

Using 40R and 43D to Stimulate Transformative Transit-Oriented Development in Gateway Cities

Elizabeth Haney

Introduction

Previous installments of this policy brief series focus on the potential of the state Housing Development Incentive Program (HDIP) and federal Opportunity Zones to facilitate transformative transit-oriented development (TOD) in the 13 Gateway Cities with current or planned rail service. This brief examines two additional state incentive programs—43D Expedited Permitting and 40R Smart Growth Zoning—as tools to spur TOD in Gateway Cities.

How Smart Growth Zoning (40R) Can Stimulate TOD

In 2004, the Massachusetts legislature enacted Chapter 40R as a smart growth zoning strategy to increase housing production in strategic locations. Under Chapter 40R, municipalities may adopt zoning overlay districts that allow densities of eight units per acre for single-family homes, 12 units per acre for two- and three-family buildings, and 20 units per acre for multi-family housing. The law requires that 20 percent of the units in the district and in projects with more than 12 units be affordable for households making 80 percent or less of Area Median Income. These districts can allow mixed-use zoning but are not required to do so.

Chapter 40R aims to spur dense development and includes parameters that make the development process easier for builders. For example, municipalities can create 40R zoning overlay districts only in “eligible locations,” which the law defines as an area within a half mile of public transit, an “area of concentrated development,” or an area in an “otherwise highly suitable location.” With this parameter, law-

makers also activated TOD statewide by incentivizing compact, dense development within half-mile of transit hubs.

The law requires that projects in 40R districts be developable “as of right,” meaning that, if a project meets area zoning standards, it can proceed without conditional approvals or special permits. Beyond this by-right review, 40R mitigates development risks in other ways. These include requiring municipalities to make permitting decisions within 120 days of submission (unless both parties agree to an extension) and limiting the grounds for denial. The law also protects projects from unfounded abutter appeals, which sometimes take years to maneuver through the courts. Appeals subject developers to heavy legal fees and carrying costs such as property taxes, insurance, and interest on loans that the developer must continue to pay even if development is on hold.¹

How Expedited Local Permitting (43D) Can Stimulate TOD

Signed into law in 2006, the Chapter 43D Expedited Local Permitting statute allows municipalities to designate Priority Development Sites (PDS) that ease the development or redevelopment process for projects with at least 50,000 square feet of floor area. Proposed projects on these sites receive a single municipal point of contact who shepherds plans through the permitting process, and cities must finalize all permitting decisions within 180 days of application. Municipalities can designate PDSs on property zoned for commercial, industrial, residential, or mixed-use. For eligibility, municipalities submit PDS proposals



to the state's Interagency Permitting Board, which ultimately approves these designations.²

Though 43D has no explicit smart growth requirement, the state strongly encourages PDSs in areas that are near existing public transit service, adjacent to existing development, or in under-utilized buildings or facilities. In addition, the expedited permitting best practices guide recommends that planners and developers analyze sites for their compatibility with the Commonwealth's Sustainable Development principles. Though developers have mainly used 43D for the development or redevelopment of industrial parks, the incentive offers a great opportunity to shift priority site designations to downtown areas in creative ways, such as focusing on large parcels or scattered-site land assembly.

The 180-day decision requirement in 43D provides developers with more certainty in the permitting process.³ Carrying the cost of acquired property and other predevelopment expenses grows with time, so this component has real economic value.

Gateway Cities Underutilize 40R and 43D as TOD Tools

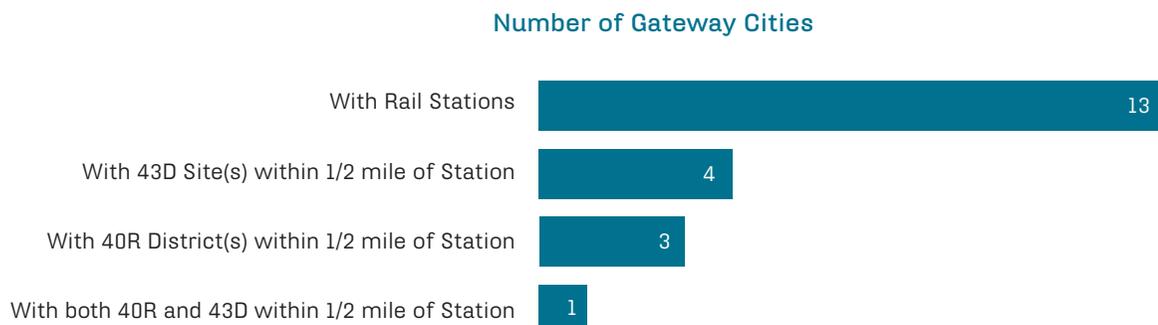
Although these tools can stimulate TOD development, neither has fully realized its potential. Recent analysis by the Citizens' Housing and Planning Association (CHA-

PA) shows that many of the early projects using 40R have not been in transit areas.⁴ Statewide, only one-quarter of 40R districts are located near transit. Gateway Cities with transit have been slow to adopt 40R as a TOD tool (Figure 1). Of the 13 Gateway Cities with commuter rail, only three (Brockton, Haverhill, and Lowell) had 40R districts in their station areas as of December 2018. And in all three of these instances, the 40R district only covers a small portion of the station area. Lawrence has a proposed district in progress. If approved, it would be the largest station area 40R district to date (Appendix, Map A5).

Across the Gateway Cities, developers have used 43D more often. Of the 13 transformative TOD communities, all but Salem have created 43D priority development sites. However, only four of these cities have sites within a half mile of a downtown commuter rail station: Lawrence's Merrimack Street, Lowell's Hamilton Canal District, Lynn's Waterfront Planning Area, and Worcester's CitySquare.

In 2012, the state legislature amended Chapter 43D to authorize PDS designation for sites zoned for residential development. This enactment allows developers to use both tools in TOD areas. Among Gateway Cities, however, only Lowell (Appendix, Map A6) has established both a 43D priority development site and 40R zoning within a half mile of its commuter rail station.

Figure 1: Gateway Cities with Existing 40R and 43D Designations





Positioning Gateway Cities to Leverage Opportunity Zones

Federal Opportunity Zones present a unique opening to attract private investment to long-overlooked Gateway City sites that are prime for TOD. The federal Opportunity Zone Program is designed to attract private investment to low-income census tracts designated as Qualified Opportunity Zones (OZs). The program seeks to connect private investors with areas of the country that have not benefited from economic growth in recent decades, and thus offers an important prosperity-sharing tool for revitalizing Gateway Cities. Policymakers are hopeful that the program will encourage patient equity and smaller deals, which could help fuel investment in the Gateway Cities.

Although the state has designated OZs in many of the Gateway Cities, projects will need to have strong economic fundamentals or additional subsidies to make the deals work for OZ investors. Developers working with OZ funds on complex sites will be particularly sensitive to permitting delays and constraints: the law requires developers to invest OZ funds within 30 months of receipt. Communities can deploy 40R and 43D to help provide greater certainty, reducing the risk of noncompliance.

Municipalities can pursue funds for planning implementation of 40R and 43D in their TOD areas strategically. Available resources include the District Local Technical Assistance Program (DLTA) and the Executive Office of Energy and Environmental Affairs' (EEA) Planning Assistance Grants. The Department of Housing and Community Development distributes DLTA funding to the Commonwealth's 13 Regional Planning Agencies, which use the funds to support planning in their cities and towns.⁵ Their activities include painstaking efforts to adopt 40R and 43D such as re-writing zoning by-laws, organizing expedited permitting, and developing design guidelines. EEA Planning Assistance Grants support similar functions related to sustainable land use and conservation.⁶

Many Gateway Cities have small or no planning staff, so increasing state support for these funding programs could catalyze work on implementing 40R and 43D in short-staffed municipalities.

Timely passage of the Baker administration's Housing Choice bill could also better equip Gateway Cities to put these districts in place, and to do so with greater speed. Housing Choice reduces the threshold for adopting 40R districts from two-thirds to a simple majority vote of a city council. CHAPA's 2018 analysis found that public support was the biggest challenge in adopting 40R districts. Officials and residents have cited various grounds for opposition, including resistance to development generally, fear of rising school costs, resistance to compact development or to affordable housing, or desire to use a lower affordability requirement.⁷ In some municipalities, officials have reported avoiding 40R district creation for fear of falling short of the current two-thirds vote threshold. Legislation to reduce the threshold for passage to a simple majority would ease adoption of 40R districts.

Finally, the state should further explore how to simplify and expedite the allocation of subsidies for smart growth 40R districts in strategic locations such as TOD areas. The potential to catalyze Opportunity Zone investment depends on clear and certain development timelines. Under 40R, many projects in Gateway Cities require additional subsidies to meet their 20 percent affordability requirement, since rents in these markets are insufficient to fill the gap. As a result, developers who seek Housing and Community Development subsidies for projects often must apply two or three times in order to receive competitive funding, which can take over two years. These delays over multiple application rounds will likely lengthen 40R project timelines beyond the 30-month investment disbursement window required for Opportunity Zone investors, making their funding alignment infeasible.



Endnotes

- 1 In other instances, abutters don't have to invest such resources up front. Under Chapter 40R Section 11, abutters seeking to reverse the decision of a zoning board of appeals must post bond equal to the annual carrying cost of the property owner/agent plus attorney fees over the estimated period of time during the appeal. If in the appeal the plaintiff does not prevail, the bond must be forfeited in an amount sufficient to cover the actual carrying costs and attorney fees. See Massachusetts General Law, Chapter 40R, Section 11.
- 2 See Massachusetts General Law Chapter 43D, Expedited Local Permitting.
- 3 To protect communities, 43D allows the 180-day guarantee to be suspended if an application is incomplete or contains false or misleading information, or if there have been substantial changes in the project.
- 4 Citizens' Housing and Planning Association. "The Use of Chapter 40R in Massachusetts: 2018 Update" (May 2018). [https://www.chapa.org/sites/default/files/TheUseofCh40R_2018.pdf]
- 5 See Massachusetts General Law Chapter 29, Section 2XXX, District Local Technical Assistance Fund.
- 6 <https://www.mass.gov/service-details/planning-assistance-grants>
- 7 Ibid, p. 5.

Appendix

Table 1: 40R Sites within Half Mile of Gateway City Commuter Rail Station

Municipality	District Name	District Size (acres)	Year Adopted	Year Amended	Future Units	Units built or permitted	Opportunity Zone
Brockton	Downtown	60	2007	2018	1,096	140	X
Haverhill	Downtown	58	2007	2017	701	362	X
Lowell	SGOD	2.5	2008	2017	250	122	X
Lawrence	Downtown	N/D	N/D	N/D	N/D	N/D	X

Note: Data was not available for Lawrence's proposed Smart Growth Zone as of December 2018.

Source: Massachusetts Department of Housing and Community Development and MassGIS *Preparing for Success Mapping Tool*.

Table 2: 43D Sites within Half Mile of Gateway City Commuter Rail Station

Municipality	Site	Acres	Date Adopted	Opportunity Zone
Lawrence	280-350 Merrimack Street	12.0	12/17/08	X
Lowell	Hamilton Canal District	21.1	5/24/07	X
Lynn	South Waterfront Priority Development Site	8.8	2/13/13	X
Lynn	North Waterfront Priority Development Site	28.3	2/13/13	X
Worcester	CitySquare	20.3	5/13/09	X

Source: Massachusetts Permit Regulatory Office and MassGIS *Preparing for Success Mapping Tool*.



Maps of Designations in Gateway City TOD Areas

Legend

-  Commuter Rail Station
-  Half-Mile Radius from Station
-  Opportunity Zone
-  40R Districts
-  43D Sites

Map A1: Attleboro

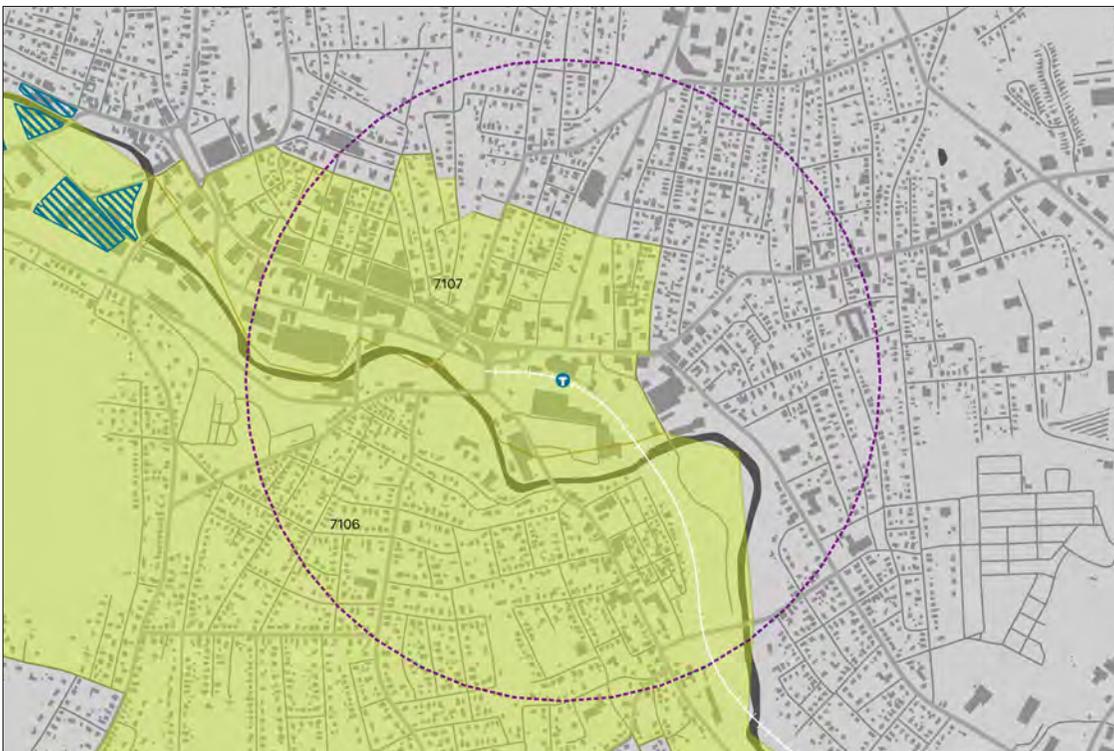




Map A2: Fall River

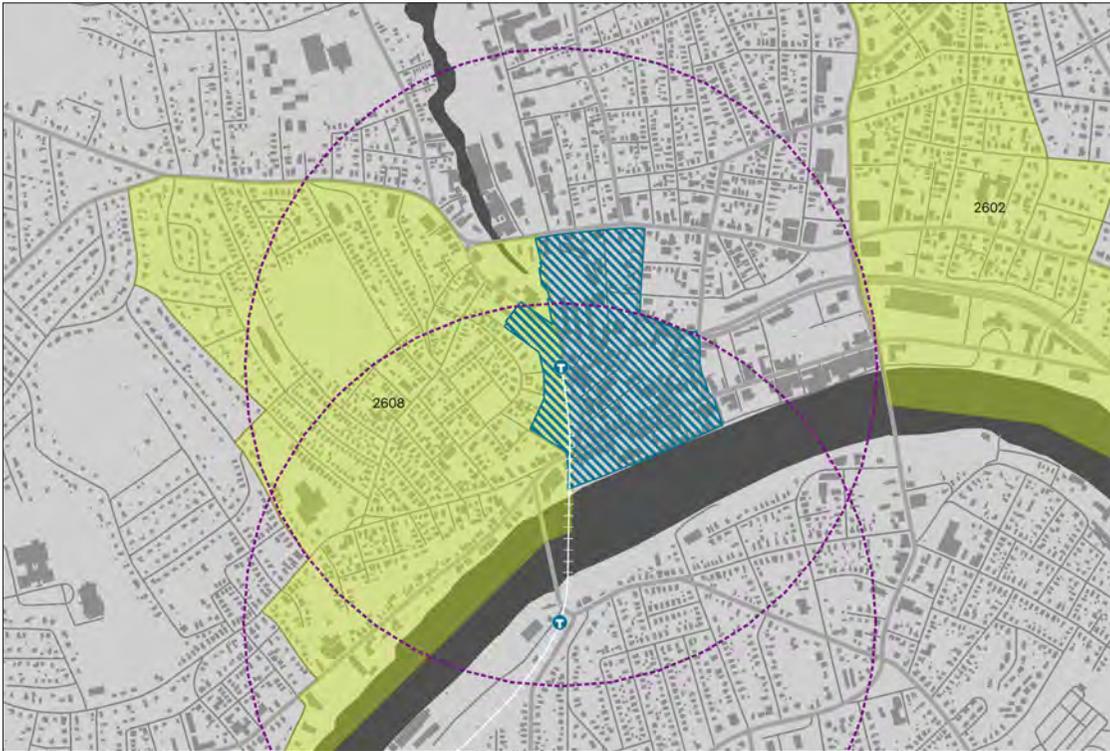


Map A3: Fitchburg

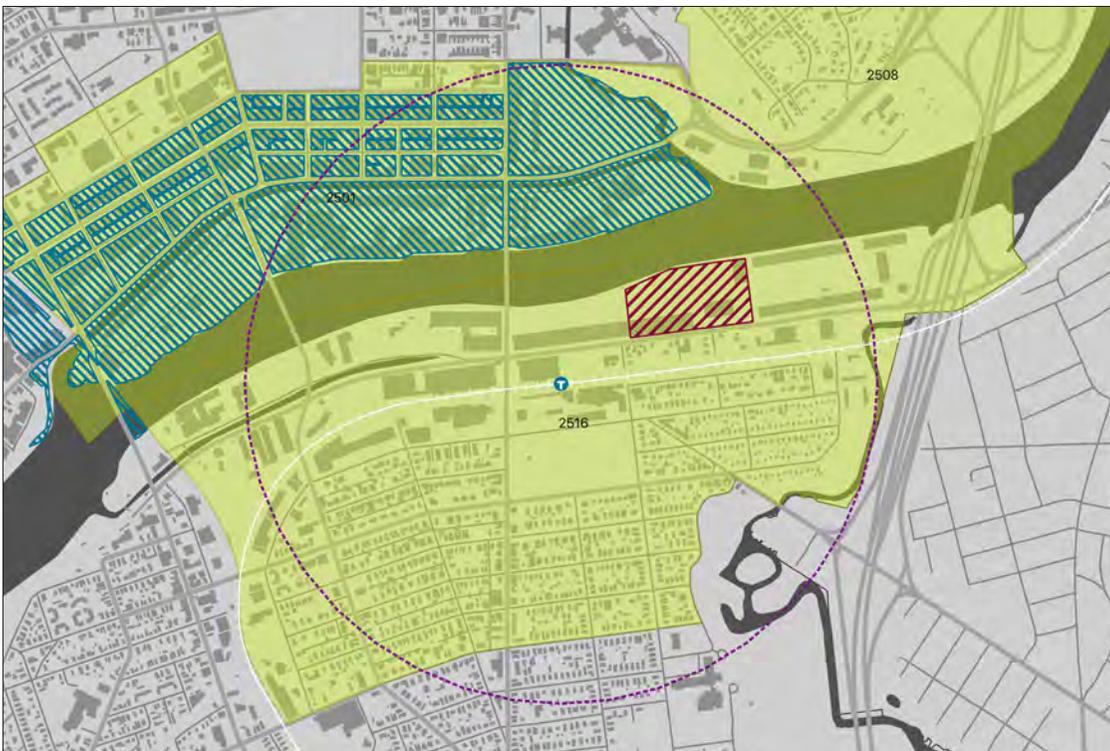




Map A4: Haverhill



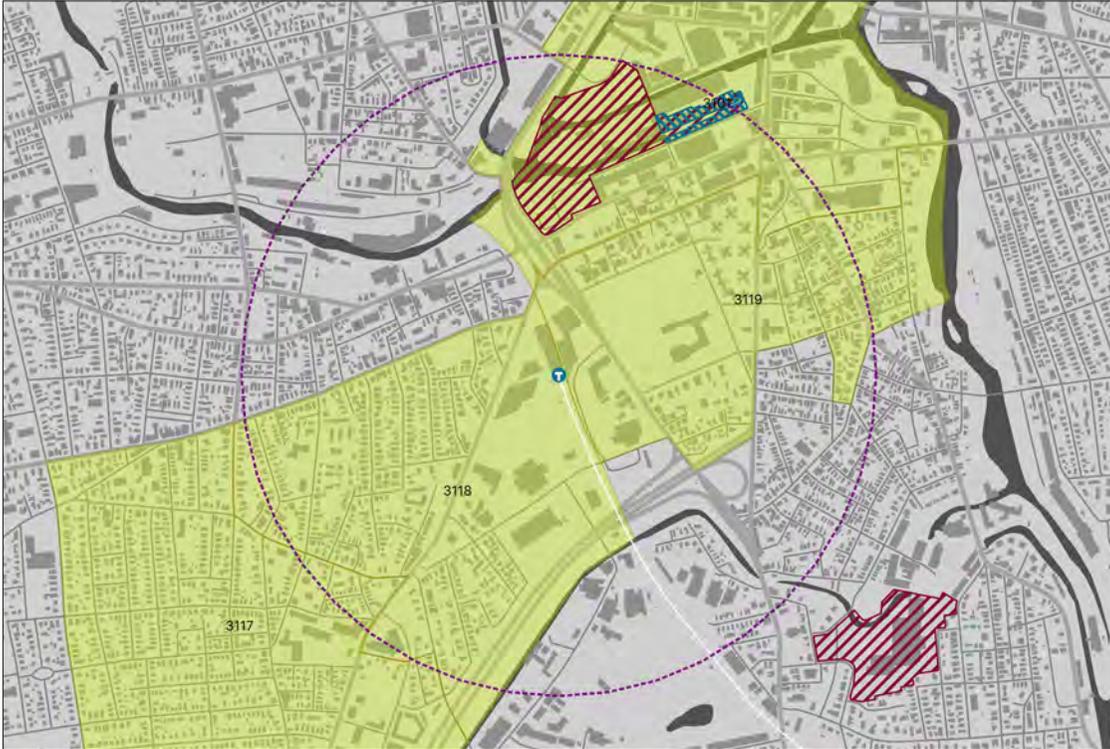
Map A5: Lawrence*



*The 40R district in Lawrence was pending approval as of December 2018.



Map A6: Lowell

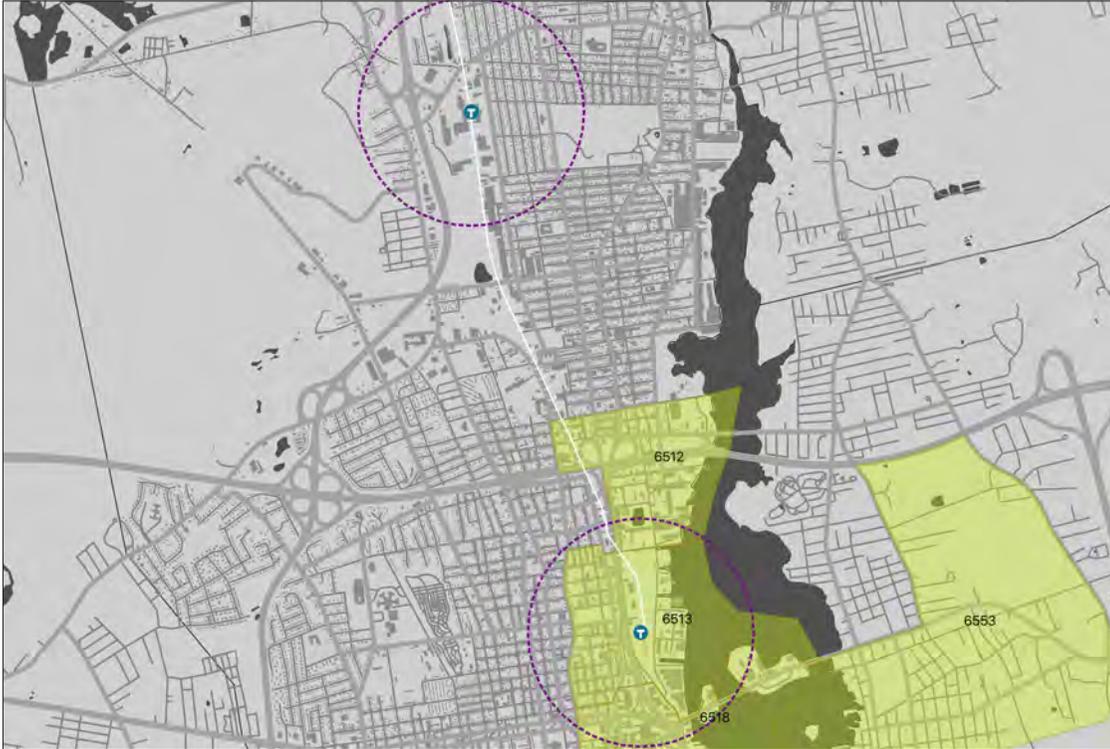


Map A7: Lynn

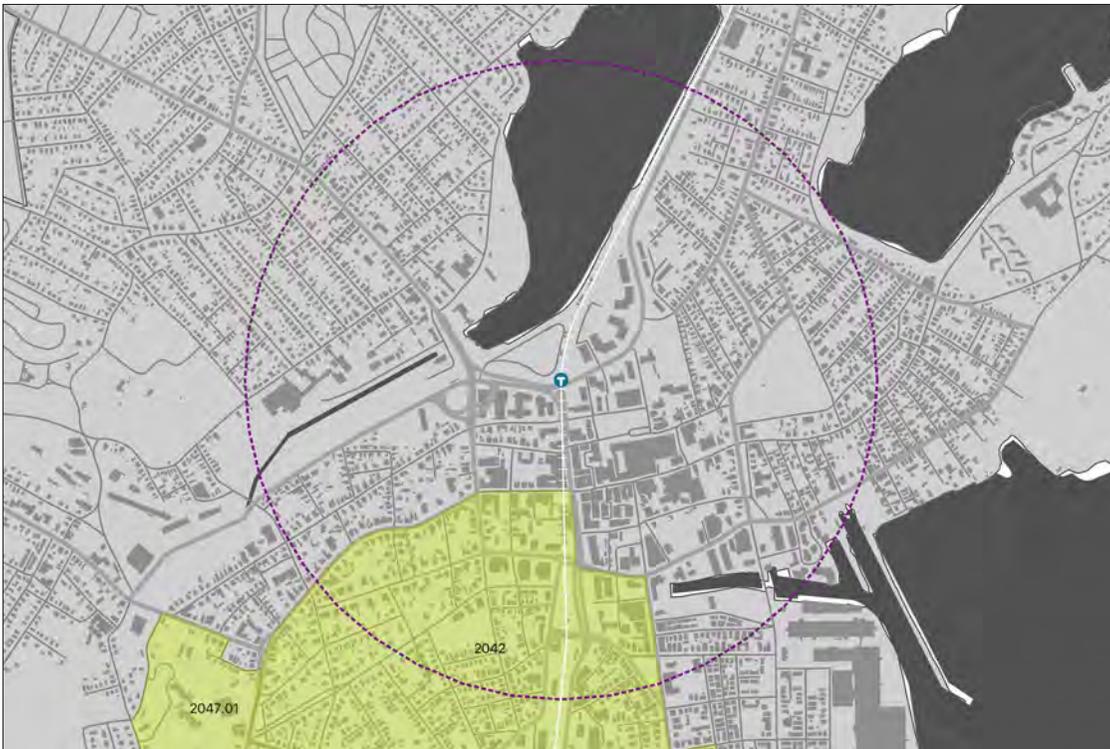




Map A8: New Bedford

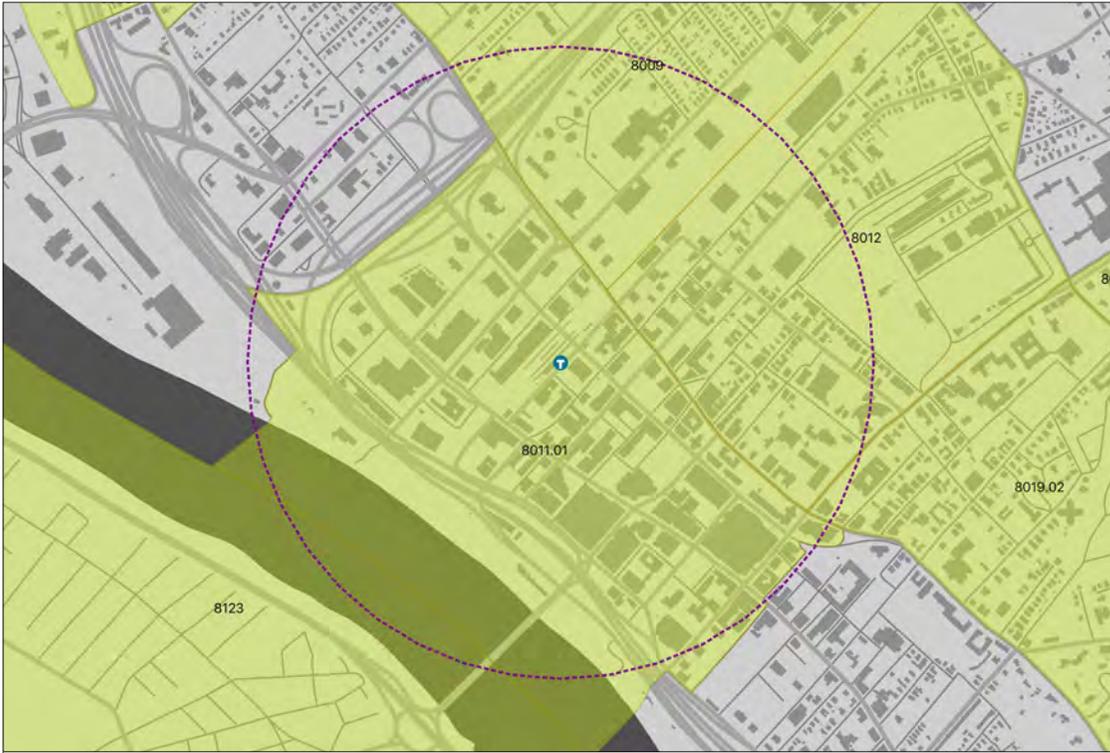


Map A9: Salem

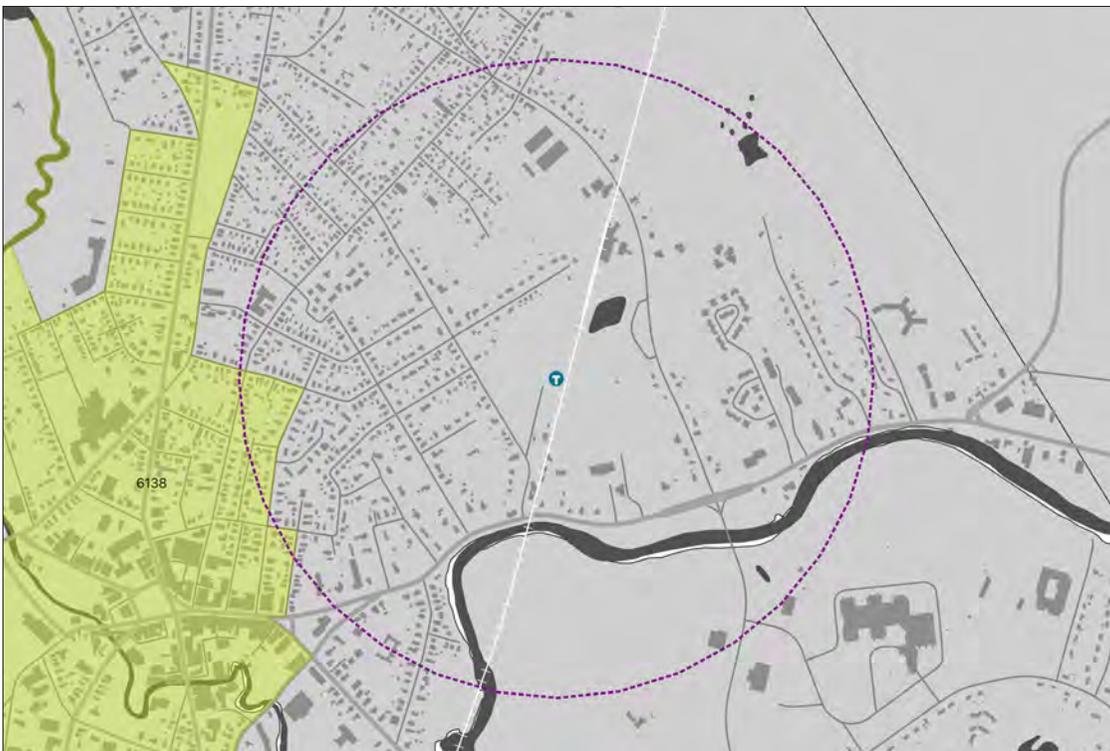




Map A10: Springfield



Map A11: Taunton

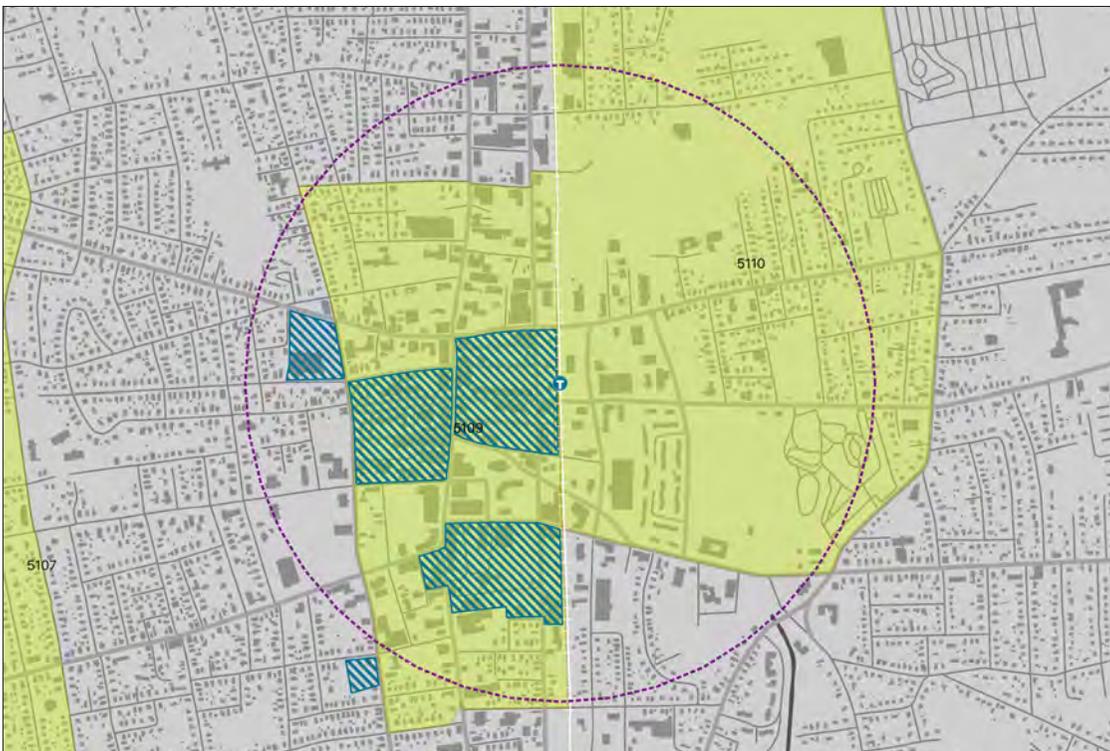




Map A12: Worcester



Map A13: Brockton





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The Massachusetts Institute for a New Commonwealth (MassINC) is a rigorously non-partisan think tank and civic organization. We focus on putting the American Dream within the reach of everyone in Massachusetts using three distinct tools—research, journalism, and civic engagement. Our work is characterized by accurate data, careful analysis, and unbiased conclusions.

ABOUT THE GATEWAY CITIES INNOVATION INSTITUTE

The Gateway Cities Innovation Institute works to unlock the economic potential of small to midsize regional cities. Leveraging MassINC’s research, polling, and policy team, the Institute strengthens connections across communities and helps Gateway City leaders develop and advance a shared policy agenda.

ABOUT THE TRANSFORMATIVE TRANSIT-ORIENTED DEVELOPMENT (TTOD) INITIATIVE

The Gateway Cities Innovation Institute kicked off its TTOD Initiative in April 2018 with the release of a study quantifying the potential opportunity and impact of transit-oriented development in 13 Gateway Cities with current or planned commuter rail service. Until 2021, we will expand this foundational research to test a range of strategies that improve the transit rider experience by promoting frequent, all-day, accessible service and stimulating inclusive growth and development in Gateway Cities and surrounding communities.



11 Beacon Street, Suite 500
Boston, MA 02108
www.massinc.org