



Public Comment on Draft Compliance Guidelines for Multi-family Districts under Section 3A of the Zoning Act

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Introduction

In January 2021, a new law took effect in Massachusetts requiring the 175 state-designated “MBTA communities” to each zone for at least 750 multi-family housing units by right in areas within half a mile of a subway, light rail, commuter rail, or bus station.¹ Further, these housing units cannot come with age restrictions or other stipulations that could prevent families with children from locating there. The state has promised flexibility in determining compliance with the law given the need for environmental protection as well as sensitivity to local context. Nonetheless, the law — Chapter 40A, Section 3A of the Massachusetts General Laws (henceforth, “Section 3A”) — is a bold attempt to align local zoning laws with the state’s sustainable development goals while allowing enough flexibility to preserve the tradition of grassroots democracy enjoyed in New England.

Then, on December 15, 2021, the Massachusetts Department of Housing and Community Development (“DHCD”) released a set of guidelines which further specify how localities can comply with the law.² This report represents Pioneer Institute’s public comment on these guidelines, with a focus on tying them more explicitly to overarching housing needs as well as maintaining fairness and accountability for the communities tasked with complying with the law. If implemented competently, Section 3A could very well improve access to high-quality jobs, schools, and homes alike for tens of thousands of Massachusetts residents.

In light of this framing, several elements of the DHCD’s guidelines are worthy of praise, namely:

¹ General Court of the Commonwealth of Massachusetts, “Section 3A: Multi-family zoning as-of-right in MBTA communities,” Commonwealth of Massachusetts, January 14, 2021, <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40A/Section3A>

² Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

- **A fair balance between local control and accountability to regional needs**

The most ready comparison in Massachusetts law to Section 3A is with Chapter 40B, a 1969 law that allows developers to bypass local zoning laws in communities that don't have at least 10% of their housing stock in the state's Subsidized Housing Inventory. In some ways, Chapter 40B has been a success, producing more than 60,000 units of housing statewide since 1970.³ However, as of December 2020, only 22% of Massachusetts municipalities comply with the law,⁴ and others have been engaged in years-long opposition battles reacting to specific proposals from developers looking to invoke the law.⁵

Thus, for many communities, the potential for developers to circumvent local zoning codes under Chapter 40B was not enough of an incentive for municipal planning boards to accommodate diverse forms of housing by their own volition. Section 3A is another attempt to compel localities to more *proactively* anticipate denser development so that they can determine its location, design details, and other specifications on their own terms. While this may still feel coercive, it also ensures that the community has a voice in planning for the future that they may not have under Chapter 40B. Both Section 3A and Chapter 40B are ultimately motivated by a recognition of Massachusetts' present and future housing needs, but only Section 3A takes steps to avoid having developers propose large-scale projects to unsuspecting communities without warning. The particularly admirable part of Section 3A's design is that it recognizes that upholding local control while achieving housing production goals requires compelling communities to make decisions about development in advance.

- **An explicit connection between regional service provision and housing production**

Another appealing element of the DHCD's guidelines is that they make a transparent values statement regarding why the particular 175 MBTA communities are subject to Section 3A and the other 176 communities in Massachusetts aren't. The DHCD asserts that "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 nonetheless benefit from being close to transit stations in nearby communities."⁶

³ Citizens' Housing and Planning Association, "Fact Sheet on Chapter 40B, The State's Affordable Housing Zoning Law," last updated October 2011, <https://www.chapa.org/sites/default/files/Fact%20Sheet%20on%20Chapter%2040B%202011%20update.pdf>

⁴ Massachusetts Department of Housing and Community Development, "Chapter 40B Subsidized Housing Inventory (SHI)," Commonwealth of Massachusetts, December 21, 2020, <https://www.mass.gov/doc/subsidized-housing-inventory/download>

⁵ The Weston Owl, "518 South Avenue Heading Back To Zoning Board Of Appeals," April 6, 2021, <https://westonowl.com/2021/04/06/518-south-avenue-heading-back-to-zoning-board-of-appeals/>

⁶ Massachusetts Department of Housing and Community Development, "DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act," Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

The idea is that the location of existing public infrastructure - including transit stations - is an important indicator of where housing can be developed in a way that's both environmentally conscious and in line with the local needs and fiscal capacities of these communities. Expanding the physical footprint of this infrastructure, rather than the scale of development within the existing footprint, often impedes on forest cover and farmland, increases a dependency on high-emissions forms of transportation (such as automobiles), and creates large infrastructure maintenance obligations for local governments.⁷

Relatedly, opposition to residential development in Massachusetts is often based on concerns that new residents would over-saturate city streets with traffic or overwhelm other forms of municipal infrastructure.⁸ Massachusetts' neighboring state of Vermont even passed a zoning reform law in October 2020 that ties development potential to water and sewer lines, setting a *maximum* lot size minimum of 1/8th of an acre among existing lots that have access to municipal water and sewer services.⁹ In the future, such a basis for incentivizing housing density and diversity should not be off the table in Massachusetts, especially for communities in western Massachusetts not subject to Section 3A that are still served by the Massachusetts Water Resources Authority.

- **An emphasis on by-right development**

The DHCD specifies that the zoning districts created under Section 3A must allow multi-family developments "without the need to obtain any discretionary permit or approval."¹⁰ This is important for two reasons. Firstly, development approvals processes in Massachusetts, particularly in the City of Boston, have long suffered from claims of corruption and favoritism, as further illuminated by former BPDA official John Lynch's conviction for charges of bribery in 2019.¹¹ Any steps the state can take to restore legitimacy and transparency to these processes would help overcome skepticism that zoning reform and other housing proposals are in the best interests of the Commonwealth. By-right development minimizes the possibility for corruption by clearly laying out restrictions and opportunities for development in advance, regardless of who

⁷ Pickett, Ray, & Silver, "5 Negative Effects of Urban Sprawl," August 2010, <https://prs3.com/5-negative-effects-of-urban-sprawl/>

⁸ Wheeler Cowperthwaite, "Norwell officials slam studies that say High Street 40B project won't add traffic," The Patriot Ledger, September 17, 2021, <https://www.patriotledger.com/story/news/2021/09/17/traffic-data-validity-a-main-concern-in-proposed-norwell-40-b-project-high-street-peter-crabtree-cvs/8366788002/>

⁹ Vermont General Assembly, "No. 179: An act relating to promoting affordable housing," State of Vermont, 2020, <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT179/ACT179%20As%20Enacted.pdf>

¹⁰ Massachusetts Department of Housing and Community Development, "DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act," Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

¹¹ Callum Borchers, "'Guilty': Former Boston Official John Lynch Enters Plea In Bribery Case," WBUR, September 12, 2019, <https://www.wbur.org/news/2019/09/12/boston-planning-real-estate-tax-corruption-lelling>

the developer is, and reducing the need for “spot zoning” of particular parcels to accommodate specific development proposals.¹²

Secondly, evidence suggests that the discretionary nature of local design review boards, zoning boards of appeals, and other municipal committees is a particularly impactful deterrent to housing production in Massachusetts.¹³ Unlike land use restrictions based around “hard numbers” like parking requirements and floor area ratios, discretionary review processes carry an element of political risk that is hard to assess in advance. This in turn leaves an off putting amount of uncertainty in the permitting process which, combined with often volatile underlying market conditions, makes development in certain communities unworkable for many firms. Again, by-right development is a major solution to this, and the DHCD’s Section 3 guidelines greatly limit the extent to which local political bodies can restrict development via site plan review processes.

- **Density guidelines that are suitable for middle-market developers**

By-right development, combined with relatively modest density minimums, also has a more subtle benefit: it could help small, local developers play a significant role in populating the multi-family residential districts created under Section 3A. Discretionary review processes and strict density limits can be especially harmful to “mom-and-pop” developers, who seldom have the resources to hire political consultants and lawyers to navigate contentious entitlements or variance procedures.¹⁴

At the same time, setting minimum density requirements that are too high could allow large, institutional developers and investors to crowd out smaller, local ones.¹⁵ While private equity firms and institutional developers certainly have a role to play in alleviating Massachusetts’ housing shortage, rewarding smaller developers and local contractors with projects can help keep dollars circulating in the local economy.¹⁶ Local developers also may be more sensitive to other community needs and desires besides density, such as design considerations.

Fortunately, Section 3A’s approach to density requirements is fairly modest, requiring that each MBTA community establish a zoning district of at least 50 acres and within a half-mile of a transit station that has a maximum density of no less than 15 housing units per acre.¹⁷ This

¹² Planopedia, “What Is By-Right Development?” Planetizen Inc., <https://www.planetizen.com/definition/right-development>

¹³ Chris Lisinski, “Greater Boston Housing Production Is Hampered By Politics And Discretion, Report Says,” WBUR, June 4, 2019, <https://www.wbur.org/news/2019/06/04/housing-zoning-report>

¹⁴ Daniel Herriges, “Have You Met This Guy?” Strong Towns, March 16, 2021, <https://www.strongtowns.org/journal/2021/3/16/have-you-met-this-guy>

¹⁵ Abby Kinney & Chuck Marohn, “Upzoned: Regulating by Use,” Strong Towns, October 27, 2021, <http://upzoned.strongtowns.org/e/regulating-by-use/>

¹⁶ Minuteman Press, “The Benefits of Supporting Local Businesses,” April 13, 2020, <https://www.lindy.minutemanpress.com/resources/news-and-articles/2020/04/the-benefits-of-supporting-local-businesses.html>

¹⁷ Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

density level - 15 units per acre - is broadly in line with traditional development patterns in residential areas throughout New England, which often have triple-deckers and other small-scale multi-family buildings mixed in with some single-family homes (see Figure 1). By contrast, mid-rise, block-sized apartment buildings of 5-7 stories of the kind typically constructed by institutional investors can have densities of 80-100 units per acre or more.¹⁸

Figure 1: A row of triple-deckers in Worcester.¹⁹ The density of residential properties on this block is 18.3 units per acre,²⁰ higher than the minimum required under Section 3A.



Perhaps the most contentious element of Section 3A is the level of density it prescribes for parts of nearly half of Massachusetts municipalities. But by keeping that minimum density level modest, albeit higher than is typical in suburban Massachusetts, the new law helps ensure a balanced and fair market for local entrepreneurs, as well as bolstering its political legitimacy.

However, there are also some elements of the guidelines that deserve further attention to detail and/or clarification, namely:

¹⁸ Bendix Anderson, "The New Take On Mid-Rise Design," AffordableHousingFinance.com, Zonda Media, September 1, 2007, https://www.housingfinance.com/developments/the-new-take-on-mid-rise-design_o

¹⁹ Simón Rios, "A Triple-Decker For The 21st Century: Airtight And Solar-Powered," WBUR, March 12, 2021, <https://www.wbur.org/news/2021/03/12/triple-decker-deep-energy-retrofit>

²⁰ MassGIS, "Massachusetts Interactive Property Map," Commonwealth of Massachusetts, 2021, <https://www.arcgis.com/apps/OnePane/basicviewer/index.html?appid=47689963e7bb4007961676ad9fc56ae9#>

- **The focus on land area, rather than production goals, as an indicator of success**

In its guidelines, the DHCD is very careful to avoid the perception that it is mandating housing *construction* in MBTA communities, as opposed to higher allowable densities in the laws that permit and/or restrict that construction. Specifically, they attest that “a multi-family district’s unit capacity is not a mandate to construct a specified number of housing units, nor is it a housing production target. Section 3A requires only that each MBTA community has a multi-family zoning district of reasonable size.”²¹

However, creating a zoning district of a certain “reasonable size” is not a compelling goal in and of itself. Instead, DHCD should orient its goals explicitly around the need for balancing local control and expediting housing production in Massachusetts. In fact, as described above, the agency’s Section 3A guidelines already seem crafted to perform this balancing act. But the implications of this fixation on land area are that a municipality would be out of compliance with Section 3A if it wanted to create a zoning district of 25 acres and a maximum density of 30 units per acre, even if this allows for the exact same number of homes to be constructed as under the 50-acre, 15 unit-per-acre paradigm given by the DHCD.

As discussed above, the DHCD-imposed density minimum of 15 units per acre could enable municipalities to better accommodate middle-market developers, but that doesn’t mean that zoning districts shouldn’t allow higher densities if the *community* desires them. In other words, if the community was willing to take this tradeoff of increased housing density for an extra 25 acres of recreational land, civic uses, or otherwise, why wouldn’t the DHCD let them?

This point has already been made by Salim Furth of the Mercatus Center,²² but it bears repeating. Pioneer Institute urges the DHCD to reconsider its binding minimum of 50 acres of total land area for Section 3A zoning districts, as long as this smaller zoning district allows for an equivalent amount of housing production as required of other MBTA communities.

- **The way the DHCD distinguishes between MBTA community subtypes**

In various ways, the DHCD’s guidelines distinguish between MBTA communities based on what kind of MBTA station is contained within their borders. These four MBTA community “subtypes” include those with subway or light rail stations, bus stations, commuter rail stations, and “MBTA-adjacent” communities whose residents are close enough to MBTA stops to benefit from them.²³

²¹ Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

²² Salim Furth, “Implementing Massachusetts’ Ambitious Zoning Law,” Mercatus Center at George Mason University, March 17, 2022, https://www.mercatus.org/system/files/furth_-_pic_-_ma_-_public_interest_comment_on_draft_guidelines_for_multi-family_zoning_requirement_for_mbt_a_communities_-_v1.pdf

²³ Massachusetts Department of Housing and Community Development, “Multi-Family Zoning Requirement for MBTA Communities,” Commonwealth of Massachusetts, 2022, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities>

Some of the distinctions made between these subtypes in the DHCD guidelines are reasonable. For example, when MBTA-adjacent communities have little or no land within half a mile of an MBTA stop, the DHCD allows them to locate their Section 3A districts “near an existing downtown or village center, near an RTA bus stop or line, or in a location with existing under-utilized facilities.”²⁴ Also, communities with access to rapid transit are required to have their Section 3A zoning districts’ multi-family unit capacity be at least 25% of their total current housing stock, while for communities with access to the commuter rail, it’s only 15%. Thus, the amount of housing allowed by a community’s zoning code is proportional to the level of investment the MBTA has made in serving that community.

Others of these distinctions between MBTA community subtypes are much more arbitrary. For example, while a municipality is conducting internal research and community engagement activities that will determine how it will comply with Section 3A, it can be designated as temporarily compliant with the law by submitting an action plan detailing its process for doing so. However, different MBTA community subtypes have different deadlines for obtaining DHCD approval of an action plan, with subway and bus communities having an earlier deadline than commuter rail and MBTA adjacent communities.²⁵

Why should subway and bus communities, like Quincy, Malden, and Waltham, be required to submit or adopt action plans before any of the small exurban towns along the commuter rail lines? If anything, these communities are larger and more diverse, with a richer variety of stakeholders to be included in discussions, and likely a larger number of parcels to be considered for rezoning. Merely determining the scope of the involved public hearings, charette processes, and planning studies necessary to include in an action plan could reasonably take longer in such communities.

Further, the determination of the MBTA community subtypes is based on whether a community falls within a half-mile of a station of a given type, regardless of any reasonable measure of its access to that station. This is because the DHCD considers the 0.5-mile buffer around MBTA stations as the crow flies, not in travel time, and also ignores situations in which the land in the relevant community is unsuitable for development.

For example, Weston is classified as a subway community because parts of it fall within half a mile of Riverside Station in Newton.²⁶ However, this part of Weston consists entirely of the I-

²⁴ Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

²⁵ Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

²⁶ Massachusetts Department of Housing and Community Development, “Multi-Family Zoning Requirement for MBTA Communities,” Commonwealth of Massachusetts, 2022, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities>

95/Mass Pike interchange and a stretch of state-owned parkland fronting on the Charles River.²⁷ Someone walking to Riverside Station from any part of Weston would, in practice, either cover more than a mile of ground or need to navigate highway interchange ramps on foot (which, needless to say, is illegal).

Weston is certainly not the only example of this mismatch between MBTA access and community subtype status. And some other subtype classifications that use the 0.5-mile “buffer rule” are more reasonable - parts of Hopkinton, for example, are quite walkable to Southborough’s commuter rail stop,²⁸ thus justifying its “commuter rail community” status.²⁹ But since Section 3A is purportedly designed to promote housing production in “areas that have safe and convenient access to transit stations for pedestrians and bicyclists,”³⁰ perhaps using an as-the-crow-flies buffer around MBTA stops in adjacent communities is too blunt an instrument for distinguishing between MBTA community subtypes.

- **The unnecessary enforcement burden placed on the DHCD**

In general, the DHCD’s guidelines do a satisfactory job of delegating certain administrative tasks related to Section 3A to communities as is appropriate, with one exception. Under their guidelines, the DHCD can rescind a community’s certification of compliance with the law if it amends its zoning bylaw to further restrict density in a relevant multi-family residential district. However, the guidelines seem to place the burden of recognizing that such a zoning change has occurred entirely on the DHCD. Instead, MBTA communities should be required, in the name of transparency, to report any subsequent zoning amendments that affect the multifamily districts created under Section 3A to the DHCD within a number of days after the amendment passes. This could make it substantially less likely that communities could successfully avoid complying with Section 3A without facing any consequences.

- **The weak and unevenly applied noncompliance provisions of Section 3A**

While it is not within the DHCD’s power to change this, punishments for noncompliance with Section 3A may be insufficient to deter communities from simply ignoring the guidelines. The main enforcement mechanism the state has for the new zoning mandates is to withhold grant funding for the Housing Choice Initiative, Local Capital Projects Fund, and MassWorks

²⁷ MassGIS, “Massachusetts Interactive Property Map,” Commonwealth of Massachusetts, 2021, <https://www.arcgis.com/apps/OnePane/basicviewer/index.html?appid=47689963e7bb4007961676ad9fc56ae9#>

²⁸ MassGIS, “Massachusetts Interactive Property Map,” Commonwealth of Massachusetts, 2021, <https://www.arcgis.com/apps/OnePane/basicviewer/index.html?appid=47689963e7bb4007961676ad9fc56ae9#>

²⁹ Massachusetts Department of Housing and Community Development, “Multi-Family Zoning Requirement for MBTA Communities,” Commonwealth of Massachusetts, 2022, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities>

³⁰ Massachusetts Department of Housing and Community Development, “DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act,” Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

infrastructure program.³¹ However, as of March 2021, of the 175 MBTA communities, only 47 have ever received a Housing Choice grant.³² The MassWorks Infrastructure Program is more far-reaching, with more than half of the state's cities and towns receiving a grant since 2015.³³ Meanwhile, the total budgeted value for the Local Capital Projects Fund in fiscal year 2021 was just \$2.5 million, or about \$7,200 for each community in Massachusetts, on average.³⁴

Moreover, it is highly likely that there are several MBTA communities that have never even obtained one of these grants, giving them little incentive to comply with Section 3A. While any new piece of legislation must balance stringent enforcement with political legitimacy, enforcement for such legislation should aim to impact communities more evenly going forward, not just the ones that are dependent on certain state grants. Perhaps this could be accomplished with adjustments to local aid formulas or another state service provided to all municipalities. As is necessary, the Massachusetts legislature should not shy away from amending Section 3A to further discourage willful noncompliance with the law.

Conclusion

Chapter 40A, Section 3A of the Massachusetts General Laws is a bold and visionary piece of legislation that seeks to carefully thread the needle between upholding self-determinism in Massachusetts' localities and creating real progress towards a more sustainable and buyer-friendly development model in the state's real estate market. Above all, in implementing this new law, the DHCD should not bend towards protecting anyone's interests - neither real estate developers eager to take advantage of Section 3A nor homeowners wary of new multi-family housing in their communities. While elements of the DHCD guidelines may require small future changes, Pioneer Institute believes that allowing denser development proximate to transit and bus stations across eastern and central Massachusetts will ultimately help the state realize its goals of enhancing environmental protection, furthering fiscal sustainability, and, most importantly, expanding economic opportunity to a new generation of residents.

³¹ Massachusetts Department of Housing and Community Development, "DRAFT Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act," Commonwealth of Massachusetts, December 15, 2021, <https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download>

³² Massachusetts Housing Choice Initiative, "Housing Choice Designation," Commonwealth of Massachusetts, last updated March 2021, <https://www.mass.gov/info-details/housing-choice-designation#list-of-housing-choice-communities-as-of-march-2021->

³³ Massachusetts Executive Office Of Housing & Economic Development, "MassWorks Infrastructure Program," Commonwealth of Massachusetts, 2022, <https://www.mass.gov/doc/fy2023-massworks-program-guidelines/download>

³⁴ Massachusetts Office of the Comptroller, "Statutory Basis Financial Report," Commonwealth of Massachusetts, 2021, https://www.macomptroller.org/wp-content/uploads/sbfr_fy-2021.pdf