

October 20, 2022

Philip R. Ottaviani, Jr., Chair  
Framingham City Council  
City Hall  
150 Concord Street  
Framingham, MA 01702

**RE: Nobscot Re-Zoning**

Dear Mr. Ottaviani:

Please be advised that I represent the Petitioners of the Petition for Zoning Change – Nobscot Village District (the “Petition”) filed with the City Council on or about September 14, 2022.

It has come to our attention that during discussions by City Representatives that a question has arisen relative to the procedure for the adoption of the zoning change and, in particular, the required vote of the City Council necessary to adopt the zoning change.

Mass. Gen. Laws c. 40A, §5 (copy attached) sets forth the procedure for the adoption of a Zoning By-Law by the City Council. Prior to 2020, the adoption of any Zoning Ordinance required a two-thirds vote of the City Council. In 2020, the Legislature approved, and the Governor endorsed Chapter 358 of the Acts of 2020 (the “Acts”). Section 19 of the Acts (copy attached) amends Section 5 of Chapter 40A, as follows:

“Zoning Ordinances, By-Laws or amendments thereto shall be adopted by a vote of two-thirds of the City Council except that the following shall be adopted by a vote of simple majority of all members of the City Council or of the City Council where there is a commission form of government or single branch of government where there are two (2) branches or by a vote of simple majority of Town Meeting:

- (1) an amendment to the Zoning Ordinance or By-Law that allows any of the following as of right in an eligible location multi-family housing or mixed-use development (a) accessory dwelling units, whether within the principal dwelling or a detached structure on the same lot or (b) open space residential development.”

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Section 16 of said Acts (copy attached) further amended Chapter 40A by inserting in Section 1(A) the following definition:

“Eligible Locations – Areas that by virtue of their infrastructure, transportation access, existing underutilization facilities or location, make highly suitable locations for residential or mixed-use/smart use 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.”

The Petition proposes to include additional land as part of the Nobscot B-4 Zoning District which allows mixed-use (residential and commercial) as a matter of right.

DHCD published Guidance for Local Officials on Determining Voting Thresholds for Zoning Ordinances and By-Laws on May 20, 2021 (“DHCD Guidance”) (copy attached). With respect to mixed-use development, the DHCD Guidance reminds that a “mixed-use development” is defined as “a development containing a mix of residential and non-residential uses, including, without limitation, commercial, institutional, industrial and other uses.” DHCD Guidance, Page 5. The DHCD Guidance is clear that “A zoning amendment will qualify for the majority threshold as long as it permits mixed-use development, as defined in the Zoning Act, either as-of-right or by special permit, in an eligible location.” DHCD Guidance, Page 5.

Nobscot Village is characterized by commercial developments, including retail developments on Edgell Road and Water Street, such as banks, restaurants, and small stores and businesses, as well as a senior living facility. Accordingly, Nobscot Village constitutes an “Eligible Location” within the meaning of Mass. Gen. Laws c. 40A, §1A. Accordingly, the Planning Board should find in its recommendation to the City Council that the area to be rezoned is an Eligible Location.

The DHCD Guidance recommends that the Planning Board in its recommendation on the proposed zoning change include in its determination that the Nobscot B-4 Zoning District qualifies as an Eligible Location entitling the zoning proposal to be approved by a simple majority vote because it allows for mixed-use development as of right.

Accordingly, upon the determination that the proposed area for re-zoning under the Nobscot B-4 Re-Zoning Petition is an Eligible Location, the City Council, may by simple majority vote, adopt the amendment of the Framingham Zoning By-Law to expand the proposed district zoning as set forth in the Petition.

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Should you have any questions, please do not hesitate to contact me.

Very truly yours,



***Peter R. Barbieri, Esq.***

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PRB/cam

Enclosures

cc: Kristina Johnson, Chair, Planning Board  
Sarkis Sarkisian, Director, Planning and Community Development  
Kathryn Fallen, City Solicitor

**Part I** ADMINISTRATION OF THE  
GOVERNMENT

**Title VII** CITIES, TOWNS AND DISTRICTS

**Chapter** ZONING

**40A**

**Section** ADOPTION OR CHANGE OF  
**5** ZONING ORDINANCES OR BY-  
LAWS; PROCEDURE

Section 5. Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter. The board of selectmen or city council shall within fourteen days of receipt of such zoning ordinance or by-law submit it to the planning board for review.

No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Said public hearing shall be held within sixty-five days after the proposed zoning ordinance or by-law is submitted to the planning board by the city council or selectmen or if there is none, within sixty-five days after the proposed zoning ordinance or by-law is submitted to the city council or selectmen. Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting city and town. The department of housing and community development, the regional planning agency, the planning boards of all abutting cities and towns and nonresident property owners who may not have received notice by mail as specified in this section may grant a waiver of notice or submit

an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on a proposed zoning ordinance, by-law or change thereto. Zoning ordinances or by-laws may provide that a separate, conspicuous statement shall be included with property tax bills sent to nonresident property owners, stating that notice of such hearings under this chapter shall be sent by mail, postage prepaid, to any such owner who files an annual request for such notice with the city or town clerk no later than January first, and pays a reasonable fee established by such ordinance or by-law. In cases involving boundary, density or use changes within a district, notice shall be sent to any such nonresident property owner who has filed such a request with the city or town clerk and whose property lies in the district where the change is sought. No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.

Prior to the adoption of any zoning ordinance or by-law or amendment thereto which seeks to further regulate matters established by section forty of chapter one hundred and thirty-one or regulations authorized thereunder relative to agricultural and aquacultural practices, the city or town clerk shall, no later than seven days prior to the city council's or town meeting's public hearing relative to the adoption of said new or amended zoning ordinances or by-laws, give notice of the said proposed zoning ordinances or by-laws to the farmland advisory board established pursuant to section forty of chapter one hundred and thirty-one.

No vote to adopt any such proposed ordinance or by-law or amendment thereto shall be taken until a report with recommendations by a planning board has been submitted to the town meeting or city council, or twenty-one days after said hearing has elapsed without submission of such report. After such notice, hearing and report, or after twenty-one days shall have elapsed after such hearing without submission of such report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. If a city council fails to vote to adopt any proposed ordinance within ninety days after the city council hearing or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.



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

*[ Clause (4) of the fifth paragraph effective until July 29, 2021. For text effective July 29, 2021, see below.]*

(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.

*[ Clause (4) of the fifth paragraph as amended by 2021, 29, Sec. 11 effective July 29, 2021. For text effective until July 29, 2021, see above.]*

(4) the adoption of a smart growth zoning district or starter home zoning district in accordance with section 3 of chapter 40R.

*[ Two paragraphs following the fifth paragraph added by 2021, 29, Sec. 12 effective July 29, 2021.]*

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.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

When zoning by-laws or amendments thereto are submitted to the attorney general for approval as required by section thirty-two of chapter forty, he shall also be furnished with a statement which may be prepared by the planning board explaining the by-laws or amendments proposed, which statement may be accompanied by explanatory maps or plans.

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty. If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote. In a municipality which is not required to submit zoning ordinances to the attorney general for approval pursuant to section thirty-two of chapter forty, the effective date of such ordinance or amendment shall be the date passed by the city council and signed by the mayor or, as otherwise provided by ordinance or charter; provided, however, that such ordinance or amendment shall subsequently be forwarded by the city clerk to the office of the attorney general.

A true copy of the zoning ordinance or by-law with any amendments thereto shall be kept on file available for inspection in the office of the clerk of such city or town.

No claim of invalidity of any zoning ordinance or by-law arising out of any possible defect in the procedure of adoption or amendment shall be made in any legal proceedings and no state, regional, county or municipal officer shall refuse, deny or revoke any permit, approval or certificate because of any such claim of invalidity unless legal action is commenced within the time period specified in sections thirty-two and thirty-two A of chapter forty and notice specifying the court, parties, invalidity claimed, and date of filing is filed together with a copy of the petition with the town or city clerk within seven days after commencement of the action.

(c) Annually, not later than January 15 of each year, the PRIM board shall file with the house and senate committee on ways and means and with the joint committee on public service a report detailing its progress toward implementing the policies and goals outlined above. Such report shall include documentation related to all minority investment managers considered for investment, including documentation, where applicable, of the reasons for declining any such investment.

SECTION 15. Section 4A of chapter 40 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:-

By a majority vote of their legislative bodies, and with the approval of the mayor, board of selectmen or other chief executive officer, any contiguous cities and towns may enter into an agreement to allocate public infrastructure costs, municipal service costs and local tax revenue associated with the development of an identified parcel or parcels or development within the contiguous communities generally; provided, that the agreement shall be approved by the department of revenue.

X 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.

X "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.

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



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

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

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

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

**GENERAL OVERVIEW**

**Q: Where does the Zoning Act apply?**

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

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

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

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

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

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

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



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

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

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

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

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

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

#### TRANSITION TO THE NEW LAW

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

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

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

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

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

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

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

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

## **MIXED-USE DEVELOPMENT**

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

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

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

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

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

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

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

## **ELIGIBLE LOCATIONS**

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

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

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

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

A: The same definition of “eligible location” that appears in section 1A of Chapter 40A also appears in section 2 of Chapter 40R. The regulations implementing Chapter 40R (760 CMR 59) set forth detailed criteria that the Department of Housing and Community Development (DHCD) applies when it determines if a land area is an eligible location under that statute. Although 760 CMR 59 does not apply to Chapter 40A, municipalities may reasonably look to those regulations for additional guidance on what areas 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 determination from the Executive Office of Housing and Economic Development. Such a request must be made by the mayor, city council, board of aldermen, or planning board (when the zoning amendment is proposed in a city); or by the select board or planning board (when the zoning amendment is proposed in a town). A request may not be made by an individual member of the council or board. Communities are encouraged to submit their request for an Advisory Opinion as early as possible in the zoning amendment process. The request should be made by completing the application at the following website: [mass.gov/forms/request-an-advisory-opinion-on-ch40A-eligible-locations](https://mass.gov/forms/request-an-advisory-opinion-on-ch40A-eligible-locations). EOHED will endeavor to provide a written advisory determination within 30 days of receipt of a complete request. (February 26, 2021)

### **ACCESSORY DWELLING UNITS**

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

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

### **SPECIAL PERMITS**

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

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

A special permit can be granted a 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.

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

*(February 26, 2021)*

#### **ADDITIONAL GUIDANCE**

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

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