March 28, 2022

VIA ELECTRONIC SUBMISSION

Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, Massachusetts 02114
Attention: Jennifer D. Maddox, DHCD Undersecretary

Re: Comments to the Draft Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act

Dear Undersecretary Maddox:

The Massachusetts Municipal Lawyers Association ("MMLA") joins with the Massachusetts Municipal Association ("MMA") in providing the following comments to the Department of Housing and Community Development's ("DCHD") draft Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act (the "Draft Guidelines").

By way of context, our organizations support the goal of the Commonwealth in the adoption of M.G.L Chapter 40A, Section 3A ("Section 3A") to encourage local zoning that supports transit-oriented development with a particular focus on the creation of multi-family housing near public transit stations. We acknowledge that there may be some number of the 175 MBTA Communities, particularly the more urban or densely developed communities, that may feel they are already poised to demonstrate compliance and, therefore, are comfortable that they can work within the Draft Guidelines. Both of our organizations, however, have heard from a greater number of municipal officials who express significant, grave concerns about the Draft Guidelines, including, among other concerns, that they are cumbersome, contain unrealistic requirements and timeframes and, with the very limited technical assistance that will be available, create an unfunded burden upon their municipalities. Our organizations are therefore concerned that the goal of Section 3A cannot be successfully achieved through the Draft Guidelines in their current form.

These are not new issues – indeed, MMA raised significant concerns when this legislation was pending, and those concerns have not been resolved (please see MMA's January 7, 2021 letter to Governor Baker at this link).

This comment letter includes a legal analysis, pointing out errors and inconsistencies with Section 3A, including instances where the Draft Guidelines exceed the statutory language, and a

review of the practical implications of the Draft Guidelines. It also includes as an attachment a redlined version of the Draft Guidelines, pointing to specific provisions of the Draft Guidelines that are discussed in this comment letter. We acknowledge that these comments highlight what our members have flagged as flaws in the Draft Guidelines, but these comments are offered, and we hope they are received, as constructive criticism and a basis for refining any final version of the Guidelines. More importantly, we believe that the goal of Section 3A would be better achieved through a revised approach as we outline herein, and we offer the assistance of our organizations in the recrafting of the Guidelines in the interest of a greater likelihood of success that Section 3 zoning districts will be adopted in more MBTA Communities.

Summary of Comment Letter:

- *While the current focus is on crafting workable Guidelines, it is important to note from an overarching policy perspective, that Section 3A is an inadequate substitute for the needed improvement and expansion of transit facilities, which would be the true driver of housing development.*

- *The approach, structure and scope of the Draft Guidelines are at odds with the goal of Section 3A to create the capacity for multi-family housing near transit stations through local rezoning. Likewise, the "General Principles of Compliance" in the Draft Guidelines, particularly the fostering of development of a scale, density and character that are consistent with a community's long-term planning goals", and the process set forth in later sections for achieving compliance, are internally inconsistent.*

- *The Draft Guidelines in some respects exceed the statutory authority granted under Section 3A and the goals of Section 3A can be met without imposing requirements in excess of such statutory authority.*

- *The provisions of the Draft Guidelines which govern the determination of the zoning district, including the location of districts and the requirements for parcel-by-parcel analysis, are cumbersome and impractical.*

- *The Draft Guidelines are inherently contradictory in setting forth a minimum district size and minimum unit capacity and at the same time allowing for unlimited flexibility in the state agency's determination of compliance with the Guidelines on a community-by-community basis. While allowing for differing conditions among communities is both necessary and prudent, the Draft Guidelines as currently structured lend themselves to the real risk, albeit an unintended consequence, of inequitable implementation of the Guidelines.*

- *A more positive approach that would have a higher likelihood of success is possible. Such an approach would look at communities where they are today with respect to existing transit facilities and multi-family housing and identify opportunity for development around existing transit stations and future transit expansions, while retaining the underlying character of each community.*

A. Section 3A Lacks the Appropriate Tools and Framework to Increase Transit-Oriented Development

As organizations that represent the interests of the affected MBTA Communities, it is important for MMLA and MMA to also take this opportunity to call out the "elephant in the room". The state action that could best contribute to economic development, access to employment and more true transit-oriented development is not addressed by Section 3A or the Draft Guidelines. That action would be full state funding for the maintenance of a reliable public transit system and expansion of transit services outside of existing communities with transit stations to the so-called adjacent communities and beyond. Several municipal officials have asked at recent presentations of the Draft Guidelines about the state's plans to expand transit services in communities subject to Section 3A. Yet, state officials have deflected these questions. In many respects, with the adoption of Section 3A, the state is treating the symptom and not the cause of the lack of transit-oriented development – the cause being the lack of a robust public transit system. To borrow a phrase, if you (the Commonwealth) build it (transit), they (housing developments) will come.

It is further noted that in presentations of the Draft Guidelines, state officials have sought to distance the requirements of Section 3A and the Draft Guidelines from the Chapter 40B mandate. It is unclear why such emphasis has been made. However, it begs the question: Why haven't developers, who currently have the ability to bypass most local regulations (except where a valid local concern exists) in any zoning district, and build any type of housing, including multi-family housing, done so near transit locations in MBTA Communities, particularly adjacent communities? As of the December 21, 2020 Subsidized Housing Inventory, only 58 of the 175 communities (approximately one-third) have achieved the 10% statutory mandate of affordable housing units in the over 50 years since Chapter 40B was enacted. Since Chapter 40B permitting overrides local regulations, the lack of such housing construction cannot be blamed on local zoning. There are likely many factors, but they include the requirement that developers actually construct affordable housing at a subsidized price and a lack of interest in developing in communities with less housing demand, less amenities and resources, and/or lower market housing prices. Neither Section 3A nor the Draft Guidelines overcome the existing lack of developer motivation, only investment in transit infrastructure to more communities can.

Development that takes advantage of Section 3A zoning districts is likely to result in continued concentration of housing construction in already dense communities and/or those with the highest housing costs in the state because that is where the developer's profit is to be found. In addition, as discussed in more detail below, the Draft Guideline provisions that put the development "due diligence" burden on the communities rather than on the property owners/developers where the burden properly lies provides for windfalls for developers while significantly compounding impacts on municipal facilities and services.

Therefore, there is a significant risk that, while the opposite of what is intended, the Draft Guidelines may result in communities opting to forego eligibility for the state funding programs[1],

[1] It is noted that MBTA Communities do not currently reap the benefits of transit facilities at no cost. Pursuant to M.G.L. Ch. 161, §9, MBTA Communities "shall contribute to the Massachusetts Bay Transportation Authority State and Local Assistance Fund" and are subject to a significant annual assessment based on the statutory formula.

rather than undertake the substantial planning burden of compliance or adopting zoning that would allow large-scale residential development resulting in substantial impacts on local resources. This is a particular risk for smaller and adjacent communities with no local MBTA services and those of significant rural character.

All of the foregoing being said, set forth below is a potential way to structure the Guidelines in a manner that can achieve the goal of Section 3A to create new local zoning districts in a more practical and less burdensome manner.

B. The Draft Guidelines Exceed the Statutory Authority Conferred Under Section 3A

The Guidelines are limited by the scope of legislative mandate set forth in Section 3A. Section 3A(c) provides that DHCD, in consultation with the MBTA and MassDOT "shall promulgate guidelines to determine if an MBTA community is in compliance with this section." Under Massachusetts law, guidelines issued by an administrative agency do not have the force of law but are given some deference if the statute is broad without clearly stated requirements. With one exception, the determination of the "reasonable size" district, Section 3A is clear and concise in its requirements. Further, even if the Guidelines had the force of law that regulations carry, which they do not, regulations are themselves limited by the scope of the statute they implement. The Guidelines cannot impose obligations that are in excess of the underlying legislative action and that cannot be interpreted in harmony with the legislative mandate.

The provisions of Section 3A(a) are quite clear and quite limited (formatting and emphasis added):

> "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
>
> 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 Draft Guidelines exceed the authority conferred under Section 3A in the following ways:

1. Inclusion of Bus Stops

There is no reference to "bus stops" in Section 3A, which clearly references commuter rail stations, subway stations, ferry terminals and bus stations. Incorporating bus stops in the Draft

Guidelines in order to increase the requirements imposed on MBTA Communities exceeds the legislative intent of Section 3A.

2. Unit Multipliers and Minimum Unit Capacity

Section 3A requires some guidance to interpret the meaning of "reasonable size" which the Draft Guidelines attempt to supply, but in doing so, the Draft Guidelines must be consistent with Section 3A's other provisions. The Draft Guidelines' determination of "reasonable size" raises practical concerns set forth below. However, after establishing a minimum district size of an arbitrary 50 acres, the Draft Guidelines go even further, by establishing a "minimum unit capacity" that is not contemplated by, and cannot be read into, Section 3A.

The stated goal of Section 3A is the creation of zoning districts that allow as of right development of transit-oriented multi-family housing in close proximity to specific types of transit stations, if applicable, and with a minimum of 15 units per acre, subject to limitations due to wetlands and Title 5. There is nothing within Section 3A that lends itself to an interpretation that the Draft Guidelines may dictate a mandatory minimum unit capacity beyond what can be developed with a gross minimum density of 15 units per acre in a reasonably sized district. Even more so, nothing in Section 3A supports the determination of a mandatory minimum unit capacity to be determined by an arbitrary multiplier.

Section 5.b. of the Draft Guidelines set forth multipliers between 10% and 25%, depending on type of transit community. There is no stated or known empirical basis that justifies the existence or the amount of such multipliers. These multipliers are then used to implicitly force districts of an even larger size or with significant greater density than 15 units per acre, without regard to the geographic size, population, existing land conditions, or extent of existing housing, in a community.

In imposing a minimum unit capacity, particularly one based on a "multiplier", the Draft Guidelines exceed the legislative authority.

3. The Determination of "Developable Land"

In adopting Section 3A, the Legislature expressly recognizes that the ideal of 15 units per acre may be unachievable due to the constraints imposed by the Wetlands Protection Act and Title 5 of the State Environmental Code (as further discussed below with respect to the practical constraints of the Draft Guidelines). Specifically, Section 3A requires a "minimum gross density of 15 units per acre, subject to any further limitations imposed by [c. 131 §40] and title 5 of the state environmental code" (emphasis added). The Draft Guidelines disregard the Legislature's directive that the minimum gross density requirement may be limited by those conditions, and instead require that the actual density, based on a very involved estimation process, must be a minimum of 15 units per acre. It would be reasonable, and consistent with Section 3A, to make determinations based on the physical realities of each community, rather than set arbitrary minimum district sizes with minimum unit capacities that are based on unjustified multipliers. Such determinations should accept, as anticipated by Section 3A, that districts might be less than

15 units per acre in the aggregate due to limitations imposed by wetlands and Title 5 constraints in particular communities. In addition, the requirement that communities undertake a parcel by parcel "due diligence" exercise of each parcel for its potential unit capacity is a significant unfunded burden and is well outside the statutory requirements of Section 3A.

4. Location of Zoning Districts

Section 3A is quite clear as to the requirements for the location of multi-family housing districts. The only requirement is that it be located within a 0.5 mile of a "commuter rail station, subway station, ferry terminal or bus station, if applicable." For communities that are not within 0.5 miles of such transit stations, Section 3A does not impose any limitations on where the multi-family housing district should be located. By contrast, the Draft Guidelines require that such communities should either be within "reasonable access" of a transit station or be consistent with sustainable development principles. It is particularly the case for adjacent communities without transit stations that the character and scale of their communities, and their overall planning goals, may lend themselves to the location of multifamily housing in areas where local infrastructure (such as utilities) and resources (such as schools and stores) are more accessible. Reasonable access to a transit station in another community, on the other hand, may put such development at the outer boundaries of these communities in areas that increase dependency on motor vehicles to access schools and stores and are outside, or stretch, municipal resources. Section 3A does not lend itself to an interpretation that allows DHCD, in determining compliance, to dictate the location of districts in communities that do not have transit stations within their boundaries.

5. Consequences of Noncompliance

The provisions of Section 3A(b) are likewise quite clear and quite limited:

> "An MBTA community that fails to comply with this section shall not be eligible for funds from:
>
> (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017;
>
> (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; or
>
> (iii) the MassWorks infrastructure program established in section 63 of chapter 23A."

The Legislature in Section 3A provided MBTA communities a clear statement as to the consequences for failure to comply, which each community should be able to rely upon when making decisions regarding the impacts of compliance or non-compliance with Section 3A. The provision of the Draft Guidelines referencing that DHCD may take noncompliance into account for other discretionary grant awards should be deleted as this statement is inconsistent with the legislation and unduly punitive. Similar statements from other state officials threatening to impose such a condition on other discretionary grant programs not identified in Section 3A are also unsupported. The Legislature listed three specific state funding sources that would be affected by a municipality's inability to comply with the requirements and limited the scope of DHCD's authority to "guidelines to determine if an MBTA community is in compliance with this section";

there was no grant of authority for DHCD to countermand the Legislature's determination as to the consequences for noncompliance by adding more consequences. The interest to expand these consequences do not support a goal of state and local cooperation toward common goals.

6. Risk of Inequitable Implementation

The practical limitations of implementing the requirements of the Draft Guidelines are set forth in detail below. A process that sets inflexible requirements and gives the reviewing agency unfettered flexibility to change the requirements on a case-by-case basis is fraught with risk of unintended inequitable compliance determinations for different communities. The only undefined provision of Section 3A is a district of "reasonable size." Unfortunately, in seeking to define a "reasonable size", the Draft Guidelines create numerous additional ambiguities which will in turn require the development of further interpretations and policies outside the scope of Section 3A. Every effort should be made to craft streamlined Guidelines that add clarity, not confusion and burden, to MBTA Communities seeking in good faith to comply with Section 3A.

C. The Draft Guidelines Contain Errors and Inconsistencies

The Draft Guidelines contain some errors and inconsistencies with current law that, at a minimum, must be corrected:

1. The definition of "as of right" does not match the definition found in another section of M.G.L. c. 40A. The difference can lead to unnecessary confusion. M.G.L. c. 40A, § 1A defines "as of right" as "development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver or other discretionary zoning approval." The Draft Guidelines define "as of right" as that "allowed in the district without the need for any discretionary permit or approval."

2. The Guidelines state that while site plan review is acceptable, it "may not be used to deny a project that is allowed as of right . . .." In fact, case law holds that there can be circumstances under which site plan denial is appropriate. *See, Castle Hill Apartments Ltd. Partnership v. Planning Bd. of Holyoke,* 65 Mass. App. Ct. 840, 846 (2006). Since site plan review is independent of statute, its parameters cannot be constrained by an agency guideline.

3. The Draft Guidelines conflict with the definition of multi-family housing set forth in G.L. c. 40R. That statute, enacted to encourage "smart growth" and housing production, defines multi-family housing as buildings that contain more than three residential units. In contrast, the Draft Guidelines require that the multi-family housing district must permit as of right buildings with three or more residential units. It appears, therefore, that a community that adopted a smart growth district does not comply with the Section 3A district as interpreted by the Draft Guidelines. The Draft Guidelines should be amended to parallel the definition in Chapter 40R.

4. The Draft Guidelines require that the community estimate the number of multi-family units that can be constructed on each "parcel" of developable land. "Parcel" is not defined, although "lot" is defined by chapter 40A, §1A. If "parcel" is intended as something different than

"lot", it should be defined, or the Guidelines should be revised to clarify whether the term "parcel" is being used interchangeably with the defined term "lot."

5. The Draft Guidelines provide that zoning districts will not be in compliance if they limit the size of the units. Some limits, however, are required by law. The State Sanitary Code, 105 CMR 410.400, sets a minimum square footage of floor space per unit and a minimum square footage for each bedroom, each depending on the number of occupants. The Guidelines should acknowledge that some limitations on size are imposed by statute or regulation.

6. Several communities have been misclassified as bus service communities when they are actually commuter rail communities. Aside from affecting the multiplier that is applied to such communities (which, as noted, is of questionable enforceability under Section 3A), the identification of the type of transit community may still have value in evaluating district size and compliance and therefore they should be accurately reflected. Reading, Beverly, Woburn, and Wilmington are just a few examples of these classification errors.

D. The Draft Guideline Requirements for Determining Compliance and Timelines for Compliance are Impractical and Will Limit the Likelihood of Achieving the Goals of Section 3A

As summarized in the introduction to this comment letter, our organizations encourage DHCD to modify its approach to determining compliance with Section 3A. Recommendations for how that might be done are set forth in the following section of this letter. The purpose of this section is to articulate why the Draft Guidelines are overly cumbersome and impractical, create an undue burden on most MBTA Communities, and may unfortunately result in less participation by MBTA Communities.

1. Reasonable Size

The definition of "reasonable size" as a minimum of 50 acres in all 175 MBTA Communities, which have diverse and unique housing and infrastructure existing conditions and future needs, is unsupported by any data. It is particularly ill-suited in adjacent communities that are not within 0.5 miles of a transit station. The 50-acre minimum, coupled with the required density of 15 units per acre, results in an unrealistic minimum unit capacity of 750 multi-family units within the required multi-family zoning district for all MBTA Communities. It fails to consider existing multi-family housing stock, the actual housing needs of each community, infrastructure burdens, level of transit service, and the unique location, topography, development patterns, and constraints of each MBTA Community. The requirement that at least one area of the multi-family housing district include a minimum of 25 contiguous acres only exacerbates this by discouraging smaller developments that would have less impact while still providing a multi-family housing option.

The mandatory minimum district size is also inconsistent with the General Principles of the Draft Guidelines, which state that "MBTA communities should adopt multi-family districts that will lead to the development of multi-family housing projects of a scale, density and character

that are consistent with a community's long-term planning goals", because it requires a high density for each district. Further, the General Principles recognize that what is reasonable in one community may not be reasonable in another, yet the Draft Guidelines set an inflexible standard of 50 acres and a minimum unit capacity which may impose a density in excess of15 units per acre.

2. Minimum Unit Capacity

The concern about inequitable implementation is noted above and one example of this concern is raised by the "minimum unit capacity" requirement. The Draft Guidelines concede that due to "the diversity of MBTA communities, a multi-family district that is 'reasonable' in one city or town may not be reasonable in another city or town. Objective differences in community characteristics must be considered in determining what is 'reasonable'". To that end, the more urban communities are being asked to adopt zoning to allow 15% (e.g. Worcester) to 20% (e.g. Brockton and Lynn) of their housing stock to be located within a multi-family zoning district. These percentages should be compared to those imposed on many small communities that would be required, pursuant to the Draft Guidelines, to create a district that allows significantly more dramatic changes in housing stock (e.g. 70% for the Town of Plympton). In fact, 46 of the MBTA Communities (more than 25%) would require 750 units although their "multiplier" would yield a much lower number. This drastic contrast does not seem to take into account the differences in community characteristics referenced in the Draft Guidelines. The numbers do not fare any better when the land areas of some communities are considered. For example, when the minimum 15 units per acre required by Section 3A is combined with the 750-unit threshold mandated by the Guidelines, both the Town of Brookline and the City of Cambridge are being asked to dedicate less than 2% of their area to transit-oriented multi-family zoning. Compare that requirement to the Town of Nahant and the City of Chelsea who, respectively, are being asked for 7.8% and 4.2% of their land area to be zoned for as of right multi-family housing. The differences in community characteristics are ignored. Even more, no consideration is given to the percentage of non-age restricted multi-family housing stock that may already exist in an MBTA Community.

The Draft Guidelines do not account for the lack of infrastructure in many communities to support such significant and concentrated multi-family units. In particular, municipal water and sewer in many communities have limited capacity; for example, the state sets limits on the amount of water each community can withdraw for its public water supply. The requirement to provide municipal water to 750 potential multi-family units can easily outstrip a community's water withdrawal permit limits. Many communities lack any municipal sewer infrastructure and clearly cannot handle the multi-family units that are expected to result from adoption of zoning in accordance with the Draft Guidelines.

Other municipal infrastructure will be impacted, including, without limitation, public ways and stormwater management facilities in the multi-family district. Emergency services such as fire, police, and ambulance services will all have additional workloads. Groundwater and wetlands located near new developments will potentially be impacted by additional impervious surfaces, construction impacts, and related matters. In addition, any large developments have impacts on the environment and wildlife habitat which are not addressed in the Draft Guidelines.

3. Parcel by Parcel Analysis

In setting minimum acreage and capacity requirements, the Draft Guidelines require each municipality to estimate how many units of multi-family housing could be constructed on each parcel of developable land in the district. This requirement imposes a significant burden on each community.

The requirements for providing the estimate of potential unit capacity are onerous and contradictory. This estimate must take into account height limitations, lot coverage, floor area ratio (FAR), setback and parking requirements, as well as any limitations in other applicable by-laws. Then it must consider limitations on development from inadequate water or wastewater infrastructure, Title 5 limitations in areas not served by municipal sewer, "known" title restrictions, and any other "physical restrictions" such as wetlands. This essentially requires the municipality to undertake expensive, time-consuming, and unnecessary design for each parcel in the district. This contradicts the statement in the Draft Guidelines that there is no requirement nor expectation that a multi-family district will be built out to its full unit capacity.

All land, in every zoning district in every municipality, has limitations based on dimensional provisions, topography, and other factors. The Draft Guidelines further ignore the reality that the area around transit stations is most often comprised of many small lots created decades ago (or longer) and that any significant multi-family development would require assemblage of multiple parcels. In such cases, a developer (who is the appropriate party to be undertaking this analysis) would undertake such due diligence on a consolidated land area basis, not parcel by parcel. Expecting the municipality to ensure that the zoning district can be developed at 15 units per acre *after* considering legal and physical considerations presented by each parcel in the district rather than *before* as contemplated by the statute is unreasonable and unduly burdensome. The Draft Guidelines do not provide clear guidance on the application of the Wetlands Protection Act and Title 5 to the formation of compliant districts in a manner consistent with the limitations created by these existing statutes as recognized by Section 3A.

4. Location

This letter has previously addressed the inconsistency of the Draft Guidelines' description of where districts must be located with the legal parameters of Section 3A. Beyond the legal concern, the Draft Guidelines, and recent presentations of them, state that there is no expectation that one unit of multi-family housing is actually built. Rather the Draft Guidelines aim to create "capacity for the future", without identifying what the state expects will happen in the future or when. Capacity is dependent on the likelihood of development; that likelihood is not determined only by land conditions (*e.g.*, wetlands or soils for wastewater systems). For all communities, it will be affected by what is already there. Developable areas around many transit stations are already developed by existing multifamily, mixed-use, single-family, or thriving commercial uses. It is unrealistic to expect, and unfair to impose, an administrative burden on municipalities to create multi-family zoning districts in areas that are fully developed with little to no likelihood of redevelopment as multi-family housing. That is not to say every 0.5-mile radius is fully developed

or unavailable for redevelopment, but rather that identifying such opportunities for rezoning would be the more appropriate focus.

To the extent Section 3A applies to adjacent communities with no transit facilities and no foreseeable promise of transit facilities, Section 3A is not a requirement to create transit-oriented development, but rather uses M.G.L. Chapter 161A (which was enacted for very different purposes), as a back-door to mandate multi-family housing at the threat of losing certain state funds. The adjacent communities (and some transit station communities) that continue to preserve active farmland need special consideration.

5. Timelines for Compliance

Due to existing statutory processes related to the adoption of zoning, if the adopted Guidelines are to encourage the creation of a compliant district, the deadline for all communities should be no earlier than December 31, 2024 (and it is recommended that all deadlines be suspended pending revision of the Draft Guidelines).

While communities with city or town council forms of government are more easily able to schedule votes on zoning amendments at any time of the year, the town meeting form of government is much more limited. Some towns hold a fall special town meeting in addition to the statutorily required annual spring town meeting, but many do not. The calling of a special town meeting is governed by state law and local charters and is a significant cost to a community. In addition, in contrast to a city or town council, the legislatures of both representative town meetings and open town meetings are much larger and require substantial community engagement.

According to the Draft Guidelines, non-compliant subway and bus communities must obtain DHCD approval of an action plan by no later than March 31, 2023 and be fully compliant by December 31, 2023. As the Guidelines are not yet final, and need significant modification, communities prematurely face the expenditure of time and resources to meet very challenging deadlines.

The Draft Guidelines further provide that a final determination of compliance is not made until *after* a zoning amendment creating the district is adopted. This means that communities may spend months in "due diligence" activities (at municipal expense), in public discussion sessions, in drafting zoning provisions, in public zoning hearings, to bring the amendment to a successful vote, only to have DHCD find that the district is not in compliance with Section 3A. Such a result would be, at a minimum, frustrating for communities with council forms of government that can revise and revote on a relatively short timeframe. For town meeting communities, that potential outcome is untenable, particularly when significant public outreach was done to bring about adoption of the proposed amendment. An option to have the form of zoning amendment pre-reviewed by DHCD, coupled with a later deadline for adoption, is practical and necessary to a successful implementation of Section 3A.

E. A Better Approach to Determining Compliance is Needed and Possible

When considering the challenges with the Draft Guidelines from a conceptual level, the approach could be described as one that is the top-down imposition of requirements and timelines (with no input from the impacted communities), which are burdensome or impractical to effectuate, thus creating a real risk of non-compliance, though not for lack of a willingness to try.

The major shortcoming in the approach of the Draft Guidelines is that they do not work with MBTA Communities "where they are" and do not invite the communities into the planning process through practical analyses that can be uniformly applied as a starting point, to then be tailored to each community in an equitable manner. The approach to impose a mandatory minimum size of 50 acres, compounded with minimum unit capacity, parcel by parcel analysis, and prohibitive timelines, is too onerous to be workable. This is particularly so when the basis or purpose of such requirements is not provided.

It is interesting to note that the "MBTA Community Information Form" contains a number of questions that would be the right jumping-off point for the Guidelines. See Questions 6 and 7 of the Form. However, some of these are posed as "yes" or "no" questions when the question itself is unclear and the subject matter does not lend itself to such simple answers (see terms such as "known obstacles" and "other development restrictions" in Questions 6.a.1, & Question 7.e).

A revised approach would remove certain mandated concepts (that are not authorized within Section 3A) such as a minimum 50-acre district, minimum unit capacity, and "multipliers", and would focus on the application of actual data to inform location and size of these zoning districts. Such revised Guidelines might include the following:

1. Each provision should focus on the goal: to encourage zoning that will allow reasonable development of non-age restricted multi-family housing close to public transit.

2. The MBTA Community could be asked to provide information on its existing multifamily housing stock. Such information could include tables and GIS plans indicating (as to both age-restricted and non-restricted multi-family housing): (a) # of multifamily units in the community as a whole; (b) percent of multifamily housing to total housing stock; (c) proximity of existing multi-family housing to existing transit stations in that community or, if none, in adjoining community(ies); (d) proximity of existing multifamily housing to other types of public transportation (e.g. MBTA or regional bus stops); and (e) units per acre of existing multi-family housing (exclusive of wetland or restricted open space areas).

   The purpose would be to have a clear picture of the multi-family housing each community currently provides within its existing housing stock and determine the extent it benefits from proximity to public transportation (whether within a 0.5 mile or more).

3. The "type" of transit community should be considered within the context of the size (land area and population), and significant existing land uses, of the community (particularly for more rural communities supporting agricultural uses). In this way the "type" of transit community can be used as a tool to assist in appropriately locating and sizing the zoning

district, rather than impose an inequitable burden on communities with "minimum unit capacities" without context to the size and nature of the community (*e.g.*, urban, suburban, rural or some combination).

4. If the percentage of existing housing units is an appropriate factor in determining reasonable district size, the percentage should be supported by documented data points that rely on factors other than (or in addition to) transit "type". For example, national or regional data that looks at averages of multi-family housing in relation to housing stock based on the nature (urban, suburban, rural) and size of the community would be appropriate. Such percentages should be based on existing housing stock with no fixed minimum. This is a critical factor in order to allow for multifamily housing development in scale, character and density consistent with a community's long-term planning goals, as stated in the Draft Guideline principles.

5. MBTA Communities with existing transit stations can create an inventory of existing land uses within 0.5 radius of the transit station(s) and approximate acreage of each in clear categories based on available GIS and other municipal records. Examples: undeveloped land (both private and general municipal property); single-family, non-age restricted multi-family; age-restricted multi-family; congregate living; mixed-use; commercial; industrial; and restricted public land (parks, conservation land, schools, and municipal facilities).

    - From such inventory, identify the amount/acreage of existing multi-family housing, undeveloped land and developed parcels that are practical options for increased- or re-development, subject to restrictions imposed by the Wetlands Protection Act and Title 5.

    - Use publicly and readily available information (such as state and local GIS, soil surveys, local Conservation Commission and Board of Health records, public water and sewer infrastructure), without further investigation, to document these publicly "known" development limitations within 0.5 miles of the transit station(s).

    Based on the information compiled in items 2-5, the MBTA Community may then propose a zoning district it believes to be of reasonable size (whether a single district, multiple sub-districts or overlay district(s)), within 0.5 mile of the transit station(s) and accompanied by zoning regulations for the district(s) that would support a minimum of 15 units, subject to the limitation recognized in Section 3A. If there is no practical way to create a district in whole or part within the 0.5 radius, then reasonable proximity should be allowed and encouraged.

6. For MBTA Communities with no existing transit stations, locating the zoning district provides an opportunity. The key to successfully encouraging such communities to fulfill the goal of Section 3A is to eliminate mandates as to location, size, and inflated minimum unit capacities. Even a requirement that it be located within a 0.5 mile of a transit station in an adjacent community could be overly restrictive given the colonial history of communities in Massachusetts developing from the center out, with the most infrastructure and other amenities for housing not found at the edges of the community. In proposing a

district of reasonable size, adjacent communities could use all of the same types of data suggested above for transit station communities with the added flexibility as to location that balances the goals of transit-oriented multi-family housing with the absence of any public transportation services in these communities.

Conclusion

The MMA and MMLA recognize and respect the challenge that comes with crafting regulations, guidelines, and policies to implement a legislative initiative. This is a task that communities must also undertake at the municipal level. What is critical to successful implementation is the participation of the stakeholders. In the case of Section 3A, the MBTA Communities are the primary stakeholders in their future land use planning and development. Municipal officials know their communities, understand the political process of effecting change at a local level, and can best articulate how zoning can be successfully adopted to meet local, regional, and state goals.

For all of the reasons discussed above, the MMLA and the MMA respectfully request that our organizations and representatives of the various types of MBTA Communities be involved in the revision of the Draft Guidelines. We welcome the opportunity to meet with DCHD and other stakeholders to discuss the information provided in this letter. If you have questions or desire additional comment, please contact MMLA Executive Director James Lampke at jlampke@massmunilaw.org and MMA Legislative Director David Koffman at dkoffman@mma.org.

Thank you for your time and consideration of the above comments and recommendations.

Sincerely,

James B Lampke

James B. Lampke
Executive Director, MMLA

Geoffrey C. Beckwith
Executive Director & CEO, MMA

Commonwealth of Massachusetts
DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT
Charles D. Baker, Governor ◆ Karyn E. Polito, Lt. Governor ◆ Jennifer D. Maddox, Undersecretary

EXHIBIT TO MMA/MMLA COMMENTS (3.28.2022) – This Exhibit reflects certain, but not all, of the comments set forth in the MMA/MMLA comment letter.

DRAFT Compliance Guidelines for Multi-family Districts | \Under Section 3A of the Zoning Act

1. Overview of Section 3A of the Zoning Act

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 (referred to herein as "Section 3A"). Subsection (a) of Section 3A provides:

> *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 purpose of Section 3A is to encourage MBTA communities to adopt zoning districts where multi-family zoning is permitted as of right, and that meet other requirements set forth in the statute.

The Department of Housing and Community Development, in consultation with the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, is required to promulgate guidelines to determine if an MBTA community is in compliance with Section 3A. DHCD promulgated preliminary guidance on January 29, 2021. DHCD updated that preliminary guidance on December 15, 2021. These guidelines provide further information on how MBTA communities may achieve compliance with Section 3A.

2. Definitions

"Adjacent community" means an MBTA community with no transit station within its border or within 0.5 mile of its border.

"Age-restricted housing" means any housing unit encumbered by a title restriction requiring occupancy by at least one person age 55 or older.

"Bus service community" means an MBTA community with a bus station within its borders or within 0.5 miles of its border, ~~or an MBTA bus stop within its borders,~~ and no subway station or commuter rail station within its border, or within 0.5 mile of its border.

"Chief executive officer" means the mayor in a city, and the board of selectmen in a town, unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter.

"Commonwealth's sustainable development principles" means the principles set forth at https://www.mass.gov/files/documents/2017/11/01/sustainable%20development%20principles.pdf as such principles may be modified and updated from time to time.

"Commuter rail community" means an MBTA community with a commuter rail station within its borders, or within 0.5 mile of its border, and no subway station within its borders, or within 0.5 mile of its border.

"Developable land" means land on which multi-family housing units have been or can be permitted and constructed. ~~Developable land shall not include land under water, wetland resource areas, areas lacking adequate water or wastewater infrastructure or capacity, publicly owned land that is dedicated to existing public uses, or privately owned land encumbered by any kind of use restriction that prohibits residential use.~~

"Ferry terminal community" means an MBTA community with a commuter rail station within its borders, or within 0.5 mile of its border, and no subway station within its borders, or within 0.5 mile of its border.

"Gross density" means a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial, and other nonresidential uses.

"Housing suitable for families" means housing comprised of residential dwelling units that are not age-restricted housing, and for which there are no ~~legal~~ zoning restriction on the number of bedrooms, the size of bedrooms, or the number of occupants.

"MBTA community" means a city or town that is: (i) one of the 51 cities and towns as defined in section 1 of chapter 161A; (ii) cone of the 14 cities and towns as defined in said section 1 of said chapter 161A; (iii) other served communities as defined in said section 1 of said chapter 161A; or (iv) a municipality that has been added to the Massachusetts Bay Transportation Authority under section 6 of chapter 161A or in accordance with any special law relative to the area constituting the authority." A list of MBTA communities is attached, including the designation of each MBTA community as a rapid transit community, a bus service community, a commuter rail community or an adjacent community for purposes of these compliance guidelines.

"Multi-family housing" means a building with ~~3 or~~ more than 3 residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building.

"Multi-family district" means a zoning district, including an overlay district, in which multi-family uses are allowed by right.

"Rapid transit community" means an MBTA community with a subway station within its borders, or within 0.5 mile of its border. An MBTA community with a subway station within its borders, or within 0.5 mile of its border, shall be deemed to be a rapid transit community even if there is one or more commuter rail stations or MBTA bus ~~lines~~ stations located in that community.

"Reasonable size" means ~~not less than 50 contiguous acres of land with a unit capacity equal to or greater than the unit capacity specified in section 5 below.~~ *[See Comment Letter]*

"Residential dwelling unit" means a dwelling unit equipped with a full kitchen and bathroom.

"Unit capacity" means an estimate of the total number of multi-family housing units that can be developed as of right within the multi-family district, made in accordance with the requirements of section 5.b below.

3. General Principles of Compliance

a. These compliance guidelines describe how an MBTA community can comply with the requirements of Section 3A. The guidelines specifically address:

- What it means to permit multi-family housing "as of right";
- The metrics that determine if a multi-family district is "of reasonable size";
- How to determine if a multi-family district has 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;
- The meaning of Section 3A's mandate that "such multi-family housing shall be without age restrictions and shall be suitable for families with children"; and
- The extent to which MBTA communities have flexibility to choose the location of a multi- family district.

b. The following general principles have informed the more specific compliance criteria that follow:

- ~~All MBTA communities should contribute to the production of new housing stock.~~
- 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.

- MBTA communities should adopt multi-family districts that will lead to development of multi- family housing projects of a scale, density and character that are consistent with a community's long-term planning goals.
- "Reasonable size" is a relative rather than an absolute determination. Because of the diversity of MBTA communities, a multi-family district that is "reasonable" in one city or town may not be reasonable in another city or town. Objective differences in community characteristics must be considered in determining what is "reasonable" for each community.
- To the maximum extent possible, multi-family districts should be in areas that have safe and convenient access to transit stations for pedestrians and bicyclists.

4. Allowing Multi-Family Housing "As of Right"

To comply with Section 3A, a multi-family district must allow multi-family housing "as of right," meaning that the construction and occupancy of multi-family housing is allowed in that district without the need to obtain any discretionary permit or approval. Site plan review and approval may be required for multi-family uses allowed as of right. Site plan review is a process by which a local board reviews a project's site layout to ensure public safety and convenience. Site plan approval may regulate matters such as vehicular access and circulation on a site, architectural design of a building, and screening of adjacent properties. Except in limited circumstances under applicable law, ~~S~~site plan review may not be used to deny a project that is allowed as of right, nor may it impose conditions that make it infeasible or impractical to proceed with a multi-family use that is allowed as of right.

5. Determining "Reasonable Size" *[See Comment Letter for a more workable approach.]*

In making determinations of "reasonable size," DHCD will take into consideration both the area of the district and the district's multi-family unit capacity (that is, the number of units of multi-family housing that can be developed as of right within the district).

a. Minimum land area

Section 3A's requirement that a multi-family district be a "reasonable size" indicates that the purpose of the statute is to encourage zoning that allows for the development of a reasonable amount of multi-family housing in each MBTA community. A zoning district is a specifically delineated land area with uniform regulations and requirements governing the use of land and the placement, spacing, and size of buildings. A district should not be a single development site on which the municipality is willing to permit a particular multi-family project. ~~To comply with Section 3A's "reasonable size" requirement, multi-family districts must comprise at least 50 acres of land – or approximately one-tenth of the land area within 0.5 mile of a transit station.~~

An overlay district is an acceptable way to achieve compliance with Section 3A~~, provided that such an overlay district should not consist of a collection of small, non-contiguous parcels. At least one portion of the overlay district land areas must include at least 25 contiguous acres of land. No portion of the district that is less than 5 contiguous acres land will count toward the minimum size requirement~~.

b. *Minimum multi-family unit capacity – [These provisions are not authorized under Section 3A. MMA/MMLA comments provide an alternative approach and ask that municipalities, as the primary stake holders, be part of the redraft of the Guidelines.]*

A reasonably sized multi-family district must also be able to accommodate a reasonable number of multi-family housing units as of right with 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. ~~MBTA communities seeking a determination of compliance with Section 3A must provide to DHCD an accurate assessment of the number of multi-family housing units that can be developed as of right within the multi-family district, referred to as the district's unit capacity.~~

~~A compliant district's multi-family unit capacity must be equal to or greater than a specified percentage of the total number of housing units within the community. The required percentage will depend on the type of transit service in the community, as follows:~~

~~**Category**~~	~~**Minimum multi-family units as a percentage of total housing stock**~~
~~Rapid transit community~~	~~25%~~
~~Bus service community~~	~~20%~~
~~Commuter rail community~~	~~15%~~
~~Adjacent community~~	~~10%~~

~~The minimum unit capacity applicable to each MBTA community is determined by multiplying the number of housing units in that community by 0.25, 0.20, 0.15 or 0.10, depending on the type of service in that community. For example, a rapid transit community with 7,500 housing units is required to have a multi-family district with a multi-family unit capacity of 7,500 x 0.25 = 1,875 multi-family units.~~

~~When calculating the minimum unit capacity, each MBTA community should use 2020 census data to determine the number of total housing units, unless another data source has been approved by DHCD.~~

~~When determining the unit capacity for a specific multi-family district, each MBTA community must estimate how many units of multi-family housing could be constructed on each parcel of developable land within the district. The estimate should take into account the amount of developable land in the district, as well as the height limitations, lot coverage limitations, maximum floor area ratio,~~

~~set back requirements and parking space requirements applicable in that district under the zoning ordinance or bylaw. The estimate must also take into account the restrictions and limitations set forth in any other municipal bylaws or ordinances; limitations on development resulting from inadequate water or wastewater infrastructure, and, in areas not served by public sewer, any applicable limitations under Title 5 of the state environmental code or local septic regulations; known title restrictions on use of the land within the district; and known limitations, if any, on the development of new multi-family housing within the district based on physical conditions such the presence of waterbodies, and wetlands.~~

~~If the estimate of the number of multi-family units that can be constructed in the multi-family district is less than the minimum unit capacity, then the MBTA community must change the boundaries of the multi-family district or make changes to dimensional regulations applicable to that district (or to other local ordinances or bylaws) to allow for the development of a greater number of multi-family units as of right.~~

It is important to understand 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. The law does not require the production of new multi-family housing units within that district. There is no requirement nor expectation that a multi-family district will be built out to its full unit capacity.

In some communities, there may be a significant number of multi-family units already existing in the multi-family district; those communities should generally expect fewer new units to be produced in the district, because it is more fully built out. Conversely, there may be some communities with relatively little multi-family housing in its multi-family district; there generally will be more opportunity for new housing production in those districts in which there is a large gap between unit capacity and the number of existing multi-family units. *[Overly broad statement – opportunity is limited by existing conditions and lack of infrastructure.]*

6. Minimum Gross Density

Section 3A states that a compliant multi-family district must 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. DHCD will deem a zoning district to be compliant with Section 3A's minimum gross density requirement if the following criteria are met.

a. District-wide gross density

Section 3A expressly requires that a multi-family district—not just the individual parcels of land within the district—must 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. To comply with this requirement, the zoning must legally and practically allow for a district-wide gross density of 15 units per acre. ~~The Zoning Act defines "gross density" 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."~~

To meet the district-wide gross density the municipality must ~~demonstrate that~~permit ~~the zoning for the district permits~~ a gross density of 15 units per acre of land within the district, "include[ing] land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses." ~~By way of example, to meet that requirement for a 50-acre multi-family district, the municipality must show at least 15 existing or potential new multi-family units per acre, or a total of at least 750 existing or potential new multi-family units.~~

b. Achieving district-wide gross density by sub-districts

Zoning ordinances and bylaws typically limit the unit density on individual parcels of land. To comply with the statute's density requirement, an MBTA community may establish sub-districts within a multi-family district, with different density requirements and limitations 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.

7. Determining Suitability for Families with Children

Section 3A states that a compliant multi-family district must be without age restrictions and must be suitable for families with children. DHCD will deem a multi-family district to comply with these requirements as long as the zoning does not require multi-family uses to include units with age restrictions and does not place any limits or restrictions on the size of the units, the number of bedrooms, the size of bedrooms, or the number of occupants except as required by state law including, without limitation, the state sanitary code.

8. Location of Districts

Section 3A states that a compliant multi-family district shall "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." DHCD will interpret that requirement consistent with the following guidelines. *[Specific protections needed for land currently zoned for agricultural use.]*

a. General rule for measuring distance from a transit station.

~~To maximize flexibility for all MBTA communities, t~~The distance from a transit station may be measured from the boundary of any parcel of land owned by a public entity and used for purposes related to the transit station, such as an access roadway or parking lot.

b. MBTA communities with some land area within 0.5 miles of a transit station

An MBTA community that has a transit station within its boundaries, or some land area within 0.5 mile of a transit station located in another MBTA community, shall comply with the statutory location requirement if a substantial portion of the multi-family district is located within the prescribed distance.

~~Absent compelling circumstances,~~To the extent that developable land is present, at least [one half] of the land area of the multi-family district should be located within 0.5 mile of the transit station. The multi-family district may include land areas that are further than 0.5 mile from the transit station, provided that such areas are ~~easily~~ reasonably accessible to the transit station based on existing street patterns and pedestrian connections.

~~In unusual cases, t~~The most appropriate location for a multi-family district may be in a land area that is further than 0.5 miles of a transit station. Where none of the land area within 0.5 mile of transit station is appropriate for development of multi-family housing—for example, because it comprises wetlands or land publicly owned for recreation or conservation purposes—the MBTA community may propose a multi-family use district that has less than one-half of its land area within 0.5 miles of a transit station. To the maximum extent feasible, the land areas within such a district should be easily accessible to the transit station based on existing street patterns, pedestrian connections, and bicycle lanes.

c. MBTA communities with no land area within 0.5 miles of a transit station

[These provisions are not supported by Section 3A and need a new approach.]~~When an MBTA community has no land area within 0.5 mile of a transit station, the multi-family district should, if feasible, be located in an area with reasonable access to a transit station based on existing street patterns, pedestrian connections, and bicycle lanes, or in an area that otherwise is consistent with the Commonwealth's sustainable development principles—for example, near an existing downtown or village center, near an RTA bus stop or line, or in a location with existing under-utilized facilities that can be redeveloped into new multi-family housing.~~

9. Determinations of Compliance

DHCD will make determinations of compliance with Section 3A upon request from an MBTA community, in accordance with the following criteria and schedule. An MBTA community may receive a determination of full compliance when it has a multi-family district that meets all of the requirements of Section 3A. An MBTA community may receive a determination of interim compliance for a limited duration to allow time to enact a new multi-family district or amend an existing zoning district in order to achieve full compliance with Section 3A.

a. Requests for determination of compliance

~~When an~~An MBTA community ~~believes it has a multi-family district that complies with the requirements for Section 3A, as set forth in these guidelines, it~~ may request a determination of compliance from DHCD~~. Such a request may be made~~ for a multi-family district that was in existence on the date that Section 3A became law,~~-~~ or for a multi-family district that was created or amended after the enactment of Section 3A, or for a proposed multi-family district prior to adoption. In ~~either~~ each case, such request shall be made on a form required by DHCD and shall include, at a minimum, the following information, which shall be provided in a format or on a template prescribed by DHCD:

General district information

i. A map showing the municipal boundaries and the boundaries of the multi-family district;

ii. A copy of those provisions in the municipal zoning code necessary to determine the uses permitted as of right in the multi-family district and the dimensional limitation and requirements applicable in the multi-family district;

~~iii. A plan showing the boundaries of each parcel of land located within the district, and the area and ownership of each parcel as indicated on current assessor records;~~

Location of districts

~~iv.~~iii. A map showing the location of the nearest transit station and how much of the multi-family district is within 0.5 miles of that transit station;

~~v. In cases where no portion of the multi-family district is located within 0.5 miles of a transit station, a statement describing how the development of new multi-family housing within the district would be consistent with the Commonwealth's sustainable development principles;~~

Reasonable size metrics

~~vi.~~iv. A calculation of the total land area within the multi-family district;

~~vii.~~v. ~~A calculation of the multi-family district's unit capacity, along with a statement describing the methodology by which unit capacity was determined, together with~~A summary of the following data *[See Comment Letter for relevant data which includes the following]*;

a. A description of the water and wastewater infrastructure serving the district, and currently available capacity~~whether that infrastructure is sufficient to serve any new multi-family units included in the unit capacity~~;

b. A description of *publicly available information (e.g. wetlands, flood plain, soils)*[any known physical conditions, legal restrictions or regulatory requirements that would restrict or limit the development of multi-family housing within the district];

c. The number ~~and age~~ of multi-family housing units already existing within the multi- family district, if any.

District gross density

~~viii.~~vi. The gross density for the multi-family district, calculated in accordance with ~~section 6 of~~ these guidelines.

Housing suitable for families

~~ix.~~vii. An attestation that the zoning bylaw or ordinance does not place any limits or restrictions on the size of the units, the number of bedrooms, the size of bedrooms, or the number of occupants in multi-family housing units within the multi-family district, except as otherwise provided under applicable law.

Attestation

~~x.~~viii. An attestation that the application is accurate and complete, signed by the MBTA community's chief executive officer.

As soon as practical after receipt of a request for determination of compliance, DHCD will either send the requesting MBTA community a notice that it has provided all of the required information, or identify the additional information that is required to process the request. Upon reviewing a complete application, DHCD will provide the MBTA community a written determination either stating that the existing multi-family use district complies with Section 3A, or identifying the reasons why the multi-family use district fails to comply with Section 3A and the steps that must be taken to achieve compliance.

An MBTA community shall be deemed to be in compliance with Section 3A for the period of time during which a request for determination of compliance, with all required information, is pending at DHCD. *[Timelines should be suspended pending revision of the Guidelines.]*

b. Action plans and interim compliance—New or amended district

[Timelines need to be tied to effective date of final Guidelines – no expenditure of resources should be required before Guidelines are in place; see also Comment Letter regarding practical issues with timeframes set forth in the Draft Guidelines.] Many MBTA communities do not currently have a multi-family district of reasonable size that complies with all of the requirements set out in Section 3A and these guidelines. These MBTA communities must take affirmative steps towards the creation of a compliant multi-family district within a reasonable time. To achieve interim compliance, the MBTA community must, by no later than the dates specified in section 9.c, send to DHCD written notice that a new multi-family district, or amendment of an existing multi-family district, must be adopted to come into compliance with Section 3A. The MBTA community must then take the following actions to maintain interim compliance:

i. *Creation of an action plan.* Each MBTA community must provide DHCD with a proposed action plan and timeline for any planning studies or community outreach activities it intends to undertake in order to adopt a multi-family district that complies with Section 3A. DHCD may approve or require changes to the proposed action plan and timeline by sending the MBTA community written notice of such approval or changes. Rapid transit communities and bus service communities must obtain DHCD approval of an action plan by no later than March 31, 2023. Commuter rail communities and adjacent communities must obtain DHCD approval of a timeline and action plan by no later than July 1, 2023.

ii. *Implementation of the action plan*. The MBTA community must timely achieve each of the milestones set forth in the DHCD-approved action plan, including but not limited to the drafting of the proposed zoning amendment and the commencement of public hearings on the proposed zoning amendment

iii. *Adoption of zoning amendment*. An MBTA community must adopt the zoning amendment ~~by the date specified in the action plan and timeline approved by DHCD. For rapid transit communities and bus service communities, DHCD will not approve an action plan with an adoption date later than December 31, 2023. For commuter rail communities and adjacent communities, DHCD will not approve an action plan with an adoption date~~no later than December 31, 2024 or, for town meeting forms of government, no later than the 2025 annual town meeting.

iv. *Determination of full compliance*. Within [90] days after adoption of the zoning amendment, the MBTA community must submit to DHCD a complete application requesting a determination of full compliance. The application must include data and analysis demonstrating that a district complies with all of the compliance criteria set forth in these guidelines, including without limitation the district's land area, unit capacity, gross density and location.

~~During the period that an MBTA community is creating and implementing its action plan, DHCD will endeavor to respond to inquiries about whether a proposed zoning amendment will create a multi- family district that complies with Section 3A. However, DHCD will issue a determination of full compliance only after final adoption of the proposed zoning amendment and receipt of a complete application demonstrating the unit capacity.~~

c. Timeframes for submissions by MBTA communities – Timelines need to commence after Guidelines are final.

To remain in interim compliance with Section 3A, an MBTA community must take one of the following actions by no later than December 31, 2022:

i. Submit a complete request for a determination of compliance as set forth in section 9.a above; or

ii. Notify DHCD that there is no existing multi-family district that fully complies with these guidelines, and submit a proposed action plan as described in section 9.b above.

10. Renewals and Rescission of a Determination of Compliance

a. Term and renewal of a determination of compliance

A determination of compliance shall have a term of 10 years. Each MBTA community shall apply to renew its certificate of compliance at least 6 months prior to its expiration. ~~DHCD may require, as a condition of renewal, that the MBTA community report on the production of new housing within MBTA community, and in the multi-family district that was the basis for compliance.~~ Applications for

renewal shall be made on a form proscribed by DHCD. *[Inconsistent with Section 3A requiring creation of a district, not actual housing production.]*

b. Rescission of a determination of compliance

DHCD reserves the right to rescind a determination of compliance if DHCD determines that (i) the MBTA community submitted inaccurate information in its application for a determination of compliance, (ii) the MBTA community amended its zoning ~~or enacted a general bylaw or other rule or regulation that materially alters the Unit capacity in the applicable multi-family use district~~in a manner inconsistent with Section 3A. *[Section 3A does not govern any local regulations or bylaws other than zoning.]*

11. Effect of Noncompliance

If at any point DHCD determines that an MBTA community is not in compliance with Section 3A, that MBTA community will not be eligible for funds from the following grant programs: (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017; (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; or (iii) the MassWorks infrastructure program established in section 63 of chapter 23A. ~~DHCD may, in its discretion, take non-compliance into consideration when making other discretionary grant awards.~~