

Helpful Hints for Drafting MBTA Communities Zoning

Last Updated: November 13, 2024

Section 3A of the Zoning Act, also known as the “MBTA communities law” or “3A”, requires MBTA communities to adopt at least one zoning district of reasonable size in which multi-family housing is permitted as of right. The law tasked EOHLC with promulgating guidelines to determine if MBTA communities comply with Section 3A, which is referred to the Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act (“Guidelines”). This document offers solutions to common challenges that have arisen within, and been resolved by, MBTA communities that achieved compliance. Questions on topics not addressed here can be directed to EOHLC3A@mass.gov.

Procedural Guidance

- MBTA communities developing new zoning districts should remember to:
 - Carefully review their existing zoning bylaw or ordinance to identify potential areas of conflict, and to exempt the 3A district from any conflicting provisions.
 - Adopt any necessary map amendments when adopting new or amended zoning text.
 - Pay careful attention to the definitions section of the zoning bylaw or ordinance and any new definitions in the 3A district to confirm that definitions are consistent and that they align with the definitions in Chapter 40A, Section 1A.
- New “3A district” zoning in MBTA communities takes effect, and is available for new development proposals, under the same timeline and procedure as any other local zoning. It does not require EOHLC’s approval or review to be effective.
- When developing GIS shapefiles to demonstrate zoning district boundaries, MBTA communities should remember to include rights of way in the district geography, even if the local practice is not to include them in the zoning district. This is necessary to determine that districts meet the gross density requirement as defined in Chapter 40A, Section 1A.
- After an MBTA community adopts zoning intended for compliance with Section 3A, the municipal CEO must submit a “District Compliance Application”. Applications can be found on mass.gov/mbtacomunities. MBTA communities that take the time to browse the website have the most success identifying procedural requirements for submitting applications, especially requirements for “mandatory mixed use” zoning districts, economic feasibility analyses, and GIS submittal standards.
- If an MBTA community proposes to include publicly owned land in the 3A district by requesting an “override” from EOHLC, it is best to initiate conversations as early in the process as possible. Public land overrides are complex and handled on a case-by-case basis. EOHLC’s goal in all cases is to confirm that the publicly owned land is available for as of right development of multi-family housing.
- The District Compliance Application requires the municipal CEO submitting the application to certify under the pains and penalties of perjury that they are not aware of any information not included in the application that would prohibit, limit, or restrict as of right development

of multi-family housing. If anybody working on 3A zoning is aware of any such information (for example: board of health or conservation commission rules and regulations that are more restrictive than Title 5 or the wetlands protection act, or deed restrictions that limit or restrict development below what the zoning allows) that person should inform the municipal CEO before an application is submitted.

Zoning Guidance

Solving contiguity issues in larger districts

Section 5a of the Guidelines requires that at least half of the land area of a 3A district is contiguous. However, some MBTA communities adopt districts that exceed the minimum land area, unit capacity, and gross density requirements. To ensure that there is no disincentive for larger zoning districts that permit more multi-family housing, if an MBTA community demonstrates that a portion of its 3A district satisfies all of its minimum requirements (including land area, unit capacity, and gross density), then any additional geographies beyond that portion will not be considered to “break” the contiguity rule.

Avoiding special permit requirements in flood plain overlay districts

Many MBTA communities have overlaps between 3A districts and flood plain overlay districts. Since Section 3A requires that multi-family housing be *permitted* without any special permit requirements, MBTA communities should ensure that the procedures for flood plain permitting do not trigger a special permit requirement. Many MBTA communities have successfully moved FEMA’s substantive requirements to non-discretionary processes such as site plan review, or reviews by the local flood plain administrator.

Meeting the suitability for families with children requirement

Section 3A requires that the multi-family housing permitted in the 3A district is suitable for families with children. That requirement is expressed in Section 7 of the Guidelines. Section 7 prohibits restrictions on the size of the units, caps on the number or size of bedrooms, and any minimum age restrictions. It also prohibits capping the number of occupants of units in the 3A district. Many MBTA communities use antiquated definitions of “family” in local zoning by-laws or ordinances that impose caps on the number of “unrelated” persons that may occupy a dwelling unit. The Guidelines protect all configurations of families from these caps, not just families with specific blood relations or degrees of kinship. MBTA communities can rely on the state sanitary code instead of zoning-based occupancy caps as the appropriate mechanism for ensuring that dwelling units are not overcrowded.

Site plan review

Section 3A requires that multi-family housing in the 3A district be permitted without any discretionary zoning approval. Many MBTA communities have some form of site plan review in their zoning by-laws and ordinances. Site plan review is permissible in Section 3A districts, and the rules surrounding its use are described in Section 4.a. of the Guidelines. The procedures and criteria must be objective and nondiscretionary and must align with case law for as of right uses. EOHLC has approved Section 3A districts with site plan review that include requirements for discretionary studies like traffic impact

analyses, or authority to deny projects based on discretionary criteria. However, EOHLC strongly recommends that MBTA communities ensure that their site plan review procedures and criteria align with the nondiscretionary requirement in order to prevent plan review processes that may unreasonably delay or impose conditions that make infeasible any projects that are allowed as of right and otherwise comply with applicable regulations.

Using special permits in 3A districts

Requiring special permits in a 3A district for uses or structures that are outside the purview of Section 3A is generally permissible. Examples of permissible special permit requirements include requirements for uses other than multi-family housing, or requirements for density bonuses as applied to the additional permissible units that exceed the minimum requirements of Section 3A. While special permit requirements that affect the multi-family housing permitted in the 3A district are not allowed, the substantive criteria found in special permit requirements can often be part of a nondiscretionary site plan review process.

Examples of impermissible special permit requirements include requirements for:

- Uses or structures that are accessory to multi-family housing, such as parking
- Ordinary site work, such as for retaining walls less than 6 feet in height
- Demolition or removal of existing structures or earth removal

Examples of permissible special permit requirements include requirements for:

- An additional story of building height when development includes retail uses
- Single family housing
- Mixed-use development, when multi-family housing is separately allowed as of right

Ensuring frontage, access, and other dimensional zoning requirements

Since Section 3A requires that multi-family housing in the 3A district be *permitted*, not just *allowed* as of right, it is essential that the parcels existing in the 3A district comply with all dimensional zoning requirements. For example, the Compliance Model does not identify frontage, but EOHLC will review the district with a focus on high-capacity parcels to ensure that they meet the minimum frontage requirement on a public way and can, therefore, be developed as of right. All parcels must also demonstrate as of right access. The access must be to a public way in the same municipality as the 3A district. If access is through a different zoning district, the MBTA community must ensure that access to multi-family housing through the other zoning district is permitted as of right. MBTA communities wanting to include parcels with access issues have successfully added zoning language by (1) clarifying that access through a different zoning district is allowed as of right, even if the other district does not allow multi-family housing, and (2) exempting parcels with alternative access from minimum frontage requirements.

Aquifer protection districts/groundwater protection districts/water resource districts

Many MBTA communities have 3A districts that overlap with these types of overlay districts that sometimes require special permits, including for rendering impervious more than 15% of lot area. An MBTA community wanting to have a 3A district with such an overlap generally has two options: (a) demonstrate it can meet minimum requirements such as a 15% lot coverage limit in the Compliance

Model; or (b) eliminate the special permit requirement for exceeding the limit. Substantive requirements for exceeding lot coverage limits may remain in place as long as it is available in an as of right, nondiscretionary process.

Partial parcels

Some MBTA communities have very large parcels and want to zone only parts of those parcels in order to align the 3A district's unit capacity more closely with minimum unit capacity requirements under Section 3A. This is permissible as long as the portion of the parcel that is zoned for multi-family housing meets the zoning requirements necessary for the multi-family housing permitted. Several Adjacent small towns have used open space development concepts to designate a maximum buildable area of a larger parcel in order to achieve 15 units per acre while ensuring that sufficient space is available for water and wastewater infrastructure to support development.

District-wide unit caps

District-wide unit caps are generally not permissible, but may be used in some cases in Adjacent small towns that rely on a single parcel to achieve compliance. These district-wide caps are only permissible in Adjacent small towns because those MBTA communities are not subject to minimum land area requirements.

Inclusionary zoning in 3A districts

Section 3A addresses the root cause of housing unaffordability – a severe shortage of homes, especially multi-family homes - by requiring multi-family zoning districts that encourage an increase of supply. MBTA communities may also use inclusionary zoning to require that developments in 3A districts set aside a certain number of deed-restricted units. Section 4b of the Guidelines allows inclusionary zoning to apply to 3A districts as long as the requirements are economically feasible. In some MBTA communities, independent consultants have determined that existing local requirements are economically infeasible. Strategies that have been helpful to those communities include:

- Applying different, economically feasible requirements to the 3A district rather than the requirements that apply to the rest of the municipality.
- Drafting zoning language stating that higher requirements are applicable to the 3A district only if EOHLC provides written notice of a determination that the MBTA community's economic feasibility analysis demonstrates that the requirements are feasible.

Impact of upzoning to existing residents - Changes to local zoning do not impact deed restrictions or cause evictions to current residents.

EOHLC is aware that there are disinformation campaigns against the MBTA communities law. While disinformation covers a wide variety of land use and municipal subject matters, a common tactic deployed by opponents has been to tell current residents that they will lose any benefits they derive from recorded deed restrictions, or even that they will be evicted from their homes if new zoning is adopted where they live. Municipalities are encouraged to clarify to residents what the Attorney General's Office has already made clear: that changes to local zoning do not impact deed restrictions or cause evictions to current residents.