



TOWN OF CONCORD

Planning Division

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To: Select Board
Planning Board

From: Elizabeth Hughes, Town Planner

cc: Kerry Lafleur, Town Manager
Linda Escobedo, Select Board Liaison

Date: September 13, 2022

Re: **MGL Ch. 40A, Section 3A - MBTA Communities Multi-family Zoning Compliance Guidelines**

This memo is intended to provide the Planning Board a brief overview of the MGL Ch. 40A, Section 3A MBTA Communities Multi-family Zoning Compliance Guidelines, and actions required for compliance with this requirement.

Compliance Guidelines Section 1: Overview of Section 3A

Section 18 of Chapter 358 of the Acts of 2020 added a new Section 3A to Chapter 40A of the General Laws (the Zoning Act) applicable to MBTA communities. The MBTA communities are any municipality which has a MBTA stop within their border including subway (T), bus, commuter rail, etc. The purpose of Section 3A is to encourage MBTA communities to adopt zoning districts where multi-family zoning is permitted as of right:

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 DHCD, in consultation with the MBTA and the Massachusetts Department of Transportation, is required to promulgate guidelines to determine if an MBTA community is in compliance with Section 3A. The DHCD issued final Guidelines on August 10, 2022.

Compliance Guidelines Section 2: Definitions

All of the definitions are fairly self-explanatory on an individual definition basis. Some of them become more confusing further in the Guidelines as they are used in the implementation of each definition.

The two definitions that have the greatest impact on the implementation of the Guidelines are “Developable land” and “Excluded land.”

Compliance Guidelines Section 3: General Principles of Compliance

The General Principles provide a bulleted list of the basic planning principles for achieving compliance with the Guidelines.

The Town of Concord does not currently have any as of right multi-family zoning that meets these General Principles of Compliance.

Compliance Guidelines Section 4: Allowing Multi-family Housing “As of Right”

Section 4(a) speaks to the process of requiring site plan review as a means of regulating land use. What this Section basically does is reminds communities that the site plan review involves the regulation of a land use and cannot be used as an outright prohibition to a project. The site plan review process can impose reasonable terms and conditions on the proposed use, consistent with applicable case law, may regulate matters such as vehicular access and circulation on a site, architectural design of a building, and screening of adjacent properties, but 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.

Section 4(b) talks about affordability requirements that can and cannot be included in the multi-family housing. 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.

DHCD will consider an affordability requirement to be consistent with as of right zoning as long as:

- (i) any affordable units required by the zoning are eligible to be listed on DHCD’s Subsidized Housing Inventory;
- (ii) the zoning requires not more than 10 percent of the units in a project to be affordable units; and
- (iii) 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.

The percentage of units required to be affordable units may be up to, but not more than, 20 percent of the units in a project, only if

- (i) the affordability requirement applicable in the multi-family zoning district pre-dates the enactment of Section 3A and the MBTA community demonstrates to DHCD that the affordability requirement has not made and will not make multi-family housing production infeasible, or
- (ii) the multi-family zoning district requires DHCD review and approval as a smart growth district under chapter 40R, or under another zoning incentive program administered by DHCD.

Section 4(c) specifically states the items that the multi-family zoning **cannot** do:

- (i) require that multi-family housing meet higher energy efficiency standards than other uses;

- (ii) require that a multi-family use achieve a third-party certification that is not required for other uses in the district; and
- (iii) require 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.

This means that the current combined business/residence zoning under Zoning Bylaw Section 4.2.3 would not meet the Guidelines.

Compliance Guidelines Section 5: Determining “Reasonable Size”

Under Section 3 of the Guidelines, it states that “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.

Section 5(a) sets out the requirements for meeting the Minimum Land Area for the multi-family zoning district, which has to be a specifically delineated land area with uniform regulations and requirements governing the use of land and the placement, spacing, and size of buildings. The 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. DHCD has established the minimum land area applicable to Concord at 50 acres.

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.

Section 5(b) establishes something that is not part of Section 3A, a Minimum Multi-Family Unit Capacity. Not only does the area to be zoned to allow multi-family housing as of right have to be 50 acres in size and allow a density under zoning of 15 units per acre, Section (b) states that 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 a commuter rail community such as Concord, that number is 15% of the total housing units or 1,094 units.

Section 5(c) outlines the methodology for determining a multi-family zoning district’s multi-family unit capacity. DHCD has provided a unit capacity worksheet that 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.

I will have to work with the Town’s GIS Analyst on going through this worksheet to determine the actual size of the zoning district needed to meet the 1,094 unit capacity.

The Guidelines specifically state that:

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.....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.

Additionally, 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.

Section 5(d) speaks to 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.

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.

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.

Compliance Guidelines Section 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. Gross density is defined in the Zoning Act 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.”

It is in Section 6(a) where the definition of developable land and excluded land come into play. For purposes of determining compliance with Section 3A's gross density requirement, the DHCD 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. It is here where the Town's GIS Analysts will work her magic.

Section 6(b) allows a community to look at the new multi-family zoning district as a whole, but within that district establish reasonable sub-districts 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. DHCD 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.

Section 6(c) recognizes that while a community can create a district of reasonable size that meets the minimum gross density of 15 units per acre, any proposed development is still subject to any further limitations imposed by the Wetlands Protection Act and Title 5 for on-site sewage disposal systems. This 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 these two regulations—even if such compliance means a proposed project will be less dense than 15 units per acre.

Compliance Guidelines Section 7: Determining Suitability for Families with Children

The multi-family zoning cannot include age restrictions, limit or restrict the size of the units, cap the number of bedrooms, the size of bedrooms, the number of occupants, or impose a minimum age of occupants.

Compliance Guidelines Section 8: Location of Districts

The multi-family zoning district is required to be located not more than 0.5 miles from either commuter rail station. However, Section 8(a) recognizes that it may not be possible or practical to locate all of the multi-family zoning district within 0.5 miles of a transit station.

DHCD 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 estimated by DHCD based on the area of a half-mile circle around an MBTA commuter rail station and removing any areas comprised of excluded land. For Concord, DHCD has estimated 519 acres of developable station area. Pursuant to Table 2 of the Guidelines, 50% of the multi-family zoning district must be within a half mile of either commuter rail station.

Additionally, at least 50% of the district's minimum multi-family unit capacity (547 units) must be located within the transit station area.

Section 8(b) is for MBTA communities with limited or no transit station area and does not apply to Concord.

Section 8(c) provide guidance on choosing the location of a new multi-family district, noting that a 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, such as areas that are subject to flooding, or are known habitat for rare or threatened species, or have prime agricultural soils in active agricultural use.

Compliance Guidelines Section 9: Determinations of Compliance

Any community that fails to comply with Section 3A's requirements will be ineligible for funding from the Housing Choice Initiative, the Local Capital Projects Fund, and the MassWorks infrastructure. However, the Guidelines also state that DHCD's determinations of compliance may also inform funding decisions by EOHED, DHCD, the MBTA and other state agencies which consider local housing policies when evaluating applications for discretionary grant programs or making other discretionary funding decisions.

Questions have been raised on what Concord might lose if it were to be found in noncompliance.

I have spoken to DHCD regarding the Local Capital Projects Fund and the best answer I can get regarding the Local Capital Projects (LCP) Funds are they are gaming receipts that are appropriated through the Legislature and funneled to Housing Authorities. For Fiscal Year 2023, the approximately 242 housing authorities had a total operating budget of \$80 million, with approximately \$8 million of that from LCP Funds. To date, I have not been able to find anyone who is able to tell me how much the Concord Housing Authority receives from the LCP Funds.

Concord has never received funds through the MassWorks program, but it could be possible in the future for things such as a new water treatment facility, upgrades to the sewage treatment facility or any significant roadway improvement projects.

I touched base with the RHSO Director Liz Rust and so far, the Town has not been eligible to be a Housing Choice Community. Looking forward, if Christopher Heights gets a building permit in 2023 for the 83 units of housing, that might be enough to qualify in 2024.

At this time, it appears that the following other discretionary grant programs that are under the State's Community One Stop for Growth Application process will take noncompliance into consideration when evaluating applications:

- MassWorks
- Urban Agenda
- Housing Choice Community Grants
- Massachusetts Downtown Initiative
- Community Planning Grants
- Rural Development Fund
- Brownfields
- Site Readiness
- Underutilized Properties
- Collaborative Workspace Program
- Real Estate Services
- Commonwealth Places

There are two stages for compliance; *interim* compliance, which means an MBTA community is taking active steps and is developing an Action Plan for towards compliance, and *district* compliance, which is achieved when DHCD determines that an MBTA community has a multi-family zoning district that complies with Section 3A. The deadline to submit an Action Plan for interim compliance is **January 31, 2023** and the deadline for district compliance is **December 31, 2024**.

Section 9(a) outlines the process for achieving interim compliance:

- Creation and submission of an action plan.* 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.
- DHCD approval of an action plan.* DHCD will review the Plan for consistency with the guidelines, and if the Plan is reasonable and will lead to district compliance in a timely manner, DHCD will issue a determination of interim compliance. DHCD may require modifications to a proposed action plan prior to approval.
- Implementation of the action plan.* An MBTA community must diligently implement the action plan. DHCD may revoke a determination of interim compliance if a community has not made sufficient progress in implementing an approved action plan. DHCD and EOHED will review a community's progress prior to making an award of funds under the Housing Choice Initiative and Massworks infrastructure program.
- Deadlines for submitting action plans.* To achieve interim compliance for grants made through the 2023 One Stop Application, the Plan must be submitted by no later than January 31, 2023. If a Plan is not submit, a community may not receive a DHCD determination of interim compliance in time to receive an award of funds from the listed funding sources in 2023. The Town could submit a Plan after the deadline and be eligible for 2024 funds, but no action plan may be submitted or approved after December 31, 2024.

Section 9(b) encourages communities to communicate as needed with DHCD throughout the process of implementing an Action Plan and notes that DHCD will review a proposed multi-family zoning bylaw before going to Town Meeting.

Section 9(c) outlines the process for achieving district compliance:

- (i) A certified copy of the zoning 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.

Section 9(d) speaks to the ongoing obligations of the Town to remain in compliance and notification requirements if any amendments to the multi-family zoning are proposed. It also outlines the reasons that DHCD can rescind compliance.

Compliance Guidelines Section 10: Changes to MBTA Service

This Section deals with ongoing changes to MBTA bus and transit services and does not address what would happen if one of the commuter rail stations in Concord were to be closed.

Final Town Planner Thoughts

The Planning Board spent approximately two and a half years developing the proposed amendments to the Thoreau Depot Business District Zoning, which raised opposition on many levels and the TDB District zoning amendments did not even come close to meeting all of the MBTA Communities Guidelines requirements.

The hypothetical build-out for a combined business/residential development for the TDB District done by MAPC for the two lots that make up Crosby's Market (5.44 acres) was 63 units. To meet the MBTA Communities requirement, the site would need to accommodate approximately 82 units to meet the 15 units per acre requirement and possibly more to meet the district unit capacity requirement if some adjacent areas had a density lower than 15 units per acre.

I think the Planning Board and the Select Board need to discuss whether the Town should even move forward with complying with the MBTA Communities requirement since there it will require significant amount of work by Town staff to develop the Action Plan, as well as the need to hire an outside consultant to assist in the development of proposed zoning.

The Planning Board and Select Board should also have a conversation with the Finance Committee regarding the comments raised about the TDB District Zoning amendment that various fiscal and infrastructure analyses were needed before any amendment is made.

Zoning is a regulatory tool that set parameters for uses and associated requirements for the physical development of a property. There are many other factors that go into the creation of a development proposal, such as the physical characteristics of the property, the permitting, the type of uses, the size and the financial feasibility of the development. It is not feasible to do a fiscal or infrastructure analysis for most Zoning Bylaw amendments, and definitely not possible for a multi-family zoning district the meets the MBTA Communities Requirements. This fact is even recognized in these Guidelines with statements like *"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... it is assumed that housing developers will design projects that work within existing water and wastewater constraints."*