

SUMMARY OF M.G.L. CHAPTER 40R

SMART GROWTH ZONING DISTRICTS

PASSED INTO LAW AS PART OF THE FY 2005 BUDGET

(includes a summary of related sections passed as part of the same budget)

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Housing production within the Commonwealth has not kept pace with the growing number of households looking for an affordable place to live. To help meet this demand, the Commonwealth adopted Chapter 40R within the General Laws allowing municipalities to encourage housing production that is aligned with the principles of “smart growth.” Communities doing so may obtain funds through housing incentive payments.

This document summarizes the new law and related sections passed as part of the FY 2005 budget. We hope you find it useful. Please remember that reading a summary of legislation is not a substitute for reading the legislation itself. The legislation is more detailed and may answer questions the summary cannot.

M.G.L. Chapter 40R Smart Growth Zoning Districts

Section 1. Purpose

It is the purpose of this chapter to encourage smart growth and increased housing production in Massachusetts. Smart growth is a principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

Section 2. Definitions

This section defines terms used in the new law. A summary of critical definitions includes:

- **“Affordable housing,”** housing affordable to those earning less than 80% of the median income, and subject to an affordability restriction lasting for at least 30 years;
- **“Approving Authority,”** a unit of town or city government designated by the municipality to review and approve projects.
- **“Comprehensive housing plan,”** plan prepared by a municipality assessing housing needs within the municipality and strategies to address those needs;
- **“Department,”** the department of housing and community development;
- **“Developable land area,”** that part of the smart growth zoning district that can be feasibly developed as residential or mixed-use development, excluding land already substantially developed, parks, open space, and wetlands, and including land with underutilized residential, commercial, industrial, or institutional buildings that could be recycled or converted into residential or mixed use.
- **“Eligible locations,”** (1) areas near transit stations, including rapid transit, commuter rail, and bus and ferry terminals, (2) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts, or (3) areas that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use smart growth zoning districts;
- **“Multi-family housing,”** apartment or condominium units in buildings with more than three units;
- **“New construction,”** construction of new housing, substantial rehabilitation of existing buildings, or conversion to residential use;
- **“Smart growth zoning district,”** a zoning district adopted by a municipality under this statute that is superimposed over one or more zoning districts in an eligible location, within which a developer may elect to either develop a project in accordance with requirements of the smart growth zoning district ordinance or develop a project in accordance with requirements of the underlying zoning district.

Section 3. Authority

A municipality may adopt a “smart growth zoning district,” in accordance with the provisions of Section 5, chapter 40A, in any eligible location allowing for primary residential use as-of-right and also permitting businesses, commercial and other uses consistent with primary residential use. Smart growth zoning districts may include areas eligible for Tax Increment Financing (“TIF”) and District Improvement Financing (“DIF”).

Section 4. Determination of Eligibility

Before adopting a smart growth zoning district, a municipality will apply to the department, which has 60 days to make a preliminary determination of whether the applicant would be eligible for the financial and other incentives in this chapter. The department will communicate this determination via a letter of eligibility. The

department may also advise the applicant of deficiencies in the application. If the municipality adopts the district, along with any changes recommended by the department, the department has 30 days to issue a final approval.

Section 5. Application Requirements

To be eligible for a smart growth zoning district, the municipality must submit to the department an application that:

- identifies the boundaries of the proposed district;
- describes the developable land area within the proposed district;
- identifies other residential development opportunities for infill housing and the residential reuse of existing buildings and under-utilized buildings within already developed areas;
- includes a comprehensive housing plan (see Section 8);
- includes a copy of the proposed smart growth district ordinance or by-law; and
- establishes that the proposed district satisfies the minimum requirements of a smart growth zoning district (see Section 6).

Section 6. Minimum Requirements of Zoning District

(a) The minimum requirements of a smart growth zoning district include the following:

1. The proposed district must be determined an “**eligible location**” (see definition in Section 2).
2. The zoning ordinance must provide for residential use to **permit a mix of housing** such as for families, individuals, persons with special needs, or the elderly.
3. **Housing density** allowed in the developable land area of a proposed district must be at least:
 - 20 units per acre for multi-family housing,
 - 8 units per acre for single-family homes, and
 - 12 units per acre for 2 and 3 family buildings.
4. The zoning ordinance for each proposed district will:
 - provide that **not less than 20%** of the residential units constructed in projects of more than 12 units will be **affordable**, and
 - contain mechanisms to ensure that **not less than 20%** of the total residential units constructed in each district will be **affordable**.
5. The zoning ordinance must **permit infill housing** on existing vacant lots and additional housing units in existing buildings, consistent with neighborhood building and use patterns, and consistent with building, fire, and safety codes.
6. Development in the district will **not be subject to any limitation on the issuance of building permits for residential uses** or any local moratorium on the issuance of such permits.

7. **No restrictions on age or any other occupancy restrictions** in the district as a whole. This provision does not preclude the development of specific projects that may be exclusively for the elderly, the disabled, or for assisted living, provided that not less than 25% of the housing units in such a project will be affordable housing.
8. Full compliance with federal, state and local **fair housing laws**.
9. The proposed **district may not exceed 15% of the total land area** in the municipality, except that the department may approve a larger land area if such an approval serves the goals and objectives of the chapter.
10. The **total land area of all approved smart growth zoning districts in the municipality may not exceed 25% of the total land area** in the municipality. (Note: unlike #9, above, this provision may not be waived.)
11. Proposed housing **density will not overburden infrastructure** as it exists or may be practicably upgraded.
12. The proposed zoning ordinance must **define the manner of review for individual projects** by the approving authority in accordance with Section 11 (see below) and specify the procedure for such review, in accordance with the regulations of the department.

(b-e) Within the zoning ordinance the municipality may:

- modify or eliminate dimensional standards;
- designate a limited percentage of the developable land area as dedicated perpetual open space through the use of a conservation restriction or other means; said open space will not be considered part of the developable land area for density calculation purposes.
- provide for mixed use development;
- the district may encompass an existing historic district or establish an historic district within an approved district; and
- require more affordability than required by this chapter provided that affordability thresholds do not unduly restrict opportunities for development.

(f) Municipalities with fewer than 10,000 persons, for hardship shown, may gain approval from the department for a smart growth zoning district with lower densities than provided in this chapter.

(g) Any amendment or repeal of the zoning for an approved district will not be effective without the written approval by the department.

(h) Nothing in this chapter will affect a municipality's authority to amend its zoning ordinances under chapter 40A, so long as the changes do not affect the smart growth zoning district.

Section 7. Certificate of Compliance

Each year the department will send a certificate of compliance to all municipalities with approved districts where it has been verified by the city or town that the zoning district has been adopted, that no previous certificate has been revoked, that the district is being reasonably developed consistent with the density and affordability requirements of this chapter, and that projects have not been unreasonably denied by the approving authority within the municipality.

Section 8. Comprehensive Housing Plan

When applying for a determination of eligibility, the municipality will submit a comprehensive housing plan that estimates the projected number of housing units of new construction (see definition in Section 2) that could be built within the proposed district. Existing comprehensive housing plans may be submitted with additions relating to the newly proposed district.

Section 9. Housing Incentive Payments

Upon approval of the district, municipalities are entitled to zoning incentive payments for housing creation. Based on number of units of new construction (see definition in Section 2) projected in the smart growth zoning district, payments will range from:

- \$10,000 for up to 20 units;
- \$75,000 for 21-100 units;
- \$200,000 for 101-200 units;
- \$350,000 for 201-500 units; to
- \$600,000 for 501 or more units of housing.

Additionally, a one-time density bonus of \$3,000 for each unit of new construction will be awarded upon issuance of a building permit. When awarding discretionary funds, the department and the executive offices of environmental affairs, transportation, and administration and finance will use a methodology that favors municipalities with approved smart growth zoning district, or other zoning policies that encourage affordable housing production.

(See Section 14 regarding repayment if no construction occurs.)

Section 10. Design Standards

Design standards may be adopted to ensure that the physical character of development within the smart growth zoning district will complement the adjacent buildings and structures, and not conflict with the comprehensive housing plan or any master plan for the community. The design standards may not add unreasonable costs to residential or mixed-use development, or unreasonably impair economic feasibility of proposed projects.

Section 11. Municipal Project Review

- The municipality may prescribe the **contents of an application** for project approval. It may require payment of reasonable consulting fees for peer review. It may refer applications for review by municipal entities in addition to the approving authority and such entities will have 60 days to comment.
- **Zoning in effect** at the time an application is submitted will govern the review of that application while it is being processed, during any appeal, and for three years after approval. If an application is denied, zoning will remain in effect with respect to any further application for two years after denial unless the applicant chooses otherwise.
- The approving authority will hold a **public hearing** consistent with the provision of Section 11 of Chapter 40A. The approving authority will make a decision within 120 days of filing or it is deemed approved.
- **Project approval is subject only to those conditions** that are necessary to ensure compliance with the smart growth zoning district ordinance and to mitigate only those impacts that are extraordinarily adverse to nearby properties.
- **A court may overrule approval of a project** only if it finds that the approving authority abused its discretion in approving the project. A plaintiff seeking to reverse a project approval must post a bond.
- In any **court appeal of a project denial** by an approving authority, the approving authority will have the burden of justifying its decision by substantial evidence in the record.

Section 12. Administration of Smart Growth Zoning Program

The department of housing and community development will serve as the administrator of the smart growth zoning district program. It will also be responsible for an annual review and report of data no later than November 15 of each year regarding the status of proposed smart growth zoning districts, the number of approved districts, development having taken place in districts to date, and monies paid to municipalities.

Section 13. Existing Zoning Districts

An existing zoning district may gain approval as a smart growth zoning district and receive incentive payments if it meets the requirements of this chapter. The application process will be consistent with that of a new smart growth zoning district. If such districts are approved, the community will not be eligible for the zoning incentive payment, but will be eligible, after the date of approval, for the one-time density bonus payment, and will be eligible for favorable review in the awarding of certain state funds. (See Section 9 for further information on these incentives.)

Section 14. Repayment

If no construction in the smart growth zoning district has taken place within three years of the date of the zoning incentive payment (see Section 9), the municipality must repay all monies paid to it under this chapter.

RELATED SECTIONS

M.G.L. Chapter 10, Section 35BB Smart Growth Housing Trust Fund

This section creates a Smart Growth Housing Trust Fund, funded by monies from the sale of surplus land, appropriations, or sanctions on communities. Without requiring further appropriation, available funds are to be disbursed by the department in accordance with the provisions of M.G.L. Chapter 40R.

M.G.L. Chapter 26, Section 548 Funding of Smart Growth Housing Trust Fund

The first \$25,000,000 of any proceeds realized from the sale of surplus state properties will be deposited into the General Fund. The second \$25,000,000 of any such proceeds will be deposited into the Smart Growth Housing Trust Fund. Any additional proceeds will be deposited into the Commonwealth Stabilization Fund. (Note: As a result of this section, funds from the sale of surplus state properties will enter the Smart Growth Housing Trust Fund *only* if annual sale proceeds exceed \$25 million, and the amount entering the Trust Fund cannot exceed \$25 million per year.)

Outside Section 367 Impact Study

The department, in consultation with the departments of education and revenue, will study the impact of the adoption of smart growth zoning districts on the educational systems of participating municipalities. The department will report to the Legislature on this study no later than July 1, 2006. The report will recommend a formula for ascertaining any actual additional net public school costs to which municipalities may become subject as a result of the adoption of smart growth zoning districts.