Via Electronic and U.S. Mail

March 29, 2022

Jennifer D. Maddox, Undersecretary
Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, Massachusetts 02114

Re: HBRAMA Comments to Draft Guidelines for Creation of Multi-Family Districts:

Dear Undersecretary Maddox:

On behalf of the Homebuilders and Remodelers Association of Massachusetts (HBRAMA), I am pleased to submit the following comments in connection with the Draft Guidelines for Creation of Multi-Family Districts, as promulgated on December 15, 2021, including comments to Frequently Asked Questions (FAQs) available through the Department of Housing and Community Development (DHCD) website.

The Home Builders and Remodelers Association of Massachusetts is a statewide trade association affiliated with both local homebuilder and remodeler associations and the National Association of Home Builders. The more than 1,400 member companies of the HBRAMA are involved in all aspects of the development and construction of new single- and two-family homes, townhomes, condominiums and apartments across a broad spectrum of incomes. The HBRAMA is grateful to the Baker-Polito Administration for its commitment to expanding housing opportunities for all the citizens of the Commonwealth.

The HBRAMA is enthusiastic about the adoption of the Housing Choice Act that was included in economic development legislation in 2020 (Chapter 358 of the Acts of 2020). We believe that the provision of the Housing Choice Act requiring multi-family zoning as of right in MBTA communities will have the potential of encouraging much needed housing development, providing a small but important step towards addressing the state's housing crisis. The more notable components of the law from our perspective are the: i) scope of the mandate (applicable to 175 municipalities); ii) timeline for adoption of action plans and final compliance; iii) requirement for as of right development with minimum land area and density provisions; iv) monetary disincentives for lack of compliance; and iv) prohibition of restrictions that affect housing for families. Our comments below are grounded in our concern for the full and effective implementation of the Housing Choice Act, with a focus on these noted components.

1. DHCD Resources for Determining Interim and Final Compliance:

In order for the timelines for compliance to work properly and to ensure appropriate oversight of municipal submissions, adequate resources need to be allocated within DHCD for this important effort. Given the schedule for submission of either i) a request for determination of compliance; or ii) a proposed action plan by December 31, 2022, along with technical assistance that may be required to achieve the documentation necessary for these milestones, enhanced funding and staffing at DHCD is critical, and steps should be taken promptly to ensure that the schedules set forth for application plan approvals, and ultimately final determination of compliance, will not be delayed at the state level.

In addition, as more carefully described below, DHCD has a crucial role to play in the review of proposed multi-family zoning districts to make sure that the as of right mandate and density requirements are achieved in real and practical terms, without hidden provisions associated with municipal laws and regulations that fall outside of strict zoning requirements, but otherwise affect land use and development.

2. Adverse Impacts of Non-Zoning Laws and Regulations:

The draft guidelines recognize the impact of non-zoning related "restrictions and limitations" that may adversely affect development, particularly those that may erode the concept of as of right development. For example, in the section regarding the determination of minimum district area, and in the determination of minimum gross density, the guidelines provide that the estimate of the number of units that can be developed must take into account other ordinances or bylaws that may restrict development. The guidelines even go so far as to propose that a municipality may need to amend non-zoning provisions contemporaneously with the development of a multi-family district, in order to allow for the requisite unit development. Furthermore, in the minimum submission requirements for application to determine final compliance, the guidelines reference a description of "any known physical conditions, legal restrictions, or regulatory requirements that would restrict or limit the development of multi-family housing."

The HBRAMA believes the acknowledgment of non-zoning restrictions and limitations is well placed, and efforts should be made in the final guidance document to strengthen these provisions, to enhance staff and funding considerations outlined above to enforce these provisions, and to provide a clear mechanism to reject submissions or rescind compliance determinations, when the as of right metrics are not achieved.

In particular, the Housing Choice Act makes specific reference to G.L. c. 40, § 131 (the Wetlands Protection Act) and G.L. c.21A, § 13 (the State Environmental Code) and provides appropriate deference to state-based environmental and health concerns and the separate impact they may have on any one development project. However, local non-zoning-based laws and regulations regarding wetlands, stormwater, septic systems, earth removal, scenic roads, tree-clearing and the like can seriously limit the "legal and practical" effects of what may otherwise appear on its face to be a compliant (as of right) multi-family district. The HBRAMA has repeatedly voiced its concern regarding municipal over-reach and abuse of local laws and regulations regarding environmental and health issues that are at best redundant of state law, and at worst are simply a veiled attempt to thwart development. The regulatory review process enacted under the Housing Choice Act, and DHCD in particular, must be able to recognize those impacts

when and where they exist, and DHCD must be willing to deny or rescind final compliance of any district proposal when they are evident.

3. Lack of Standards for Site Plan Review:

The draft guidelines provide that site plan review and approval may be required for multi-family uses allowed as of right. The guidelines continue by stating that site plan review "may not be used to deny a project that is allowed as of right, nor may it impose conditions that make it infeasible or impractical to proceed" with a project.

There are two matters of concern in these statements. First, the guidelines should provide a more robust description as to what is an acceptable site plan review process and what is not. The HBRAMA has for years, in partnership with NAIOP Massachusetts and the Greater Boston Real Estate Board, advocated for amendments to G.L. c.40A (the Zoning Act) which would formally recognize a process for site plan approval in the context of as of right development. Currently, no such statutory provision exists, and while judicial decisions have attempted for fill the void, there is no clear understanding of what site plan review should be. Under such circumstances, the guidelines should provide a detailed set of parameters regarding acceptable site plan procedures, including, potentially streamlined review through one permitting board, timelines for opening and concluding review, standards for the imposition of reasonable conditions, and prohibitions on linkage fees and impact fees without a direct nexus to the project proposed. An example of detailed provisions advocated on behalf of the HBRAMA follows as Exhibit A to this letter.

Second, and in light of the concern above, each municipal submission of an action plan, or a request for final determination of compliance, should include the express parameters of site plan review, if any, that will be in effect in the proposed multi-family district(s), and the same should be part of what DHCD reviews in rendering a determination of compliance.

4. Infrastructure Requirements:

In many instances, there may be inadequate water, sewer, or roadway infrastructure to allow for highly dense multi-family housing. In the FAQs, DHCD acknowledges that conforming districts with requisite densities are possible with private septic systems and wastewater treatment systems. Furthermore, DHCD states that private developers may be able to support the cost of necessary water and sewer connections. While this acknowledgment may appear innocuous, it raises several concerns. First, in the review of local laws and regulations, DHCD should be wary of any requirement for wastewater treatment systems (so-called package sewage treatment plans), when a conventional septic system is possible. Wastewater treatment systems can be prohibitively expensive, and in all instances where both methods of waste disposal are viable it should be the developer's choice. Second, where public water and sewer are located within the municipality but not adjacent to the multi-family district, there should be no requirement for connections, where alternative on-site means are available. This too, should be at the developer's option. Third, the developer should not be saddled with off-site conditions that impose additional costs on any water and sewer connection or extension effort, or traffic improvement, when not directly tied to the needs of the project.

5. Affordability Requirements:

In response to a question on requiring affordable units, the FAQs state that "[y]es, affordability requirements are allowed."

The HBRAMA strongly opposes this position. At its core, the requirement of any measure of affordability in a multi-family district may render some projects impractical, and may disqualify or discourage one or more developers from pursuing development. As a result, affordability requirements, even if deemed reasonable by some, may impede development within an approved district, a result contrary to the purpose and intent of the law. The Housing Choice Act was designed to address the Commonwealth's housing shortage in the broadest sense, particularly family housing, without any requirement for a measure of affordability. The Housing Choice Act is grounded in the concept that if we promote multi-family housing, by removing unnecessary permitting obstacles, we will address housing availability and affordability problems through the simple calculus of supply and demand. In this simplest of fashions, we should not burden the Housing Choice initiative with the costs of subsidizing affordable units, and the lotteries, income qualifications and monitoring requirements that goes with them. Moreover, the unrestricted development of multi-family units will have the broadest demographic benefit, potentially reaching those in currently underserved populations with family incomes between 80% and 120% of AMI.

Second, the FAQs make reference to so-called "inclusionary" zoning requirements in 140 municipalities in the Commonwealth, without any stated reference point as to a standard of appropriateness. In the opinion of the HBRAMA, municipalities are misconstruing G.L. c. 40A, § 9, in the application of inclusionary ordinances and bylaws. These enactments have been and continue to be a hodgepodge of sloppy, poorly written and poorly implemented laws. By way of example, it is our experience that some municipalities are requiring special permits for inclusionary units in otherwise as of right developments, requiring inclusionary units without a density bonus, and imposing burdensome regulations and costs on the backs of developers in connection with affordable unit production, without compensation, raising stark concerns regarding compliance with the Zoning Act, not to mention state and federal constitutional concerns. DHCD's reference to this practice as an example of how affordability requirements could or should work their way into a multi-family district is misplaced at best. At its worst, the FAQs can be read as an endorsement of inclusionary requirements, without standards, with a dire result on multi-family production.

There are existing and complimentary laws and permitting processes in place for the production of affordability (i.e., G.L. c. 40B and 40R). The Housing Choice Act cannot be and should not be the vehicle to address every perceived wrong associated with housing. Our direct experience with previous initiatives, such as the Starter Home initiative, is that the insistence on certain affordability and occupancy requirements within the regulatory process, together with complicated mechanisms for approval, can stifle the best made plans. We should not repeat the same mistake here.

6. DHCD's Rights of Recission:

The draft guidelines provide a limited mechanism for DHCD to rescind a municipality's determination of compliance. Recission is currently proposed in situations where a municipality i) has submitted inaccurate application information; or ii) subsequently amends its zoning or enacts a law, rule or regulation that materially alters capacity in an approved district. This reserved right should be broadened substantially, allowing DHCD to continually monitor a municipality in its application of an approved district and in its reaction to specific project proposals. Such monitoring should include, but not be limited to, how a municipality applies existing laws and regulations to project proposals, how much time a municipality takes to process a proposal, whether a municipality has a record of discouraging or denying proposals, and what conditions a municipality imposes in the granting of an approval, all of which in practice, can significantly erode the as of right requirements and goals of the Housing Choice Act. In connection with this monitoring, the guidelines should provide a clear mechanism by which a certification of compliance may be rescinded, together with processes by which an applicant may request an inquiry by DHCD, and a determination by DHCD as to whether the municipality continues to be in compliance with the Housing Choice Act.

We welcome the opportunity to address any questions or comments you may have in connection with our stated concerns and look forward to working with DHCD on the promulgation of final guidelines.

Respectfully,

Emerson Clauss III
President

C: Michael Kennealy, Secretary, Executive Office of Housing and Economic Development
Clark Ziegler, Executive Director, Massachusetts Housing Partnership

EXHIBIT A

Proposed Site Plan Regulations

- The ordinance or by-law shall establish the submission, review, and approval process for applications, which may include the requirement of a public hearing held pursuant to the provisions in G.L. c. 40A, § 7. Approval of a site plan shall require a simple majority vote of the designated authority and shall be made within the time limits prescribed by ordinance or by-law, not to exceed 90 days from the date of filing of the application. If no decision is issued within the time limit prescribed, the site plan shall be deemed constructively approved as provided in G.L. c. 40A, § 9. The submission and review process for a site plan submitted in connection with an application for a multi-family development shall be conducted with the review of such application in a coordinated process.

- Site plan review may impose only those conditions that are necessary to ensure substantial compliance of the proposed use of land or structures with the requirements of the zoning ordinance or by-law provided, however, that any such off-site conditions solely address extraordinary direct adverse impacts of the project on adjacent properties or adjacent roadways. A site plan application may be denied only on the grounds that: (i) the proposed use of land or structures project does not meet the requirements set forth in the zoning ordinance or by-law; (ii) the applicant failed to submit the information and fees required by the zoning ordinance or by-law necessary for an adequate and timely review of the design of the proposed land or structures; or (iii) it is not feasible to adequately mitigate any extraordinary direct adverse project impacts on adjacent properties or adjacent roadways by means of suitable site design conditions.

- Zoning ordinances or by-laws shall provide that a site plan approval shall lapse within a specified period of time, not less than three years from the date of the filing of such approval with the city or town clerk, if substantial use or construction has not yet begun, except as extended for good cause by the approving authority. Such extension shall not include time required to pursue or await the determination of an appeal. The aforesaid minimum period of three years may, by ordinance or by-law, be increased to a longer period.

- Decisions made under site plan review may be appealed by a civil action in the nature of certiorari pursuant to G.L. c 249, § 4, and not otherwise. Such civil action may be brought in the superior court or in the land court and shall be commenced within twenty days after the filing of the decision of the site plan review approving authority with the city or town clerk. The issuance of a building permit shall not be a prerequisite to the filing of such civil action under this section. All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings. A complaint by a plaintiff challenging a site plan approval under this section shall allege the specific reasons why the project fails to satisfy the requirements of this section, the zoning ordinance or by-law, or other applicable law and shall allege specific facts establishing how the plaintiff is aggrieved by such decision. The approving authority's decision in such a case shall be affirmed unless the court concludes that the approving authority abused its discretion in approving the project.

- A plaintiff seeking to reverse a site plan approval shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant's attorney's fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner's carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.