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**GUIDANCE FOR LOCAL OFFICIALS ON
DETERMINING VOTING THRESHOLDS FOR
ZONING ORDINANCES AND BYLAWS**

Chapter 358 of the Acts of 2020 (sometimes referred to as the economic development legislation of 2020) made several amendments to Chapter 40A of the General Laws, commonly known as the Zoning Act. Among these amendments are (1) changes to section 5 of the Zoning Act, which reduce the number of votes required to enact certain kinds of zoning ordinances and bylaws from a $\frac{2}{3}$ supermajority to a simple majority; and (2) changes to section 9 of the Zoning Act, making similar changes to the voting thresholds for the issuance of certain kinds of special permits.

Section 100 of said chapter 358 directs “[t]he executive office of housing and economic development [to] issue guidance to assist local officials in determining the voting thresholds for various zoning amendments. Such guidance shall be assembled in consultation with the department of housing and community development, the Massachusetts attorney general's municipal law unit, and Massachusetts Housing Partnership.” This guidance is intended to comply with that directive.

This guidance was initially posted on February 26, 2021 and was updated on March 15, 2021, April 8, 2021 and May 20, 2021. On May 20, the guidance was restructured to include topic headings and reordered certain questions under the relevant headings. The date listed with each question and answer below indicates when posted, and, if relevant, any subsequent updates.

GENERAL OVERVIEW

Q: Where does the Zoning Act apply?

A: The Zoning Act applies to all cities and towns in Massachusetts except the City of Boston, which has its own zoning enabling act. (*February 26, 2021*)

Q: What kinds of zoning ordinance or bylaw can be enacted with a simple majority vote?

A: Under the newly amended section 5 of the Zoning Act, a zoning ordinance or bylaw can be enacted by a simple majority vote, rather than the $\frac{2}{3}$ supermajority that applies to other zoning amendments, if that ordinance or bylaw does any of the following:

1. Allows for multi-family housing or mixed-use developments “as of right” in an eligible location.
2. Allows for open space residential development as of right.
3. Allows accessory dwelling units, either within the principal dwelling or within a detached structure on the same lot, as-of-right.
4. Allows by special permit accessory dwelling units in a detached structure on the same lot.
5. Reduces the parking requirements for residential or mixed-use development under a special permit.
6. Permits an increase in the permissible density of population or intensity of a particular use in a proposed multi-family or mixed-use development that requires a special permit.
7. Changes dimensional standards such as lot coverage or floor area ratio, height, setbacks, minimum open space coverage, parking, building coverage to allow for the construction of additional residential units on a particular parcel or parcels of land.
8. Provides for the transfer of development rights or natural resource protection zoning in instances where the adoption of such zoning promotes concentration of development in areas that the municipality deems most appropriate for such development, but will not result in a diminution in the maximum number of housing units that could be developed within the municipality.
9. Adopts a smart growth or starter home districts in accordance with section 3 of Chapter 40R of the General Laws.

Key terms such as “multi-family housing,” “mixed-use development,” “accessory dwelling unit,” “transfer of development rights,” “natural resource protection zoning,” and “eligible location” are now defined in section 1A of the Zoning Act. (*February 26, 2021*)

Q: Who decides which voting threshold applies to a particular zoning proposal?

A: Section 5 does not specify who determines whether a proposed zoning ordinance or bylaw is the kind that can be approved by a simple majority vote. The proponent of a zoning ordinance or bylaw that allows or facilitates the development of new housing should include in the petition a statement explaining if it meets any of the criteria for being approved by a simple majority vote. The Zoning Act provides that no vote on a zoning petition may occur until after the planning board

in a city or town, and the city council (or a committee designated or appointed by the council) each has held a public hearing on the proposal. Additionally, no vote to adopt a zoning ordinance or bylaw may be taken until the planning board has submitted a report and recommendations to the town meeting or city council, or 21 days have elapsed after the hearing without submission of such report. It is recommended that the planning board include in this report a determination of which voting threshold applies to the zoning proposal. It is further recommended that the legislative body affirm the voting threshold in its vote on the subject zoning amendments. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to “preside and regulate the proceedings, and decide all questions of order”—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15.

Under section 32 of chapter 40 of the General Laws, all zoning bylaws adopted by a town must be submitted to the Attorney General for review and approval. A request for approval must include adequate proof that the town has complied with all of the procedural requirements for the adoption of the bylaw. If the Attorney General finds an inconsistency between the proposed bylaw and state law, the bylaw or portions of it may be disapproved. (*February 26, 2021; updated May 20, 2021*)

Q: What happens if a proposed zoning ordinance or bylaw includes some changes that can be adopted with simple majority vote, and other changes that require a 2/3 supermajority?

A: Section 5 as amended provides that “any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote.” A proposed zoning amendment cannot be adopted by a simple majority vote if it is combined with an amendment that requires a 2/3 supermajority. Drafters of new zoning proposals should take care not to combine provisions that require different voting thresholds, so that proposals that will encourage new housing production will get the benefit of the simple majority threshold. If a municipality desires to combine proposals with different voting thresholds, the municipality should first confer with municipal counsel, and review the guidance issued by EOHED. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. (*March 15, 2021; updated April 9 and May 20, 2021*)

Q: Should a city or town in the process of updating its zoning code make changes to conform to the statutory changes?

A: A city or town may decide to review its zoning ordinances or by-laws and consider making changes to be consistent with the statute, but such conforming changes are not required for the new thresholds to apply. (*March 15, 2021*)

TRANSITION TO THE NEW LAW

Q: My board is considering a zoning amendment that would qualify for the majority threshold set forth in amended section 5 and was filed and had a public hearing before the effective date of the recent changes to Chapter 40A. Does the new threshold apply to zoning proposals that were initiated before the Zoning Act was amended?

A: Yes. The amendments to section 5 of Chapter 40A became effective immediately on the date the Governor signed chapter 358 of the Acts of 2020 (January 14, 2021). The new voting thresholds apply to any zoning amendment that comes before a city council or town meeting for a vote after that date, regardless of when the petition was filed or when the public hearing was opened. (*March 15, 2021*)

Q: Does the new voting threshold for certain special permits likewise apply to projects that filed a special permit application prior to January 14, 2021? What if the initial hearing was opened prior to January 14, 2021, but a vote has not yet been taken?

A: Yes. If a project qualifies for a special permit by majority vote, that threshold applies to any vote by a special permit granting authority taken after January 14, 2021, regardless of when the application was filed or the hearing opened. (*March 15, 2021*)

Q: Does a municipality need to change its zoning ordinances or by-laws in order for the new voting threshold to apply?

A: No. A town or city does not have to take any action for the amendments to Chapter 40A to take effect. There is no “opt in” provision. The changes apply automatically to all cities and towns except Boston, which has its own zoning statute. (*March 15, 2021*)

Q: My town is planning a comprehensive update of our zoning bylaws to eliminate inconsistencies and make the bylaws easier to use (for example, by consolidating all definition in a new section). Can this be done by a vote on a single article that amends and restates the entire zoning code, as originally planned? Or should we delay the vote so that the existing provisions that qualify for a simple majority vote can be presented as separate articles?

A: You may proceed with a vote as planned, consistent with the following guidance. Section 5 of the Zoning Act now provides that “any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote.” The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. If a city or town is considering an existing proposal to amend and restate its entire zoning code with a single vote, and there is not enough time to separate amendments that have different voting thresholds, it may proceed as planned rather than starting over or delaying the vote. Although the statute does not say so expressly, in the view of EOHEd, the combined article may be approved by a $\frac{2}{3}$ vote. The Attorney General has not yet taken a position on this question. The city or town alternatively may elect to delay the vote and separate out the zoning provisions that have different approval thresholds. Going forward it is the recommendation of EOHEd that proposals to amend and restate an entire zoning code should be drafted so that housing-friendly provisions that qualify for approval by a simple majority approval are considered separately, if possible. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to “preside and regulate the proceedings, and decide all questions of order”—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. (*April 9, 2021*)

MIXED-USE DEVELOPMENT

Q: My town is considering a zoning change that would allow a mixed-use project in a particular zoning district. Does the amendment qualify for the majority threshold if the zoning amendment will permit projects that are primarily commercial rather than residential?

A: The Zoning Act was amended to define “mixed-use development” as “development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.” There is no requirement that the mix of uses be in any particular ratio or configuration. A zoning amendment will qualify for the majority threshold as long as it permits mixed-use development, as defined in the Zoning Act, either as-of-right or by special permit, in an eligible location. *(March 15, 2021; updated May 20, 2021)*

Q: My town is considering a new overlay district in which a mixture of retail, hospitality, recreational, entertainment, commercial and other uses will be allowed by right. Multifamily and mixed-use developments are among many types of uses that will be allowed in the new zone, along with things like retail, hotels, commercial recreational facilities, and entertainment uses. The new overlay district does not require a proposed project to include a residential component. Does this overlay district qualify for the simple majority?

A: Section 5 of the Zoning Act now provides that “any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote.” The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. It also is intended to ensure that zoning proposals that otherwise would require a $\frac{2}{3}$ vote are not approved by a simple majority simply because a multifamily use or other residential use has been added to the mix of allowed uses. This overlay district appears to conflict with the statute’s prohibition on combined articles, since it combines uses that require a $\frac{2}{3}$ vote with uses that may potentially qualify for a simple majority vote. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to “preside and regulate the proceedings, and decide all questions of order”—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(April 9, 2021)*

Q: Section 5 says that a zoning amendment requiring a simple majority vote shall not be combined with amendments that require a $\frac{2}{3}$ majority vote. But it also says that a simple majority is sufficient to approve mixed-use development in an eligible location. When a zoning amendment permits housing and other uses, how do I know which threshold applies?

A: You must determine if the zoning amendment permits “mixed-use development” as defined in the Zoning Act: “development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.” If a zoning amendment is drafted to permit a mixture of uses in a new zone, and also *requires* that all future uses in that zone include a residential component, then the amendment allows “mixed-use development” as defined in the statute, and qualifies for the simple majority, as long as the affected

land area is an “eligible location.” Municipalities that want to approve a mixed-use overlay district by simple majority should take care to draft the article so that individual projects must include a residential use. (*May 20, 2021*)

ELIGIBLE LOCATIONS

Q: How do I know if a particular land area qualifies as an eligible location?

A: Section 1A of the Zoning Act defines “eligible locations” as areas that by virtue of their infrastructure, transportation access, existing underutilized facilities or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts, including without limitation: (i) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; or (ii) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns and existing rural village districts.

Section 5 does not specify who determines whether the land area subject to a proposed zoning ordinance or bylaw is an eligible location. The proponent of a zoning ordinance or bylaw that allows or facilitates the development of new housing should include in the petition explaining if the land area affected meets any of the criteria for an eligible location. As noted above, no vote to adopt a zoning ordinance or bylaw may be taken until the proposal has received a public hearing and the planning board has submitted a report with recommendations to the town meeting or city council, or 21 days have elapsed after the hearing without submission of such report. It is recommended that the planning board include in this report a determination of whether the affected land area is an eligible location, when such a determination is relevant to the voting threshold. (*February 26, 2021*)

Q: Is there any additional guidance for determining eligible locations?

A: The same definition of “eligible location” that appears in section 1A of Chapter 40A also appears in section 2 of Chapter 40R. The regulations implementing Chapter 40R (760 CMR 59) set forth detailed criteria that the Department of Housing and Community Development (DHCD) applies when it determines if a land area is an eligible location under that statute. Although 760 CMR 59 does not apply to Chapter 40A, municipalities may reasonably look to those regulations for additional guidance on what areas are should be deemed eligible locations under Chapter 40A.

Under the statutory definition, a land area qualifies as an eligible location if it is located “near” a transit station, including rapid transit, commuter rail or bus or ferry terminals. Any parcel that is at least partially within 0.5 miles of the kind of transit station listed should be deemed to be an eligible location. In addition, the statute includes within the definition of “eligible location” parcels that are within “an area of concentrated development, including a town or city enter, or other existing commercial districts, or existing rural village district.” All other land areas may be determined to be “eligible locations” if, in the judgment of the planning board, the land area is a highly suitable location for residential or mixed-use development based on its infrastructure, transportation access, or existing underutilized facilities.

If there is uncertainty about whether a zoning proposal affects an eligible location, the municipality may request an advisory determination from the Executive Office of Housing and Economic Development. Such a request must be made by the mayor, city council, board of aldermen, or planning board (when the zoning amendment is proposed in a city); or by the select board or planning board (when the zoning amendment is proposed in a town). A request may not be made by an individual member of the council or board. Communities are encouraged to submit their request for an Advisory Opinion as early as possible in the zoning amendment process. The request should be made by completing the application at the following website: mass.gov/forms/request-an-advisory-opinion-on-ch40A-eligible-locations. EOHEd will endeavor to provide a written advisory determination within 30 days of receipt of a complete request. (February 26, 2021)

ACCESSORY DWELLING UNITS

Q: My town will be voting on a zoning amendment to permit accessory dwelling units, up to 1,200 square feet, as of right in the residential A zoning district. Does this amendment qualify for the simple majority threshold?

A: No. A zoning amendment to permit “accessory dwelling units” by right only qualifies for the simple majority vote if the proposal is consistent with the Zoning Act’s definition of accessory dwelling unit. The statutory definition limits the size of the unit to “not larger in floor area than ½ the floor area of the principal dwelling or 900 square feet, whichever is smaller.” Communities may add size or other restrictions, but the zoning amendment does not qualify for simple majority if it permits accessory dwelling units larger than specified in the statute. (May 20, 2021)

SPECIAL PERMITS

Q: What is a special permit and what are the required thresholds for special permit votes?

A: Section 9 of the Zoning Act provides that zoning ordinances or bylaws can provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Zoning ordinances or bylaws may also provide for special permits authorizing increases in density or intensity of a particular use in a proposed development if the petitioner or applicant agrees to conditions that serve the public interest. Special permits may also issue for other purposes set forth in section 9.

A special permit can be granted a 2/3 vote of boards with more than 5 members, a vote of at least 4 members of a 5-member board, and a unanimous vote of a 3-member board. But, the recent amendments to section 9 provide that a special permit may be issued by a simple majority vote if the special permit does any of the following:

- Permits multi-family housing that is located within ½ mile of a commuter rail station, subway station, ferry terminal or bus station; provided that not less than 10% of the housing is affordable to and occupied by households whose annual income is less than 80% of the area median income and affordability is assured for a period of not less than

30 years through the use of an affordable housing restriction.

- Permits mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns and rural village districts; provided, that not less than 10% of the housing meets the same standard of affordability as noted above.
- Permits a reduced parking space to residential unit ratio requirement, provided such reduction in the parking requirement will result in the production of additional housing units.

(February 26, 2021)

ADDITIONAL GUIDANCE

Q: Where can I find additional guidance about the voting thresholds for zoning ordinances and bylaws?

A: Periodic updates to this guidance will be posted at www.mass.gov/info-details/housing-choice-and-mbta-communities-legislation. Questions about zoning thresholds that are not answered in the guidance can be directed to the Executive Office of Housing and Economic Development at eohezoning@mass.gov. *(February 26, 2021, updated May 20, 2021)*