



A public plaza within a private development, Trio, in Newton. (Photo by Amy Dain.)

HOUSING / OPINION

## Seeking predictable permitting for new housing

# MBTA Communities law mandates as-of-right zoning



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Jan 4, 2023

*Third in a five-part series.*

**IF YOU LIVE** in an affluent suburb of Boston, your municipality is probably not using as-of-right zoning to permit construction of apartments or condos. If your community is served by the MBTA, then the Massachusetts state Legislature has mandated that your municipality zone for multi-family housing as-of-right. The clock is now ticking on implementation.

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The mandate was adopted because Boston's suburbs have not allowed enough transit-oriented home development to meet the region's needs for housing and transit-accessibility. Discretionary review processes are part of the problem. As-of-right zoning can help.

As-of-right zoning, also called "by-right zoning," is the most predictable type of zoning. By definition, property owners have a right to build what is allowed by right on their properties. The municipality cannot use discretion in granting permits to projects that comply with as-of-right zoning requirements, which get adopted by city council or town meeting.

On privately-owned, unrestricted properties (for example, properties that are not protected nature reserves), municipal zoning has to allow for something to be built by right. That something, in practice, is most often a single-family detached home.

To get construction of multi-family homes permitted via zoning, builders typically have to confront an unpredictable, political, and long permitting process.

Those would-be builders apply either for A) a “special permit,” granted by vote of the “special permit granting authority,” or B) for a rezoning, decided by town meeting or city council vote. Either way, approval is at the discretion of municipal decisionmakers, and involves public hearings and local politics.

Why do municipalities prefer the special permit or rezoning processes to as-of-right zoning for multi-family housing? Because discretionary decisionmaking offers municipalities greater ability to limit, leverage, and control development.

Many local voters are highly cautious about allowing residential development, in general. Discretionary approval offers processes for a) killing or downsizing projects unpopular with neighbors, b) shaping projects (for example their look and layout), c) determining builder-led mitigation strategies to address possible negative impacts of projects on the community, and d) sometimes even capturing value from lucrative developments (beyond what is needed for mitigation) and directing it towards public ends.

Value capture is possible when the price of housing units (sales or rents) is projected to come in higher than the cost of construction per unit. All of these costs and prices are in flux, which complicates the practice of value capture. When municipalities attempt to leverage more value than projects can yield, they undermine housing production.

Rising costs of construction may serve to reduce opportunities for value capture, especially when combined with any dips in market prices of housing. Moreover, greater “inclusionary” requirements (restricting the sales prices and rents of some

units in a residential development so they remain affordable to low- and moderate-income households) and new standards for low carbon-emission (“net zero”) buildings may eliminate the pool of funds available for public leverage and negotiation. Trends in residential regulation have been favoring stronger inclusionary zoning and carbon-efficiency standards.

Why would the state want to limit local discretionary approval processes for residential development? The answer is straightforward: They have been fueling the state’s housing crisis.

The processes lengthen development timelines and often lead to expensive changes to construction plans. Due to added costs, some projects fail to pencil out. The reviews lead to unnecessary downsizing of projects and permit denials. The risk deters some people from considering redevelopment of their properties into multi-family housing, and some development firms from entering the market. A developer who has learned the ropes of Newton’s permitting process may not attempt projects in Wellesley, or vice versa – making the market less competitive. (Competition generally puts downward pressure on prices.) Small firms, especially, rely on predictability to make their business plans viable and secure capital funding. Uncertainty and high costs undermine home development.

In these ways, discretion both causes housing scarcity and increases the cost of building homes.

After decades of documented underproduction and over-restriction of multi-family housing in Massachusetts, the Legislature created the MBTA Communities zoning law to require some municipalities to allow multi-family housing development as-of-right.

There are options for municipalities to shape developments via by-right permitting. First of all, municipalities write the by-right zoning and all of the associated requirements; they can also adopt design guidelines and form-based

codes that influence the form and scale and look of buildings, as a part of as-of-right zoning.

Second, inclusionary zoning is consistent with by-right zoning. Inclusionary zoning can be considered as a type of value capture, as the affordable units may not bring in enough revenues to cover their portion of the cost of construction; and their inclusion is a public good. (Note: if requirements are set too high, they can hamper home production. Projects have to pencil out.)

Third, site plan review is consistent with as-of-right zoning, so as-of-right projects can still be reviewed by a board; the board can require, for example, changes to the layout of driveways or the screening of neighboring properties – things that often get addressed through discretionary processes (special permit or rezoning). Site plan review can still be time consuming and expensive for developers, but approval is more certain than for special permit applications.

For small projects, for example triplexes or fourplexes or 10-unit apartment buildings, discretionary permitting does not typically involve significant mitigation or value capture, as the impacts of individual projects are not substantial, and the private profits not enough to leverage for public ends. In these cases, site plan review replaces special permits for the same public benefits, without the uncertainty. There is really no good reason for small residential projects to need special permits, although many municipalities require them.

For large projects, say 100 or more dwelling units, in affluent areas, where rents and sales prices are high, some municipalities are accustomed to leveraging project value, via the permitting process, to upgrade public rights of way, put in paths to the Charles River, create public plazas, dedicate funds for playgrounds or schools, and accomplish other priorities. It may not be possible to leverage as much value via as-of-right zoning.

In some states, assessment of impact fees or linkage fees on residential construction is a mechanism for mitigation and value capture of by-right projects. The Massachusetts Supreme Judicial Court has highly limited their use. Fees are frequently assessed, in accordance with the court's limits, to pay for sewer and water hookups.

As municipal stakeholders deliberate about their options for creating zoning districts in compliance with the MBTA Communities zoning law, many will discuss value capture. The state-issued implementation guidelines for the law give municipalities significant flexibility in drawing large low-density districts or small high-density districts, or some combination of densities, to come into compliance. As they evaluate different scenarios, some people will push back against using as-of-right zoning for dense development, for the missed opportunity to capture value. Also, the greater the density allowed by-right, the less likely it is that developers will engage in the negotiation process for a special permit or rezoning for denser development. These are only a couple of considerations out of many.

If project margins tighten in a shaken world economy, predictable permitting will become even more important to keep the homebuilding industry afloat and gain needed homes. The economy may make opportunities for value capture scarce, even for bigger projects in affluent communities, especially as standards for inclusionary zoning and energy efficiency are strengthened. Under such circumstances, there will be little public benefit to use discretionary zoning for small or big projects. The main "benefit" would be for people who prefer housing scarcity.

The MBTA Communities law supports a flexible transition to reduce the riskiness of project permitting, improve home affordability, and make sure there are homes for everyone.

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