

Article 24 – MBTA Communities Act Resolution

Recommendation: By a vote of 3-1-1, the Subcommittee voted to table Article 24 pending its review of the Select Board’s charge to a committee to review MBTA Community Act compliance options, and steps to advance the work of the Committee in a prompt fashion.

Roll call vote:

- Pehlke: No
- Johnson: Yes
- Correa: Yes
- Selwyn: Abstain
- Pollak: Yes

The Land Use, Zoning and Sustainability Subcommittee of the Advisory Committee held a duly noticed public hearing on April 10, 2023, at 7 p.m. on Zoom.

In attendance were Subcommittee members David Pollak (Chair), Lee Selwyn, Linda Pehlke, Anita Johnson, Carlos Ridruejo (portion), and Patty Correa.

Also in attendance for some or all of the meeting were Kara Brewton, Joslin Murphy, Neil Gordon, Bill Reyelt, Carla Benka, Dick Benka, Charlie Homer, Fran Perler, Joan Lancourt, John Harris, John Rumpler, John VanScoyoc, Jonathan Margolis, and Paul Saner.

The recording of the meeting can be found here:

https://brooklinema.zoomgov.com/rec/share/0s4e7azxR8anugLjuwF_0gzpZ0iZtweyLs9iTCJzNjYILE07uwYyuBSDqN7efDb.Oct_S-KZThSIKTxo

Meeting materials can be found [here](#).

Executive Summary:	<p>Effective 2021, the Massachusetts legislature amended Mass. Gen. Laws Chapter 40, Section 3A, to require “MBTA communities” such as Brookline to create at least one zoning district of “reasonable size” within .5 miles of a transit station that permits multi-family housing as of right. Known as the “MBTA Communities Act (“MBTACA”, or “Act”), the Act directed the State’s Department of Housing and Community Development (“DHCD”) to “promulgate guidelines” for when a community is in compliance. DHCD’s MBTACA guidelines require the Town to enact zoning changes that implement no later than December 31, 2023, the end of this year. (As of this writing, DHCD has not responded to the Select Board’s March 28, 2023 request for a longer timeline and certain substantive changes to the guidelines).</p> <p>As of this writing, the Planning Department’s proposal for compliance is through zoning changes in the vicinity of the Town’s Harvard St. corridor, with a stated goal of publicly releasing a draft warrant article in late June 2023, and with filing of the final draft by the early September deadline for the November 2023 Special Town Meeting.</p>
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	The Petitioners’ resolution asks for a Moderator’s Committee to “identify additional potential options” for compliance with the Act beyond the Planning Department’s current proposal, with Planning Department staff and other support. Following the April 10, 2023 Subcommittee hearing, the Select Board appointed a committee to review options to the Planning Department’s Harvard St. proposal, which is to be Chaired by Co-Petitioner Richard Benka and whose membership includes Co-Petitioner Linda Olson Pehlke.
Voting Yes will...	Ask the Moderator to appoint a Moderator’s Committee with Planning Department staff support that will “identify additional potential options” to the Planning Department’s current proposal to comply with the Act and the guidelines (including the existing deadline of the end of this year for legally necessary zoning changes).
Voting No will...	Refrain from asking the Moderator to appoint such a committee.
Financial impact [if any]	There are no direct costs associated with the appointment of a volunteer Moderator’s Committee. There could be burdens on the Planning resulting from such an appointment, particularly in the scenario of the appointment of both a Select Board and a Moderator’s Committee. In addition, the Act includes a sanction for non-complying communities consisting of the loss of certain funding, which, in the Town’s case, would mean loss of approximately \$225,000 in Local Capital Projects funding for the Brookline Housing Authority (BHA). In addition, DHCD’s Guidelines state that it and other state agencies may consider a community’s non-compliance in making discretionary decisions on grant applications or funding.
Legal implications [if any]	There are no direct legal implications posed by the establishment of a Moderator’s Committee. In a memorandum dated March 3, 2023 , Town Counsel identified legal risks to the Town that could be posed by failure to timely comply with the Act. In addition, on March 15, 2023, the Massachusetts Attorney General released written MBTACA Guidance stating that non-complying communities may be “subject to civil enforcement action” by the AG. In his March 3, 2023 memorandum, Town Counsel states that a remedy a judge could impose against the Town could include an order imposing a compliant zoning district on the Town, and that certain types of claims the Town could face for non-compliance could, if the Town were to lose, require the Town to pay the prevailing plaintiff’s attorneys’ fees/costs.

Introduction

Petitioners Neil Gordon, Richard Benka, John Doggett, Jane Gilman, Nancy Heller, Jonathan Margolis, Linda Olson Pehlke, and Marty Rosenthal filed Warrant Article 24, which asks the Moderator to appoint a committee to “identify potential options” to the Planning Department’s current proposal for compliance with the December 31, 2023 deadline established by the Guidelines of the Massachusetts Department of Housing and Community Development

(“DHCD”) pursuant to the MBTA Communities Act (“Act”, or “MBTACA”), [Massachusetts General Laws Chapter 40A, Section 3A](#). Currently, the [Planning Department’s proposal](#) focuses on the Harvard St. corridor. Extensive background information, including but not limited to the foregoing and following, is available on the [Town’s website](#) entitled “Multi-family Zoning Requirements for Compliant MBTA Communities”.

A. The MBTA Communities Act and the DHCD Guidelines

Section 18 of “An Act Enabling Partnerships for Growth”, 2020 Mass. Acts ch. 358, created a new Section (“s.”) 3A of the State’s Zoning Act, Massachusetts General Laws (“MGL”) Chapter 40A. Section 3A requires “MBTA communities” such as Brookline to create at least one zoning district of “reasonable size” within .5 miles of a transit station that permits multi-family housing as of right. The Act directed the State’s Department of Housing and Community Development (“DHCD”) to “promulgate [guidelines](#)” for when a community is in compliance. DHCD’s Guidelines list some of their guiding principles. These include that communities benefiting from having the State’s transit network within their borders have an obligation to facilitate the creation of denser housing around those transit stations, and that generally, multi-family housing should be facilitated in locations with easy access to transit stations for pedestrians and bicyclists.

According to the Guidelines, the Act does not require actual housing production; it only requires that a zoning district be designed to make the creation of “multi-family housing” possible.

The State Zoning Act defines “multi-family housing” as buildings with at least 3 units, or lots with at least two buildings, each building having at least 2 units. (MGL c. 40A, s. 1A). The Act and DHCD’s current iteration of the Guidelines together establish complex and detailed parameters for Brookline’s MBTACA-compliant district that include the following requirements:

- The zoning district must permit “multi-family housing” as of right; the zoning district’s rules may not condition a multi-family housing project on approval through discretionary decision-making such as a special permit process. (MGL s. 40A, s. 3A; Guidelines, s. 4)
- The Town may not impose zoning requirements on the multi-family housing zoning district that it does not generally impose on other uses (e.g., single and two-family residential) such as required ground-floor retail. (Guidelines, s. 4C)
- A “reasonably sized” zoning district must be of “neighborhood scale”; based on its “developable land”, Brookline’s zoning district must be at least 41 acres in size (1.5% of “developable land”). (Guidelines, s. 5(a) and App. 1 p. 1).
- 90% of this zoning district must be within .5 miles of an MBTA stop. (Guidelines, s. 8, App. 1 p. 1)
- At least 50% of the zoning district’s land area must be comprised of contiguous lots. (s. 5)
- If in more than one area, each portion of the zoning district must be at least 5 acres in size. (s. 5)
- The required minimum density of the zoning district is 15 units/acre. (MGL c. 40A, s. 3A) Non-residential uses (such as parking) **is counted** toward the density calculation, except for rights of way and public land for non-residential uses. (Guidelines, s. 6(a)) Municipalities may establish sub-districts with different density requirements so long as the district as a whole supports a density of 15 units/acre. (Guidelines, s. 6(b))

- The zoning district’s required multi-family unit capacity is 6,990 housing units (25% of the Town’s 27,961 housing units counted in the 2020 US Census). (Guidelines, s. 5(b) and App. 1 p. 1) This is theoretical capacity only; the zoning rules must allow for the production of this number of units by right on the 41 acres but do not require any housing production at all. Moreover, the Guidelines ignore the actual existence of housing and treat land theoretically as undeveloped. (Guidelines, s. 5(b)).
- The Town may have a sole zoning district of less than 5 acres that is compliant with the unit capacity and density requirements if it is comprised of entirely contiguous lots. (Guidelines, s. 5(a))
- Units that count toward compliance may not have age or size restrictions or cap the number or size of bedrooms and the number of occupants. (Guidelines, s. 7)

By December 31, 2023, the Town must demonstrate compliance through a unit capacity count and GIS “shapefile” for the zoning district, using DHCD’s electronic compliance model. DHCD’s compliance model uses the Town Assessor’s geospatial tax parcel data hosted by MassGIS and reflects any excluded land area and local regulatory and dimensional features that impact unit capacity. (Guidelines, s. 9, App. 2) The Town must also provide proof that the Town Clerk has at least submitted the zoning district to the Attorney General for approval, along with a certified copy of the Town’s Zoning By-Law.

Following compliance, the Town must continue to notify DHCD of any proposed or enacted zoning change affecting the multi-family housing district, and of any local rule that limits multi-family housing development in the zoning district. The Guidelines list a host of factors that could prompt DHCD to rescind the determination of compliance, including zoning action that “materially alters” the zoning district’s land area or unit capacity. (Guidelines, s. 10)

B. Town’s Recent Compliance Steps

Please see the [Town’s website](#) for a more complete description of Town staff’s and volunteer board’s work related to achieving MBTACA compliance to date.

Briefly, in late 2022, the Planning Department released its initial [compliance proposal](#) that focuses on the Harvard St. area with form-based zoning. In January 2023, some members of the community voiced written concerns to the Select Board about an MBTACA compliance approach that focused on Harvard St.

In April, the Planning Department is holding three public meetings to educate the public about the MBTACA requirements and seek public input and discussion about options to the Harvard St. proposal, with [recordings and slides](#) posted on the Town website. (The Planning Department is to report back to the Select Board about these discussions at the Select Board’s April 28, 2023 meeting.) On March 28, 2023, the [Select Board wrote to DHCD](#) asking for certain clarifications about and changes to the Guidelines, and asking for an extended timeline compliance by the end of 2024. On April 18, 2023, the Select Board appointed a committee to review options to the Planning Department’s Harvard St. proposal. The Select Board committee members include Warrant Article 24 Co-Petitioners Richard Benka (as Chair) and Linda Olson Pehlke.

C. The Housing Choice Act and Simple Majority Zoning Bylaw Approval

Section 19 of same 2021 legislation that enacted the MBTACA, which is separately known as the “Housing Choice” act, amended [Section 5 of Chapter 40A](#) to provide for Town Meeting approval of a zoning bylaw by a **simple majority** in certain circumstances.

As amended by the Housing Choice act, Section 5 now allows for simple majority approval where a zoning provision permits specified housing by right, including:

- “multi-family housing” (see above definition) or mixed use (defined as residential and non-residential uses in the same development) in “eligible locations”, and
- accessory dwelling units.

[State guidance under the Housing Choice legislation](#) defines “eligible locations” to presumptively, but not exclusively, include areas within .5 miles of a transit station.¹ The [State’s website](#) on the Housing Choice legislation describes a mechanism for a community to seek an advisory opinion on “eligible locations” and provides a detailed [guidance document](#) on the Housing choice act.

Section 5 also now allows for simple majority approval for certain other zoning bylaw measures allowed by special permit, including reductions in the amount of required parking for housing or mixed-use development.

Section 5 contains an important caveat to the above, namely that a zoning provision that “requires a simple majority vote shall not be combined with [a provision] that requires a two-thirds majority vote.”

Evaluation Methodology/Research

a. The April 10, 2022 Subcommittee Hearing/Meeting

The Subcommittee’s initial hearing began with a presentation by Co-Petitioner Richard Benka for the Petitioners. Mr. Benka stated that the Planning Department’s MBTACA compliance proposal uses a key commercial area of the Town for compliance with a State law that deters commercial activity by prohibiting a mixed use development requirement. He questioned the benefit of the incentives the Town would have to offer to achieve ground floor retail without running afoul of the law, such as reducing affordable housing requirements. He stated that the Town would need to forego a parking minimum requirement in order to reach the required unit capacity count. He said that units created without a parking minimum may pose difficulties to the elderly and disabled who may not enjoy easy use of the T or who need parking for home assistants, and to parents of children who need transportation to areas not covered by the T. Any DHCD agreement to the Select Board’s letter requesting permission to incorporate mandatory ground floor commercial and parking minimums will require Town adjustments to compensate for losses in unit capacity, such as increases in height, density or area, he said.

¹ Section 1A of the State Zoning Act defines “eligible locations” to also include “areas of concentrated development” such as town centers and commercial districts.

Mr. Benka stated that the Town should comply with the MBTA Communities Act and that he was not urging otherwise. He stated that the current compliance focus on Harvard St., a commercial area, may not pass Town Meeting. Therefore, there should be a different proposal that minimizes disruption, perhaps to include modification of requirements in the SC and T zones, also in the M zones and along major corridors such as Beacon St. Existing housing in certain multi-family districts now exceeds the MBTACA's unit capacity requirement, but there would be necessary tweaks to use these districts as the basis for compliance, including elimination of any existing special permit requirements that may be tied to design review, and to substitute Planning Department design standards instead.² Co-Petitioner Neil Gordon said during the hearing that he wants to see a second competing proposal put before Town Meeting to choose from.

With regard to the Select Board's plan to appoint its own committee to study options, Mr. Benka stated that the public has not yet seen whether the committee membership will have the necessary technical and zoning expertise and will challenge the Harvard St. proposal. It has not seen whether the Select Board's charge will make clear that alternatives should be sought -- including reliance on existing multi-family zones -- and whether alternatives will be pursued. Co-Petitioner Jonathan Margolis stated that a Moderator's Committee will provide a more independent review than he feels a Select Board committee will provide.

Co-Petitioner Neil Gordon expressed distrust in the efficacy of a Select Board committee, stating that the Select Board's initial view was against asking DHCD for relief on the basis that non-compliance was not on the table, when Town Meeting's rejection of the Town's proposal could mean non-compliance. Mr. Margolis and Mr. Gordon also expressed distrust on the basis that the Select Board did not move to promptly appoint a committee to get started on reviewing alternatives after community concerns and requests for alternatives first arose beginning early this year. Petitioner Linda Olson Pehlke stated that it is everyone's goal to get something passed at Town Meeting, that a Moderator's Committee may be less politically charged, and that Town Meeting trusts Moderator's Committees. The process would be additive to reach the required numbers depending on how much of Harvard St. is included or not. We need to come up with something that the whole Town is happy with, even those who are hesitant about density increases, she said.

Planning Director Kara Brewton said that the Planning Department did begin its development of a proposal by entertaining other compliance options, but it settled on Harvard St. because DHCD's compliance model is extremely restrictive, for example, with how it counts parking and ground floor retail. Last week's first community options workshop the Department held with the public circled back to discussing the initial options the Planning Department had considered, and the Department will see where the conversation goes in future meetings. The Department is holding the meetings to get started on steps to assure that there is a proposal that passes Town Meeting.

² During the hearing, Director Kara Brewton stated that her department has been cataloguing alternatives for consideration, including this one and several others she mentioned. She stated that her department has proceeded cautiously in recognition of impacts on neighborhoods that could result from such "tweaks".

The Petitioners answered the Subcommittees questions as follows:

Q: How is voting yes on Warrant Article 24 also voting yes on MBTACA compliance, given that a zoning warrant article has to be filed in early September?

A (Benka): The difference between a Moderator's vs. a Select Board committee is a few weeks. Warrant Article 24 could be accelerated at the May Town Meeting, and there are mechanisms for late filing of a warrant article and for a second special town meeting. Making tweaks to the Town's multi-family districts could be more expeditious than the implementing form-based zoning on Harvard St.

Q: How could limited staff in the Planning Department support both a Select Board committee and a Moderator's Committee?

A (Benka): We envisioned just one Committee and we prefer a Moderator's Committee. Members of the public are not able to work on their proposal without Town staff support due to the need to utilize DHCD's electronic compliance model to run the numbers. Another thought is that the Moderator's Committee could provide oversight if the Select Board's Committee is seen to aggressively pursue alternatives.

Q [to Select Board member John VanScoyoc]: The Town Administrator's 4/10/23 memorandum to the Subcommittee did not seem to express a preference for a Select Board Committee over a Moderator's Committee. Does the Executive Branch have a preference?

A (VanScoyoc): Speaking for myself, we would like to get on one track, call it a combined Moderator's/Select Board committee. We've got to keep the focus a technically compliant proposal that Town Meeting is willing to pass. It will get confusing if there are two committees studying the same matter. There is limited staff. Two competing proposals could make for a very confusing Town Meeting. But we're at a delicate point right now in figuring out what a Moderator's or Select Board committee would look like. The Select Board has used the time to date to communicate with DHCD and seek relief it. It needs to spend a short amount of time considering whether it is able to address the concerns underlying the Moderator's Committee proposal and whether a Moderator's Committee and two competing proposals could impede the effort to pass a proposal at Town Meeting so that the Town can be in compliance.

Q [to Planning Director Kara Brewton]: Does the Planning Director have an opinion on this?

A (Brewton): No, except to add that the State is willing to pre-review (before Town Meeting) a proposal that has Select Board sign off.

Q: Does the Select Board's 3/28/23 letter address Warrant Article 24's request for Select Board communication with DHCD?

A: The 3/28/23 letter is responsive but the article's request is for continuing communication. The letter gives a good idea of the items the petitioners are interested in getting from DHCD.

Q: Do you see some part of the Harvard St. proposal factoring into a Moderator's Committee proposal?

A (Benka): Conceivably, but Harvard St. does not work with DHCD's current constraints, which perhaps it will change. We could say that Harvard St. is a commercial area and we save it. We could say that there are parts of Harvard St. that could be part of compliance. We could look at other areas that wouldn't need major changes.

During the public hearing, one commenter urged no action on Warrant Article 24, believing that its objective is more auto-centered development when a departure from that model is now needed. He is not opposed to considering alternatives that promote walkability and transit, not auto, oriented development.

Another commenter urged no action, stating that the State passed the MBTACA to address a housing shortage in the State, and the Planning Department chose to focus on Harvard St. to preserve the character of the town and promote increased foot traffic in a commercial area. He agreed with the value of reviewing alternatives that likely complement the proposal, and the Select Board plans to appoint a committee to provide that oversight, which is a more efficient approach. The Planning Department has already gotten started on holding community meetings to discuss options.

A third commenter urged no action given the Planning Department's steps to hold community options meetings and that the appointment of a Moderator's Committee would burden Planning staff. The Select Board should be the oversight body.

A final commenter said that she had not been hearing about the proposal and that it feels like the matter is decided without community input. She wondered whether a Moderator's Committee might be more relatable to the public.

Following public comment, Subcommittee members offered comment. One Subcommittee member urged the Petitioners to work toward consensus on a single proposal to Town Meeting to avoid the chaos that could ensue from competing proposals with a hard deadline for legal compliance. A second commented on what he viewed as the expected burdens on schools, Town services and the T that could ensue from the increased multi-family housing. He said he believes that alternatives need exploration and he supports the Article.³ A third Subcommittee member commented that she supports the Harvard St. proposal as in keeping with the character of the neighborhood and as sensible for a transit-oriented corridor. She saw the Article as an attempt to derail the proposal and said she would vote no action. A fourth Subcommittee member commented that he believed it was the Select Board's job to provide the oversight needed to assure a plan that could pass Town Meeting and would vote no action on a proposal that contemplated a Moderator's Committee instead. He suggested a motion to table the Article pending review of any prompt steps by the Select Board to establish its committee.

Recommendation

³ In reply to this point, another Subcommittee member pointed out the possible legal risks of factoring into the Town's decision-making the costs associated with housing families, and said that she would not do so and suggested others not do so.

By a vote of 3-1-1, the Subcommittee voted to table Article 24 pending its review of the Select Board's charge to a committee to review MBTA Community Act compliance options, and steps to advance the work of the Committee in a prompt fashion. Roll call vote:

Pehlke: No

Johnson: Yes

Correa: Yes

Selwyn: Abstain

Pollak: Yes