Monday, June 7, 2021
SPECIAL MEETING
Medway Planning and Economic Development Board
155 Village Street
Medway, MA 02053

Members	Andy Rodenhiser	Bob Tucker	Tom Gay	Matt Hayes	Rich Di Iulio	Jessica Chabot
Attendance	X	X	X	X	X	X

Chairman Rodenhiser opened the special meeting of the Planning and Economic Development Board at 7:40 pm. Board members attended the meeting of the Medway Select Board for a presentation on the new Housing Choice Legislation.

Others present included Select Board members Dennis Crowley, John Foresto, Frank Rossi, Glenn Trindade and Mary Jane White; Town Manager Michael Boynton; Executive Assistant Liz Langley; and Barbara Saint Andre, Director of Community and Economic Development

Presentation by KP Law: New Housing Choice Provisions— Judith Cutler of KP Law
The Board reviewed:
(1) e-update from KP Law, dated February 1, 2021
(2) guidance from Executive Office of Housing and Economic Development, and
(3) Chapter 358 of the Acts of 2020, Sections 16-25, Amending the Zoning Act, G.L. c. 40A

Mr. Boynton stated he requested a 30,000 ft. view of what the new Housing Choice legislation means to Medway as the new law has a major impact to communities. He noted that Medway did a lot of work to reach 10% in affordable housing to obtain Safe Harbor status and is interested in how this new law impacts 40Bs. He introduced Ms. Cutler who will address most the direct impacts on Medway.

Ms. Cutler stated the Housing Choice law includes a lot of language that does not require Towns to do much of anything noting the intent of the law is to open doors for more housing and economic development and make it easier for certain types of developments to be implemented. She reported that the MA Department of Housing and Community Development (DHCD) was tasked with developing guidelines for this law, and they have yet to begin work on these guidelines, therefore, there is no need for Medway to take any action at this time. She then described the four elements impacted by this new law including: (1) changes of the quantum of vote requirements lowered for certain types of zoning amendments and then explained the specific instances, (2) changes to the quantum of vote requirements reduced for certain special permits and then explained the specific instances, (3) new zoning requirements for MBTA communities, of which Medway is one where there must be a zoning ordinance or by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right and explained the related specifics, and (4) new zoning terms expressly defined at the State level, noting these definitions may not be in conflict with those of towns. She reiterated that there is no deadline for adoption of new zoning but until adopted, the Town's eligibility for certain grant funds will be limited. She stated now is the stage for planning the implementation and

working with DHCD to confirm their concept as well as looking at those regulations relative to Smart Growth developments. She noted the type of growth this law is intended to incentivize is the Town center kind of density nearby to public facilities with the need to look at where this density can be accommodated and in what circumstances.

Ms. Cutler noted that the new legislation does not compete with 40B in any way as there are no specific implementation requirements. This is an opportunity for towns to develop this the way they want noting all that would be needed is a simple majority vote for amendment to the zoning by-law to allow multifamily housing and mixed use development in an eligible location close to center of Town. She noted that a lot of communities already have zoning for mixed development, multifamily housing, and accessory use dwelling units but use terms which are defined very differently in each Town. There will be a need to match the Town's definitions to the new law as that is what impacts the change in quantum from 2/3 versus majority vote. Mr. Trindade asked if the Attorney General would determine if the State terminology superseded the Town's terminology. and

Ms. Cutler stated the State has a recommended process and the Town should be advised by both DHCD and Town Counsel to determine if this should be a 2/3 versus majority vote. She noted that the State guidance requires a petitioner to justify why this development requires a simple majority vote and that the PEDB during a public hearing would determine if this is a 2/3 or majority vote and make that recommendation at Town Meeting. She noted that most Towns are being very careful in their analysis of this. She then reviewed the specific scenarios impacted by simple majority vote amendments including: (1) allowance of multifamily housing or mixed-use development in eligible locations by special permit, (2) an increase in the permissible density of population or intensity of a particular use in a multifamily or mixed-use development, (3) accessory dwelling units in a detached structure on the same lot or a reduction in the amount of parking required in a residential or mixed use development in order to allow more housing units, and (4) a zoning or by-law amendment that alters height, bulk, setbacks, parking, building coverage allowing for additional housing units beyond what could normally be allowed all of which are based on terminology defined in this law. She then noted that for the Zoning Board of Appeals (ZBA) and PEDB this impacts special permits noting the law is very specific on which permits only require a majority vote including (1) multifamily housing located within half a mile of a rail, bus, ferry station, (2) mixed-use development, and (3) in centers of commercial activity within the Town including Town centers and other commercial districts. Mr. Boynton asked when these types of projects come before the PEDB is it their decision regarding the majority vote or is that determined by the new law. Ms. Cutler stated the Town zoning by-law defines mixed-use development in a certain way and if it does not match up significantly with the new State definition, there is no simple majority vote involved. The Town would have to show that the Town's definition is the same as the one defined in the Zoning Act. Mr. Boynton asked if the new law is allowing the Town through the PEDB to adjust the zoning by-law. The law does not change the quantum vote but provides the PEDB the ability to do so. Ms. Cutler confirmed.

Mr. Boynton stated the portion that does affect Medway is relative to the requirement that an MBTA designated Town must define a district for multifamily housing by right. Ms. Cutler confirmed. Mr. Rodenhiser stated it looks like there are two places where we currently have a situation where changes need to occur to zoning to make it match the statute and he is thinking potentially that would be Glen Brook and 39 Main Street as both have the density to address this. Mr. Crowley asked how that would benefit the Town. Mr. Rodenhiser said we would meet the statutory requirements which would allow access to specific grant funding. Mr. Rodenhiser also stated we could look at our central business district but would need to assess what we currently have in place compared to the Housing Choice law. Mr. Boynton stated if we rezone either Glen Brook or 39 Main Street we need to ensure that we do not run afoul of any spot zoning issue.

There was further discussion about the impact of not addressing this zoning or addressing it in a way that could potentially negatively impact the Town. Mr. Trindade asked if the Town's mixed-use definition of the central business district is close to what is in the statute. Mr. Gay stated the PEDB has yet to review the Housing Choice definitions. Mr. Rodenhiser stated the PEDB must compare the Town's current definitions to this new law. Ms. Cutler stated that there is no requirement that Towns change their zoning by-laws to match the State and this only impacts MBTA communities. Mr. Rodenhiser stated our current process is a special permit for a multifamily development and to look at that area for density. He further stated that he feels the PEDB has been progressive noting the State is talking about raw density and trying to drive up that type of housing. Ms. Cutler clarified that the State wants a by-right multifamily housing within half a mile of an MBTA station if at all possible/practical. There was further discussion on the potential eligible locations and possibility of requesting an added MBTA stop. Mr. Di Iulio asked about the possibility of creating an overlay district in the Glen Brook and 39 Main Street area that is larger than those parcels. Mr. Rodenhiser stated he believes that achieves the same thing. Mr. Tucker stated the need of the PEDB to look at the statute and have further discussion noting that both of those areas are two good options to further investigate. Mr. Trindade then explained the specifics of both projects. There was further discussion regarding rezoning the 39 Main Street project and the efficacy of that site meeting the new statutory requirements. Ms. Saint Andre stated her belief that a development like 39 Main Street would fulfill the statutory requirement. Mr. Hayes asked what the affordable housing requirement is under new statute. Ms. Cutler stated the multifamily development would require 10% of the units as affordable housing at the 80% median income level along with an affordable restriction put on them for thirty years. Ms. Chabot stated the requirement is 15 units per acre but asked if the PEDB can still set other requirements like minimal parcel sizes, height restrictions, etc. Ms. Cutler confirmed noting it is just a by right and not a special permit. Mr. Gay asked if once the central business district is maxed at a commercial level which was the original plan, could we then build on with this designation. Ms. Cutler confirmed as long as the multifamily is treated as by right. Mr. Crowley asked if we anticipate a lot of PEDB articles coming up in November caused by this. Mr. Rodenhiser stated a least a couple. Ms. Saint Andre reminded all that we now have mixed-use development, our own version, can just keep them, do not have to change them based on this statue, and we can wait until we have the DHCD guidelines which are not out yet. Mr. Rodenhiser stated his preference is to wait on the DHCD guidelines. Ms. Cutler agreed stating the only issue to be addressed is one multifamily type.

Ms. Cutler stated there is one bizarre change which is the definition of a lot which is different in every Town and was never defined before. She noted that the applicable definition would default to the State. She stated that the PEDB should look at this definition as well. Ms. Chabot asked what the penalty would be should the PEDB decide not to comply.

Ms. Cutler stated if an applicant comes into Town to use this definition, they could go to court to force the Town to adopt the zoning.

A motion to adjourn the meeting was made by Jess Chabot and seconded by Rich Di Iulio. The motion passed unanimously.

The meeting was adjourned at 8:30pm

Respectfully submitted,

Liz Langley,
Executive Assistant
Town Manager's office

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

Chapter 358 of the Acts of 2020 (sometimes referred to as the economic development legislation of 2020) made several amendments to Chapter 40A of the General Laws, commonly known as the Zoning Act. Among these amendments are (1) changes to section 5 of the Zoning Act, which reduce the number of votes required to enact certain kinds of zoning ordinances and bylaws from a ⅔ 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.

1. 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.

2. 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 ⅔ supermajority that applies to other zoning amendments, if that ordinance or bylaw does any of the following:

a. Allows for multi-family housing or mixed-use developments "as of right" in an eligible location.

b. Allows for open space residential development as of right.

c. Allows accessory dwelling units, either within the principal dwelling or within a detached structure on the same lot, as-of-right.

d. Allows by special permit accessory dwelling units in a detached structure on the same lot.

e. Reduces the parking requirements for residential or mixed-use development under a special permit.

f. 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.

g. 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.

h. 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.

i. 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.

3. 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.

4. 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.

5. 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 enter, or other existing commercial districts, or existing rural village district."

All other land areas may be determined to be "eligible locations" if, in the judgment of the planning board, the land area is a highly suitable location for residential or mixed-use development based on its infrastructure, transportation access, or existing underutilized facilities.

If there is uncertainty about whether a zoning proposal affects an eligible location, the municipality may request an advisory 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.

6. 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 ⅔ 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 with an amendment that requires a ⅔ supermajority. Drafters of new zoning proposals should take care not to combine provisions that require different voting thresholds, so that proposals that will encourage new housing production will get the benefit of the simple majority threshold. If a municipality desires to combine proposals with different voting thresholds, the municipality should first confer with municipal counsel, and review the guidance issued by EOHED. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Updated: April 9, 2021)*

7. 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 ⅔ vote of boards with more than 5 members, a vote of at least 4 members of a 5-member board, and a unanimous vote of a 3-member board. But, the recent amendments to section 9 provide that a special permit may be issued by a simple majority vote if the special permit does any of the following:

- Permits multi-family housing that is located within ½ mile of a commuter rail station, subway station, ferry terminal or bus station; provided that not less than 10% of the housing is affordable to and occupied by households whose annual income is less than 80% of the area median income and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction 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.

8. 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.

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

You may proceed with a vote as planned, consistent with the following guidance. Section 5 of the Zoning Act now provides that "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote." The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. If a city or town is considering an existing proposal to amend and restate its entire zoning code with a single vote, and there is not enough time to separate amendments that have different voting thresholds, it may proceed as planned rather than starting over or delaying the vote. Although the statute does not say so expressly, in the view of EOHED, the combined article may be approved by a ⅔ vote. The Attorney General has not yet taken a position on this question. The city or town alternatively may elect to delay the vote and separate out the zoning provisions that have different approval thresholds. Going forward it is the recommendation of EOHED that proposals to amend and restate an entire zoning code should be drafted so that housing-friendly provisions that qualify for approval by a simple majority approval are considered separately, if possible. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of

a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Added: April 9, 2021)*

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

Section 5 of the Zoning Act now provides that "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote." The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. It also is intended to ensure that zoning proposals that otherwise would require a ⅔ vote are not approved by a simple majority simply because a multifamily use or other residential use has been added to the mix of allowed uses. This overlay district appears to conflict with the statute's prohibition on combined articles, since it combines uses that require a ⅔ vote with uses that may potentially qualify for a simple majority vote. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Added: April 9, 2021)*

Issue date: February 26, 2021
Update date: April 9, 2021

KP | LAW eUpdate

Housing Choice Act of 2020 Update

February 1, 2021

On January 14, 2021, Governor Charlie Baker signed into law House Bill 5250 – "An Act Enabling Partnerships of Growth", the so-called "Housing Choice Law". The stated purpose of this legislation is to: "finance improvements to the commonwealth's economic infrastructure and promote economic opportunity." To that end, the legislation includes more than $682,000,000 in capital authorizations. However, the Act also makes a number of substantial changes to housing and development statutes, including G.L. c.40R (Smart Growth Districts), G.L. c.40V (Housing Development Initiative Programs) and G.L. c.40A (the Zoning Act). The purpose of this Memorandum is to alert you to several important amendments to G.L. c.40A that took effect immediately upon the signing of the bill into law. Future updates will address other important provisions of the new legislation.

Among the important changes to the Zoning Act are: (1) amendments to Section 5 reducing from 2/3 to simple majority the quantum of vote required for the legislative body to approve specified categories of local zoning; (2) amendments to Section 9 reducing the quantum of vote required for issuance of specified categories of special permits; (3) the addition of a new Section 3A that mandates "as of right" multi-family housing districts in communities serviced by public transportation; and (4) the insertion in Section 1A of several new definitions. We have addressed these changes below, in turn.

As you will see, there may be value in reviewing existing zoning bylaws or ordinances to determine whether amendments will need to be made to address these revisions to state law.

Quantum of Vote Requirements Lowered for Certain Zoning Amendments

As of January 14, 2021, only a majority vote of the legislative body is required to enact the following types of local zoning:

1. A by-law or ordinance to allow any of the following as of right:
    a. Multifamily housing or mixed-use development in an eligible location;
    b. Accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot; or
    c. Open-space residential developments.

2. A by-law or ordinance to allow by special permit:
    a. Multi-family housing or mixed-use development in an eligible location;
    b. An increase in the permissible density of population or intensity of a particular use in a proposed multi-family or mixed use development;

c. Accessory dwelling units in a detached structure on the same lot; or
d. A diminution in the amount of parking required for residential or mixed-use development.

3. A by-law or ordinance that:
   a. Provides for Transfer of Development Rights (TDR) zoning or natural resource protection zoning where adoption of such zoning promotes concentration of development in areas the municipality deems "most appropriate" for such development but which will not result in a diminution in the maximum number of housing units that could be developed within the municipality; or

   b. Modifies zoning regulations beyond what would otherwise be permitted under the existing zoning with respect to bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements to allow for additional housing units.

4. The adoption of a "smart growth" or "starter home" zoning district in accordance with G.L. c.40R, §3, subject to specific requirements.

For cities and towns with councils of fewer than 25 members, the new law creates a process to increase the quantum of vote to 2/3. If the owners of 80% or more of the land area included in the zoning change, extending 300 feet therefrom, file a written protest prior to final action, then a 2/3 vote will be required to enact that particular change.

Finally, as will be addressed in more detail below, the Act amends G.L. c.40A, §1A to define the categories of zoning amendments requiring only a majority vote, including: "accessory dwelling unit"; "as of right"; "open space development"; "multi-family housing"; "mixed-use development"; "eligible location"; and "lot".

Quantum of Vote Reduced for Certain Special Permits

Also immediately effective are amendments to the special permit provisions of G.L. c.40A, § 9, reducing the quantum of vote required for the grant of specified types of special permits. Specifically, instead of requiring approval by a supermajority vote of all of the members of the special permit granting authority, only a simple majority vote is now required to grant a special permit allowing any of the following:

1. Multifamily housing located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80% of the area-wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction;

2. 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 shall be affordable to and occupied by households whose annual income is less than 80% of the area-wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction; or

3. A reduced parking space to residential unit ratio requirement; provided, that a reduction in the parking requirement will result in the production of additional housing units.

As noted above, the terms "multifamily housing" and "mixed-use development" are now defined terms in G.L. c.40A, §1A.

New Zoning Requirements for "MBTA Communities"

The new Housing Choice Law amends the Zoning Act, G.L. c.40A, by inserting a new section 3A. Chapter40A, §3A requires each "MBTA Community" to "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 . . . ." An MBTA Community is now broadly defined in G.L. c.40A, §1A. A preliminary list of the MBTA Communities subject to the application of this law appears at the end of this document.

General Laws c.40A, § 3A mandates that a multi-family housing zoning district must exist in each MBTA Community and that (1) such zoning district shall not be subject to age restrictions and must be suitable for families with children; (2) such zoning district shall have a minimum gross density of at least 15 units per acre; and (3), if applicable, that such district be located not more than ½ mile from a commuter rail station, subway station, ferry terminal, or bus station.

Section 3A also creates a penalty for failure to ensure the existence or creation of such a district. MBTA Communities that fail to create a zoning district in which multi-family housing is permitted as of right will be ineligible for funds from the Housing Choice Initiative Program, the Local Capital Projects Fund, and the MassWorks Infrastructure Program. The Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation are charged with promulgating guidelines to determine if an MBTA Community is in compliance with this new section. When additional information is available concerning these regulations, we will update you.

Certain Zoning Terms Expressly Defined

Several of the amendments to G.L. c.40A introduced by this new legislation employ terms that were previously undefined. Now, the following 10 terms are specifically defined in G.L. c.40A, §1A:

- Accessory dwelling unit;
- As of right;
- Eligible locations;
- Gross density;
- Lot;
- MBTA community;
- Mixed-use development;
- Multi-family housing;
- Natural resource protection zoning; and
- Open space residential development.

Also of note, the new legislation replaces the definition of "Transfer of development rights" in G.L. c.40A, §1A, and substitutes the term "open space residential" for the word "cluster" in G.L. c.40A, § 9.

Conclusion

The above summary is intended to highlight the changes to the Zoning Act that have the most immediate and consequential impacts on the Commonwealth's cities and towns. Notably, many of the terms now defined in G.L. c.40A, §1A have long been used and variously defined in local zoning by-laws and ordinances. While amendments to municipal zoning definitions may not be necessary immediately, municipalities should anticipate that differences between the new definitions in G.L. c.40A and those already employed in municipal zoning by-laws and ordinances may eventually lead to problems. This may be particularly important when determining the applicable quantum of vote requirements for certain zoning changes and special permits. For that reason, it will be useful to review the municipality's current zoning bylaw or ordinance to determine if any immediate revisions are needed. In many towns, there may still be time to address these issues at the Annual or Special Town Meeting.

Should you have any questions regarding these changes or any other aspects of the new legislation, please contact your KP Law Attorney.

Preliminary List

MBTA COMMUNITIES (G.L. c. 40A, § 3A)

Abington	Acton	Amesbury	Andover	Arlington	Ashburnham
Ashby	Ashland	Attleboro	Auburn	Ayer	Bedford
Bellingham	Belmont	Berkley	Beverly	Billerica	Boston
Boxford	Boxborough	Braintree	Bridgewater	Brockton	Brookline
Burlington	Cambridge	Canton	Carlisle	Carver	Chelmsford
Chelsea	Cohasset	Concord	Danvers	Dedham	Dover
Dracut	Duxbury	East Bridgewater	Easton	Essex	Everett
Fitchburg	Foxborough	Framingham	Franklin	Freetown	Georgetown
Gloucester	Grafton	Groton	Groveland	Halifax	Hamilton
Hanover	Hanson	Harvard	Haverhill	Hingham	Holbrook
Holden	Holliston	Hopkinton	Hull	Ipswich	Kingston
Lakeville	Lancaster	Lawrence	Leicester	Leominster	Lexington
Lincoln	Littleton	Lowell	Lunenburg	Lynn	Lynnfield
Malden	Manchester-by-the-Sea	Mansfield	Marblehead	Marlborough	Marshfield
Maynard	Medfield	Medford	Medway	Melrose	Merrimac
Methuen	Middleborough	Millbury	Middleton	Millis	Milton
Nahant	Natick	Needham	Newbury	Newburyport	Newton
Norfolk	North Andover	North Attleborough	North Reading	Northborough	Northbridge
Norton	Norwell	Norwood	Paxton	Peabody	Pembroke
Plymouth	Plympton	Princeton	Quincy	Randolph	Raynham
Reading	Rehoboth	Revere	Rochester	Rockland	Rockport
Rowley	Salem	Salisbury	Saugus	Scituate	Seekonk
Sharon	Sherborn	Shirley	Shrewsbury	Somerville	Southborough
Sterling	Stoneham	Stoughton	Stow	Sudbury	Sutton
Swampscott	Taunton	Tewksbury	Topsfield	Townsend	Tyngsborough
Upton	Wakefield	Walpole	Waltham	Wareham	Watertown
Wayland	Wellesley	Wenham	West Boylston	West Bridgewater	West Newbury
Westborough	Westford	Westminster	Weston	Westwood	Weymouth
Whitman	Wilmington	Winchester	Winthrop	Woburn	Worcester
Wrentham					

**Please note that this list is preliminary, and not exhaustive. Communities may be subject to MBTA Community requirements as a result of special legislation.*

SECTION 16. Section 1A of chapter 40A of the General Laws, as so appearing, is hereby amended by inserting after the introductory paragraph the following 10 definitions:-

"Accessory dwelling unit", a self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not limited to additional size restrictions, owner-occupancy requirements and restrictions or prohibitions on short-term rental of accessory dwelling units.

"As of right", 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.

"Eligible locations", 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.

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

"Lot", an area of land with definite boundaries that is used or available for use as the site of a building or buildings.

"MBTA community", a city or town that is: (i) one of the 51 cities and towns as defined in section 1 of chapter 161A; (ii) one 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.

"Mixed-use development", development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses;

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

"Natural resource protection zoning", zoning ordinances or by-laws enacted principally to protect natural resources by promoting compact patterns of development and concentrating development within a portion of a parcel of land so that a significant majority of the land remains permanently undeveloped and available for agriculture, forestry, recreation, watershed management, carbon sequestration, wildlife habitat or other natural resource values.

"Open space residential development", a residential development in which the buildings and accessory uses are clustered together into 1 or more groups separated from adjacent property and other groups within the development by intervening open land. An open space residential development shall be permitted only on a plot of land of such minimum size as a zoning ordinance or by-law may specify which is divided into building lots with dimensional control, density and use restrictions for such building lots varying from those otherwise permitted by the ordinance or by-law and open land. The open land may be situated to promote and protect maximum solar access within the development. The open land shall either be conveyed to the city or town and accepted by said city or town for park or open space use, or be made subject to a recorded use restriction enforceable by said city or town or a non-profit organization the principal purpose of which is the conservation of open space, providing

that such land shall be kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway.

SECTION 17. Said section 1A of said chapter 40A, as so appearing, is hereby further amended by striking out the definition of "Transfer of development rights" and inserting in place thereof the following definition:-

"Transfer of development rights", the regulatory procedure whereby the owner of a parcel may convey development rights, extinguishing those rights on the first parcel, and where the owner of another parcel may obtain and exercise those rights in addition to the development rights already existing on that second parcel.

SECTION 18. Said chapter 40A is hereby further amended by inserting after section 3 the following section:-

Section 3A. (a)(1) 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.

(b) 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.

(c) The department, in consultation with the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section.

SECTION 19. Section 5 of said chapter 40A, as so appearing, is hereby amended by striking out the fifth paragraph and inserting in place thereof the following paragraph:-

Except as provided herein, no zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are 2 branches, or by a two-thirds vote of a town meeting; provided, however, that the following shall be adopted by a vote of a simple majority of all members of the town council or of the city council where there is a commission form of government or a single branch or of each branch where there are 2 branches or by a vote of a simple majority of town meeting:

(1) an amendment to a zoning ordinance or by-law to allow any of the following as of right: (a) multifamily housing or mixed-use development in an eligible location; (b) accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot; or (c) open-space residential development;

(2) an amendment to a zoning ordinance or by-law to allow by special permit: (a) multi-family housing or mixed-use development in an eligible location; (b) an increase in the permissible density of population or intensity of a particular use in a proposed multi-family or mixed use development pursuant to section 9; (c) accessory dwelling units in a detached structure on the same lot; or (d) a diminution in the amount of parking required for residential or mixed-use development pursuant to section 9;

(3) zoning ordinances or by-laws or amendments thereto that: (a) provide for TDR 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; or (b) modify 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 under the existing zoning ordinance or by-law; and

(4) the adoption of a smart growth zoning district or starter home zoning district in accordance with section 3 of chapter 40R. Any amendment that requires a simple majority vote shall not be combined with an amendment that requires a two-thirds majority vote. If, in a city or town with a council of fewer than 25 members, there is filed with the clerk prior to final action by the council a written protest against a zoning change under this section, stating the reasons duly signed by owners of 50 per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending 300 feet therefrom, no change of any such ordinance shall be adopted except by a two-thirds vote of all members.

SECTION 20. Section 9 of said chapter 40A, as so appearing, is hereby amended by inserting after the word "interests," in line 34, the following words:- ; provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing transfer of development rights to be permitted as of right, without the need for a special permit or other discretionary zoning approval.

SECTION 21. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by striking out, in lines 39 and 43, the word "cluster" each time it appears and inserting in place thereof in each instance the following words:- open space residential.

SECTION 22. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by inserting, after the word "control,", in line 47, the following words:- ; provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing open space residential developments to be permitted as of right, without the need for a special permit or other discretionary zoning approval.

SECTION 23. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by striking out the seventh paragraph and inserting in place thereof the following paragraph:-

Zoning ordinances or by-laws may also provide that special permits may be granted for reduced parking space to residential unit ratio requirements 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.

SECTION 24. Said section 9 of said chapter 40A, as so appearing, is hereby further amended by inserting after the twelfth paragraph the following paragraph:-

A special permit issued by a special permit granting authority shall require a simple majority vote for any of the following: (a) multifamily 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 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development 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; (b) 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 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development 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; or (c) a reduced parking

space to residential unit ratio requirement, pursuant to this section; provided, that a reduction in the parking requirement will result in the production of additional housing units.

SECTION 25. Section 17 of said chapter 40A, as so appearing, is hereby amended by inserting after the second paragraph the following paragraph:-

The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.