3/6/25

3.1

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT

TOWN OF HANSON, by and through its Select Board, LAURA FITZGERALD-KEMMETT, DAVID GEORGE, ANN REIN JOSEPH WEEKS, and EDWIN HEAL

Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS; EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES; MASSACHUSETTS DEVELOPMENT FINANCE AGENCY;

and

MASSACHUSETTS OFFICE OF THE STATE AUDITOR, by and through its DIVISION OF LOCAL MANDATES

Defendants

No. 2583CV00209

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Introduction

Plaintiffs in the above-captioned action hereby submit this Memorandum of Law in Support of their Motion for Preliminary Injunction as against Defendants, Commonwealth of Massachusetts ("the Commonwealth") and the Executive Office of Housing and Livable Communities ("EOHLC"), and the Massachusetts Development Finance Agency ("MassDevelopment") (collectively "Defendants"). For the reasons set forth below, and in the Plaintiffs' Verified Complaint, Plaintiffs are entitled to an Order preliminarily enjoining and

restraining the the Commonwealth and EOHLC from enforcing the provisions of G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC in 760 C.M.R. 72.00 as against the Town of Hanson ("the Town"), and enjoining and restraining MassDevelopment from withholding execution of grant agreements or contracts, or dispensing grant funds, on the basis of purported non-compliance with the provisions of G.L. c. 40A, § 3A. The Town has a substantial likelihood of success on the merits, and the irreparable harm that the Town will face by enforcement of the provisions of G.L. c. 40A, § 3A, and the corresponding regulations promulgated by EOHLC, and the potential loss of funding from MassDevelopment substantially outweighs any interest on the part of the Commonwealth, EOHLC or MassDevelopment in the enforcement of them or the withholding of funding. Furthermore, the public's interest favors the entry of injunctive relief.

Facts and Background

Plaintiffs incorporate and rely upon those factual assertions set forth in the Verified Complaint, filed herewith, and as follows. G.L. c. 40A, § 3A was added by § 18 of Chapter 358 of the Acts of 2020, and was thereafter amended by § 10 of Chapter 29 of the Acts of 2021, effective July 29, 2021. G.L. c. 40A, § 3A was further amended by §§ 152-153 of Chapter 7 of the Acts of 2023, effective May 30, 2023. G.L. c. 40A, § 3A was further amended by § 9 of Chapter 150 of the Acts of 2024, effective August 6, 2024. G.L. c. 40A, § 3A was further amended by §§ 2, 2A, 2B, and 20-26 of Chapter 234 of the Acts of 2024, effective November 20, 2024. The General Court at no time, whether contemporaneously with enactment of G.L. c. 40A, § 3A, or subsequent thereto, has provided by general law or by appropriation funds for the assumption by the Commonwealth of the direct costs to the Town imposed by G.L. c. 40A, § 3A, or the corresponding regulations promulgated by EOHLC.

The Town is defined as an "other served community" pursuant to G.L. c. 161A, § 1 and G.L. c. 40A, § 1A. As an "other served community", the Town is considered an "MBTA Community" subject to the provisions of G.L. c. 40A, § 3A. Pursuant to G.L. c. 40A, § 3A, the Town as an "Adjacent MBTA Community" is required to adopt a zoning by-law providing for at least one (1) district of "reasonable size" in which multi-family housing is permitted by right. *G.L. c. 40A, § 3A(a)*. Under these requirements, the Town is required to enact zoning bylaws that allow, as a matter of right, 750 multi-family housing units in approved districts. That is in excess of a 15% increase in the total number of housing units in the Town.

Pursuant to emergency regulations promulgated by EOHLC in 760 CMR 72.00, the Town has a deadline of July 14, 2025, to submit a "District Compliance Application" to EOHLC, setting forth information about current zoning, past planning for Multi-family housing, if any, potential locations for a Multi-family zoning district and establishing a timeline for various actions needed to create a Multi-family zoning district in compliance with G.L. c. 40A, § 3A, and EOHLC regulations. *760 CMR 72.09*. As an MBTA Community, the Town's compliance with the provisions of G.L. c. 40A, § 3A and the corresponding EOHLC regulations is not a choice. Rather, as concluded by the Supreme Judicial Court, compliance with §3A is mandatory. *Id*; *Town of Milton*, infra, at 193. Additionally, pursuant to G.L. c. 40A, §3A(b), failure by the Town to submit a "District Compliance Application" to EOHLC by July 14, 2025, will result in the Town's ineligibility for funding from, *inter alia*, Housing Choice Initiative, the Local Capital Projects Fund, and MassWorks infrastructure program, as well as those additional programs identified in 760 CMR 72.09. *G.L. c. 40A, § 3A(b)*; *760 CMR 72.09*. The Town has not submitted a "District Compliance Application" to EOHLC and is at risk of losing eligibility for funding from those programs identified in G.L. c. 40A, § 3A(b) and 760 CMR 72.09.

On January 8, 2025, the Massachusetts Supreme Judicial Court concluded, *inter alia*, that, in addition to the potential loss of grant funds due to noncompliance, G.L. c. 40A, §3A establishes an affirmative mandate on all applicable communities to adopt complying zoning bylaws. *Attorney General v. Town of Milton*, 495 Mass. 183, 193 (2025). The construction of 750 housing units will result in substantial infrastructure impacts to the Town, including, without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing.

The Town has submitted, and received approval of, two (2) applications for grant funding to Mass Development, from the Site Readiness Program and the Brownfields Redevelopment Fund, in the amounts of $70,000 and $237,000, respectively. **Exhibit 1**, *Correspondence of October 11, 2024*; **Exhibit 2**, *Correspondence of October 15, 2024*. However, with respect to each grant, MassDevelopment has stated that "a Grant Agreement will not be executed if the [Town] is not compliant with G.L. c. 40A, § 3A as determined by EOHLC".

On October 15, 2024, the Towns of Wrentham and Middleborough, and the City of Methuen submitted a request to the Auditor of the Commonwealth, via the Division of Local Mandates ("DLM") seeking a determination of whether G.L. c. 40A, § 3A constituted an unfunded mandate on the Town within the contemplation of G.L. c. 29, § 27C. By correspondence dated February 21, 2025, DLM issued a Determination that G.L. c. 40A, § 3A constituted an unfunded mandate. **Exhibit 3**, *DLM Determination*, Feb. 21, 2025. As stated in such determination, the mandate established under the statute and as affirmed by the Supreme Judicial Court, will result in material impacts to municipal infrastructure, necessitating new investment therein. *Id*, at pp. 4-

6. As noted in the DLM Determination, the Commonwealth has acknowledged, in the adoption of G.L. c. 40A, §3A and the regulations promulgated thereunder, that such impacts will occur and are the obligation of the host community. *Id*, at pp. 7-8.

The DLM Determination also states that it was disabled from completing its determination and calculating the amount of the funding deficiency until such time as EOHLC prepares and submits a fiscal impact statement which is required under G.L. c. 30A, §3. Entry of an injunction until such time as this process unfolds will ensure a complete and fulsome evaluation of this vital issue.

7. The present deadline for compliance with G.L. c. 40A, §3A is July 14, 2025. Notwithstanding the DLM determination, the Commonwealth has asserted through the Attorney General's office that it would ignore the requirements therein and, instead, compel compliance. In order to comply, the Town must hold several hearings and a Town Meeting vote in order to achieve compliance. Subsequently, the Town must appropriate necessary funds to supplement vital infrastructure needed to support 750 housing units. Certainly, given the uncertainty raised by the DLM Determination and the AG's disagreement with the same, securing necessary Town Meeting approvals is in jeopardy.

Applicable Law

I. Preliminary Injunction Standard

The decision to grant a preliminary injunction is left to the sound discretion of the trial judge. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 86-87 (1984); *Packing Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980). A party moving for a preliminary injunction must show that in the absence of injunctive relief, it will suffer a loss of rights that is not capable of

remediation by a final judgment in law or equity. *Cheney*, at 616. The purpose of a preliminary injunction is to preserve the status quo pending a final determination on the merits. *Id.*

Under Massachusetts law, to obtain preliminary injunctive relief, the moving party must show that "(1) success is likely on the merits; (2) irreparable harm will result from the denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Massachusetts Port Authority v. Turo, Inc.*, 487 Mass. 235, 247 (2021). (quoting, *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 357 (2006)). "A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment." *Id.* (quoting, *GTE Prods. Corp. v. Stewart,* 414 Mass. 721, 724 (1993)).

However, when weighing injunctive relief sought by a public entity, the ordinary standard is not applicable. Instead, "[w]hen the government acts to enforce a statute or a declared policy of [the Legislature], the standard of public interest and not the requirements of private litigation measure the need for injunctive relief." *Mass. CRINC*, 392 Mass. at 89 (internal quotation marks removed).

II. Unfunded Mandate Law

G.L. c. 29, § 27C(a) provides that no "law taking effect on or after January 1, 1981 imposing any direct service or cost obligation upon any city or town shall be effective in any city or town ... unless the general court, at the same session in which such law is enacted, provides, by general law and by appropriation, for the assumption by the commonwealth of such cost". *G.L. c. 29, § 27C(a)*. G.L. c. 29, § 27C(c) provides that no "administrative rule or regulation taking effect on or after January 1, 1981 which shall result in the imposition of additional costs upon any city or town shall [...] be effective until the general court has provided by general law and by appropriation for the assumption by the commonwealth of such cost". *G.L. c. 29, § 27C(c)*. Absent

funding for direct costs imposed by an act of the Legislature or by regulation, a municipality's remedy is excusal from compliance. *City of Worcester v. The Governor*, 416 Mass. 751, 754, 762 (1994).

Argument

Here, the Plaintiffs have a likelihood of success on the merits. As the DLM Determination and the Supreme Judicial Court's holding in *Town of Milton* establishes, there is a mandate imposed on the Town by virtue of the application and enforcement of the provisions of G.L. c. 40A, § 3A and 760 CMR 72.00, *et seq*. Furthermore, the DLM Determination clearly establishes that not only is there a mandate, but also that it will more likely than not impose substantial direct costs on the Town for which no appropriation has been made—in other words, an unfunded mandate which results in the Town standing to lose significant funding from MassDevelopment for vital infrastructure and economic development projects.

In this case, the DLM's determination is entitled to deference. The Legislature has delegated to DLM the responsibility for determining the existence and financial impact of mandates imposed by statutes and regulations. *G.L. c. 11, § 6B*; *G.L. c. 29, § 27C*. "We give great deference to the [agency's] expertise and experience in areas where the Legislature has delegated to it decision-making authority". *Teamsters Joint Counsel No. 10 v. Director of Dep't of Labor*, 447 Mass. 100, 106 (2006) (quoting, *Box Pond Ass'n v. Energy Facilities Siting Bd.*, 435 Mass. 408, 412 (2001); *Wolf v. Dep't of Public Utilities*, 407 Mass. 363, 367 (1990)). Interpretations adopted by an agency as "the official position of the agency" are entitled to deference by a Court. *Sidell v. Commissioner of Internal Revenue*, 225 F.3d 103, 111 (1st Cir. 2000); *Silva v. Todisco Services, Inc.*, 2019WL2334173, at *6 (Mass.Super., Apr. 4, 2019, Salinger, J.).

Here, because the Legislature has delegated the function of determining the existence and extent of an unfunded mandate, the DLM Determination is entitled to deference. Furthermore, the DLM Determination is unquestionably the official position of the Office of the State Auditor, and again, is entitled to deference. See, *Interview D. DiZoglio, Boston Public Radio Live at the Boston Public Library, February 26, 2025*, https://www.youtube.com/live/sxnwBFr0nr0?t=8163s (last accessed 3/6/2025); **Exhibit 4**, *Open Letter to M. Healey and A. Campbell from D. DiZoglio*, March 4, 2025. As such, the DLM determination establishes the Town's likelihood of success on the merits.

Furthermore, there is no question that irreparable harm will befall the Town by virtue of an unfunded mandate—indeed, by definition an unfunded mandate is irreparable harm. The entire purpose of the statutory scheme of G.L. c. 29, § 29C is to avoid the imposition of direct and substantial costs to municipalities resulting from state-imposed mandates for which no appropriation is contemporaneously made and no reimbursement provided. *G.L. c. 29, § 27C(a)*. Here, in the absence of an appropriation contemporaneous with the passage of G.L. c. 40A, § 3A, and absent any reimbursement for the direct costs which may be incurred by the Town, the Town's irreparable harm resulting from the imposition of costs for substantial infrastructure impacts to the Town, the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services is manifest, and is clearly demonstrated in the refusal of MassDevelopment to execute funding agreements with the Town absent compliance with G.L. c. 40A, § 3A. **Exhibits 1 and 2**. Accordingly, preliminary injunctive relief is appropriate. With the entry of preliminary relief, the status quo can be preserved, providing EOHLC and DLM, or this Court, the necessary time to reach a result that is in accordance with law, while also freeing up funds for vital public works projects.

The risk of harm to the Town far outweighs any harm to the Commonwealth, EOHLC or MassDevelopment should an injunction issue. As contemplated by G.L. c. 29, § 27C, the Commonwealth has the authority and resources to appropriate funding to cover the substantial, significant, and direct costs incurred by municipalities in connection with mandatory legislation such as G.L. c. 40A, § 3A—resources that the Town simply cannot muster itself without incurring significant debt or the sacrifice of other important programs to meet the direct costs associated with the legislation. The Town's applications for funding for important economic development projects have been approved, yet withheld on the basis of the requirements of an unfunded mandate. It is the Commonwealth's burden and obligation to fund a statute at its inception. It is also EOHLC's burden to provide a fiscal impact statement in accordance with any rulemaking. Accordingly, any perceived hardship is entirely of the Commonwealth's and EOHLC's own making and the Town ought not to be burdened by the statute due to such transgressions, nor should MassDevelopment be constrained by them. Again, the statutory scheme governing the operation of the DLM clearly recognizes the balance of the harms weighing heavily in favor of the Town. Moreover, the public interest of the residents of Hanson clearly supports the issuance of injunctive relief here. The public has an interest in seeing state-imposed mandates funded from a broader pool than the limited resources available to the Town, and that interest is served by enjoining the operation and effect of an unfunded mandate until such time as the requisite appropriation and/or reimbursement is made. Additionally, the public interest of the residents of Hanson are also served by the release of funding through MassDevelopment for the projects identified in **Exhibits 1 and 2**.

Furthermore, there is no harm to the Commonwealth, or EOHLC by the delays that may associated with entry of an injunction. The Town is not seeking invalidation of G.L. c. 40A, §3A;

rather it is simply seeking that the statute be properly funded before it pursues the process of compliance, all as contemplated under the Unfunded Mandate statute. Similarly, there is no harm to MassDevelopment in the issuance of an injunction. The funds have been allocated, and in light of the injunction barring enforcement of G.L. 40A, § 3A and the corresponding regulations, there is no reason for MassDevelopment to withhold funding.

Conclusion

For the reasons set forth above, and the authorities cited herein, the Plaintiffs respectfully request this Honorable Court issue an injunction restraining and enjoining the Commonwealth and EOHLC from enforcing the requirements of G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC against the Town of Hanson and restraining and enjoining MassDevelopment from withholding those funds identified in **Exhibits 1 and 2**.

Plaintiffs,

TOWN OF HANSON,

by and through its SELECT BOARD,
LAURA FITZGERALD-KEMMETT,
DAVID GEORGE, ANN REIN JOSEPH
WEEKS, and EDWIN HEAL
by their Attorneys,

/s/ Per C. Vaage

Jason R. Talerman, Esq. (BBO# 567927)
Katherine M. Feodoroff (BBO# 657377)
Per C. Vaage, Esq. (BBO# 664385)
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978-463-7700
jay@mtclawyers.com
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per@mtclawyers.com

Dated: March 6, 2025

EXHIBIT 1

MassDevelopment

99 High Street
Boston, MA 02110

Main: 617-330-2000
Fax: 617-330-2001

massdevelopment.com

VIA Electronic Mail to tdefrias@hanson-ma.gov
October 11, 2024

Antonio De Frias, Town Planner
Town of Hanson
542 Liberty Street
Hanson, MA 02341

RE: Application: 00720

Dear Mr. De Frias,

Congratulations on the Town of Hanson's successful application to the FY25 Round of the Community One Stop for Growth.

On behalf of the Healy-Driscoll Administration, I am pleased to inform you that a grant in the amount of $70,000 from the Site Readiness Program has been approved to support the 212 Industrial Boulevard project.

If this project is located in an MBTA Community, please note that a contract will not be executed if the community is noncompliant with Section 3A of M.G.L. Chapter 40A as determined by EOHLC.

The Site Readiness Program Award is to support due diligence and planning activities for your project and the next step is to work with our staff to confirm the scope for your project, which may differ from your application, and finalize a grant agreement. Please review the accompanying sample grant agreement template carefully. The specifics of this document will be identified during the scoping process. Please note, this grant is recoverable if the site, or any portion thereof, is sold, conveyed, gifted, demised, ground leased, otherwise transferred, or refinanced within thirty (30) years of the execution of the agreement. Please see Section 2(e) of the sample grant agreement for additional information.

Please be advised that this letter does not constitute an agreement or contract with MassDevelopment or the Commonwealth of Massachusetts, and the grant award is not final until the organization has executed a contract with MassDevelopment. You should not proceed with any grant activities until a contract is in place.

Sincerely,

Gary S. Walker
Interim Executive Vice President, Real Estate

Enclosure – Sample Grant Agreement

Cc: Lisa Green, Esq, Town Administrator

EXHIBIT 2

MassDevelopment

99 High Street
Boston, MA 02110

Main: 617-330-2000
Fax: 617-330-2001

massdevelopment.com

October 15, 2024

Lisa Green
Town Administrator
Town of Hanson
542 Liberty Street
Hanson, MA 02341

VIA EMAIL

Re: Application: FY25-00932 for Brownfields Site Remediation

Dear Lisa:

Congratulations on the Town of Hanson's successful application to the FY25 Round of the Community One Stop for Growth. On behalf of the Healy-Driscoll Administration, I am pleased to inform you that a grant in the amount of $237,000 from the Brownfields Redevelopment Fund has been approved to support the 100 Hawks Avenue Rear Site Remediation.

If this project is located in an MBTA Community, please note that a Grant Agreement will not be executed if the community is noncompliant with Section 3A of M.G.L. Chapter 40A as determined by EOHLC.

Our Program Manager, David Bancroft, will be in touch to assist you with entering into a Grant Agreement regarding use of the funds and containing the details on the conditions, processes, and timeframe for drawing down funds, and other program requirements during the term of the Grant Agreement including, but not limited to, compliance with MassDevelopment's Contractor Policy and potential recoverability of the award under limited circumstances.

Prior to execution of the Grant Agreement, MassDevelopment will require proof of site ownership or legal authority for you and your Massachusetts Licensed Site Professional ("LSP") or remediation contractor to enter the site and perform the approved site assessment investigations or remediation activity. We will require that you submit a fully executed contract and scope of services with your contractor consistent with the scope submitted with the One Stop application for the work to be performed.

Please be advised that this letter does not constitute an agreement or contract with MassDevelopment or the Commonwealth of Massachusetts. No MassDevelopment funds will be disbursed until the Grant Agreement is fully executed and all disbursement conditions are met. MassDevelopment Funds cannot be used for any site assessment or remediation work undertaken prior to the execution of the Grant Agreement unless such work is approved in the Grant Agreement by MassDevelopment.

MassDevelopment's primary mission is to help build the communities of the Commonwealth by stimulating economic development. We look forward to working with you to make your project a reality for the benefit of the Town of Hanson and all of the people of Massachusetts.

Sincerely,

Marcos Marrero
Deputy Director & Senior Executive Vice President

EXHIBIT 3

DIANA DIZOGLIO
AUDITOR

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

ONE WINTER STREET, 9TH FLOOR
BOSTON, MASSACHUSETTS 02108

TEL (617) 727-0025
FAX (617) 727-0984

February 21, 2025

By First-Class Mail & Email <SBOffice@wrentham.gov>

Town of Wrentham Select Board
79 South Street
Wrentham, MA 02093

RE: Mandate Determination related to MBTA Communities Act (M.G.L. c. 40A, § 3A)

Dear Select Board Members:

On October 15, 2024, on behalf of the Town of Wrentham, you requested that the Office of the State Auditor (OSA), through the Division of Local Mandates (DLM), provide a determination of whether M.G.L. c. 40A, § 3A (the MBTA Communities Act, the Act, or § 3A), constitutes an unfunded mandate imposed on cities and towns by the Commonwealth within the meaning of M.G.L. c. 29, § 27C (the Local Mandate Law), and the total annual financial impact thereof for a period of no less than 3 years. In response to your request, this office sent correspondence dated November 27, 2024, requesting a waiver of the 60-day timeline under M.G.L. c. 29, § 27C. On December 5, 2024, Michael King, Interim Town Manager, indicated that the Wrentham Select Board voted unanimously to deny our waiver request. On December 12, 2024, further correspondence was sent stating that this office was unable to issue a determination due to litigation in connection with the MBTA Communities Act that was before the Supreme Judicial Court of Massachusetts at that time. The Court issued its decision in *Attorney General v. Town of Milton*, No. SJC-13580, on January 8, 2025.[1]

[1] *Attorney General v. Town of Milton & another; Executive Office of Housing and Livable Communities, third-party defendant*, Mass., No. SJC-13580, slip op. (January 8, 2025), *available at* https://www.mass.gov/doc/attorney-general-v-town-of-milton-executive-office-of-housing-and-livable-communities-sjc-13580/download (accessed February 18, 2025).

DLM has conducted extensive legal and policy review regarding the requested matter, including review of the *Milton* decision and the emergency regulations filed thereafter by the Administration,[2] and determines that the MBTA Communities Act constitutes an unfunded mandate. DLM's analysis in arriving at said determination is set forth below. Regarding the fiscal impact, the Court in its decision noted the absence of the required statements under M.G.L. c. 30A, § 5, estimating the fiscal effect of proposed regulations on the public and private sector, and considering the impact of such regulations on small business, rendering the guidelines promulgated by the Executive Office of Housing and Livable Communities (EOHLC) ineffective.[3] DLM requires additional time to perform a thorough analysis of the costs imposed as the impact of the MBTA Communities Act is still being determined. Such analysis will include review of the required fiscal impact statements by EOHLC and implementing other data collection measures as necessary.

M.G.L. c. 29, § 27C — the Local Mandate Law

In general terms, the Local Mandate Law provides that any post-1980 state law, rule, or regulation that imposes additional costs, excluding incidental local administration expenses, upon any city or town is conditional on local acceptance or being fully funded by the Commonwealth.[4] A city or town may request that DLM determine whether a law, rule, or regulation imposes a mandate within the meaning of the Local Mandate Law and, if so, the costs of compliance and the amount of any deficiency in funding by the Commonwealth.[5] Alternatively, or in addition to asking DLM for such a determination, a community alleging an unfunded mandate may petition the Superior Court for a determination of deficiency and an exemption from compliance until the Commonwealth provides sufficient funding.[6]

In order to determine that a state law imposes a mandate within the meaning of the Local Mandate Law, the law must take effect on or after January 1, 1981, must be a new law changing existing law, and must result in a direct service or cost obligation imposed on municipalities by the Commonwealth that amounts to more than an incidental local administration expense.[7] Moreover, the challenged law must not be exempted from application of the Local Mandate Law, whether by express override of the Legislature, application of federal law or regulation, or other exemption.

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[2] 760 CMR 72.00: Multi-Family Zoning Requirement for MBTA Communities (2025), *available at* https://www.mass.gov/regulations/760-CMR-7200-multi-family-zoning-requirement-for-mbta-communities (accessed February 18, 2025).
[3] *See Milton* at 7, 22.
[4] *See* M.G.L. c. 29, §§ 27C(a)–(c).
[5] *See* M.G.L. c. 29, § 27C(d).
[6] *See* M.G.L. c. 29, § 27C(e).
[7] *See City of Worcester v. the Governor*, 416 Mass. 751 (1994).

Once DLM has determined that a law imposes a mandate within the meaning of the Local Mandate Law, the analysis turns to whether the Commonwealth has provided sufficient funding to assume the costs imposed by the law in question. The Local Mandate Law clearly states that "the general court, at the *same session* in which such law is enacted, [must provide], *by general law and by appropriation*, for the assumption by the commonwealth of such cost[s], . . . and . . . by appropriation in *each successive year* for such assumption" (emphasis added).[8] The Supreme Judicial Court has recognized that "the 'plain meaning' of [M.G.L.] c. 29, Section 27C(a), is that funding be provided at the *same time* that [the] mandate is imposed on cities and towns," and that the language of the statute "means that the Legislature envisioned a scheme wherein cities and towns would be reimbursed *in advance — or, at least, contemporaneously* — for costs incurred pursuant to the mandate" (emphasis added).[9] Furthermore, funding must be provided by a specific allocation of funds and cannot be fulfilled merely by increasing unrestricted local aid, as "[s]uch an approach would render the [Local Mandate Law] meaningless, for it would always be possible to attribute undesignated increases in State aid to the local mandate being challenged."[10] In short, for funding to be sufficient, the imposed costs must be assumed by the Commonwealth and appropriation made contemporaneously with and specific to the mandate in question.

M.G.L. c. 40A, § 3A — the MBTA Communities Act

The MBTA Communities Act provides as follows:

"Section 3A: Multi-family zoning as-of-right in MBTA communities

Section 3A. (a)(1) An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children. For the purposes of this section, a district of reasonable size shall: (i) have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A; and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.

(b) An MBTA community that fails to comply with this section shall not be eligible for funds from: (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017; (ii) the Local Capital Projects Fund established in section

[8] *See* M.G.L. c. 29, § 27C(a).
[9] *See Town of Lexington v. Commissioner of Education,* 393 Mass. 693, 698–701 (1985).
[10] *See id.* at 701.

2EEEE of chapter 29; (iii) the MassWorks infrastructure program established in section 63 of chapter 23A, or (iv) the HousingWorks infrastructure program established in section 27 ½ of chapter 23B.

(c) The executive office of housing and livable communities, in consultation with the executive office of economic development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section."[11]

An MBTA community is defined as "a city or town that is: (i) one of the 51 cities and towns as defined in section 1 of chapter 161A; (ii) one of the 14 cities and towns as defined in said section 1 of said chapter 161A; (iii) other served communities as defined in said section 1 of said chapter 161A; or (iv) a municipality that has been added to the Massachusetts Bay Transportation Authority under section 6 of chapter 161A or in accordance with any special law relative to the area constituting the authority."[12] The Town of Wrentham is specified as one of the other served communities in clause (iii).[13]

Application of the Local Mandate Law to the MBTA Communities Act

The MBTA Communities Act provisions contained in § 3A were added by § 18 of Chapter 358 of the Acts of 2020, effective January 14, 2021, amended by § 10 of Chapter 29 of the Acts of 2021, effective July 29, 2021, further amended by §§ 152-153 of Chapter 7 of the Acts of 2023, effective May 30, 2023, and further amended by § 9 of Chapter 150 of the Acts of 2024, effective August 6, 2024.[14] Accordingly, the MBTA Communities Act is a law that took effect on or after January 1, 1981.

Furthermore, the MBTA Communities Act is a new law changing, not merely clarifying, existing law.[15] The MBTA Communities Act creates a new zoning requirement, requiring that all MBTA communities zone at least 1 district in which multi-family housing is permitted as of right, subject to other requirements.[16] Prior to enactment of the MBTA Communities Act, no such district was required. Emergency regulations filed by EOHLC on January 14, 2025, provide significant context regarding the breadth of considerations necessary for compliance with the Act – "[w]hat

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[11] M.G.L. c. 40A, § 3A; St. 2020, c. 358, § 18; amended St. 2021, c. 29, § 10; amended St. 2023, c. 7, §§ 152-153; amended St. 2024, c. 150, § 9.
[12] M.G.L. c. 40A, § 1A; St. 2020, c. 358, § 16. *See* Appendix A.
[13] M.G.L. c. 161A, § 1.
[14] St. 2020, c. 358, § 18; amended St. 2021, c. 29, § 10; amended St. 2023, c. 7, §§ 152-153; amended St. 2024, c. 150, § 9.
[15] *See Worcester,* 416 Mass. at 756; *see also Lexington,* 393 Mass. at 697.
[16] M.G.L. c. 40A, § 3A(a)(1).

it means to allow Multi-family housing 'as of right' … [t]he metrics that determine if a Multi-family zoning district is 'of reasonable size' … [h]ow to determine if a Multi-family zoning district has a minimum gross density of 15 units per acre … [t]he meaning of M.G.L. c. 40A, § 3A's mandate that 'such multi-family housing shall be without age restrictions and suitable for families with children' … [t]he extent to which MBTA communities have flexibility to choose the location of a Multi-family zoning district" – as well as permissible steps toward compliance, all of which constitute a substantive change in municipal zoning authority.[17]

The analysis continues with an evaluation of whether the MBTA Communities Act *imposes* a direct service or cost obligation on municipalities by the Commonwealth that amounts to more than an incidental local administration expense. The MBTA Communities Act provides in relevant part that "[a]n MBTA community *shall* have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right" (emphasis added). M.G.L. c. 4, § 6 provides that "[w]ords and phrases shall be construed according to the common and approved usage of the language." Given this, "[t]he word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation."[18]

Neither is the MBTA Communities Act conditional upon local acceptance. M.G.L. c. 4, § 4 provides that "[w]herever a statute is to take effect upon its acceptance by a municipality or district, or is to be effective in municipalities or districts accepting its provisions, this *acceptance shall be*, except as otherwise provided in that statute, in a municipality, *by vote of the legislative body*, subject to the charter of the municipality, or, in a district, by vote of the district at a district meeting" (emphasis added). The Commonwealth has specifically included language in various statutes conditioning effectiveness upon local acceptance (local option statutes).[19] In contrast, the MBTA Communities Act applies to all municipalities meeting the definition of an "MBTA community."[20]

The Court in *Milton* confirmed this interpretation of the MBTA Communities Act as imposing an obligation on MBTA communities, concluding that the town's proposed reading that the only consequence to an MBTA community for failing to comply would be the loss of certain funding opportunities would "thwart the Legislature's purpose by converting a *legislative mandate* into a matter of fiscal choice" (emphasis added).[21]

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[17] *See* 760 CMR 72.03 et seq.
[18] *Galenski v. Town of Erving*, 471 Mass. 305, 309 (2015), *quoting Hashimi v. Kalil*, 388 Mass. 607, 609 (1983).
[19] *See Galenski*, 471 Mass. 305; *see also Adams v. City of Boston*, 461 Mass. 602 (2012).
[20] M.G.L. c. 40A, § 1A; St. 2020, c. 358, § 16. *See* Appendix A.
[21] *Milton* at 17.

As for costs of implementation, the MBTA Communities Act requires MBTA communities to have "a zoning ordinance or by-law" providing for a district that meets specific criteria. Although the total fiscal impact of implementation cannot be determined without further data collection, it is apparent that, at a minimum, direct costs exist in developing compliant zoning that amount to more than incidental local administration expenses. Incidental local administration expenses "are relatively minor expenses related to the management of municipal service and . . . are subordinate consequences of a municipality's *fulfilment of primary obligations*" (emphasis added).[22] The implication is that expenses incurred by a municipality in fulfilling its primary obligations are not incidental local administration expenses and, consequently, one must look to the purpose of the statute to determine the primary obligation imposed on the municipality. The purpose of the MBTA Communities Act as stated in the emergency regulations is "to encourage the production of Multi-family housing by requiring MBTA communities to adopt zoning districts where Multi-family housing is allowed As of right."[23] The Commonwealth through EOHLC, after review of submitted applications, awarded "technical assistance" grant funding to some MBTA communities for the very purpose of developing zoning compliant with the Act.[24] Accordingly, DLM determines that the MBTA Communities Act imposes direct service or cost obligations on municipalities by the Commonwealth that amount to more than incidental local administration expenses.

MBTA Communities Act Funding

The MBTA Communities Act does not provide a funding mechanism for compliance with its provisions.[25] The statutory language of § 3A and the original enacting legislation of Chapter 358 of the Acts of 2020 fail to provide for the assumption by the Commonwealth of the costs imposed by the MBTA Communities Act and did not contain an appropriation for § 3A.[26] The FY 2022 budget, passed during the same annual session as when the MBTA Communities Act became effective (the first annual session of the 2021–2022 biennial legislative session), and all other appropriations bills passed during the same annual session, likewise did not contain an

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[22] *See Worcester*, 416 Mass. at 758–759 (where the primary obligation imposed by a regulation was "to identify children in need of special education," written parental notification was "a subordinate administrative task"; where the primary obligation of a law was "to provide school accessibility to students with limited mobility," the requirement for the annual submission of school building access plan imposed "only administrative expenses incidental (subordinate) to the primary obligation").

[23] 760 CMR 72.01.

[24] *See* Executive Office of Housing and Livable Communities, *3A Technical Assistance Awards & Resources*, available at https://www.mass.gov/info-details/3a-technical-assistance-awards-resources (accessed February 18, 2025).

[25] *Cf.* St. 1983, c. 503, *An Act Extending the Time of Voting in Certain Elections* ("SECTION 3. As hereinafter provided, the commonwealth shall pay to each city and town an amount sufficient to defray the additional costs imposed on the city or town under the provisions of this act.").

[26] *See* M.G.L. c. 40A, § 3A; St. 2020, c. 358.

appropriation for § 3A.[27] Neither was the MBTA Communities Act specifically exempted from application of the Local Mandate Law by the Commonwealth.[28]

As stated above, the Commonwealth has already provided grant funding to some MBTA communities for certain costs of drafting compliant zoning. In addition, the Commonwealth continues to anticipate that the MBTA Communities Act will impose costs on MBTA communities. Section 2A of Chapter 150 of the Acts of 2024 includes the following line item:

> 7004-0077.. For a local capital projects grant program to support and encourage implementation of the housing choice designation for communities that have demonstrated housing production and adoption of housing best practices, *including a grant program to assist MBTA communities in complying with the multi-family zoning requirement in section 3A of chapter 40A of the General Laws*..... $50,000,000 (emphasis added)

Further, Section 4 of said chapter 150 provides in part:

> (a) There shall be in the executive office of housing and livable communities a HousingWorks infrastructure program to: (i) issue infrastructure grants that support housing to municipalities and other public entities ... ; or (ii) assist municipalities to advance projects that support housing development, preservation or rehabilitation. Preference for grants or assistance under this section shall be given to: ... (C) *multi-family zoning districts that comply with section 3A of said chapter 40A* .... (emphasis added)

However, establishment of the grant programs above did not occur contemporaneously with the enactment of § 3A, nor did they provide the required specific allocation of funds to municipalities for the costs of compliance with § 3A.[29] Moreover, there are questions as to whether a grant

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[27] *See* St. 2021, c. 24; St. 2021, c. 23; St. 2021, c. 29; St. 2021, c. 76.

[28] *Cf.* St. 1993, c. 71, *An Act Establishing the Education Reform Act of 1993* ("SECTION 67. This act shall apply to all cities, towns, and regional school districts, notwithstanding section twenty-seven C of chapter twenty-nine of the General Laws and without regard to any acceptance or appropriation by a city, town, or regional school district or to any appropriation by the general court.") *See Lexington,* 393 Mass. at 698 ("[the challenged law] does not indicate any express amendment or repeal of section 27C"); *see also School Committee of Lexington v. Commissioner of Education,* 397 Mass. 593, 595-596 (1986) ("One option was to provide specifically that [the challenged law] supersedes [the Local Mandate Law]. . . . [T]he Legislature could either have repealed or superseded an aspect of [the Local Mandate Law] directly.").

[29] *See Lexington,* 393 Mass. at 699-700 (where the Supreme Judicial Court of Massachusetts recognized that a method by which reimbursement may be sought by cities and towns *after the costs have been incurred* and *without an appropriation of funds specifically targeted to the assumption of incurred costs* does not pass muster under M.G.L. c. 29, § 27C(a) (emphasis added)).

program requiring municipalities to compete for funding to support and encourage compliance with a law, even if created and funded contemporaneously with the law in question, would satisfy the Local Mandate Law because such a program is not intended to assume all costs imposed.[30]

The emergency regulations also make reference to potentially necessary funding for compliance with § 3A: "For purposes of the unit capacity analysis, it is assumed that housing developers will design projects that work within existing water and wastewater constraints, and that developers, *the municipality, or the Commonwealth will provide funding for infrastructure upgrades as needed* for individual projects" (emphasis added).[31] Whether a particular expense is imposed by the MBTA Communities Act within the meaning of the Local Mandate Law will require further data collection and analysis. DLM will implement data collection measures necessary to determine the estimated and actual financial effects on each MBTA community of the MBTA Communities Act. In the interim, because the Commonwealth did not assume the costs of the MBTA Communities Act by general law and by appropriation in the 2021 session contemporaneously with the effective date of the MBTA Communities Act, DLM determines that the current method of funding by the Commonwealth of the costs of compliance with § 3A incurred by MBTA communities does not satisfy the requirements of the Local Mandate Law.

Conclusion

It is the determination of DLM that the provisions of the MBTA Communities Act *impose an unfunded mandate* within the meaning of the Local Mandate Law as the current method of funding by the Commonwealth of § 3A compliance costs incurred by municipalities does not satisfy the requirements of the Local Mandate Law. DLM cautions that, as with all determinations, the conclusions herein are based on DLM's interpretation and application of current law and judicial precedent and, accordingly, are subject to legislative or regulatory changes or judicial determination. As stated above, DLM will conduct data collection measures as necessary and will report on the financial effects of the MBTA Communities Act when the process concludes.

This opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with M.G.L. c. 29, § 27C(e). This determination does not guarantee that expenses will, in fact, be reimbursed, as the Supreme Judicial Court has opined that a municipality's sole recourse for an unfunded mandate is to petition the Superior Court for an exemption from compliance.[32]

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[30] *See id.*
[31] 760 CMR 72.05(1)(e)2.
[32] *See Worcester,* 416 Mass. at 761–762.

Thank you for bringing this important matter to our attention. We look forward to continuing to work with you in service to the residents of Wrentham and our Commonwealth.

Sincerely,

Jana DiNatale
Director of Division of Local Mandates
Office of State Auditor Diana DiZoglio

cc: Michael J. King, Interim Town Manager, Town of Wrentham
Kimberley Driscoll, Lieutenant Governor of the Commonwealth
Andrea Campbell, Attorney General of the Commonwealth
Karen E. Spilka, President of the Senate
Ronald Mariano, Speaker of the House
Edward M. Augustus Jr., Secretary, Executive Office of Housing and Livable Communities
Adam Chapdelaine, Massachusetts Municipal Association Executive Director and Chief Executive Officer
Elizabeth T. Greendale, President of the Massachusetts Town Clerks' Association

Appendix A: MBTA Communities[33]

"51 cities and towns", the cities and towns of Bedford, Beverly, Braintree, Burlington, Canton, Cohasset, Concord, Danvers, Dedham, Dover, Framingham, Hamilton, Hingham, Holbrook, Hull, Lexington, Lincoln, Lynn, Lynnfield, Manchester-by-the-Sea, Marblehead, Medfield, Melrose, Middleton, Nahant, Natick, Needham, Norfolk, Norwood, Peabody, Quincy, Randolph, Reading, Salem, Saugus, Sharon, Stoneham, Swampscott, Topsfield, Wakefield, Walpole, Waltham, Wellesley, Wenham, Weston, Westwood, Weymouth, Wilmington, Winchester, Winthrop and Woburn.

"Fourteen cities and towns", the cities and towns of Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Milton, Newton, Revere, Somerville and Watertown.

"Other served communities", the cities and towns of Abington, Acton, Amesbury, Andover, Ashburnham, Ashby, Ashland, Attleboro, Auburn, Ayer, Bellingham, Berkley, Billerica, Boxhorough [sic], Boxford, Bridgewater, Brockton, Carlisle, Carver, Chelmsford, Dracut, Duxbury, East Bridgewater, Easton, Essex, Fitchburg, Foxborough, Franklin, Freetown, Georgetown, Gloucester, Grafton, Groton, Grove land, Halifax, Hanover, Hanson, Haverhill, Harvard, Holden, Holliston, Hopkinton, Ipswich, Kingston, Lakeville, Lancaster, Lawrence, Leicester, Leominster, Littleton, Lowell, Lunenburg, Mansfield, Marlborough, Marshfield, Maynard, Medway, Merrimac, Methuen, Middieborough. [sic] Millbury, Millis, Newbury, Newburyport, North Andover, North Attleborough, Northborough, Northbridge, Norton, North Reading, Norwell, Paxton, Pembroke, Plymouth, Plympton, Princeton, Raynham, Rehoboth, Rochester, Rockland. Rockport, Rowley, Salisbury, Scituate, Seekonk, Sherborn, Shirley, Shrewsbury, Southborough, Sterling, Stoughton, Stow, Sudbury, Sutton, Taunton, Tewksbury, Townsend, Tyngsborough, Upton, Wareham, Way land, West Boylston, West Bridgewater, Westborough, West Newbury, Westford, Westminster, Whitman, Worcester, Wrentham, and such other municipalities as may be added in accordance with section 6 or in accordance with any special act to the area constituting the authority.

[33] M.G.L. c. 161A, § 1.

EXHIBIT 4

The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, ROOM 230
BOSTON, MASSACHUSETTS 02133

DIANA DIZOGLIO
AUDITOR

TEL (617) 727-2075
FAX (617) 727-3884

March 4, 2025

The Honorable Maura T. Healey
Governor of the Commonwealth
Massachusetts State House
24 Beacon St., Room 280
Boston, MA 02133

The Honorable Andrea Joy Campbell
Office of the Attorney General
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Governor Healey and Attorney General Campbell,

I am writing to address the perpetuation of some significant misunderstandings regarding my office's recent mandate determination and to help address the issue pertaining to an appropriate funding mechanism under the Local Mandate Law with respect to the MBTA Communities Act. Below is a simple provision adopted from the Uniform Polling Hours Law (St. 1983, c. 303) when the Commonwealth included language to address a potential unfunded mandate issue:

The Commonwealth shall pay to each city and town an amount sufficient to fund the costs imposed on the city or town under the provisions of G.L. c. 40A, s. 3A. In every year not later than September fifteenth, the executive office of housing and livable communities shall determine the costs attributed to said s. 3A to be incurred by each city and town in the next fiscal year. The secretary of housing and livable communities shall include in such secretary's budget recommendations for such fiscal year a request for an appropriation in an amount equal to such costs, and shall distribute to each city or town its share of any such appropriated funds not more than thirty days prior to the date upon which said costs shall be incurred by the city or town. Funds so distributed to each city or town shall be deposited in the general fund of the city or town and shall be expended without further appropriation by the city or town to meet the costs incurred by it under the provisions of said s. 3A.

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This provision would need to be accompanied by an annual appropriation of funds specifically for this purpose (the below is adapted from the budget line item for early voting under G.L. c. 54, s. 25B):

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[Sample provision regarding budget section]

- [Budget line item] For implementing compliance with section 3A of chapter 40A of the General Laws, as determined by the executive office of housing and livable communities for distribution by the secretary of said office..... $_____

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Certainly, any provisions would need to be properly vetted by the Legislature and Administration, then adopted accordingly, but this is an example derived from existing mechanisms addressing funding for extended polling hours and early voting.

Regarding the fiscal impact, as noted by the SJC in Milton, the Executive Office of Housing and Livable Communities (EOHLC) is required under G.L. c. 30A to file an estimate of fiscal effect as well as a small business impact statement for regulations to be effective. Those statements and regulations are necessary for the Division of Local Mandates to determine if the mandate is funded by appropriation.

While the Division of Local Mandates has received inquiries as to why a fiscal analysis has not yet been completed by our office, the simple answer is that our office cannot conduct this aspect of our work until the Administration, via EOHLC, files an estimate of fiscal effect and a small business impact statement. Once EOHLC fulfills its obligations, as noted by the SJC, and outlines the parameters of what constitutes direct costs under G.L. c. 40A, s. 3A, the Legislature will then be able to determine how much funding is required and make an appropriation sufficient to cover these costs. The Division of Local Mandates can then, as is its statutory obligation, compare the appropriation with EOHLC's determination of costs.

It is EOHLC, not the Office of the State Auditor's Division of Local Mandates, that is authorized and required to promulgate regulations and set the parameters determining what constitutes direct costs under G.L. c. 40A, s. 3A. This office has made no statement, even remotely, suggesting that the law is not the law. It has simply stated that the funding mechanism needs work – work which is well within the reach of this Administration, EOHLC, and the Legislature to conduct. But for that work to get done, we need to communicate rather than rush to judgment.

Attempts to scapegoat my office, by the Attorney General and others, for issues that have arisen due to the inadequate vetting of well-intentioned legislation and EOHLC's failure to file the required fiscal impact statements – while mischaracterizing the Division of Local Mandates'

determination as being anything more than the fulfillment of its statutorily required duties to respond to municipalities who seek such determinations – are grossly out of line and incredibly disingenuous.

If the Attorney General's Office has a good faith disagreement regarding this determination, it should have reached out to my office instead of making public conclusory accusations that the determination of our division is "wrong" without providing any evidence or legal analysis to support this claim. What would be more productive than lobbing broad-based accusations, with no legal analysis, is meeting with our office to discuss our proposed solutions to address these challenges – together.

As someone who has been very public about my own experience with childhood housing insecurity, currently lives in an MBTA community, and has been on the record – for over a decade – as having voted for these housing initiatives as a member of the Legislature, I find it hugely disappointing that any colleague of mine would politically weaponize my office's fulfillment of its legally required duties.

Massachusetts is mired in a housing crisis that demands leaders work together, rather than in constant opposition, to implement functional solutions and move us past this time of local division.

I invite you to contact me and our Division of Local Mandates to discuss these matters promptly.

Yours in service,

Diana DiZoglio

Diana DiZoglio
Auditor of the Commonwealth

Cc:

Edward M. Augustus Jr., Secretary, Executive Office of Housing and Livable Communities