town	5%

To be deemed in compliance with Section 3A, each MBTA community must have a multi-family zoning district with a multi-family unit capacity equal to or greater than the minimum unit capacity shown for it in Appendix 1. The minimum multi-family unit capacity for each MBTA community has been determined as follows:

(i) First, by multiplying the number of housing units in that community by 0.25, 0.15, 0.10, or .05 depending on the MBTA community category. For example, a rapid transit community with 7,500 housing units is required to have a multi-family zoning district with a multi-family unit capacity of 7,500 x 0.25 = 1,875 multi-family units. For purposes of these guidelines, the number of total housing units in each MBTA community has been established by reference to the most recently published United States Decennial Census of Population and Housing.

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

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

units in that MBTA community.

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

c. Reasonable Size – Consideration Given to Unit Capacity in Mixed-Use Development Districts

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

EOHLC shall take these mixed-use development districts into consideration as reducing the unit capacity needed for a multi-family zoning district to be "reasonable" (as listed in Appendix I) where:

(i) the mixed-use development zoning district is in an eligible location where existing village-style or downtown development is essential to preserve pedestrian access to amenities;

(ii) there are no age restrictions or limits on unit size, number of bedrooms, bedroom size or number of occupants and the residential units permitted are suitable for families with children;

(iii) mixed-used development in the district is allowed "as of right" as that phrase has been interpreted by EOHLC (for example, in section 4(c) with respect to affordability requirements);

(iv) the requirement for non-residential uses is limited to the ground floor of buildings, and in no case represents a requirement that more than thirty-three percent of the floor area of a building, lot, or project must be for non-residential uses;

(v) the requirement for non-residential uses does not preclude a minimum of three residential dwelling units per lot;

(vi) the requirement for non-residential uses allows a broad mix of non-residential uses as-of-right in keeping with the nature of the area; and

(vii) there are no minimum parking requirements associated with the non-residential uses allowed as of right.

An MBTA community asking to reduce the unit capacity requirement for its multi-family zoning district(s) based on the unit capacity for one or more mixed-use development districts shall submit to EOHLC, on a form to be provided by EOHLC, a request for a determination that the mixed-use development district is in an eligible location meeting the requirements of subparagraph (i). This request must be submitted at least 90 days prior to the vote of the MBTA community's legislative body.

An MBTA community also may submit a broader inquiry as to Section 3A compliance in accordance with section 9(b). EOHLC shall respond prior to the vote of the MBTA community's legislative body if the request is timely submitted.

In any community with both a multi-family zoning district and a mixed-use development district that meets these considerations, the unit capacity requirement for the multi-family zoning district listed in Appendix I shall be reduced by the lesser of

(i) the unit capacity of residential dwelling units in the mixed-use development district or subdistrict (as calculated by EOHLC using a methodology similar to that in section 5(d) which takes into account the impact of non-residential uses), or

(ii) twenty five percent of the unit capacity requirement listed in Appendix I. This consideration shall not affect the minimum land area acreage or contiguity requirements for a multi-family zoning district otherwise required by these Guidelines.

d. *Methodology for determining a multi-family zoning district's multi-family unit capacity*

MBTA communities seeking a determination of compliance must use the EOHLC compliance model to provide an estimate of the number of multi-family housing units that can be developed as of right within the multi-family zoning district. The multi-family unit capacity of an existing or proposed district shall be calculated using the unit capacity worksheet described in Appendix 2. This worksheet produces an estimate of a district's multi-family unit capacity using inputs such as the amount of developable land in the district, the dimensional requirements applicable to lots and buildings (including, for example, height limitations, lot coverage limitations, and maximum floor area ratio), and the parking space requirements applicable to multi-family uses.

Minimum unit capacity is a measure of whether a multi-family zoning district is of a reasonable size, not a requirement to produce housing units. Nothing in Section 3A or these guidelines should be interpreted as a mandate to construct a specified number of housing units, nor as a housing production target. Demonstrating compliance with the minimum multi-family unit capacity requires only that an MBTA community show that the zoning allows multi-family housing as of right and that a sufficient number of multi-family housing units could be added to or replace existing uses and structures over time—even though such additions or replacements may be unlikely to occur soon.

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

e. *Water and wastewater infrastructure within the multi-family zoning district*

MBTA communities are encouraged to consider the availability of water and wastewater infrastructure when selecting the location of a new multi-family zoning district. But compliance with Section 3A does not require a municipality to install new water or wastewater infrastructure, or add to the capacity of existing infrastructure, to accommodate future multi-family housing production within

the multi-family zoning district. In most cases, multi-family housing can be created using private septic and wastewater treatment systems that meet state environmental standards. Where public systems currently exist, but capacity is limited, private developers may be able to support the cost of necessary water and sewer extensions. While the zoning must allow for gross average density of at least 15 units per acre, there may be other legal or practical limitations, including lack of infrastructure or infrastructure capacity, that result in actual housing production at lower density than the zoning allows.

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

6. Minimum Gross Density

Section 3A expressly requires that a multi-family zoning district—not just the individual lots of land within the district—must have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A. The Zoning Act defines "gross density" as "a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses."

a. *District-wide gross density*

To meet the district-wide gross density requirement, the dimensional restrictions and parking requirements for the multi-family zoning district must allow for a gross density of 15 units per acre of land within the district. By way of example, to meet that requirement for a 40-acre multi-family zoning district, the zoning must allow for at least 15 multi-family units per acre, or a total of at least 600 multi-family units.

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

b. *Achieving district-wide gross density by sub-districts*

Zoning ordinances and by-laws typically limit the unit density on individual lots. To comply with Section 3A's gross density requirement, an MBTA community may establish reasonable sub-

districts within a multi-family zoning district, with different density limits for each sub-district, provided that the gross density for the district as a whole meets the statutory requirement of not less than 15 multi-family units per acre. EOHLC will review sub-districts to ensure that the density allowed as of right in each sub-district is reasonable and not intended to frustrate the purpose of Section 3A by allowing projects of a such high density that they are not likely to be constructed.

c. *Wetland and septic considerations relating to density*

Section 3A provides that a district of reasonable size shall have a minimum gross density of 15 units per acre, "subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A." This directive means that even though the zoning district must permit 15 units per acre as of right, any multi-family housing produced within the district is subject to, and must comply with, the state wetlands protection act and title 5 of the state environmental code—even if such compliance means a proposed project will be less dense than 15 units per acre.

7. Determining Suitability for Families with Children

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

8. Location of Districts

a. General rule for determining the applicability of Section 3A's location requirement

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

Table 2.

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

The percentages specified in this table apply to both the minimum land area and the minimum multi-family unit capacity. For example, in an MBTA community that has a total of 500 acres of transit station area within its boundaries, a multi-family zoning district will comply with Section 3A's location requirement if at least 50 percent of the district's minimum land area is located within the transit station area, *and* at least 50 percent of the district's minimum multi-family unit capacity is located within the transit station area.

A community with transit station areas associated with more than one transit station may locate the multi-family zoning district in any of the transit station areas. For example, a rapid transit community with transit station area around a subway station in one part of town, and transit station area around a commuter rail station in another part of town, may locate its multi-family zoning district in either or both transit station areas.

b. MBTA communities with limited or no transit station area

When an MBTA community has less than 100 acres of developable station area within its boundaries, the MBTA community may locate the multi-family zoning district anywhere within its boundaries. To encourage transit-oriented multi-family housing consistent with the general intent of Section 3A, MBTA communities are encouraged to consider locating the multi-family zoning district in an area with reasonable access to a transit station based on existing street patterns, pedestrian connections, and bicycle lanes, or in an area that qualifies as an "eligible location" as defined in Chapter 40A—for example, near an existing downtown or village center, near a regional transit authority bus stop or line, or in a location with existing under-utilized facilities that can be redeveloped into new multi-family housing.

c. General guidance on district location applicable to all MBTA communities

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

9. Determinations of Compliance

Section 3A provides that any MBTA community that fails to comply with Section 3A's requirements will be ineligible for funding from any of the listed funding sources. EOHLC will make determinations of compliance with Section 3A in accordance with these guidelines to inform state agency decisions on which MBTA communities are eligible to receive funding from the listed funding sources. The following discretionary grant programs will take compliance with Section 3A into consideration when making grant award recommendations:

i. Community Planning Grants, EOHLC,
ii. Massachusetts Downtown Initiative, EOED,
iii. Urban Agenda, EOED,
iv. Rural and Small Town Development Fund, EOED,
v. Brownfields Redevelopment Fund, MassDevelopment,
vi. Site Readiness Program, MassDevelopment,
vii. Underutilized Properties Program, MassDevelopment,
viii. Collaborative Workspace Program, MassDevelopment,
ix. Real Estate Services Technical Assistance, MassDevelopment,
x. Commonwealth Places Programs, MassDevelopment,
xi. Land Use Planning Grants, EOEEA,
xii. Local Acquisitions for Natural Diversity (LAND) Grants, EOEEA, and
xiii. Municipal Vulnerability Preparedness (MVP) Planning and Project Grants, EOEEA

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

EOHLC interprets Section 3A as allowing every MBTA community a reasonable opportunity to enact zoning amendments as needed to come into compliance. Accordingly, EOHLC will recognize both *interim* compliance, which means an MBTA community is taking active steps to enact a multi-family zoning district that complies with Section 3A, and *district* compliance, which is achieved when EOHLC determines that an MBTA community has a multi-family zoning district that complies with Section 3A. The requirements for interim and district compliance are described in more detail below.

Table 3.

Transit Category (# of municipalities)	Deadline to Submit Action Plan	Deadline to Submit District Compliance Application
Rapid transit community (12)	January 31, 2023	December 31, 2023
Commuter rail community (71)	January 31, 2023	December 31, 2024
Adjacent community (58)	January 31, 2023	December 31, 2024
Adjacent small town (34)	January 31, 2023	December 31, 2025

a. Process to achieve interim compliance

Many MBTA communities do not currently have a multi-family zoning district of reasonable size that complies with the requirements of Section 3A. Prior to achieving district compliance (but no later than the deadlines set forth in Table 3), these MBTA communities can achieve interim compliance by taking the following affirmative steps towards the creation of a compliant multi-family zoning district.

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

ii. *EOHLC approval of an action plan*. EOHLC will review each submitted action plan for consistency with these guidelines, including but not limited to the timelines in Table 3. If EOHLC determines that the MBTA community's action plan is reasonable and will lead to district compliance in a timely manner, EOHLC will issue a determination of interim compliance. EOHLC may require modifications to a proposed action plan prior to approval.

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

iv. *Deadlines for submitting action plans*. To achieve interim compliance for grants made through the 2023 One Stop Application, action plans must be submitted by no later than January 31, 2023. An MBTA community that does not submit an action plan by that date may not receive a EOHLC determination of interim compliance in time to receive an award of funds from the listed funding sources in 2023. An MBTA community that does not achieve interim compliance in time for the 2023 One Stop Application may submit an action plan to become eligible for a subsequent round of the One Stop Application, provided that an action plan must be submitted by no later than January 31 of the year in which the MBTA community seeks to establish grant eligibility; and provided further that no action plan may be submitted or approved after the applicable district compliance application deadline set forth in Table 3.

b. *Assistance for communities implementing an action plan.*

MBTA communities are encouraged to communicate as needed with EOHLC staff throughout the process of implementing an action plan, and may inquire about whether a proposed multi-family zoning district complies with Section 3A prior to a vote by the municipal legislative body to create or

modify such a district. Such requests shall be made on a form to be provided by EOHLC. If a request is submitted at least 90 days prior to the vote of the legislative body, EOHLC shall respond prior to the vote.

c. Requests for determination of district compliance

When an MBTA community believes it has a multi-family zoning district that complies with Section 3A, it may request a determination of district compliance from EOHLC. Such a request may be made for a multi-family zoning district that was in existence on the date that Section 3A became law, or for a multi-family zoning district that was created or amended after the enactment of Section 3A. In either case, such request shall be made on an application form required by EOHLC and shall include, at a minimum, the following information. Municipalities will need to submit:

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

After receipt of a request for determination of district compliance, EOHLC will notify the requesting MBTA community within 30 days if additional information is required to process the request. Upon reviewing a complete application, EOHLC will provide the MBTA community a written determination either stating that the existing multi-family zoning district complies with Section 3A, or identifying the reasons why the multi-family zoning district fails to comply with Section 3A and the steps that must be taken to achieve compliance. An MBTA community that has achieved interim compliance prior to requesting a determination of district compliance shall remain in interim compliance for the period during which a request for determination of district compliance, with all required information, is pending at EOHLC.

10. Ongoing Obligations; Rescission of a Determination of Compliance

After receiving a determination of compliance, an MBTA community must notify EOHLC in writing of any zoning amendment or proposed zoning amendment that affects the compliant multi-family zoning district, or any other by-law, ordinance, rule or regulation that limits the development of multi-family housing in the multi-family zoning district. EOHLC may rescind a determination of district compliance, or require changes to a multi-family zoning district to remain in compliance, if EOHLC determines that:

(i) The MBTA community submitted inaccurate information in its application for a determination of compliance;
(ii) The MBTA community failed to notify EOHLC of a zoning amendment that affects the multi-family zoning district;

(iii) The MBTA community enacts or amends any by-law or ordinance, or other rule or regulation, that materially alters the minimum land area and/or the multi-family unit capacity in the multi-family zoning district;

(iv) A board, authority or official in the MBTA community does not issue permits, or otherwise acts or fails to act, to allow construction of a multi-family housing project that is allowed as of right in the multi-family zoning district (or any mixed-use zoning development district taken into account in determining the required multi-family unit capacity in the multi-family zoning district);

(v) The MBTA community takes other action that causes the multi-family zoning district to no longer comply with Section 3A; or

(vi) An MBTA community with an approved multi-family zoning district has changed transit category as a result of a newly opened or decommissioned transit station, or the establishment of permanent, regular service at a transit station where there was formerly intermittent or event-based service.

11. Changes to MBTA Service

Section 3A applies to the 177 MBTA communities identified in section 1A of the Zoning Act and section 1 of chapter 161A of the General Laws. When MBTA service changes, the list of MBTA communities and/or the transit category assignments of those MBTA communities in Appendix 1 may change as well.

The transit category assignments identified in Appendix 1 of these guidelines reflect certain MBTA service changes that will result from new infrastructure now under construction in connection with the South Coast Rail and Green Line Extension projects. These service changes include the opening of new Green Line stations and commuter rail stations, as well as the elimination of regular commuter rail service at the Lakeville station. These changes are scheduled to take effect in all cases a year or more before any municipal district compliance deadline. Affected MBTA communities are noted in Appendix 1.

Municipalities that are not now identified as MBTA communities and may be identified as such in the future are not addressed in these guidelines or included in Appendix 1. New MBTA communities will be addressed with revisions to Appendix 1, and separate compliance timelines, in the future.

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

List of Appendices:

Appendix 1: MBTA Community Categories and Requirements
Appendix 2: Compliance Methodology/Model

Appendix 1:

MBTA Community Categories and Requirements

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Abington	Commuter Rail	6,811	1,022	50	307	40%
Acton	Commuter Rail	9,219	1,383	50	246	20%
Amesbury	Adjacent Community	7,889	789	50	-	0%
Andover	Commuter Rail	13,541	2,031	50	587	50%
Arlington	Adjacent Community	20,461	2,046	32	58	0%
Ashburnham	Adjacent Small Town	2,730	137	-	-	0%
Ashby	Adjacent Small Town	1,243	62	-	-	0%
Ashland	Commuter Rail	7,495	1,124	50	272	40%
Attleboro	Commuter Rail	19,097	2,865	50	467	50%
Auburn	Adjacent Community	6,999	750	50	-	0%
Ayer	Commuter Rail	3,807	750	50	284	40%
Bedford	Adjacent Community	5,444	750	50	-	0%
Bellingham	Adjacent Community	6,749	750	50	-	0%
Belmont	Commuter Rail	10,882	1,632	27	502	50%
Berkley	Adjacent Small Town	2,360	118	-	79	0%
Beverly	Commuter Rail	17,887	2,683	50	1,435	90%
Billerica	Commuter Rail	15,485	2,323	50	308	40%
Bourne	Adjacent Small Town	11,140	557	-	-	0%
Boxborough	Adjacent Small Town	2,362	118	-	-	0%
Boxford	Adjacent Small Town	2,818	141	-	-	0%
Braintree	Rapid Transit	15,077	3,769	50	485	50%
Bridgewater	Commuter Rail	9,342	1,401	50	181	20%
Brockton	Commuter Rail	37,304	5,596	50	995	90%
Brookline	Rapid Transit	27,961	6,990	41	1,349	90%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Burlington	Adjacent Community	10,431	1,043	50	-	0%
Cambridge	Rapid Transit	53,907	13,477	32	1,392	90%
Canton	Commuter Rail	9,930	1,490	50	451	50%
Carlisle	Adjacent Small Town	1,897	95	-	-	0%
Carver	Adjacent Small Town	4,701	235	-	-	0%
Chelmsford	Adjacent Community	14,769	1,477	50	-	0%
Chelsea	Rapid Transit	14,554	3,639	14	608	75%
Cohasset	Commuter Rail	3,341	638	43	241	20%
Concord	Commuter Rail	7,295	1,094	50	519	50%
Danvers	Adjacent Community	11,763	1,176	50	-	0%
Dedham	Commuter Rail	10,459	1,569	49	507	50%
Dover	Adjacent Small Town	2,046	102	-	-	0%
Dracut	Adjacent Community	12,325	1,233	50	-	0%
Duxbury	Adjacent Community	6,274	750	50	-	0%
East Bridgewater	Adjacent Community	5,211	750	50	-	0%
Easton	Adjacent Community	9,132	913	50	-	0%
Essex	Adjacent Small Town	1,662	83	-	-	0%
Everett	Rapid Transit	18,208	4,552	22	200	20%
Fall River	Commuter Rail	44,346	6,652	50	324	40%
Fitchburg	Commuter Rail	17,452	2,618	50	601	75%
Foxborough	Adjacent Community	7,682	768	50	-	0%
Framingham	Commuter Rail	29,033	4,355	50	270	40%
Franklin	Commuter Rail	12,551	1,883	50	643	75%
Freetown	Commuter Rail	3,485	750	50	346	40%
Georgetown	Adjacent Community	3,159	750	50	-	0%
Gloucester	Commuter Rail	15,133	2,270	50	430	50%
Grafton	Adjacent Community	7,760	776	50	82	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Groton	Adjacent Small Town	4,153	208	-	-	0%
Groveland	Adjacent Small Town	2,596	130	-	-	0%
Halifax	Commuter Rail	3,107	750	50	300	40%
Hamilton	Commuter Rail	2,925	731	49	184	20%
Hanover	Adjacent Community	5,268	750	50	-	0%
Hanson	Commuter Rail	3,960	750	50	218	20%
Harvard	Adjacent Small Town	2,251	113	-	-	0%
Haverhill	Commuter Rail	27,927	4,189	50	415	50%
Hingham	Commuter Rail	9,930	1,490	50	757	75%
Holbrook	Commuter Rail	4,414	662	41	170	20%
Holden	Adjacent Community	7,439	750	50	-	0%
Holliston	Adjacent Community	5,562	750	50	-	0%
Hopkinton	Adjacent Community	6,645	750	50	79	0%
Hull	Adjacent Community	5,856	586	7	34	0%
Ipswich	Commuter Rail	6,476	971	50	327	40%
Kingston	Commuter Rail	5,364	805	50	345	40%
Lakeville	Adjacent Small Town	4,624	231	-	30	0%
Lancaster	Adjacent Small Town	2,788	139	-	-	0%
Lawrence	Commuter Rail	30,008	4,501	39	271	40%
Leicester	Adjacent Small Town	4,371	219	-	-	0%
Leominster	Commuter Rail	18,732	2,810	50	340	40%
Lexington	Adjacent Community	12,310	1,231	50	-	0%
Lincoln	Commuter Rail	2,771	635	42	130	20%
Littleton	Commuter Rail	3,889	750	50	244	20%
Lowell	Commuter Rail	43,482	6,522	50	274	40%
Lunenburg	Adjacent Small Town	4,805	240	-	-	0%
Lynn	Commuter Rail	36,782	5,517	50	637	75%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Lynnfield	Adjacent Community	4,773	607	40	-	0%
Malden	Rapid Transit	27,721	6,930	31	484	50%
Manchester	Commuter Rail	2,433	559	37	305	40%
Mansfield	Commuter Rail	9,282	1,392	50	327	40%
Marblehead	Adjacent Community	8,965	897	27	-	0%
Marlborough	Adjacent Community	17,547	1,755	50	-	0%
Marshfield	Adjacent Community	11,575	1,158	50	-	0%
Maynard	Adjacent Community	4,741	474	21	-	0%
Medfield	Adjacent Community	4,450	750	50	-	0%
Medford	Rapid Transit	25,770	6,443	35	714	75%
Medway	Adjacent Community	4,826	750	50	-	0%
Melrose	Commuter Rail	12,614	1,892	25	774	75%
Merrimac	Adjacent Small Town	2,761	138	-	-	0%
Methuen	Adjacent Community	20,194	2,019	50	-	0%
Middleborough	Commuter Rail	9,808	1,471	50	260	40%
Middleton	Adjacent Community	3,359	750	50	-	0%
Millbury	Adjacent Community	5,987	750	50	-	0%
Millis	Adjacent Community	3,412	750	50	-	0%
Milton	Rapid Transit	9,844	2,461	50	404	50%
Nahant	Adjacent Small Town	1,680	84	-	-	0%
Natick	Commuter Rail	15,680	2,352	50	680	75%
Needham	Commuter Rail	11,891	1,784	50	1,223	90%
New Bedford	Commuter Rail	44,588	6,688	50	744	75%
Newbury	Adjacent Small Town	3,072	154	-	69	0%
Newburyport	Commuter Rail	8,615	1,292	35	213	20%
Newton	Rapid Transit	33,320	8,330	50	2,833	90%
Norfolk	Commuter Rail	3,601	750	50	333	40%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
North Andover	Adjacent Community	11,914	1,191	50	5	0%
North Attleborough	Adjacent Community	12,551	1,255	50	-	0%
North Reading	Adjacent Community	5,875	750	50	-	0%
Northborough	Adjacent Community	5,897	750	50	-	0%
Northbridge	Adjacent Community	6,691	750	50	-	0%
Norton	Adjacent Community	6,971	750	50	-	0%
Norwell	Adjacent Community	3,805	750	50	-	0%
Norwood	Commuter Rail	13,634	2,045	50	861	90%
Paxton	Adjacent Small Town	1,689	84	-	-	0%
Peabody	Adjacent Community	23,191	2,319	50	-	0%
Pembroke	Adjacent Community	7,007	750	50	-	0%
Plymouth	Adjacent Community	28,074	2,807	50	-	0%
Plympton	Adjacent Small Town	1,068	53	-	-	0%
Princeton	Adjacent Small Town	1,383	69	-	-	0%
Quincy	Rapid Transit	47,009	11,752	50	1,222	90%
Randolph	Commuter Rail	12,901	1,935	48	182	20%
Raynham	Adjacent Community	5,749	750	50	-	0%
Reading	Commuter Rail	9,952	1,493	43	343	40%
Rehoboth	Adjacent Small Town	4,611	231	-	-	0%
Revere	Rapid Transit	24,539	6,135	27	457	50%
Rochester	Adjacent Small Town	2,105	105	-	-	0%
Rockland	Adjacent Community	7,263	726	47	-	0%
Rockport	Commuter Rail	4,380	657	32	252	40%
Rowley	Commuter Rail	2,405	601	40	149	20%
Salem	Commuter Rail	20,349	3,052	41	266	40%
Salisbury	Adjacent Community	5,305	750	50	-	0%
Saugus	Adjacent Community	11,303	1,130	50	11	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Scituate	Commuter Rail	8,260	1,239	50	373	40%
Seekonk	Adjacent Community	6,057	750	50	-	0%
Sharon	Commuter Rail	6,581	987	50	261	40%
Sherborn	Adjacent Small Town	1,562	78	-	-	0%
Shirley	Commuter Rail	2,599	650	43	338	40%
Shrewsbury	Adjacent Community	14,966	1,497	50	52	0%
Somerville	Rapid Transit	36,269	9,067	24	1,314	90%
Southborough	Commuter Rail	3,763	750	50	167	20%
Sterling	Adjacent Small Town	3,117	156	-	-	0%
Stoneham	Adjacent Community	10,159	1,016	27	12	0%
Stoughton	Commuter Rail	11,739	1,761	50	317	40%
Stow	Adjacent Small Town	2,770	139	-	-	0%
Sudbury	Adjacent Community	6,556	750	50	-	0%
Sutton	Adjacent Small Town	3,612	181	-	-	0%
Swampscott	Commuter Rail	6,362	954	20	236	20%
Taunton	Commuter Rail	24,965	3,745	50	269	40%
Tewksbury	Adjacent Community	12,139	1,214	50	-	0%
Topsfield	Adjacent Small Town	2,358	118	-	-	0%
Townsend	Adjacent Small Town	3,566	178	-	-	0%
Tyngsborough	Adjacent Community	4,669	750	50	-	0%
Upton	Adjacent Small Town	2,995	150	-	-	0%
Wakefield	Commuter Rail	11,305	1,696	36	630	75%
Walpole	Commuter Rail	10,042	1,506	50	638	75%
Waltham	Commuter Rail	26,545	3,982	50	470	50%
Wareham	Adjacent Community	12,967	1,297	50	-	0%
Watertown	Adjacent Community	17,010	1,701	24	27	0%
Wayland	Adjacent Community	5,296	750	50	-	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Wellesley	Commuter Rail	9,282	1,392	50	921	90%
Wenham	Commuter Rail	1,460	365	24	111	20%
West Boylston	Adjacent Community	3,052	587	39	-	0%
West Bridgewater	Adjacent Small Town	2,898	145	-	-	0%
West Newbury	Adjacent Small Town	1,740	87	-	-	0%
Westborough	Commuter Rail	8,334	1,250	50	194	20%
Westford	Adjacent Community	9,237	924	50	-	0%
Westminster	Adjacent Small Town	3,301	165	-	30	0%
Weston	Commuter Rail	4,043	750	50	702	75%
Westwood	Commuter Rail	5,801	870	50	470	50%
Weymouth	Commuter Rail	25,419	3,813	50	713	75%
Whitman	Commuter Rail	5,984	898	37	242	20%
Wilmington	Commuter Rail	8,320	1,248	50	538	50%
Winchester	Commuter Rail	8,135	1,220	37	446	50%
Winthrop	Adjacent Community	8,821	882	12	14	0%
Woburn	Commuter Rail	17,540	2,631	50	702	75%
Worcester	Commuter Rail	84,281	12,642	50	290	40%
Wrentham	Adjacent Community	4,620	750	50	-	0%
			296,806			

* Minimum multi-family unit capacity for most communities will be based on the 2020 housing stock and the applicable percentage for that municipality's community type. In some cases, the minimum unit capacity is derived from an extrapolation of the required minimum land area multiplied by the statutory minimum gross density of 15 dwelling units per acre. In cases where the required unit capacity from these two methods would exceed 25% of the community's housing stock, the required unit capacity has instead been capped at that 25% level.

** Minimum land area is 50 acres for all communities in the rapid transit, commuter rail and adjacent community types. There is no minimum land area requirement for adjacent small towns. Where 50 acres exceeds 1.5% of the developable land area in a town, a cap has been instituted that sets minimum land area to 1.5% of developable land area in the town.

*** Developable station area is derived by taking the area of a half-mile circle around an MBTA commuter rail station, rapid transit station, or ferry terminal and removing any areas comprised of excluded land.

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area

******** This Appendix was updated on 3/13/2023 to add two new MBTA communities (Fall River and New Bedford, which became MBTA communities on 1/1/2023)

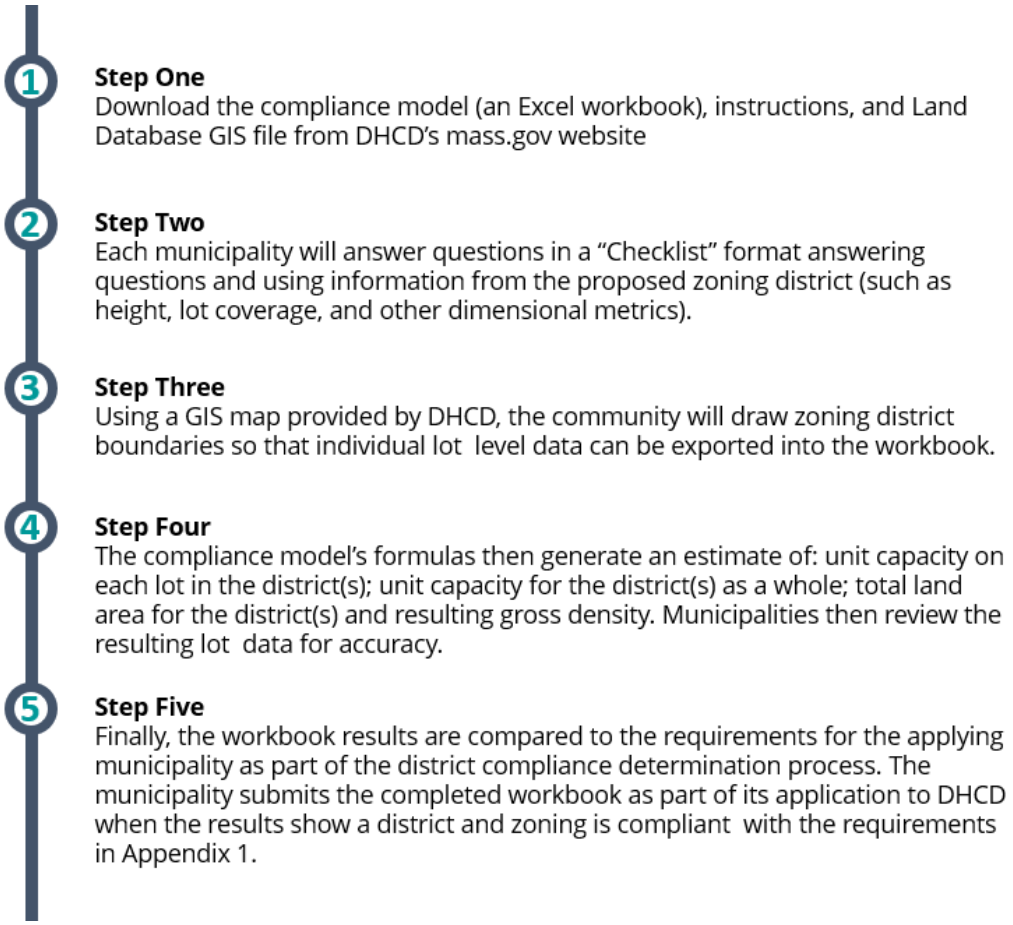
Appendix 2

Compliance Model Overview

The purpose of the compliance model is to ensure a consistent approach to measuring and evaluating multi-family zoning districts for compliance with Section 3A. The compliance model is intended to create a reasonable estimate of multi-family unit capacity of each multi-family zoning district. It is not intended to provide a precise determination of how many units may be developed on any individual lot or combination of lots.

The model uses geospatial tax parcel data from local assessors, compiled and hosted by MassGIS, to define lot boundaries and dimensions in each multi-family zoning district. The model also captures key dimensional and regulatory elements of the multi-family zoning district that impact multi-family unit capacity. The product of the compliance model is a Microsoft Excel workbook that must be submitted as part of a compliance application to DHCD. Consultant support is available at no cost to assist MBTA communities in meeting all the technical requirements of compliance.

The Compliance Modeling Process at a Glance:



Components of the Compliance Model

Land database

The compliance model includes geospatial parcel data for each MBTA community that identifies how much land area on each lot within a multi-family zoning district is developable land. Applicants will prepare this parcel data for the model's calculations by creating a shapefile for each district, measuring each district's land area, and exporting all lot records within the district's boundaries into an Excel or .csv file. These exported tables can then be pasted into the zoning review checklist and unit capacity estimator, described below.

Zoning review checklist and unit capacity estimator

To capture the data needed to estimate a district's multi-family unit capacity, municipalities will be required to complete a zoning review checklist. The checklist is of a series of questions and responses about allowed residential uses, parking requirements, dimensional restrictions (such as maximum building height and minimum open space), and other regulatory elements applicable in the district.

The unit capacity estimator uses the GIS exported lot information from the land database and the information entered into the zoning review checklist to calculate an estimate of the maximum number of multi-family residential units that could be constructed on each lot in each district as of right. It then aggregates the unit capacity estimates for each lot into an estimate of total unit capacity for each district. It also derives an estimate of the gross density for each district.

Case-Specific Refinements to the Compliance Model Inputs and Outputs

To ensure the integrity and reasonableness of each unit capacity estimate, DHCD may adjust the compliance model inputs and outputs as necessary to account for physical conditions or zoning restrictions not adequately captured by the compliance model. For example, DHCD may override the GIS data and change one or more lots from excluded land to developable land where a municipality demonstrates those lots meet the definition of developable land. DHCD may also adjust the unit capacity estimator's algorithm when it does not adequately account for an atypical zoning requirement or other local development restriction that will clearly impact unit capacity.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0078

ATTORNEY GENERAL

vs.

TOWN OF MILTON and JOE ATCHUE, in his official capacity

RESERVATION AND REPORT

This matter came before the court, Georges, J., on a complaint in which the Attorney General sought declaratory, injunctive, and other relief. I hereby reserve and report this case for determination by the Supreme Judicial Court for the Commonwealth.

In her complaint, the Attorney General sought a declaration that G. L. c. 40A, § 3A (a), affirmatively obligates the Town of Milton (Town) to have a zoning bylaw providing for at least one district of reasonable size in which multi-family housing is permitted as of right, which district also satisfies the other requirements of § 3A (a) and the related "Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act" (Guidelines), issued by what is now the Executive Office of Housing and Livable Communities (EOHLC). Further, the Attorney General sought declarations to the effect that the Town has

failed to meet its obligations under the statute and the Guidelines, as well as injunctive and other relief compelling compliance.

The Attorney General moved the court to reserve and report this matter to the Supreme Judicial Court for the Commonwealth. The Town and Joe Atchue[1] opposed the motion, and a hearing was held. The defendants speculated that fact disputes may arise but did not point to any specific material fact in the Attorney General's complaint which they dispute. Rather, they argued that the case did not raise a novel issue, and they made a number of legal arguments, including (1) that the exclusive remedy against municipalities failing to comply with § 3A (a), is to be found in § 3A (b), which makes such municipalities ineligible for certain funds, and (2) that the Attorney General's Office lacks authority and standing to enforce compliance. In effect, the former is a legal argument that the statute permits the Town to "opt out" of the obligations described in § 3A (a) and the Guidelines.

[1] Atchue is sued only in his official capacity as the Town's Building Commissioner. See Porter v. Treasurer & Collector of Taxes of Worcester, 385 Mass. 335, 343 (1982), quoting Monell v. Department of Social Servs. of the City of N.Y., 436 U.S. 658, 690 n.55 (1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent").

After considering the parties' submissions, I believe that this case raises novel questions of law which are of public importance, and which are time sensitive and likely to recur, i.e., the scope of a municipality's legal obligations under G. L. c. 40A, § 3A, and under the related Guidelines, and whether the Attorney General has authority and standing to enforce compliance with the same. Therefore, in my opinion, the matter would best be decided by the full court, and as noted above, I hereby reserve and report this case for its determination.

The parties shall prepare and file in the full court a comprehensive statement of agreed facts necessary to resolve the issues raised. The statement of agreed facts shall be prepared in time for inclusion in the parties' record appendix. The failure to agree on all necessary facts could impair the court's ability to resolve the matter.

The record before the full court shall consist of the following:

1. All papers filed in SJ-2024-0078;

2. The docket sheet in SJ-2024-0078;

3. The statement of agreed facts; and

4. This reservation and report.

The Attorney General, as the plaintiff, shall be deemed the appellant, and the defendants shall be deemed the appellees.

Oral argument shall take place in October 2024 or such other time as the full court may order. The parties shall confer with the Clerk of the Supreme Judicial Court for the Commonwealth to determine a schedule for the service and filing of briefs and the date of oral argument. This matter shall otherwise proceed in all respects in accordance with the Massachusetts Rules of Appellate Procedure.

By the Court

/s/ Serge Georges, Jr.
Serge Georges, Jr.
Associate Justice

Entered: March 18, 2024

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2024-M011

SUPREME JUDICIAL COURT
NO. SJC-13580

ATTORNEY GENERAL

v.

TOWN OF MILTON and JOE ATCHUE, in his official capacity

ORDER

This matter came before the court, Georges, J., on a motion referred by the full court to the single justice for disposition. The defendants, Town of Milton and Joe Atchue, moved for leave to file a proposed answer and counterclaim in the above-captioned full court case. After the motion was referred to the single justice for disposition, the Attorney General filed in the county court a partial assent and partial opposition to the motion.

Upon consideration, the motion of the defendants Town of Milton and Joe Atchue is hereby ALLOWED in part. The defendants are ordered to file their answer and counterclaim forthwith with the Office of the Clerk of the Supreme Judicial Court for Suffolk County, so that it may be docketed in No. SJ-2024-0078,

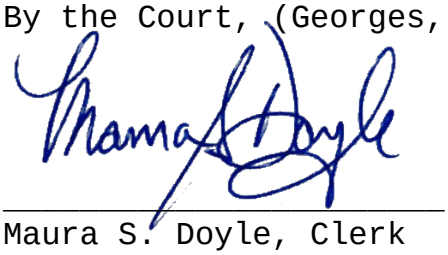
that is, the county court proceeding underlying the above full court matter. The counterclaim defendants, the Attorney General and the Executive Office of Housing and Livable Communities (EOHLC), shall file responsive pleadings within 20 days of the filing of the defendants' answer and counterclaim. Such responsive pleadings also shall be filed in Docket No. SJ-2024-0078, with the Office of the Clerk of the Supreme Judicial Court for Suffolk County.

Consistent with the reservation and report issued on March 18, 2024, in Docket No. SJ-2024-0078, the defendants' answer and counterclaim and the counterclaim defendants' responsive pleadings, once so filed, will become part of the record before the full court (and shall be included in the record appendix filed before the full court).

As the case has been reserved and reported without limitation, the Attorney General's requests to defer or to separate out the issue of whether the Town of Milton was properly deemed a "rapid transit community," and to file a status report regarding that issue, are hereby DENIED. The parties are reminded that the March 18, 2024, reservation and report requires them to "prepare and file in the full court a comprehensive statement of agreed facts necessary to resolve the issues raised," which "shall be prepared in time for inclusion in the parties' record appendix," and further, that "failure to

agree on all necessary facts could impair the court's ability to resolve the matter."

By the Court, (Georges, J.)



Maura S. Doyle, Clerk

Entered: May 3, 2024