



March 21, 2022

Secretary Michael Kennealy
Executive Office of Housing and Economic Development
1 Ashburton Place, Room 2101
Boston, MA 02108

Dear Secretary Kennealy:

I am writing to share MAPC's public comments on the draft guidelines for the new Section 3A of M.G.L. Chapter 40A. Of the 175 communities across the Commonwealth subject to these new requirements, 97 are in the MAPC region.¹ The following comments reflect MAPC's position on how the guidelines can best (1) advance the objectives of the law and (2) position municipalities to comply with the requirement. They are rooted in analysis by MAPC staff, input from housing policy experts, and feedback from our member municipalities.

Equity

I'd like to convey MAPC's enthusiasm for the principles outlined in section 3(b) of the guidelines, which overlap with many goals from our regional plan, *MetroCommon 2050*, adopted in November 2021. We agree that all MBTA communities should contribute to the production of new housing and that areas with safe and convenient transit access are especially appropriate for multifamily housing. The guidelines, however, do not explicitly include principles around equity. It is paramount that opportunities like Section 3A be used to redress the racial inequity and disparate impacts of longstanding housing practices that have excluded people from many communities in the Commonwealth, including policies that continue to this day. Towards that end, MAPC strongly believes the guidelines should provide communities with the tools to zone for affordable units and larger units suitable for families to meet the most pressing needs in the housing field and to make a significant dent in the region's segregation by race and income.

- **The guidelines should provide incentives for communities to adopt inclusionary zoning for their qualifying district or sub-districts. We recommend giving extra weight to deed-restricted affordable housing units when calculating unit capacity.** In districts where affordable units are required, a unit serving households at or below 80% of Area Median Income (AMI) could count as, say, 1.5 units toward minimum unit capacity, while a unit serving households at or below 50% of AMI could count as 2 units. This would enable communities to zone for slightly fewer units if they require affordable housing through inclusionary zoning or other means. For example, a district might allow for 100 units on a given parcel, while also requiring that 20 of the units are affordable at or below 80% AMI. In this case, the calculated unit capacity is 110: the number of market-rate units (80) plus the "weighted" number of affordable units (20 x 1.5=30). This change would encourage municipalities to establish mandatory inclusionary zoning policies when they otherwise would have little incentive to do so. With reasonable weights, the impacts on overall capacity will be relatively small while the number of affordable units produced could be quite large. To ensure that inclusionary zoning is not used as a barrier to development, the guidelines should require a financial feasibility analysis for mandatory set-asides above 15%.

¹ Our remaining four communities are Boston, which is exempt from Chapter 40A, and Hudson, Bolton, and Milford, which are not MBTA communities.

- **While the guidelines stipulate districts cannot include age restrictions or place limits on the size of units, number and size of bedrooms, or number of occupants, the guidelines should also address other zoning barriers to multi-bedroom units. First, guidelines should require district parking regulations to be set on a per-unit basis rather than per bedroom.** Parking requirements based on the number of bedrooms discourage developers from building 3-plus bedroom units, which require more floor area *and* more parking area without commanding proportionally higher rent. Requiring municipalities to standardize parking requirements across unit sizes allows developers to make bedroom mix decisions based on the market. Additionally, EOHEd should indicate its intention to review zoning for similar bedroom-based standards that could effectively discourage family-sized units.
- **Second, EOHEd can advance family-sized housing objectives by requiring transparent and inclusive assumptions about unit size and bedroom mix when calculating unit capacity.** For example, any municipality that establishes density limits based on floor area will need to make assumptions about the bedroom distribution and corresponding unit sizes used to estimate unit yield for each district or subdistrict. If a municipality assumes all 1-bedroom and/or studio units, the yield estimate will be higher than if some larger units were in the mix. **The guidelines should require municipalities to assume a minimum of 15% family-sized units when calculating unit capacity.** EOHEd should also establish guidelines for how to document, apply, and report such assumptions. These additions plainly advance the intention of the statute to meet the need for family housing.

Location of Districts

For the law to result in truly transit-oriented housing development, and not just housing that happens to be adjacent to transit, the guidelines should include additional language.

- **The guidelines should require at least $\frac{3}{4}$ of the district rather than $\frac{1}{2}$ to be within a $\frac{1}{2}$ -mile walking distance to the corresponding station and establish standards for walking distance.** Currently, municipalities could create districts that are easily a mile or more walking distance from the transit station, which would not advance the objectives of the legislation. The specific areas within a $\frac{1}{2}$ -mile walking distance can be easily determined using GIS data available from MassDOT, which should be shared with all municipalities. Municipalities should be allowed to submit their own walking distance calculations that account for planned projects or unmapped connections. Municipalities that wish to locate more than $\frac{1}{4}$ of their district *outside* of the station area should be required to demonstrate that either a) the station area is unsuitable for development based on specific criteria established by EOHEd or b) the proposed location is superior with regard to transportation efficiency as measured through readily available metrics such as transit access to jobs or HUD's Location Affordability Index.
- **The guidelines should expressly allow communities with more than one station area to split their unit capacity across subdistricts in more than one station area. The guidelines should also direct municipalities with more than one station area to prioritize rezoning in the station area(s) more consistent with the Commonwealth's Sustainable Development Principles, and with higher levels of transit access to jobs, location affordability, and local walkability.** Multi-station area municipalities that locate districts or subdistricts in less-accessible station areas should be required to justify the proposed location.

- **EOHED should consider reducing the minimum acreage from 50 acres to 25 acres to allow smaller districts more appropriate for small, slow-growth communities, while requiring districts to contain a minimum number of developable parcels in order to ensure multiple options for developers.** This would prevent sprawling patterns of development and encourage more compact village style development.² Compactness is an essential element of successful transit-oriented development, enabling residents to walk to nearby amenities and the transit stop. While there are good reasons to ensure that a district includes multiple parcels and options for developers, oversized districts could end up experiencing scattered development that does not create a sense of place or walkability.

While beyond the scope of the guidance, it is also imperative that transit service be maintained if not enhanced. If municipalities are to undertake complicated rezoning efforts to facilitate transit-oriented development, then that transit must be reliable and accessible enough to encourage ridership.

Determination of “Reasonable Size”

MAPC applauds EOHED for setting an ambitious, forward-looking target for zoning capacity. The potential increase in zoning capacity—344,000 housing units—is at a scale sufficient to address the next 20 years of multifamily housing demand. By comparison, MAPC and the University of Massachusetts Donahue Institute have previously forecast that the municipalities subject to the law may grow by approximately 215,000 households overall from 2020 to 2040. Given demographic trends and policy goals, it’s reasonable to plan for 75% of this net demand to be met in transit-accessible locations. This translates to about 165,000 units. Therefore, the *regionwide* minimum unit capacity is roughly double the likely demand for multifamily housing in transit areas over the next 20 years. This is an appropriate ratio between capacity and demand.

However, the scale of local rezoning necessary to achieve these outcomes has raised great concern among MAPC’s municipalities, even those supportive of the overall mandate. Rezoning is a complex undertaking under any circumstances; in this case, the scale and timeline for compliance will require significant investment of staff and consultant time as well as political capital. Careful planning is needed to respond to infrastructure capacity limitations and to avoid unforeseen undesirable outcomes, such as demolition and replacement of existing naturally affordable housing. Higher targets also bring greater community opposition and increase the potential that municipalities will opt out of the requirement altogether.

- To reconcile the need for a substantial long-term increase in multifamily zoning capacity with local concerns about the scale and pace of rezoning, **MAPC suggests that the guidelines allow a phased approach that sets an overall lower target for the initial rezoning, followed by increases in the minimum unit capacity at regular intervals.** A phased approach would initially reduce the percentages for each transit service type by, say, two-thirds, thereby requiring municipalities to zone for one-third of the required capacity for the initial deadlines at the end of 2023 and 2024. For example, rapid transit communities would need to zone for a minimum unit capacity equal to 8.3% of their existing stock (one third of 25%). Communities would then have a

² While the definition of multifamily housing in the legislation precludes “missing middle” housing typologies such as clustered homes and duplexes, these housing types are appropriate for many transit areas, not to mention less intimidating for many communities. Furthermore, clustered homes and duplexes can be developed in such a way as to meet the minimum density requirement of 15 units per acre.

set period (e.g., 3 or 5 years) to again increase capacity by their set percentage (e.g., another 8.3% for rapid transit communities), followed by another interval and increasing requirement, so that at the end of six or ten years the full percentage for each service type is reached. This provides a predictable timeline for revisiting and improving district zoning, supporting the requirement's long-term success, while also creating substantial zoning capacity in the short term (115,000 units by the end of 2024.) Such an approach would be similar to the California Regional Housing Needs Allocation process, which sets a framework for municipalities to expand and improve their multifamily zoning districts on a predictable schedule. Communities should be permitted or even incentivized to zone for more than required during the initial rezoning if they don't want to repeat the process multiple times.

- **The guidelines should set a lower minimum unit capacity of no more than 375 units, and the effective capacity (minimum unit capacity/2020 housing units) should be capped at 25% (or a phased equivalent) so that no community is required to do more—in relative terms—than a rapid transit community.** MAPC analysis found the current 750-unit minimum applies to nearly half of the MBTA communities—generally those with the least transit access—and results in effective capacity requirements of up to 70% of existing housing stock. MAPC believes that such requirements are both unreasonable and undesirable; they have the potential to create capacity for tens of thousands of units of housing in areas that are largely car dependent. While it is important to ensure sizeable districts with many development options, it is also true that compactness is an essential element of transit-oriented development and smart growth, and a lower minimum unit capacity will help advance that objective.
- **MAPC continues to recommend that the guidelines use net unit capacity as the standard for compliance** rather than allowing municipalities to demonstrate they meet the minimum unit capacity without netting out existing units or accounting for financial feasibility. Dozens of municipalities have existing neighborhoods at or above the minimum density of 15 units per acre; for many municipalities, simply rezoning to “legalize” these neighborhoods at their existing density could meet the minimum unit capacity requirements without allowing for much new growth. MAPC analysis suggests such rezoning could reduce the cumulative net capacity by *at least* a quarter, with the greatest decreases among rapid transit communities. Creative rezoning by municipalities could reduce the effective net yield even further. As a result, the entire mandate may not have the impact it would if the zoning capacity were for *new* units. It could also lead to misunderstanding and mistrust when municipal officials reassure community members that the capacity in the district isn't *really* the number of new units that might be built.
- **MAPC encourages EOHED to reconsider the use of a formula based approach, such as [one previously demonstrated by MAPC](#), that provides a tailored minimum unit capacity for each municipality, rather than assigning minimum unit capacity requirements based on transit categories.** Currently, the resulting percentages do not bear a consistent relationship to local level of transit service, housing need, or development opportunity and constraints. Some similarly situated communities have very different requirements based on their transit service designation. While seemingly simple, the service type classification could be challenged as arbitrary. MAPC's proposed formula combines information about transit accessibility to jobs, level of housing exclusion, and potentially developable transit station area to a set minimum unit capacity target for each municipality. The process starts with a baseline yield set by EOHED (say, 6% of existing housing stock). The formula adjusts the yield up or down based on the three factors; EOHED determines the relative weights of each factor and the total “spread” between high and low yield percentages. Variants on this formula could be used for MBTA adjacent

communities without a transit station area and for those where the minimum requirement results in an unreasonably high yield (e.g., 50% of existing stock.) For example, yield for adjacent communities could be calculated based only on housing exclusion measures. The formula could also cap the effective yield at two or three times the baseline yield, so no rural communities are subject to excessive requirements.

Minimum Gross Density

The statute indicates that a qualifying district must have a minimum gross density of 15 units per acre. MGL Chapter 40A defines the “gross density” measurement as inclusive of land occupied by public rights of way and other undevelopable land. This means that the actual allowable density on the average parcel will need to be higher than 15 units per acre to achieve that same minimum gross density at the district level. This is confusing as well as hard for municipalities to message; how can they defend passing a minimum density of 20 units per acre, for example, when the statute and the guidelines only require 15? It’s also inconsistent with typical local density regulations.

- **The guidelines or other materials from HED should acknowledge this discrepancy and include language that explains why it is necessary for compliant zoning to achieve an actual density of 15 units per acre.** Municipalities need to be able to point to state language as a defense for their proposed density.

Allowing Multifamily Housing “As of Right”

The guidelines stipulate that “as of right” development means that construction and occupancy of multifamily housing is allowed in the district without the need to obtain any discretionary permit or approval.

- **The guidelines should clarify that, while overlay districts in general are an acceptable mechanism to satisfy the requirements of Section 3A, a floating overlay district is not.** Floating overlays require two sets of approvals: one to apply the overlay in a particular location and a second to approve the project itself. They do not constitute by-right development.
- **The guidelines should establish a methodology for EOHED to monitor the extent to which site plan review is being used to slow or otherwise thwart development and revisit the guidelines in three years if there is need to remedy this.** A municipality disinclined towards housing production could potentially use this tool to impose undue conditions on development, rather than to ensure development meets a community’s reasonable design goals.

Determination of Compliance

Some of the most frequently voiced questions from municipalities about Section 3A relate to the calculation of yield, area, and density. The guidelines do not provide detailed instructions about how zoning features and other elements (such as wetlands or water and sewer capacity) should be considered in estimating whether the zoning meets capacity targets. EOHED has addressed many of these questions, but the level of detail provided so far still delegates many complex decisions to municipalities. While this enables more local control, it is also highly inefficient and creates an opportunity for municipalities to create methodologies that overstate capacity. Each municipality or consultant will have to develop its own approach to determining yield and compliance with the guidelines. A community could make a good faith effort to adopt zoning only to have it ruled ineligible. Estimates developed with different methods and different data sources will be hard to compare or even validate. EOHED has indicated its intention to

provide additional guidance and resources later, but the details of these calculations are essential elements of the program that should be documented in the guidelines.

- **To achieve transparency, the guidelines and review standards should utilize open and standardized information about existing conditions to determine capacity, area, and transit proximity, using formulas and tools that are easily reproducible and verifiable.** The increasing availability of statewide datasets about parcels, development activity, zoning, sewer service, and other development factors allows for consistency across municipalities, enhancing fairness and efficiency. While not all such datasets are comprehensively available, the frameworks exist for municipalities to provide information in a standard format.
- **The guidelines should include or reference step-by-step workflows for determining unit capacity estimates using standardized datasets, local details, and zoning requirements.** The 2020 guidelines for the 40B General Minimum Land Area provide an example of how a complex, locally-specific analysis can be standardized. In this case, the guidelines should specify how to map “developable land” using readily-available datasets, how to document zoning parameters in a standard format (setbacks, height, FAR, parking requirements, etc.), and how to calculate unit capacity for each parcel. By providing communities with detailed instructions on how to calculate unit capacity using standard data, the guidelines could reduce the cost, burden, and variability inherent in requiring municipalities to determine the yield independently.
- **MAPC recommends that EOHEC dedicate resources to the procurement of a decision support tool available to all municipalities to help with determining minimum unit capacity.** A website or application, pre-populated with available data and transparent formulas, could enable users to draw zoning district boundaries, specify density assumptions, and receive an estimate of district capacity. This will allow communities to focus on planning and consensus building instead of mapping and calculations.
- **The guidelines should provide a detailed framework for how municipalities should determine “limitations...resulting from inadequate water and sewer infrastructure.”** For municipalities or districts lacking centralized sewer systems, the guidelines must specify how the capacity analysis should account for the leaching area needed to support the estimated yield on each parcel, and how to demonstrate that the estimated yield is not limited by wastewater disposal requirements. Existing data on the extent of soils suitable for subsurface disposal based on NRCS classification will be essential for this analysis. For parcels in areas proposed to be served by package treatment, the capacity analysis should identify potential treatment and discharge sites.
- **The guidelines should also specify how municipalities will respond to limitations on water withdrawals and wastewater treatment established through the Water Management Act and how to ensure consistency with safe yields identified through the Sustainable Water Management Initiative.** Involvement of the DEP Water Management Program will be essential to determine the unit capacity that is “reasonable” for a given watershed. Without careful attention to this issue, municipalities may be adopting zones that can never be developed due to water limitations.³

³ For municipalities without public sewer, limitations on certain forms of package treatment may be a barrier to development within the new zones. While outside the scope of these guidelines, MAPC recommends EOHEC address issues with existing environmental regulations. Specifically, Massachusetts wastewater disposal regulations require projects of more than 44 units to use wastewater disposal practices that are expensive to permit, construct, operate, and maintain. Recent developments in wastewater disposal technology can provide a more cost-effective approach for mid-sized developments while also protecting

Submittal Requirements

Implementation of Section 3A should minimize subjective review, loopholes, and opportunities for municipalities to avoid appropriate compliance, which is inevitably unfair to communities that make a good faith effort to comply. This will ensure that the program is implemented fairly and equitably, even in wealthy communities with access to sophisticated lawyers and consultants.

- **EOHED should offer towns the option of a preliminary review process before zoning goes to Town Meeting;** otherwise, they could mistakenly adopt non-compliant zoning and need to wait a whole year before undertaking another adoption campaign to make what could be relatively minor adjustments. This process could be similar to DHCD's 40R compliance review.
- **All municipal submittals should be made in electronic format, with machine-readable information (shapefiles, data tables) about district boundaries, zoning standards, and other information.** While it is not feasible to expect municipalities to use a "standard" approach to their zoning, given the existing complexities of local conditions and existing land use codes, municipalities should be required to report certain basic elements of their qualifying zoning in a manner that is comparable across municipalities. For example, regulations related to height, unit density, parking requirements, lot coverage, allowable area, inclusionary zoning requirements, and other important factors should all be reported using the same units and definitions. This would enable information about the districts to be combined into a regional picture important to both developers and stakeholders.
- **The guidelines should specify that municipalities must notify DHCD and RPAs in the event of zoning amendments or rezoning during the 10-year compliance term.** If new zoning is adopted that is no longer in compliance with Section 3A, the municipality's status should be changed to non-compliant.

Conclusion

Section 3A is a tremendous opportunity to address the Commonwealth's housing crisis. With strong guidelines, it will not only help meet profound housing need, but also position our communities to become more inclusive and the region to become more sustainable. I appreciate your consideration of MAPC's comments on the draft guidelines and would be happy to answer any questions you may have. I look forward to the final guidelines for Section 3A and to working with our communities to adopt zoning that expands housing choice.

Sincerely,



Marc D. Draisen
Executive Director

human health and the environment. The State should consider a number of options to modernize its regulations, including a new tier of regulations for 45-to-90-unit developments and new ways of calculating flow rate for large developments.