

**CITY OF NEWTON
LAW DEPARTMENT MEMORANDUM**

DATE: March 17, 2021
TO: All Members, City Council
FROM: Andrew S. Lee, Assistant City Solicitor
RE: Housing Choice Zoning Amendments – Update

The law department issued a memorandum dated February 4, 2021 outlining the key changes made by the Housing Choice legislation to the Massachusetts Zoning Act, G.L. c. 40A. A copy of the February 4, 2021 memo is attached as Attachment A. As stated in the prior memo, the Executive Office of Housing and Development was working on additional guidance to assist municipalities in determining voting thresholds for various zoning amendments. On February 26, 2021, the Executive Office of Housing and Development issued such additional guidance. A copy of the guidance is attached as Attachment B.

The following is a summary of the highlights from the updated guidance.

As more fully set forth in both the prior memorandum and additional guidance, the Housing Choice legislation changed the voting requirement for certain types of zoning amendments from 2/3 to a simple majority. However, the legislation itself does not identify how a municipality should determine which voting threshold applies to a particular zoning proposal. The guidance recommends the following process to decide which voting threshold applies:

1. The proponent of the proposed zoning amendment should include in their petition a statement explaining if the proposal meets any of the criteria for being approved by a simple majority vote, including whether the land area affected meets the definition of an eligible location.
2. The Planning and Development Board, after consultation with the law department, should include in its report and recommendations to the full city council a determination of which voting threshold applies to the zoning proposal.
3. The City Council may affirm the voting threshold determined by the Planning and Development Board.

The Executive Office of Housing and Economic Development has also created an application by which the Mayor, City Council or Planning and Development Board may request an advisory opinion from the Executive Office on whether a particular zoning proposal affects an eligible location. The request may not be made by an individual member of the City Council or Planning and Development Board.

The law department will continue to monitor updates from the state, including the anticipated guidelines from DHCD regarding the requirements for MBTA Communities.

ATTACHMENT A

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

DATE: February 5, 2021
TO: All Members, City Council
FROM: Jonah Temple, Assistant City Solicitor
RE: Housing Choice Zoning Amendments

On January 14, 2021, Governor Charlie Baker signed into law *An Act Enabling Partnerships for Growth* (the “Act”), a comprehensive economic bill that provides Covid-19 economic relief to various sectors. The Act included the long-awaited Housing Choice legislation that was previously proposed by Governor Baker in an effort to increase housing development. This memorandum summarizes the key changes to Massachusetts zoning law, G.L. c. 40A, that are most relevant to the City Council.

1. Simple Majority Vote for Certain Zoning Amendments and Special Permits

Prior to the Act, all changes to local zoning ordinances and all special permits required a $\frac{2}{3}$ vote to be approved. The Act changes that required vote from $\frac{2}{3}$ to a simple majority for certain types of zoning amendments and special permits.

The following types of zoning amendments are now subject to simple majority vote:

- Amendments that allow as of right or by special permit accessory dwelling units.
- Amendments that allow as of right or by special permit multi-family or mixed-use developments at an “eligible location,” which is defined as an area that by virtue of its infrastructure, transportation access, existing underutilized facilities, or location is a highly suitable location for residential or mixed-use smart growth zoning districts or starter home districts, including areas near transit stations such as rapid transit, commuter rail, bus or ferry terminals, or areas of concentrated development such as town and city centers and other existing commercial districts in cities and towns and existing rural village districts.
- Amendments that allow as of right open space residential developments.
- Amendments that allow by special permit an increase in the permissible density or intensity of use in a multi-family or mixed-use development.
- Amendments that allow by special permit a reduction in the amount of parking required for residential or mixed-use developments.

- Amendments that provide for TDR (Transfer of Development Rights) zoning or natural resource protection zoning in instances where the adoption of such zoning promotes concentration of development where a municipality deems it most appropriate, but will not result in a reduction in the maximum number of housing units that could be developed within the municipality.
- Amendments that modify local regulations concerning the bulk and height of structures, yard sizes, lot area, setbacks, open space, parking, and building coverage requirements to allow for additional housing units beyond what would otherwise be permitted the existing zoning ordinance.
- Adoption of a smart growth zoning district or starter home zoning district in accordance with state law Chapter 40R.

The Act also provides a mechanism, known as a protest petition, to return the voting threshold for the above types of amendments back to $\frac{2}{3}$ in very limited circumstances where the owners of fifty percent or more of the area of the land proposed to be included in the zone change or of the area of the land immediately adjacent extending 300 feet therefrom file a protest to the zoning change.

The following types of special permits are now subject to a simple majority vote:

- Multi-family housing located within $\frac{1}{2}$ mile of a commuter rail station, subway station, ferry terminal, or bus station with not less than 10% of the housing affordable to households with annual income less than 80% of Area Median Income and whose affordability is assured by a minimum 30-year affordable housing restriction.
- Mixed-use development in centers of commercial activity within a municipality, subject to the same affordability requirements referenced above for multi-family housing.
- A reduced parking space to residential unit ratio requirement if the reduction results in the production of additional housing units.

These new voting requirements are *currently in effect* and will apply to all future City Council action on special permits and zoning amendments.

2. Multi-Family Zoning by Right in MBTA Communities

The Act imposes new by right multi-family zoning requirements for all “MBTA Communities,” which includes nearly all communities within the Greater Boston area and eastern Massachusetts, including Newton. All “MBTA Communities” must now have at least one zoning district of reasonable size in which multi-family housing is allowed by right, with no age restrictions and that is suitable for families with children. The Act also requires each such zoning district to have a minimum gross density of 15 units per acre and be no more than $\frac{1}{2}$ mile from a transit station.

If an MBTA Community fails to comply with this new zoning requirement, the Act imposes significant state funding penalties. Communities not in compliance will forfeit their eligibility to receive funding from sources such as the Governor's Housing Choice Initiative, the Local Capital Projects Fund, and the MassWorks infrastructure program.

Newton does not currently have a zoning district that satisfies the above requirements. Therefore the City will need to adopt such a district through formal amendment of the zoning ordinance. Given that the minimum criteria for this required district appear to also satisfy the requirements for being an "eligible location" for multi-family housing or mixed-use development, it is likely that adoption of such a zoning district will only require a majority vote.

The state Department of Housing and Community Development (DHCD) recently issued preliminary guidance regarding compliance with this by right multi-family zoning requirement. The guidance states that MBTA Communities will be deemed in compliance with the requirement until more specific guidance is developed and made available to affected communities. This means the City will have some period of time to implement the planning process necessary to adopt the mandatory zoning before it becomes ineligible for state grant programs.

3. Special Permit Standard for Reduced Parking for Residential Developments

The Act also allows municipalities to adopt a different special permit standard for reduction in parking if they choose. A zoning ordinance may provide that special permits can be granted for reduced parking spaces for a residential development after a finding by the special permit granting authority that the public good would be served and that the area in which the development is located would not suffer a substantial adverse effect from such diminution in parking.

4. Looking Ahead

The changes to a simple majority vote for certain zoning amendments and special permits are effective immediately and now apply to all future City Council action that triggers a majority vote. Moving forward, the Law Department will notify the City Council, through its Land Use and Zoning and Planning Committees, whenever a docket item triggers a simple majority voting requirement. In contrast, the new requirement that Newton adopt a by right multi-family zoning district is not immediate. The City will have time to create the required compliant zoning district and will not forgo any grant opportunities until additional guidance is provided and likely for some period of time thereafter.

DHCD intends to issue more detailed guidelines to MBTA Communities on compliance criteria and timelines for the Act's provisions requiring a by right multi-family zoning district. It is also expected that the Executive Office of Housing and Economic Development will issue guidance to assist municipalities in determining voting thresholds for various zoning amendments.

The Law Department is closely monitoring these significant changes and will keep you up to date when further guidance is released. Additional information and advice will also likely be forthcoming from the City's Planning and Development Department on the planning process for adoption of a by right multi-family zoning district.

**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.

Where does the Zoning Act apply?

The Zoning Act applies to all cities and towns in Massachusetts except the City of Boston, which has its own zoning enabling act.

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

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 transfer of development rights zoning 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 district 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 zoning,” “natural resource protection zoning,” and “eligible location” are now defined in section 1A of the Zoning Act.

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

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 proposed zoning amendment 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, after consultation with municipal legal counsel, include in this report a determination of which voting threshold applies to the zoning proposal. The legislative body’s vote consistent with that recommendation will affirm the voting threshold.

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.

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

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, after consultation with municipal counsel, 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.

Is there any additional guidance for determining eligible locations?

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 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 center, 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 opinion 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: www.mass.gov/forms/request-an-advisory-opinion-on-ch40a-eligible-locations. EOHEd will endeavor to provide a written advisory opinion within 30 days of receipt of a complete request.

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?

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 into a single proposal with changes that require 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 the municipal law unit of the Attorney General’s Office.

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

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 1/2 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 as defined in section 31 of chapter 184.
- 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.

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

Answers to frequently asked questions (FAQs) 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 FAQs can be directed to the Executive Office of Housing and Economic Development at housingchoice@mass.gov.

Issue date: February 26, 2021