MILTON PLANNING BOARD COMMENT LETTER TO HLC

February 21, 2025

From: Town of Milton Planning Board

To: EOHLC Executive Secretary Edward M. Augustus, Jr.

1: Process Summary

The HLC Action Plan Document requires that a municipality must agree to and sign, by February 13, 2025, the HLC's Action Plan mandate that the municipality unconditionally accepts every aspect of HLC's proposed regulations now, regardless of the municipality's views about HLC's prior or proposed revised guidelines. Milton hereby reserves all rights to challenge the HLC's timing requirements and disregard of the APA process.

The HLC inappropriately would require that the municipality must agree to all Action Plan proposed regulations now, before the HLC complies with the Supreme Judicial Court's Order that in order to adopt enforceable regulations, HLC must obtain the municipalities' inputs, as HLC failed to do previously. Indeed, it totally ignores the SJC's clear and binding Order that HLC's August 17, 2023 guidelines are "ineffective" and unenforceable" precisely because HLC's guidelines were not "promulgated" in accordance with the APA (page 23 of SJC's decision and order).

The HLC thereby disregards SJC's clear directive to it that in order to be entitled to "promulgate" regulations, which could become law upon completion of the APA process without further steps, the state agency (HLC) must gather affected persons' data, views, or arguments. Furthermore, the state agency cannot require that its proffered regulation must be agreed to without the municipality being able to seek judicial review.

Telling Milton, as the HLC purports to do, that Milton must sign the Action Plan's requirement now, which states that Milton accepts in writing unconditionally all aspects of HLC's application of Chapter 40A Section 3A, is contrary to the very purpose of the APA requirement that affected persons' inputs must be gathered as part of the process of regulations development. Affected persons' inputs cannot be treated as a mere after-the-fact formality, nor can the gathering of such affected person inputs be preceded by an HLC requirement that an affected person must sign a binding commitment of compliance with "all requirements" of the HLC's proposed regulations. Here, that HLC attempted requirement was asserted even before the gathering of interested persons' inputs of data, views, or arguments was scheduled. That HLC attempted process (1) is contrary to the purpose of the SJC's Order to obtain affected person inputs, (2) will discourage potential commenters from commenting, and (3) if it is not challenged, could also inappropriately act as a waiver of the Milton's right "to seek judicial review of HLC's regulations, as expressly referenced at page 13 of the SJC's January 8, 2025 decision in this matter. ("Person" under the APA, Chapter 30 Section 1(4), includes municipalities.)

By requiring such a signed Action Plan before completing the required process, HLC attempts to foreclose any ability of Milton, or any other municipalities receiving the HLC Action Plan and agreeing to its terms, from proceeding in court to ask a court to decide whether HLC's regulations, once adopted, will fully comply with Chapter 40A Section 3A as applied to that municipality. That is a particularly inappropriate attempt by HLC to foreclose Milton from asking the SJC to address application to Milton of HLC's classification of Milton which the SJC expressly did not decide because, as the SJC held, HLC had not yet even complied with the APA by taking any steps to obtain the required Town inputs.

Without reservation of the right to contest this, the HLC's Action Plan would, in advance, render any such Town inputs unnecessary to be considered and potentially provide the HLC a way to foreclose Milton from even asking the SJC to rule on HLC's application of Chapter 40A Section 3A to Milton because HLC could argue that, by signing the Action Plan, Milton agreed to HLC's proposed regulations. Hence, Milton reserves all rights to contest HLC's Action Plan content. In disregard of the SJC's order, HLC's Action Plan notice now unlawfully demands that Milton's Town Administrator accept on behalf of the Town in writing "all requirements" of the HLC's January 14, 2025 "emergency regulations" by February 13, 2025 despite the invalidity and unenforceability of regulations that cannot be promulgated without the APA mandated, and SJC ordered, opportunity for interested persons to present data, views and arguments having been conducted. Here, such data includes the facts that Milton indisputably has no 0.5 mile proximity to a subway station, data about the realities of subway station location, the reality that old, above-ground trolleys are not underground modern subway cars in any event, as well as the clear, dispositive facts that three commuter rail stations are in 0.5-mile proximity to Milton.

Furthermore, HLC's "emergency regulation" is not emergency-based because there is no overriding emergency that is so urgent that the APA and SJC-required resident input can be ignored. And even a true emergency would not allow HLC to mandate a signed Action Plan waiver of disputed matters. Nor is HLC compliant with the specific statutory wording that HLC must follow to "determine compliance with this section" as discussed above. Section 3A is utterly clear and straightforward in its wording as to applicability to Milton: inapplicable as to subway station proximity; and clearly applicable to Milton due to its commuter rail station proximity.

2: How The Statute's Words and Math Are Clearly "Applicable" To Milton

Chapter 40A Section 3A paragraph (c) very specifically defines the scope of HLC's guidelines authority. It is "to determine if an MBTA community is in compliance with this section." The wording of "this section" is as follows:

The full text of Section A paragraph 1 (a)(1) provides that "An MBTA community shall have a zoning ordinance or bylaw that provides for at least 1 district of reasonable size in which multi-family zoning is permitted as of right… For the purposes of this section, a district of reasonable size shall (i) have a minimum gross density of 15 units per acre…, and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable."

Milton is not located within 0.5 miles of any subway station. The nearest subway station to Milton is located 0.95 miles from its border. But Milton is located not more than 0.5 miles from three commuter rail stations. That is "applicable."

Therefore, Milton can fully comply with Section 3A by implementing a zoning ordinance or bylaw that provides for 15 multi-family units per acre within the total of 37.5 acres of developable land in Milton that is located not more than 0.5 miles from the Fairmount, Readville and Blue Hills Ave MBTA commuter rail stations. (See the Utile consultants' three Commuter Rail Station 0.5-mile area maps and itemized Milton locations accompanying this Appendix) The Statute's words and math apply.

The Chapter 40A Section 3A statute's explicit wording, therefore, yields the statutorily required total Milton Section 3A multi-family zoning to be 563 multi-family units 15 x 37.5 = 562.5 units (rounded-up, that is 563 units). Milton can fully comply with Section 3A by implementing that zoning. If need be, Milton can ask the SJC to so rule.

Indeed, under the EOHLC's Guidelines Definitions (Section 72.02 of its proposed Emergency Guidelines), Milton is an "Adjacent Community" because Milton is "an MBTA community that (1) has within its boundaries less than 100 acres of Developable station area, and (ii) is not an Adjacent small town."

However, the HLC emergency regulations would require any Adjacent Community to have a multi-family unit capacity equal to "10% of [its] total housing units." That can be challenged because it is clearly ultra vires the statute's clear, express wording and math as applied to Milton.

Furthermore, in its new "emergency regulations" the HLC has now tried to find a new way to improperly assert that Milton has subway stations. The reason is as follows. In the SJC's decision, the Court found that the HLC had not complied with the APA when adopting its regulations, and for that reason the SJC declined to rule on Milton's argument that HLC's regulations falsely misclassified Milton as having "Subway stations" despite the fact that the nearest subway station to Milton is 0.95 miles distant from the Milton border. That subway station is the MBTA Ashmont station in Dorchester which is on the separate, modern MBTA subway line that runs from Ashmont station onward through Boston and on to Cambridge. Yet, now, in its new "emergency regulations," the HLC attempts to add the following new words to its regulations' definition of "Subway station" that simply defy reality and also underscore HLC's deliberate disregard of the statute's words.

HLC now defines "Subway station" this way, adding the words shown in bold: "'Subway station' means any of the stops along the Massachusetts Bay Transportation Authority Red Line, Green Line, Orange Line, or Blue Line, including but not limited to the Mattapan High Speed Rail Line and any extensions to such lines." Those 10 bolded words are ultra vires the statute and untrue in fact.

In fact, the Mattapan Trolley line has no subway stations. It lies entirely above ground with its own separate trolley line and very old trolleys. The Amicus brief submitted by Brian O'Halloran and Douglas Brooks (SJC Opinion 13580 Docket number (53) explains the realities of the Mattapan Trolley line in clear detail. Those 10 inapposite words should be stricken from the new "emergency guidelines" as utterly inconsistent with reality and with the statute's plain use of its plain words "subway station." Only the legislature could make such an amendment to the statute, not HLC.

Consequently, for at least the following two reasons, among others, the HLC has exceeded its guidelines authority to "determine if Milton is in compliance with this section 3A" as applied to Milton: HLC both disregards the clear meaning and reality of the words "subway station" and HLC also disregards the specific requirement defining its guidelines authority, under paragraph (c), to apply the statutory compliance criterion of Section 3A. 1 (a) (1) (ii).

That provision, quoted above, is the required "reasonable size" criterion "applicable" to Milton. To say it differently, Section 3A is very explicit about what a "reasonably sized district" is when a municipality is located not more that 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station.

That is important for Milton because when that wording is "applicable" to a municipality, as it is to Milton, the HLC must use that precise wording of the statute, and not HLC's own preferences, to determine compliance. The inapplicability to Milton of 0.5-mile subway station proximity is just as clear as is the applicability to Milton of 0.5-mile commuter rail station proximity to Milton.

Because that wording of the statute controls any guideline adoption, under this statute's explicit 0.5 mile proximity and 15 units per acre, if applicable, mandate, HLC has no authority to require Milton to zone for 25% multi-family unit capacity, or 10% "Adjacent Community" multi-family unity capacity—-indeed no authority to choose any other percent multi-family unit capacity than what the statute's wording and math provide "if applicable". Why? Because the Section 3A statute's explicit wording requiring zoning for "15 multi-family units per acre" within the total of 37.5 acres of "developable land" "located not more than 0.5 miles from" the Fairmount, Readville and Blue Hills Ave MBTA "commuter rail stations", the yields the statutorily "applicable" required total Milton Section 3A multi-family zoning to be 563 multi- family units. Milton can fully comply with Section 3A by implementing that zoning.

The applicable-to-Milton 0.5 mile proximity and 15 units per acre metrics completely define Milton's Section 3A reasonable size and location obligation. That statutory wording and math is dispositive here. Period. Full stop. Milton can always choose to do more multi-family zoning, but HLC has no Section 3A authority to require it.

The Town of Milton's briefing to the SJC, and Amicus briefs that Milton residents submitted to the SJC, challenged HLC's "subway station" application of Chapter 40A Section 3A to Milton. The SJC ruled that the HLC had failed to comply with the Administrative Procedure Act (APA) requirement that it must "give notice and afford interested persons the opportunity of present data, views or arguments" in order to promulgate APA compliant regulations. That prior HLC failure to provide interested persons such an opportunity accompanied HLC's misapplication of the statute to Milton is again being repeated now by HLC's Action Plan timing and its requirement that Milton agree in the Action Plan to HLC's inapplicable zoning requirements in disregard of the APA and SJC's directives that HLC must provide interested persons such input opportunity before attempting to mandate compliance with a regulation.

In disregard of the SJC's order, HLC's Action Plan notice unlawfully demanded that Milton's Town Administrator accept on behalf of the Town in writing "all requirements" of the HLC's January 14, 2025 "emergency regulations" by February 13, 2025 despite the invalidity and unenforceability of regulations that cannot be promulgated without the APA mandated, and SJC ordered, opportunity for interested persons to present data, views and arguments having been conducted. Here, such data includes the facts that Milton indisputably has no 0.5 mile proximity to a subway station, data about the realities of subway station location, the reality that old, above-ground trolleys are not underground modern subway cars in any event, as well as the clear, dispositive facts that three commuter rail stations are in 0.5 mile proximity to Milton.

Furthermore, HLC's "emergency regulation" is not emergency-based because there is no overriding emergency that is so urgent that the APA and SJC-required resident input can be ignored. And even a true emergency would not allow HLC to mandate a signed Action Plan waiver of disputed matters. Nor is HLC compliant with the specific statutory wording that HLC must follow to "determine compliance with this section" as discussed above. Section 3A is utterly clear and straightforward in its wording as to applicability to Milton: inapplicable as to subway station proximity; and clearly applicable to Milton due to its commuter rail station proximity.

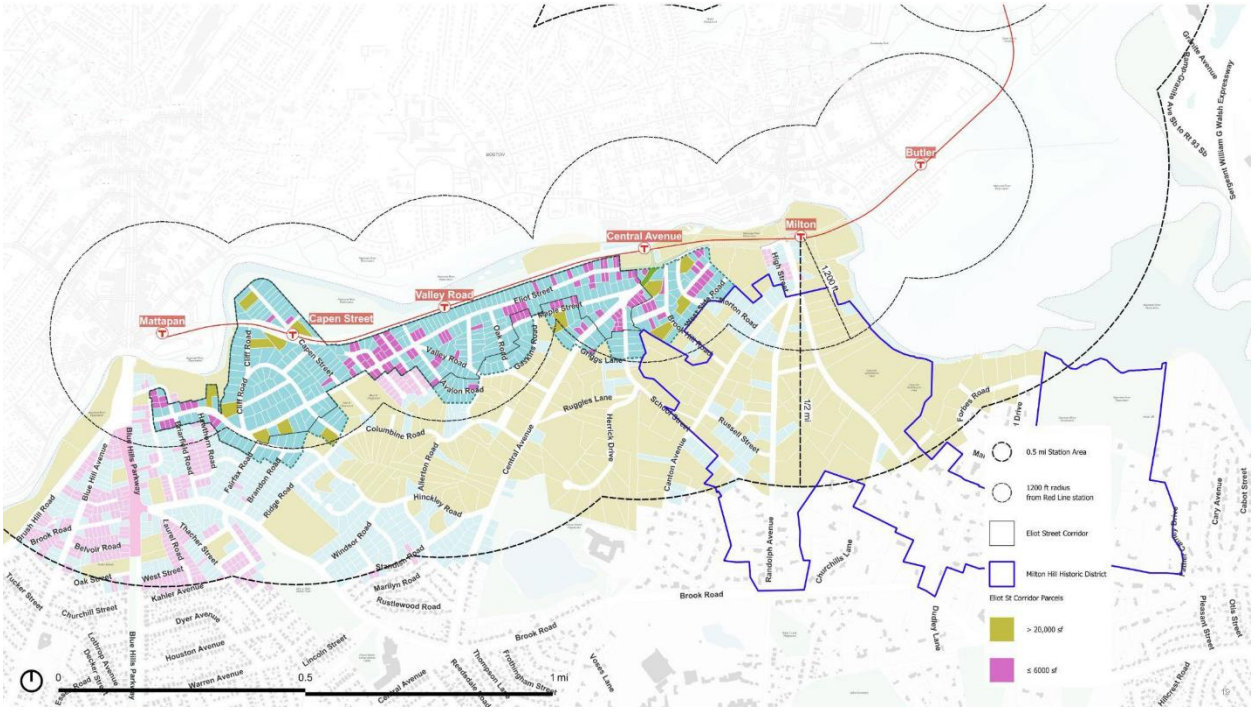
The SJC Order that HLC must promulgate its new regulation does not give HLC license to require that Milton agree in advance now to HLC's continued misapplication of the Section 3A statute to Milton before HLC complies with the APA requirement that HLC has failed to comply with - - namely to gather data, views and arguments from interested persons. HLC does not have freedom to delay doing so by making such data-gathering an after-the-fact formality. Yet, HLC now waits to gather the APA required "data, views, or arguments" until only after HLC has first unlawfully required municipalities to adhere to its unilateral and unauthorized precondition such that Milton must first make a binding commitment to "comply" with "all requirements of the HLC's January 14 "emergency regulations" by no later than February 13, by stating so in Milton's Action Plan submission and without HLC first gathering the APA and SJC required data, views, or arguments --and without HLC even considering and responding to those specified public inputs. HLC's demands turn APA compliance into a perfunctory formality and, improperly would allow HLC to "promulgate" (i.e. put into law irreversibly) its misapplication of Section 3A to Milton.

In summary, the HLC's Action Plan's timing and content ignore the APA requirement and the SJC's regulation promulgation Order. That would result in an unauthorized precondition to HLC's compliance with the APA and SJC Order, and a backwardly-timed and procedurally empty modus operandi that deeply prejudices Milton, its residents, and other municipalities. Meanwhile, the HLC improperly continues to withhold funding from Milton based upon HLC Guidelines that the SJC has ruled are unenforceable and invalid. The HLC should restore and resume that funding because HLC's basis for withholding was/is unenforceable.

3. Further Suggested Modifications

The Milton Planning Board has spent considerable time studying, with the help of staff and technical consultants, how best to apply the HLC guidelines to the town's existing built fabric. We have found certain aspects of the guidelines challenging and anticipate that other towns have found similar challenges. Please consider the following suggested modifications.

Much of the area within half a mile of transit is comprised of hundreds of small parcels with single- and two-family homes constructed primarily from the late 19th-century through the 1920's. It is a cohesive neighborhood that offers opportunities for lower density infill. It also includes one of the few business districts, with existing mixed-use overlay zoning. The guidelines, however, favor larger parcels and larger developments, and disfavor the type of infill - "the missing middle" - housing and mixed-use development that is most appropriate here and yet could achieve a gradual increase in units in an area with access to transit and amenities.



1. **"Multi-family housing" definition**

The definition "a building with three or more Residential dwelling units or two or more buildings on the same Lot with more than one Residential dwelling unit in each building" disfavors the most logical manner to add units in the area near transit, by infill. Retaining a historic single-family home and adding a two-family building or adding a single-family to a lot with an existing two-family would achieve the same result of three units, but it is not allowed by the definition. <u>This definition incentivizes the demolition of existing homes.</u>

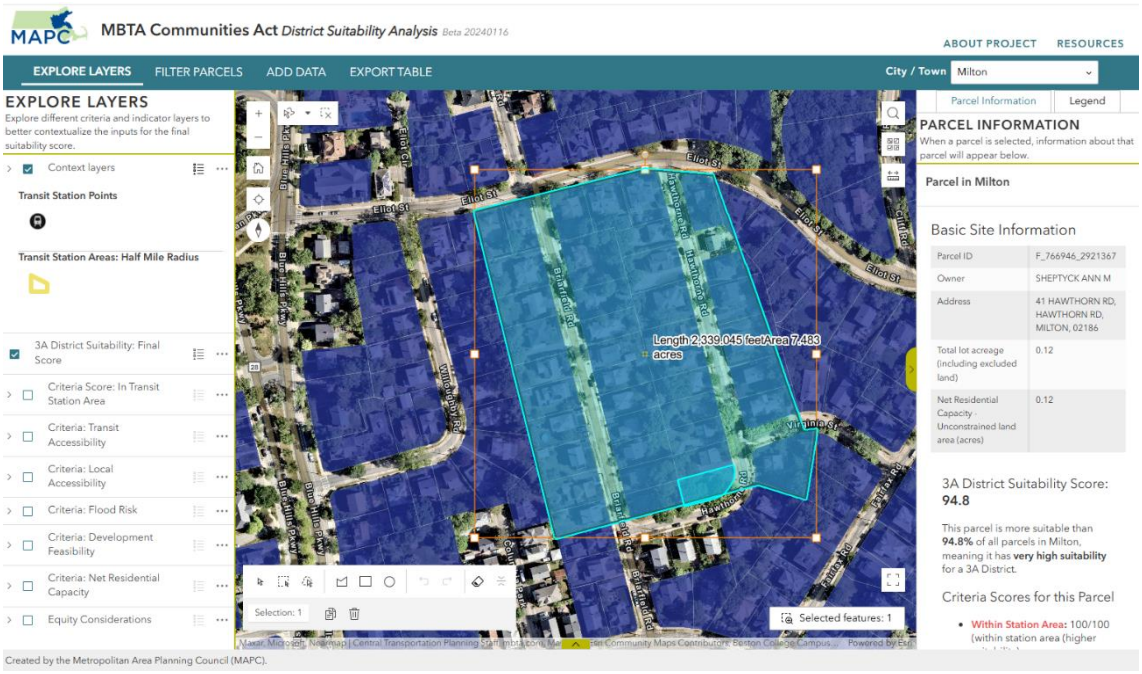
Request: Change the definition of multi-family housing to three dwelling units on the same Lot, no matter how configured.

2. **"Gross density" definition**

The definition of "a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational civic, commercial, and other nonresidential uses" disfavors existing neighborhoods with mostly small parcels, roads and any of the other uses in the definition, as <u>it lowers the modeled density</u>.

For example, a 7.5-acre area within 1,200 feet of transit, in the Eliot Street area, is comprised of 41 lots mostly in the 5,000-7,500-sf size. If each of these lots were allowed 3 units, that would allow 123 units. Using the definition, the density calculation would be: 123 / 7.5 = 16.4 units / acre. If the public way associated with the roads is removed, approximately 1.2 acres, the total acreage is 6.3 acres, and the density calculation would be 123 / 6.3 = 19.5 units / acre. The density per acre calculation is further impacted if there are parks or other of the uses included in the definition. The expansive definition discounts zoned capacity in existing neighborhoods with small lots and associated roads, parks or other uses.

Request: Change the definition to exclude land occupied by public rights-of-way and recreational civic, commercial, and other non-residential uses.



3. **Minimum subdistrict size of 5 acres.**

By allowing lower density infill in the areas near the transit, the historic fabric of existing neighborhoods can be retained. This approach, however, requires greater density in areas with larger underdeveloped parcels to meet the required average density of 15 units per acre. Undeveloped parcels are rare in Milton. Some that are suitable for redevelopment are smaller than 5 acres and are otherwise isolated such that they cannot be combined with other

parcels to meet the 5-acre minimum. One such parcel is 2 Granite Avenue, which is within half of a mile of the Cedar Grove station, and another is at Truman Parkway, which is just outside of half of a mile of the Fairmount Station on the commuter rail. These parcels would be appropriate for greater density and could be included if the minimum subdistrict size were lowered.

Request: Reduce the minimum subdistrict size from 5 acres to 2 acres.

4. **Cap on zoned capacity allowed in mandatory mixed-use zones.**

Milton has limited areas zoned for commercial use, much of it within half of a mile of the transit. The East Milton Square district is the largest, though outside of the transit catchment area, with a grocery market, pharmacy, restaurants, shops and service businesses. These business districts are well suited for mixed-use zoning, allowing housing above businesses, but the cap limits the area that this can be applied to, allowing only a portion of the existing business districts.

The Planning Board has submitted as-of-right mixed-use overlay zoning for the East Milton Square business district for the May 2025 Town Meeting. There is concern about including this district in MBTA Communities zoning since mandatory mixed-use would not be allowed given the application of that to the Milton Village/Central Ave business district. Residents do not support a loss of businesses because of MBTA zoning.

Request: Increase the zoned capacity allowed within mandatory mixed-use districts.

5. **District locations outside of half of a mile from transit stations.**

As noted above, larger parcels suitable for greater density exist outside of the half of a mile catchment area of transit, including several on Route 28/Randolph Avenue, which is served by MBTA bus line 240.

Request: Allow subdistricts in locations without restriction.

6. **Affordability**

While the guidelines allow for inclusionary zoning, it is widely recognized that a development of approximately seven units is required to reasonably trigger a 10% affordability requirement. The infill development pattern that is most suitable for the neighborhoods near transit would not trigger an affordability requirement. Towns should be able to require 17% affordable housing to meet their affordable housing goals in their multifamily housing.

Request:

In cases where developments are 7 units or less, a municipality may require that 17% of the total development assessed value be given to the town's affordable housing trust fund by the developer.

If a multifamily development is greater than 7 new units a municipality may require 17% affordable housing.

Partial Units / Payment in Lieu of Units: Where the total number of units required to meet the unit contribution is calculated to be a fraction below a unit, the Applicant may be required to pay the fractional amount to the municipalities affordable housing trust fund.

Length of Restriction: A deed restriction and/or affordability covenant may be placed on each Inclusionary Zoning Unit in perpetuity.

7. **ADA access near transit**

Under Section 72.03, General Principles of Compliance, subsection (2)(d) states, "The following general principles have informed the more specific compliance criteria that follow: (d) When possible, Multi-family zoning districts should be in areas that have safe, accessible, and convenient access to Transit stations for pedestrians and bicyclists, as well as parking for motorists and ADA compliant access for people with disabilities.

Request: Parking for motorists and ADA compliant access for people with disabilities near transit.

8. **Definitions**

The definition of 'Subway' is beyond the scope of the language in the statute. Section 72.02, "Subway Station", states, "any of the stations along the Massachusetts Bay Transportation Authority Red Line, Green Line, Orange Line, or Blue Line, excluding the Mattapan High Speed Line and any extensions to such lines.

Request: Change in terms to make the definition more consistent.

9. **Density**

The language in Section 72.05(3)(e) is unclear about what is required of the developer, the municipality, and the Commonwealth.

Request: If the existing municipal utilities and infrastructure is insufficient, the town should be allowed to limit the amount of density in that location.

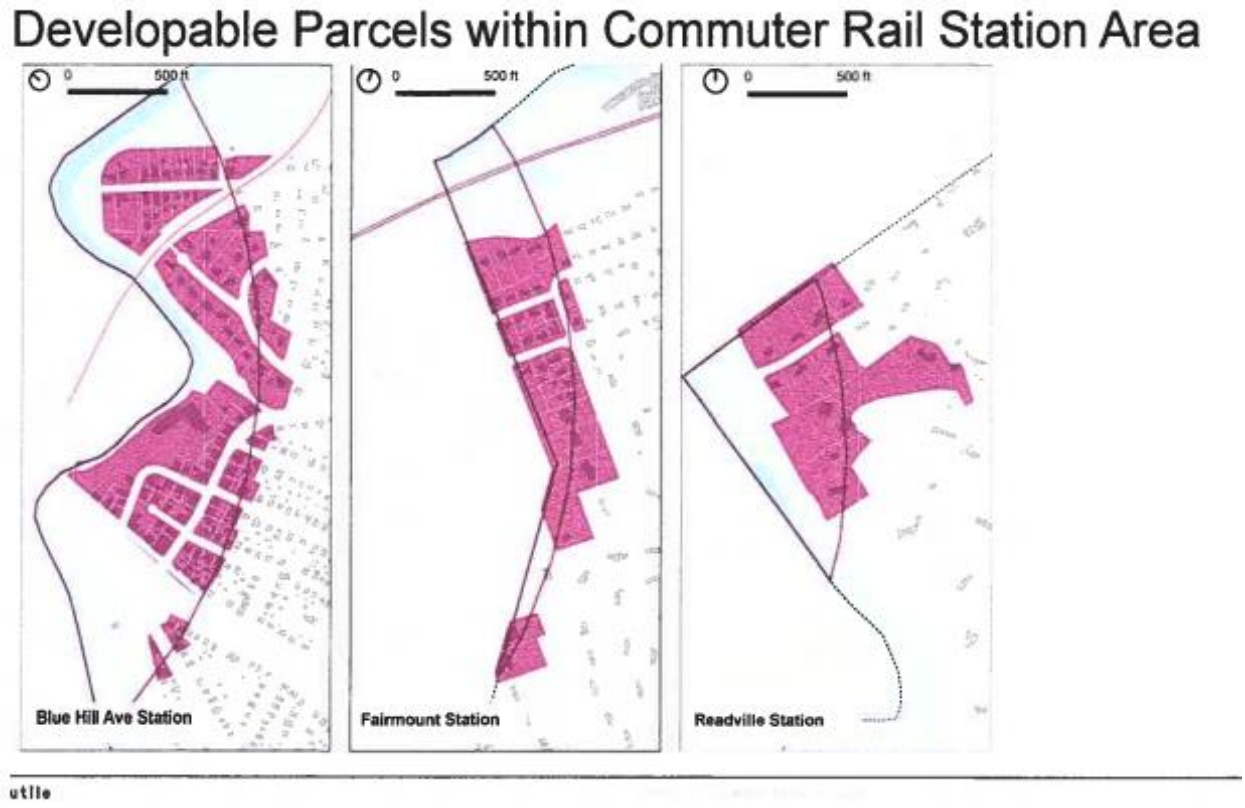
10. **Minimum multi-family unit capacity**

Section 72.05(B) Minimum Multi-family unit capacity

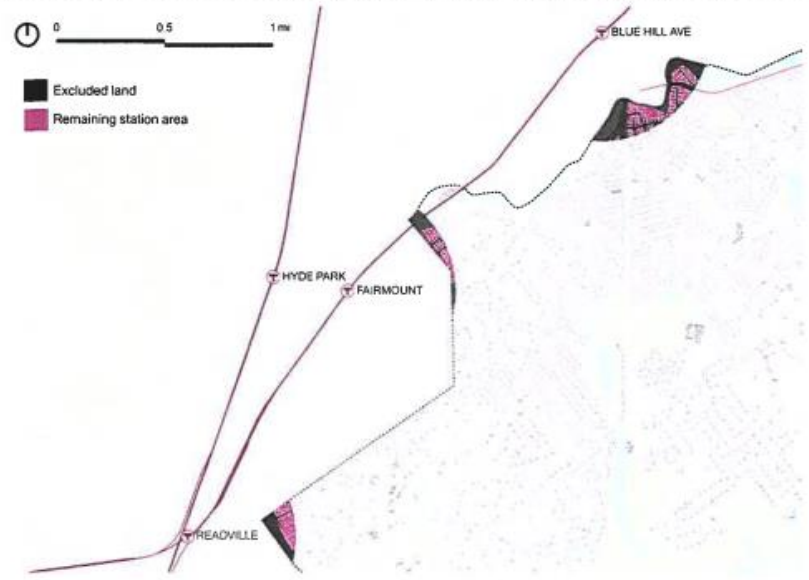
Request: An explanation of the percentages listed in Table 1. When looking at the developable area within the ½ mile radii, more than 60% of the land area is either in Boston or is part of the Neponset River watershed area and is excluded from Milton's developable land area.

As the municipality tries to determine the location for multi-family districts, Milton is uniquely challenged with many acres of land which are not able to be included in the developable area, due to the land being protected under conservation, or school/college classification.

ATTACHMENT:



Developable Commuter Rail Station Area Calculation: excluded land



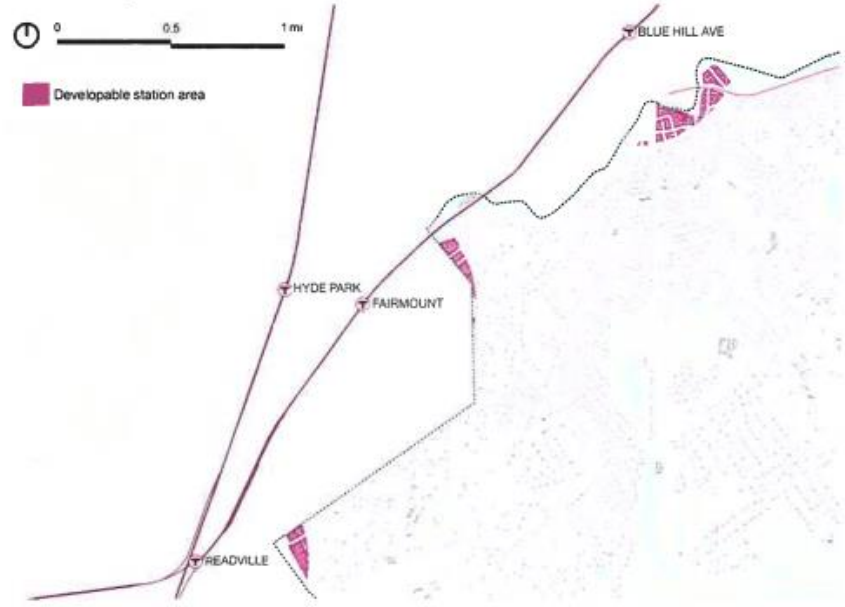
Excluded land within commuter rail station area:
36.5 acres

The 3A guidelines / compliance model identifies the following land types as "excluded land" (summarized, see the Guidelines for full detail):

1. Public rights-of-way
2. Protected open space / recreational land
3. All publicly-owned land (except portions of lots deemed developable)
4. Educational / institutional land
5. Rivers, lakes, streams and other water bodies
6. Wetlands
7. Wellhead protection / surface water supply protection areas

utile

Developable Commuter Rail Station Area Calculation: result



74 acres - 36.5 acres =

Developable land within commuter rail station area:
37.5 acres

After subtracting excluded land, almost exactly half of the commuter rail station area remains developable

utile