

January 9, 2024

To: Town of Newbury Planning Board
From: Ian Burns, Community & Economic Development Program Manager, Merrimack Valley Planning Commission
Cc: Town of Newbury Select Board
Martha Taylor, Planning Director
Kristen Grubbs, Assistant Planner
RE: Penalties for non-compliance with the MBTA Communities Act

Introduction

During public meetings with Newbury residents and with the Newbury Select Board and Planning Board over the past few months, participants have asked what is at risk if Newbury does not comply with the State's "MBTA Communities" Act. Specifically, some residents have asked what funding Newbury has received in the past that may be under threat if the Town does not comply. The following is a summary of penalties for non-compliance with the law and a summary of impacts to Newbury.

Background on State Regulations

The Town of Newbury, along with 176 other cities and towns in eastern Massachusetts, is subject to Chapter 40A (the Zoning Act), Section 3A of the Massachusetts General Laws, "Multi-family zoning as-of-right in MBTA Communities," otherwise known as "MBTA Communities" or "3A." As a community subject to this law, Newbury must create a zoning district that allows multi-family housing by right. If Newbury does not comply with the law, the Town risks several penalties as outlined in the statute and in guidelines written by the Executive Office of Housing and Livable Communities (EOHLC or HLC).

Section 3A states that non-compliant communities will be ineligible for the following grant programs:

1. MassWorks Infrastructure Grants
2. Housing Choice Community Grants
3. Local Capital Projects Funds

In addition to the above grants, EOHLC Guidelines state that non-compliant communities may be less competitive when applying for the following grant programs, when compared to applications from compliant communities¹:

1. Community Planning Grants

¹ "Compliance Guidelines for Multi-family Zoning Districts," Section 9, revised August 17, 2023.
<https://www.mass.gov/doc/compliance-guidelines-for-multi-family-zoning-districts-under-section-3a-of-the-zoning-act/download>

2. MA Downtown Initiative
3. Urban Agenda
4. Rural & Small Town Development Fund
5. Brownfields Redevelopment Fund
6. Site Readiness Program
7. Underutilized Properties Program
8. Collaborative Workspace Program
9. Real Estate Services Technical Assistance
10. Commonwealth Places Programs
11. Land Use Planning Grants
12. Local Acquisitions for Natural Diversity (LAND) Grants
13. Municipal Vulnerability Preparedness (MVP) Planning & Project Grants

EOHLC guidelines also state that a community’s compliance status may “inform funding decisions by EOED, EOHLC, the MBTA *and other state agencies* [emphasis added] which consider local housing policies when evaluating applications for discretionary grant programs, or making discretionary funding decisions.”² It is important to note that this language is broad and may be interpreted to cover many state agencies that award grant funding.

As Governor Healy has said recently, “If you don’t comply with the act, then you’re going to see us withholding, as a state, money for any number of programs that you’re used to receiving money for [...] That includes for schools, it includes for roads and bridges, it includes for a whole host of things that are important to communities.”³

Outside of State grant penalties, the Massachusetts Attorney General has issued an advisory stating the law is not optional and that non-compliant communities “risk liability under federal and state fair housing laws.”⁴ Failure to comply “may result in civil enforcement action.”⁵

How This Impacts Newbury

Over the past 10 years, the Town of Newbury has received over \$1.7 million in State grant funding for various projects (Appendix A). Of this \$1.7 million, \$367,164 comes from grant programs explicitly mentioned in HLC guidelines. This \$367,164 received by Newbury all came from the Municipal Vulnerability Preparedness (MVP) Program. Under this Program, the Town received funds for MVP planning, assessing storm damage, Plum Island cost/benefit analysis, and the Orchard Street culvert replacement project.

² “Compliance Guidelines for Multi-family Zoning Districts,” Section 9, revised August 17, 2023. <https://www.mass.gov/doc/compliance-guidelines-for-multi-family-zoning-districts-under-section-3a-of-the-zoning-act/download>

³ WBUR Morning Edition interview, December 7, 2023, <https://www.wbur.org/news/2023/12/08/maura-healey-mbta-communities-act-zoning-law>

⁴ “Advisory Concerning Enforcement of the MBTA Communities Zoning Law,” March 15, 2023. <https://www.mass.gov/doc/advisory-concerning-enforcement-of-the-mbta-communities-zoning-law/download>

⁵ Press Release: “AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law.” March 15, 2023. <https://www.mass.gov/news/ag-campbell-issues-advisory-on-requirements-of-mbta-communities-zoning-law>

The remaining roughly \$1.35 million in grants received may fall under the other “funding decisions” explained in the above background section as written in HLC guidelines.

In addition to grants received over the past 10 years, there are also a number of projects the Town may wish to undertake in the future, whose funding may be threatened by non-compliance. These projects include, but are not limited to:

1. Municipal Vulnerability Preparedness Planning 2.0
2. Open Space and Recreation Plan update
3. Border to Boston Trail projects
4. Various culvert, bridge, dam, and other infrastructure projects

Furthermore, long-range planning efforts, including projects such as the Housing Production Plan updates currently underway, often use consultants funded through programs listed above (such as, but not limited to, the Community Planning and Land Use Planning grants).

As stated in the background section, the Attorney General has also threatened potential litigation against communities that do not comply. It is recommended that the Town of Newbury consider the costs of litigation and associated legal fees when discussing penalties for non-compliance.

