

ARTICLE 24

TWENTY-FOURTH ARTICLE

Submitted by: Neil Gordon; Richard Benka; John Doggett; Jane Gilman; Nancy Heller; Jonathan Margolis; Linda Olson Pehlke; Marty Rosenthal

To see if the Town will adopt the following Resolution:

WHEREAS the Massachusetts Department of Housing and Community Development (“DHCD”) has enacted guidelines that impose a December 31, 2023, compliance deadline for MBTA “Rapid Transit” communities such as Brookline to present zoning plans complying with the so-called “MBTA Communities Act” (“MBTA-CA”), G.L. ch. 40A, § 3A, as determined by application of a DHCD “Compliance Model; and

WHEREAS Brookline’s Planning and Community Development Department (“Planning Department”) has developed a single strategy that would involve substantial rezoning of a 48-acre district centered on the Harvard Street corridor as well as neighboring streets, but other options should be considered; and

WHEREAS while it has been repeatedly claimed that there is no “up-zoning” contemplated, the Harvard Street strategy, in order to comply with DHCD guidelines, assumes the elimination of all parking requirements for new developments along Harvard Street, the elimination of any requirement for commercial or other publicly accessible space (e.g., retail, restaurant, personal services, professional services) even on the first floor, the elimination of floor area ratio restrictions on density, and a 48-foot height limit rather than the existing staggered building height limits; and

WHEREAS all of these factors contribute to significant increases in permissible density from redevelopment that could seriously threaten existing businesses, commercial vitality and existing moderately priced housing; disrupt neighborhoods; and ignore the need for open space and the critical need to increase our tree canopy; and

WHEREAS the Harvard Street strategy is focused solely on pursuing MBTA-CA compliance with the single 48-acre zoning district (which could, in fact, have to expand even further into neighboring streets), although the DHCD guidelines do not require a single area; and

WHEREAS the number of actual, existing multi-family (3-plus) units in Brookline already far exceeds the MBTA-CA “capacity” requirements, a fact not recognized by the DHCD guidelines; and

WHEREAS unlike the Harvard Street strategy, utilizing multiple areas in Town to comply with the MBTA-CA, including existing three-family and other multi-family districts or portions of other corridors, would not require the Town to impose potentially negative

changes on the Harvard Street corridor and would not concentrate the potential for additional multi-family housing and the potential impacts on school population on only three elementary schools (Ridley, Lawrence and Pierce); and

WHEREAS recent successful rezoning efforts have been guided by resident committees with staff and consultant support, where the committees reflect appropriate technical skills along with representation from affected constituencies, to increase the credibility of their recommendations and the likelihood of acceptance by Town Meeting; and

WHEREAS the Harvard Street strategy and the chosen process raise significant concerns that could well result in the defeat of that strategy at the November 2023 Town Meeting and it would be imprudent for the Town to “put all its eggs in one basket” without having the option of fully considering other options for complying with the MBTA-CA; and

WHEREAS it is prudent to establish a resident-guided process that will, to the extent possible, ensure the development of alternative strategies for MBTA-CA compliance that could be utilized by themselves or in conjunction with a modified form of the Harvard Street strategy, and that will involve public engagement and analysis of potential impacts of not only the Harvard Street strategy but also alternative strategies;

NOW, THEREFORE, BE IT RESOLVED that Town Meeting

- A. Requests the Select Board and the Town’s legislative delegation to initiate or continue efforts to seek appropriate modifications to the DHCD deadline and guidelines; and further
- B. Requests the Moderator to appoint a committee to identify additional potential options for complying with the MBTA Communities Act; and further,
- C. Requests the Select Board to direct the Planning Department to provide staff support to said Moderator’s Committee in analyzing both the Harvard Street strategy’s potential impacts, including impacts on Town and School services and risks to existing businesses, and other potential options for MBTA-CA compliance, including without limitation applying the DHCD Compliance Model and developing appropriate site plan review standards.

Or act on anything relative thereto.

PETITIONER’S ARTICLE DESCRIPTION

1. Brookline is not required to create a “mega district” to comply with the MBTA-CA

The DHCD guidelines require Brookline to have a “minimum land area” of 41 acres with “multi-family unit capacity” of 6,990 units (25% of the Town’s current number of units) as determined by a DHCD “Compliance Model.” In response, the Harvard Street strategy has identified a single 48-acre district encompassing the entire length of Harvard Street from Station Street to Verndale Street (interrupted only for a block at Coolidge Corner). Moreover, because properties along Harvard Street -- even with the substantial zoning changes contemplated by the Harvard Street strategy – apparently yield only 5,400 of the required 6,990 unit “capacity,” the Planning Department has actually included contiguous portions of Stearns Road, Littell Road, Alton Court, St. Paul Street, Webster Place, Kent Street, Station Street, Stedman Street and Beals Street in the so-called “Harvard Street” plan.

The Town, however, is not required to concentrate the impact of the MBTA-CA on only one “mega district.” The DHCD guidelines actually state, for example, that

- “[i]f an MBTA community has two or more zoning districts in which multi-family housing is allowed as of right, then two or more districts may be considered cumulatively to meet the minimum land area and minimum multi-family unit capacity requirements”;
- “no portion of the district that is less than 5 contiguous acres [of] land will count toward the minimum [land] size requirement”; and
- “at least half of the multi-family zoning district land areas must comprise contiguous lots of land.”

DHCD guidelines also allow the inclusion of areas that are already developed and do not limit “capacity” calculations to lots that are vacant. Thus, the guidelines make clear that

- “[n]othing ... should be interpreted as a mandate to construct a specified number of housing units, nor as a housing production target”;
- “capacity” simply means “that a sufficient number of multi-family housing units could be added to or replace existing uses and structures over time – even though such additions or replacements may be unlikely to occur soon”; and
- all privately owned property, even if already developed, can be included in calculating “capacity” unless development is prohibited to protect private or public water supplies or the property is used for institutional uses such as a hospital, utility, or private school, college or university.

Furthermore, DHCD guidelines expressly allow “site plan review” with by-laws that impose conditions on “the appearance and layout” of specific projects, including the regulation of matters such as vehicular access and circulation, screening of adjacent properties, and the “architectural design of a building.” Because the door is open to utilizing site plan review and to considering multiple areas in Town, including multiple commercial areas and existing three-family and multi-family zones, MBTA-CA compliance could generate fewer negative impacts than a single-minded pursuit of the Harvard Street strategy.

2. It is erroneous to argue that the Harvard Street strategy is not up-zoning

It has been repeatedly argued that the Harvard Street strategy provides the potential for growth “without up-zoning,” that “[n]o up-zoning [is] required” and that the strategy will “facilitate infill for both housing/commercial without up-zoning.”

Planopedia, a source of recognized urban design terms, defines “upzoning” as options “to create new development capacity,” including “increas[ing] the floor-area ratios,” “[i]ncreased height restrictions, lower parking requirements, or density bonuses.” The Harvard Street strategy includes

- replacing maximum floor-area ratios (currently 1.0 to 1.75 in most of the area) with “form-based zoning,” thus eliminating (not merely increasing) the allowable floor-area ratios and, with the proposed increase in height limits, essentially tripling the allowable density of properties in the area;
- increasing height restrictions to 48 feet (from 40 feet in most of the area), a 20% increase;
- eliminating various setback and open space requirements in favor of “form-based zoning;”
- eliminating the requirement for publicly accessible first floor space;
- and eliminating (not just reducing) parking restrictions.

The assertion that there would be no “upzoning” is erroneous.

3. The DHCD guidelines are particularly troublesome when applied to the entirety of the existing Harvard Street commercial corridor

Choosing a single, huge 48-acre land area, rather than doing the additional work of objectively pursuing ways in which the MBTA-CA could be achieved with other less disruptive approaches, will focus potential enrollment impacts on only three of the Town’s eight elementary schools and potentially disrupt a vibrant commercial corridor.

First of all, the ironic choice of a commercial corridor as the venue for compliance triggers State DHCD guidelines that flatly prohibit the Town from requiring publicly accessible, commercial activities on the ground floor, or, indeed, anywhere in a building. The threat to commercial viability and to local business is clear. The Town has offered two responses, both of which would likely create further problems:

- First, the Town has apparently suggested, or will suggest, that DHCD remove this restriction. The problem, of course, is that the Harvard Street “mega district” could become even larger than 48 acres, or the “canyonization” of Harvard Street even greater, if the Town’s request for changes to the DHCD guidelines were allowed. Thus, if the Town were permitted to require first-floor commercial space, the “as of right” multi-family housing floor area in buildings would be reduced and the “capacity” target of 6,990 units could be reached only by further

- expanding the district into even more neighboring streets, or by increasing the height limit and thus density even further beyond the contemplated 48 feet.
- Second, the Planning Department has said that it could provide “incentives” for developers to include commercial uses to avoid dead, publicly inaccessible first-floor spaces in the critical Harvard Street commercial area. The “incentives,” however, would likely require either financial support from the Town in the form of tax abatement agreements, a reduction in the Town’s affordable housing requirements, or zoning incentives allowing even greater density and the resulting “canyonization” beyond that already contemplated by the Harvard Street strategy.

Second, because the DHCD model deducts space required for parking in calculating housing “capacity,” the Planning Department’s Harvard Street strategy reaches a “capacity” of 5,400 units on Harvard Street, and 6,990 units in the entire MBTA-CA district, only by eliminating all required parking for new development in the district:

- The absence of any minimum on-site parking requirements imposes potential negative impacts on potential patronage in the Harvard Street commercial area (if any commercial activity is able to survive), on surrounding neighborhoods, and even on the residents of any new multi-family housing. Is it realistic to proceed on the assumption that no residential parking is needed?
- Including any on-site parking requirement to avoid congestion and impacts on neighborhood streets and municipally owned parking lots would require that building heights be increased even more or that the MBTA-CA district be expanded even further into surrounding neighborhoods to achieve the desired “capacity.”

Thus, the focus on a single huge area, and a commercial area to boot, creates problems under the DHCD guidelines that could potentially be avoided. Indeed, these problems would, as discussed below, exacerbate other inequities generated by the application of the MBTA-CA.

4. Brookline’s already-existing multi-family units far exceed the MBTA-CA “capacity” guidelines

The DHCD guidelines identify Brookline as one of twelve “Rapid Transit” communities - - Braintree, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Milton, Newton, Quincy, Revere, and Somerville – that are required to have a “minimum multi-family unit capacity” equivalent to 25% of the total number of housing units in the community according to the 2020 U.S. Census.¹

¹<https://www.mass.gov/doc/compliance-guidelines-for-multi-family-zoning-districts-under-section-3a-of-the-zoning-act/download>

The Town's already-existing multi-family units, according to the 2021 U.S. Census American Community Survey, are already 66.8% of the Town's housing units.

- The percentage of multi-family units in the twelve “Rapid Transit” communities ranges from 10.8% to 71.9%.
- Brookline is one of only three of the twelve communities, along with Chelsea and Cambridge, where multi-family housing already constitutes more than 2/3 of the total housing units.
- Thus, Brookline's actual, already-existing multi-family inventory is more than 2 ½ times the MBTA's “capacity” goal.²
- It has also been stated that an even higher percentage (75%) of the units in Brookline's Green Line service area are multi-family, more than three times the MBTA-CA “capacity” goal.³

But whether the multi-family percentage of Brookline's existing housing units is 2/3 or 3/4, Brookline far exceeds the MBTA-CA 25% “capacity” standard and cannot credibly be accused of excluding multi-family housing.

5. The MBTA-CA expects other municipalities to subsidize Boston and Cambridge and commercial developers in those cities

Over the past decade, as set forth in more detail in Appendix “A,”

- Boston and Cambridge have effectively shifted to other communities the cost of providing housing and related municipal services, including public education, for the households of workers attracted by commercial development in those two cities.
- Those two cities have gained tens of millions (Cambridge) or hundreds of millions (Boston) of dollars of additional property tax levies from commercial development, a windfall they do not share with other communities. On a per capital basis, Boston's tax levy increase from commercial development is 5 times that of Brookline, and that of Cambridge is 7 times Brookline's.
- More specifically, in the decade after 2010, Boston added 124,800 new jobs but provided only 29,200 additional housing units (only 23% of the new jobs); Cambridge added 35,500 new jobs but provided only 6,600 additional housing units (only 19% of the new jobs); and Brookline added 1,200 new jobs while providing 1,500 additional housing units (25% more units than the number of new jobs).
- Studies conducted by Boston and Cambridge themselves confirm the fact that other municipalities already house the vast majority of new workers attracted to those cities. Those studies further confirm that the housing “linkage payments”

²https://censusreporter.org/data/table/?table=B25024&geo_ids=16000US2509210,05000US25021,31000US14460,04000US25,01000US&primary_geo_id=16000US2509210#valueType|estimate

³ Boston Globe, March 4, 2023, p.A-9 (Linda Olson Pehlke; Readers' Forum).

- paid by developers in those two cities are a trivial percentage of the additional housing costs imposed by commercial development (without even accounting for the costs of municipal services necessitated by additional housing).
- And, as with their commercial property tax windfalls, the housing linkage payments received by Boston and Cambridge are not shared with the municipalities actually housing the vast majority of new workers from those two cities.
6. Residential taxpayers in Brookline bear the brunt of providing Town and School services

As further set forth in Appendix “A,” because of Brookline’s relatively small commercial tax base and limited commercial growth compared to Boston and Cambridge,

- Residential properties in Brookline pay a much larger percentage of Brookline’s property tax levy – twice the share paid by Boston’s residential properties and almost 2 ½ times the share paid by residential properties in Cambridge.
- Brookline, like other “bedroom” communities, has faced multiple operating overrides and debt exclusion votes, primarily to meet school needs.
- The taxes on residential properties have already increased dramatically, even without including the impact of the debt exclusion for fire station rehabilitation voted in 2022 and the pending 2023 operating override and Pierce School debt exclusion.
- In contrast, Boston and Cambridge, with their commercial property tax growth and offloading of housing and municipal service responsibilities to other communities, have had NO operating overrides or debt exclusions in at least 35 years, if ever.⁴

And, as a final irony, Boston is totally excluded from any obligation under the MBTA-CA to provide multi-family housing capacity.

7. A closing comment

Despite the obvious negative fiscal impacts of Brookline’s already sparse commercial development and despite the fact that DHCD guidelines preclude the Town from requiring space for commercial activity, the Harvard Street strategy utilizes a major corridor defined by commercial activity along almost its entire length as the location for efforts to satisfy the MBTA-CA.⁵

⁴ <https://www.mass.gov/lists/reports-relating-to-property-tax-data-and-statistics#proposition-2-1/2-referendum-data->

⁵ Indeed, as noted above, even if the DHCD guidelines prohibiting commercial mandates were relaxed, any mandate to include commercial activity would likely either require that the zone be expanded even further

The Harvard Street strategy, under external time pressure,⁶ proposes changes that will have potentially serious and irreversible impacts enduring for decades. Plunging ahead with this single strategy would leave the Town with no viable alternatives that might be acceptable.⁷ Town Meeting should not be so severely hamstrung in its future decision making. The more prudent course would examine available alternatives for complying with the MBTA-CA. This resolution is an effort to start that process.

into adjoining neighborhoods or that the proposed zoning be changed to allow even greater density and “canyonization” through increased height limits.

⁶ The Town and other municipalities are apparently seeking an extension of the December 31, 2023 deadline for submitting final plans. Even if that time is not extended, the Boston Globe reported on December 16, 2022, that DHCD on or about December 14, 2022 issued a letter stating that “Once a community comes back into compliance, the housing authority funding will be restored.” <https://www.bostonglobe.com/2022/12/16/business/state-soften-budget-cuts-towns-that-dont-comply-with-new-mbta-housing-law/>

⁷ In its MBTA-CA Action Plan, the Planning Department recognized “the fears of obliterating our small commercial tenants”; that “[w]ithout having the ability to require commercial use on the ground floor in our core commercial districts along Harvard Street, we may not be able to secure a majority vote at Town Meeting”; that “we are unsure whether Town Meeting will agree to no parking minimums by right”; and that “[w]hile no parking minimums by right may seem an obvious policy solution, it may prove to not be a politically palatable outcome.” <https://www.mass.gov/doc/submitted-section-3a-action-plans/download>

APPENDIX “A”

Commercial New Growth over the Past Decade

Boston:

- Has averaged an increase of over \$50 million of “new growth” annually in its property tax levy limit from Commercial, Industrial and Personal Property (e.g., laboratory equipment) (“CIP”) development.
- This bonanza that has not abated even after the pandemic, with an additional \$69.3 million property tax levy increase from CIP new growth in the most recent Fiscal Year 2023.⁸

Cambridge:

- Has averaged an increase of over \$13.3 million annually in its property tax levy limit from CIP development.
- As in Boston, this has not abated even after the pandemic, with an additional \$21.1 million CIP new growth increase in Fiscal Year 2023.⁹ Each annual increase becomes part of the permanent tax levy limit for all future years, being aggregated year after year and further increased by 2 ½% annually under Proposition 2 ½.

Brookline, in contrast:

- Has had an increase averaging only \$0.9 million annually in its property tax levy limit from CIP development
- And, in fact, this number fell after the pandemic, with only a \$792,628 CIP new growth tax levy increase in Fiscal Year 2023.¹⁰

In per capita terms:

- Over the past decade the annual per capita new growth in the tax levy limit from CIP development in Boston has been 5 times that of Brookline, and the increase in Cambridge has been more than 7 times that of Brookline.
- And none of the increased CIP property taxes collected by Boston and Cambridge are shared with other communities.
- This discrepancy would not be troubling if Boston and Cambridge were in fact housing the additional workers and their households and providing the costs attendant on that housing, including the costs of providing municipal services and public education. As shown below, however, that is not the case.

⁸ https://dls.gateway.dor.state.ma.us/reports/rdPage.aspx?rdReport=NewGrowth.NewGrowth_dash_v2_test

⁹ Ibid.

¹⁰ Ibid.

“Off-loading” of Housing and Municipal Service Responsibilities by Boston and Cambridge to Other Communities.

State and federal data:

- Between the 4th quarter of 2010 and the 4th quarter of 2019 (before pandemic distortions), Boston added 124,800 new jobs, Cambridge added 35,500 new jobs, and Brookline added 1,200 new jobs.¹¹
- The U.S. Census shows a growth in housing units between 2010 and 2020 in Boston of 29,200 units (only 23% of the new jobs), in Cambridge of 6,600 units (only 19% of the new jobs), and in Brookline of 1,500 units (25% more units than the new jobs added in Brookline).¹²

Boston’s own 2016 study:

- Found that only 24% of new workers in Boston commercial developments seek housing in Boston.
- Also found that a linkage payment of \$85.55 per square foot of CIP development – in 2016 dollars -- would be needed to provide housing for low-, moderate- and middle-income workers among just the 24% of additional workers seeking housing in Boston.¹³
- Extrapolated to the communities that provide housing for the other 76% of workers, that \$85.55 figure would be \$360 per square foot, even without accounting for increases in costs between 2016 and 2023.
- Yet in contrast to that required \$360 per square foot – in 2016 dollars -- Boston currently collects a trivial housing linkage fee of only \$13.00 per square foot (and only for developments over 100,000 square feet), and none of that is shared with the communities that are providing housing for 76% of the workers generated by Boston’s commercial development.
- Proposed increases of the housing linkage fee to approximately \$25.85 per square foot for laboratory space and \$19.40 per square foot for other commercial uses¹⁴ would still be a trivial part of the \$360 per square foot of housing costs – in 2016 dollars -- imposed by commercial development, and none of that amount would be shared with the other communities such as Brookline providing housing for 76% of the workers attracted by Boston CIP development.

Cambridge’s own 2019 study:

¹¹ <https://lmi.dua.eol.mass.gov/LMI/EmploymentAndWages>

¹² <https://data.census.gov/cedsci/all?q=boston%20ma%20housing%20units> (Boston);
<https://data.census.gov/cedsci/all?q=cambridge%20ma%20housing%20units> (Cambridge);
<https://data.census.gov/cedsci/all?q=housing%20units%20brookline%20ma> (Brookline)

¹³ <https://www.bostonplans.org/getattachment/b883ad7f-fc1f-4c83-ac88-1334e519742d>

¹⁴ 84% of the increased fees, with the remaining 16% going to job training.

- Found that only 13% of new workers in Cambridge commercial developments seek housing in Cambridge.
- Found that a linkage payment of \$55.27 per square foot of CIP development – in 2019 dollars – would be needed to provide housing for low-, moderate- and middle-income workers among just the 13% of additional workers seeking housing in Cambridge.¹⁵
- Extrapolated to the communities that provide housing for the other 87% of workers, that \$55.27 figure would be \$415 per square foot, even without accounting for increases in costs between 2019 and 2023.
- In contrast to that required \$415 per square foot – in 2019 dollars -- Cambridge currently collects a trivial housing linkage fee of only \$20.10 per square foot (and only for developments over 30,000 square feet), and none of that is shared with the communities that are providing housing and the attendant public services for 87% of the workers generated by Cambridge’s commercial development.

To make matters even worse, the MBTA-CA:

- Excludes Boston, one of the principal beneficiaries of commercial development taxes, from the mandate to provide multi-family housing.¹⁶
- Under the DHCD guidelines, actually places a “cap” on affordable housing requirements, stating that, in the absence of an “economic feasibility analysis” by a “third party acceptable to DHCD, and using a methodology and format acceptable to DHCD,” zoning cannot require more than 10 percent of the units in a project to be affordable, and the income cap cannot be less than 80% of the area median income (so that a municipality cannot, for example, choose a cap on income that is less than \$112,150 for a household of four).

Impact on Residential Taxpayers in Brookline, Boston and Cambridge

Burden of paying local property taxes:

- Brookline residential properties pay 83.5% of the total property tax levy.
- Boston residential properties pay only 41.7%.
- Cambridge residential properties pay only 34.2%.¹⁷

¹⁵ https://www.cambridgema.gov/-/media/Files/CDD/Housing/incentivezoning/hsg_Incentive_Zoning_Nexus_Study_20191211.pdf

¹⁶ And Cambridge has stated in its MBTA-CA Action Plan that its “most likely” zoning strategy to comply with the MBTA-CA is essentially the status quo: “An existing zoning district or districts that might already comply with the Section 3A Guidelines.” <https://www.mass.gov/doc/submitted-section-3a-action-plans/download>

¹⁷ <https://dls.gateway.dor.state.ma.us/reports/rdPage.aspx?rdReport=Dashboard.TrendAnalysisReports.TaxLevyByClass>

Overrides and debt exclusions:

- Brookline, like other “bedroom communities” without the extensive commercial growth of Boston and Cambridge, has required increasingly frequent operating overrides, largely to fund school expenses (1994; 2008 (\$6.2 million); 2015 (\$7.665 million); 2018 (\$6.6 million); proposed 2023 (approximately \$12 million)).
- Brookline has likewise had multiple debt exclusions primarily to meet school needs (1990, new Lincoln School; 1995, High School renovation; 2015, new Ridley (\$120 million); 2018, renovate and expand High School (\$238 million); 2019, new Driscoll (\$120 million); 2022, fire station life safety and gender equity (\$65 million); proposed 2023, new Pierce (\$173 million expected Town share)).
- In contrast, Boston and Cambridge have had no operating overrides or debt exclusions in at least 35 years, if ever.

The impact on residential property taxes, without the impact of the \$65 million 2022 fire station debt exclusion (which has not yet affected property taxes) or the potential impacts of the proposed 2023 \$173 million Pierce School debt exclusion and 2023 \$12 million operating override:

- With the owner-occupied property tax exemption, from FY18 to FY23, taxes have already increased as follows (including the CPA surcharge):
 - On the median single-family home, from \$11,882 to \$17,160;
 - On the median condominium, from \$3,933 to \$4,659;
 - On the median 2-family home, from \$12,420 to \$17,749; and
 - On the median 3-family home, from \$13,607 to \$18,753.
- Taxes on the median apartment building have increased from \$27,201 to \$36,767.¹⁸

ECONOMIC DEVELOPMENT ADVISORY BOARD RECOMMENDATION

On April 3rd, the Economic Development Advisory Board (EDAB) held a public hearing on Warrant Article 24. After a presentation of the article by the petitioner, several comments from members of the public, and comments from EDAB members and Town staff, EDAB voted 8-0-3 in favor of the following motion:

¹⁸ [https://www.brooklinema.gov/DocumentCenter/View/37282/FY2023-Classification-Hearing-Presentation?bidId=\(adjusted for actual residential exemption of 20%, commercial tax shift of 1.745, and CPA surcharge per conversation with Chief Assessor\):https://meetings.brooklinema.gov/OnBaseAgendaOnline/Documents/ViewDocument/Select_Board_948_Agenda_Packet_11_27_2018_6_30_00_PM.pdf?meetingId=948&documentType=AgendaPacket&itemId=0&publishId=0&isSection=false](https://www.brooklinema.gov/DocumentCenter/View/37282/FY2023-Classification-Hearing-Presentation?bidId=(adjusted%20for%20actual%20residential%20exemption%20of%2020%2C%20commercial%20tax%20shift%20of%201.745%2C%20and%20CPA%20surcharge%20per%20conversation%20with%20Chief%20Assessor):https://meetings.brooklinema.gov/OnBaseAgendaOnline/Documents/ViewDocument/Select_Board_948_Agenda_Packet_11_27_2018_6_30_00_PM.pdf?meetingId=948&documentType=AgendaPacket&itemId=0&publishId=0&isSection=false)

To recommend no action on Warrant Article 24, in recognition of the fact that: the process of identifying and evaluating alternative concepts for MBTA Communities Act compliance is underway, including a series of community engagement activities and public workshops; that the Select Board and Town Administrator are working with the petitioners and others to advance this process well in advance of the May Town Meeting, including the potential appointment of a committee for this purpose; and that this collaborative approach may result in Warrant Article 24 becoming moot prior to Town Meeting.

PLANNING BOARD RECOMMENDATION

Warrant Article 24 is a resolution by citizen petition asking the Moderator to appoint a committee to explore alternative ways for the Town to comply with the MBTA Communities Act (MBTA CA) that is a different approach from the Planning and Community Development Department's study of form-based zoning for Harvard Street. The MBTA CA, which became law in 2022, must be met by December 31, 2023.

The Planning Board hearing on Warrant Article 24 was held on April 12, 2023. Dick Benka, one of the petitioners, gave a presentation on the proposed resolution, after which the Planning Board heard public comment. The Planning Board then asked questions and made comments.

It was noted that since the Select Board had recently appointed a committee to look at options for meeting the MBTA CA, a Moderator's Committee to do the same thing was unnecessary.

Planning Board members made the following comments:

- the proposed article should be tabled or the Planning Board should vote on it and recommend No Action.
- the proposed article should not be supported; instead the focus should be on the Harvard Street Study, which is a good approach. There would be opportunities for the Town to adjust any recommendations.
- it was premature to vote in favor of WA 24.
- the Town may have already met the MBTA Act if the Beacon Street Corridor is used as an option; therefore WA 24 should be supported.

Mark Zarrillo stated that the Select Board Committee should be given the opportunity to explore alternatives and report back on them. He felt that opinions were divided on how to meet the MBTA CA. Many people did not like one particular alternative vs. the other. He mentioned that there would be a series of community engagement activities and public

workshops where the Harvard Street study and different alternatives would be discussed. This would help Town Meeting members decide how to vote.

Mark Zarrillo, therefore, moved to recommend No Action on Article 24. Blair Hines seconded the motion.

The Planning Board voted 4-0-1 in favor of the motion to recommend No Action on Article 24. The roll call vote went as follows: Zarrillo – aye, Chipimo– aye, Hamlin – aye, Hines – aye and Brue – abstained. (Heikin was not present.)

SELECT BOARD’S RECOMMENDATION

Article 24 is a resolution asking for the Moderator to form a committee to evaluate potential models for compliance with Chapter 40A, Section 3A of the Massachusetts General Laws, commonly known as the “MBTA Communities Act.” The Act requires communities with access to state-financed public transit to create a zoning district of “reasonable size” where multi-family housing is permitted “as of right.” Expressing concern that the proposal developed by the Planning Department at the request of the Select Board might not pass Town Meeting, Article 24’s petitioners further asked that the Moderator request the Select Board require the Planning Department to provide staffing support to the Moderator’s committee.

On April 18, 2023, in response to the concerns raised by Article 24, the Select Board named an eight-person committee to evaluate additional MBTA Communities Act compliance options. The Select Board’s charge required the new committee to develop at least two proposals for such compliance, at least one of which must be reasonably calculated to lead to the potential development of at least 10% of the housing units the state believes Brookline could accommodate under the Act. The charge was reviewed by the Article 24 petitioners, and their suggestions were taken into account in revising it. Several petitioners of Warrant Article 24 now serve on the Select Board committee, which is staffed by the Planning Department.

No petitioners appeared to argue in favor of Article 24 to the Select Board at its public hearing on the matter on April 25, 2023, and a member of the Select Board indicated at that time that the petitioners were divided as to whether to continue to press for a Moderator’s committee. Noting that the Advisory Committee had voted favorable action on the Article despite the Select Board’s proactive efforts to satisfy the Article’s underlying policy aims, the Select Board closed its public hearing and voted 4-0 to recommend NO ACTION on Article 24.

ROLL CALL VOTE:

Aye:

Greene
Aschkenasy
VanScoyoc
Sandman

ADVISORY COMMITTEE'S RECOMMENDATION

Recommendation: FAVORABLE ACTION on Warrant Article 24 by a vote of 11-6-4.

<p>Executive Summary</p>	<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 0.5 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” detailing criteria for its determination of compliance. DHCD’s MBTACA guidelines require compliance by 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 of filing a final article in early September deadline for the November 2023 Special Town Meeting.</p> <p>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.</p> <p>On April 18, 2023, the Select Board appointed a committee of its own charged with identifying, developing and analyzing options to the Planning Department’s Harvard St. proposal. The Select Board committee’s roster includes Article 24 Co-Petitioner Richard Benka (Chair) and Co-Petitioner Linda Olson Pehlke. For further information, see the Select Board’s April 18 charge and slate. (Item 16A, pp. 456-457)</p>
<p>Voting Yes will...</p>	<p>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 for timely compliance with the MBTACA.</p>
<p>Voting No will...</p>	<p>Refrain from asking the Moderator to appoint such a committee.</p>

<p>Financial impact</p>	<p>There are no direct costs associated with the appointment of a volunteer Moderator’s Committee. There could be burdens on Planning Department staff resulting from such an appointment, particularly given the April 18, 2023 appointment of the Select Board’s committee and the need for Planning Department support of both committees (since the options review each would be undertaking requires access to the State’s electronic compliance model). 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.</p>
<p>Legal implications</p>	<p>There are no direct legal implications posed by the establishment of a Moderator’s Committee. 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 a memorandum dated March 3, 2023, Town Counsel identified legal risks posed by failure to timely comply. The memorandum states that the remedies a judge could order for noncompliance include the imposition of a compliant zoning district on the Town, as well as an award of attorneys’ fees/costs to any prevailing plaintiff in a civil lawsuit.</p>

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. That deadline is established by the Guidelines of the Massachusetts Department of Housing and Community Development (“DHCD”) that DHCD implemented 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 0.5 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](#)” defining 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 community create a zoning district where it is possible and permissible to build “multi-family housing”.

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 0.5 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) **are 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 DHCD does 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, and they may not cap the number or size of bedrooms or 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, at a minimum, the Town Clerk has submitted the zoning district to the Attorney General for approval, and it must provide 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 within it. 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/has held three public meetings to educate the public about the MBTACA requirements and to seek public input and discussion about alternatives 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 a phased-in and extended timeline for compliance through the end of 2026.

On April 18, 2023, the Select Board appointed a committee charged with reviewing alternatives to the Planning Department's Harvard St. proposal. The Select Board committee members include Article 24 Co-Petitioners Richard Benka (as Chair) and Linda Olson Pehlke. For further information, see the [Select Board's April 18, 2023, charge and slate](#).

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 0.5 miles of a transit station. 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 by-law 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."

Discussion

At the April 10, 2022, Subcommittee's hearing/meeting, several of the Co-Petitioners explained the reasons for Article 24. Some of their major points were that Harvard St. is a poor choice for MBTACA compliance because it is a commercial corridor and the DHCD guidelines do not permit zoning rules requiring ground floor retail. They expressed concern that zoning rules that permit construction of buildings without ground floor retail could threaten existing businesses and inhibit the corridor's economic vitality. Planning Director Kara Brewton did not express a view of Article 24, except to add that the State is willing to pre-review (before Town Meeting) a proposal, but that it must have received Select Board sign off. (For a more complete account of the Co-

Petitioners' remarks and of the hearing, please see the [Subcommittee's report to the full Advisory Committee.](#))

The full Advisory Committee's April 20, 2022, meeting included a discussion with Co-Petitioners Linda Olson Pehlke and Neil Gordon concerning whether the Co-Petitioners intended to move Article 24, given the Select Board's creation of an "alternatives" committee and Co-Petitioner Pehlke's participation in it (along with Co-Petitioner Richard Benka, Chair).

Co-Petitioner Gordon said that a Moderator's Committee could be redundant of the Select Board committee. He added that had the Moderator appointed the slate of individuals who are on the Select Board committee, the Co-Petitioners would have been happy with the membership. He said that the Co-Petitioners are happy with the Select Board's charge.

Co-Petitioner Pehlke said that she is not sure that all of the Co-Petitioners would agree with Mr. Gordon. She said that she had a slight concern about a comment she heard from the Town Administrator that seemed to contemplate that just one proposal would come out of the Select Board committee, when the Co-Petitioners envisioned the possibility of more than one. She agreed that there was no need for redundant efforts, but given the uncertainties, she could not say with certainty that none of the Co-Petitioners would want to move the Article. Mr. Gordon added that a non-Petitioner would also be free to move the Article.

In response to a committee member's question, Planning Director Brewton stated that the Town will be able to change the MBTACA zoning that Town Meeting approves in the fall, so long as the Town's zoning remains compliant. She also expects DHCD to modify its guidelines over time, as it has with other new laws. In response to another question, she said that the Housing Choice Act permits a majority Town Meeting vote when a zoning measure facilitates the creation of multi-family housing. Other types of zoning changes would require the usual two-thirds Town Meeting vote. Town Counsel will be consulted for advice on the quantum of the vote needed for any future proposed changes to the Town's MBTACA-compliant zoning bylaw.

Comments in support of the minority position favoring no action on Article 24 included the following:

- It would be counter-productive to have dueling committees.
- Expressed high satisfaction with the roster of the individuals appointed to the Select Board committee and the range of views they will represent.
- Town Meeting's role is to vote up or down the executive branch's proposal. Glad that the executive stepped up and addressed concerns by appointing a Select Board committee.

Comments in support of the majority position for favorable action on Article 24 included:

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- Expressed unhappiness with some of the individuals appointed to the Select Board committee.
- The Town Administrator attempted an end run to avoid a Town Meeting discussion by trying to make it moot. The Article should go to Town Meeting for its consideration and discussion.
- The executive was attempting to cut Town Meeting out of the discussion, which is not appropriate given the many interests at stake.

The recording of the Advisory Committee’s April 20, 2023, 7 pm meeting and vote can be found here: [Advisory Committee Hearing and Meeting - Zoom \(zoomgov.com\)](#).

Meeting materials, including the Subcommittee’s report to the full Advisory Committee (on Land Use, Zoning and Sustainability) detailing its April 10, 2023, public hearing and Q&A with the Co-Petitioners, can be found [here](#).

Recommendation

By a vote of 11-6 with 4 abstentions, the Advisory Committee voted FAVORABLE ACTION on Article 24.

ARTICLE 24 ADVISORY COMMITTEE VOTES

Article Description	MBTACA Resolution
AC recommendation (Favorable Action unless indicated)	11-6-4
Ben Birnbaum	N
Harry Bohrs	N
Cliff Brown	
Patty Correa	N
John Doggett	Y
Katherine Florio	
Harry Friedman	Y
David-Marc Goldstein	Y
Neil Gordon	A
Susan Granoff	A
Kelly Hardebeck	
Amy Hummel	Y
Anita Johnson	N
Alisa Jonas	Y
Janice Kahn	Y

Pam Lodish	Y
Joslin Murphy	Y
Donelle O'Neal, Sr.	Y
Linda Olson Pehlke	Y
Markus Penzel	N
David Pollak	N
Stephen Reeders	A
Carlos Ridruejo	
Lee Selwyn	Y
Alok Somani	A
Carolyn Thall	
Christine Westphal	
Dennis Doughty *	
* Chairperson does not vote except to break a tie	

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