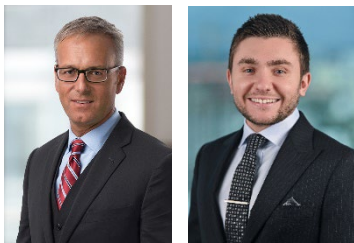


Lawyer Insights

MBTA Act is a promising response to the housing crisis, but it needs teeth

By Christopher J. Cunio and Aidan Gross
Published in Boston Business Journal | March 15, 2024



The commonwealth has long struggled with problematically high housing prices. To combat this issue, in 1969 the state Legislature passed Chapter 40B, which provided a streamlined process to obtain building permits for developers who agree to make 25% of new housing units affordable. Chapter 40B created thousands of affordable housing units in Massachusetts. Yet housing prices continued to increase.

In 2004, the commonwealth passed Chapter 40R, which allowed municipalities to adopt a “smart growth zoning district” that encouraged affordable housing development in exchange for financial rewards. Chapter 40R created thousands of affordable housing units. But it also failed to solve the commonwealth’s housing problem: This year, in fact, housing costs hit another historic high, with the average cost of a single-family home in the commonwealth now at \$600,000.

In 2021, the state Legislature passed the MBTA Act. Traditionally, developers must obtain special-use permits that require a special review process to develop multifamily housing units. These special-review processes can take years, stifling development projects. The MBTA Act changes this. The act requires all 177 MBTA communities — communities situated near MBTA service stations — to create at least one zoning district where developers may build multifamily housing units without going through a special-review process. An MBTA community that fails to comply will lose certain state funding.

The MBTA Act is a novel approach, and its mandate is intended to enable the development of multi-family housing where it is most needed: near public transit systems. The act is promising, but it needs “teeth.”

MBTA communities must comply with the act by the “district compliance” deadline, which varies based on the type of MBTA community. The deadline for the 12 “Rapid Transit” communities passed on Dec. 31, 2023. One of these communities, Milton, has not achieved compliance by the deadline.

Attorney General Andrea Campbell has emphasized compliance is mandatory. She is creating the “Housing Affordability Unit” to help oversee compliance and has threatened civil enforcement against noncompliant communities, including a recent suit against Milton. Although the attorney general is taking steps to ensure compliance, her ability to sue communities has not been tested. These legal realities illustrate the need for “teeth” — private and public enforcement mechanisms.

A private enforcement mechanism would give private individuals the right to sue MBTA communities that fail to comply with the act. To create a private enforcement mechanism, the state Legislature could adjust the zoning act to address standing and provide a private right of action where District Compliance deadlines are not met or zoning districts provide illusory “rights.” Without adjustment, one Massachusetts Superior Court judge has already ruled that private individuals have no standing to sue.

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In addition, the Legislature could enact a public enforcement mechanism explicitly giving the attorney general the power to bring an action for permanent injunction against MBTA communities that fail to comply with the act.

A private enforcement mechanism, paired with an attorney general enforcement mechanism, should enhance swift statewide compliance with the MBTA Act.

On Jan. 3, 2024, the Legislature reconvened. The last day to propose changes to existing laws is April 24, 2024. Residents have until then to call their local representatives and encourage them to add private enforcement and Attorney General enforcement mechanisms to the zoning act. A list of your local representatives can be found online.

Moreover, residents should remain vigilant and support local officials who are advocating for and ensuring compliance with the Act to prevent what happened in Newton, where one local councilor who spearheaded compliance was voted out of office.

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Originally published on March 15, 2024 online with the *Boston Business Journal* at https://www.bizjournals.com/boston/news/2024/03/15/mbta-act-is-a-promising-response-to-housing-crisis.html?cx_testId=40&cx_testVariant=cx_22&cx_artPos=7#cxrecs_s. Reproduced with permission. Further duplication is prohibited.