COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT
No. _____

TOWN OF MIDDLETON, by and through its Select Board, RICHARD KASSIOTIS, DEBBIE CARBONE, KOSTA E. PRENTAKIS, BRIAN M. CRESTA, and JEFFREY P. GARBER

Plaintiffs

v.

COMMONWEALTH OF MASSACHUSETTS; EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES; MASSACHUSETTS EXECUTIVE OFFICE OF ECONOMIC DEVELOPMENT;

and

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

Defendants

VERIFIED COMPLAINT FOR DECLARATORY and INJUNCTIVE RELIEF and MANDAMUS

Introduction, Parties And Jurisdiction

1.) The Town of Middleton ("Middleton" or "the Town"), by and through its Select Board and its constituent members (collectively "Plaintiffs"), pursuant to G.L. c. 29, § 27C(e), G.L. c. 231A, § 1, *et seq*. and G.L. c. 249, § 5, hereby petition this Honorable Court for a Declaration that Plaintiffs are exempt from the provisions of G.L. c. 40A, § 3A, for an injunction restraining and enjoining the Defendants from enforcement of the provisions of G.L. c. 40A, § 3A, a writ of mandamus requiring Defendants to provide financial impacts and determination of deficiencies, and for an accounting of the amounts of such deficiencies.

2.) Plaintiff, Town of Middleton, is a duly incorporated municipal corporation, situated in Essex County, Commonwealth of Massachusetts, with a usual place of business at 48 South Main Street, Middleton, Massachusetts.

3.) Plaintiffs, Richard Kassiotis, Debbie Carbone, Kosta E. Prentakis, Brian M. Cresta, and Jeffrey P. Garber, are the duly-elected members of the Select Board of the Town of Middleton, with a usual place of business at 48 South Main Street, Middleton, Massachusetts, and bring this claim in their official capacities.

4.) Defendant, Commonwealth of Massachusetts is a state organized and existing under the Laws of the United States of America and pursuant to the Constitution of the Commonwealth of Massachusetts, with a usual place of business c/o Secretary of the Commonwealth, One Ashburton Place, Boston, Massachusetts.

5.) Defendants, Executive Office of Housing and Livable Communities ("EOHLC") is a cabinet-level Office of the Commonwealth, established pursuant to G.L. c. 6A, § 16G½, with a usual place of business at 100 Cambridge Street, Boston, Massachusetts.

6.) EOHLC is the instrumentality of the Commonwealth tasked with promulgating guidelines to determine if an MBTA community is in compliance with the provisions of G.L. c. 40A, § 3A.

7.) Defendant Massachusetts Executive Office of Economic Development ("EOED") is a cabinet-level Office of the Commonwealth, established pursuant to G.L. c. 6A, § 16G, with its usual place of business at One Ashburton Place, Room 2101, Boston, Massachusetts, and which provides grant funding and resources through the "MassWorks Infrastructure Program" to municipalities in Massachusetts for economic development.

8.) The Division of Local Mandates (DLM) is an agency of the Office of the State Auditor and is authorized under G.L. c. 29, §27C to conduct inquiries and issue determinations in accordance with such statute. DLM is named as a defendant solely to ensure a full and just adjudication of this matter and the Plaintiffs do not assert any allegation of noncompliance against such defendant.

9.) This Court has jurisdiction over the parties and the subject matter of this Petition pursuant to G.L. c. 29, § 27C, G.L. c. 241, § 1, and G.L. c. 231A, § 1, and G.L. c. 249, § 5.

10.) Venue is appropriate in this Court as the subject matter of the Petition is concerned with, and is situated in, the Town of Middleton, Essex County.

FACTS

11.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-10 above, as if set forth in full herein.

12.) 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".

13.) 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".

14.) 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.

15.) G.L. c. 40A, § 3A was further amended by §§ 152-153 of Chapter 7 of the Acts of 2023, effective May 30, 2023.

16.) G.L. c. 40A, § 3A was further amended by § 9 of Chapter 150 of the Acts of 2024, effective August 6, 2024.

17.) 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.

18.) 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.

19.) The Town is defined as one of the "51 cities and towns" pursuant to G.L. c. 161A, § 1 and G.L. c. 40A, § 1A.

20.) As one of the "51 cities and towns", the Town is considered an "MBTA Community" subject to the provisions of G.L. c. 40A, § 3A.

21.) Pursuant to G.L. c. 40A, § 3A, the Town as an "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. 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 over a 20% increase in the total number of housing units in the Town.

22.) 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 Ch. 40A, § 3A, and EOHLC regulations.

23.) Under the EOHLC regulations, there are four (4) categories of MBTA communities that must submit a "District Compliance Application": Rapid Transit Communities; Commuter Rail Communities; Adjacent Communities; and Adjacent Small Towns.

24.) Middleton does not meet the definition of any one of the four (4) categories of MBTA communities identified in the EOHLC regulations. Specifically, Middleton contains no MBTA facilities and is not immediately adjacent to any communities with mass transit services.

25.) As an MBTA Community, the Town's compliance with the provisions of G.L. c. 40A, § 3A and the corresponding EOHLC regulations is purportedly mandatory.

26.) 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 the MassWorks infrastructure program.

27.) The Town has not submitted a renewed "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.

28.) On January 8, 2025, the Massachusetts Supreme Judicial Court, in an action entitled Attorney General v. Town of Milton, et al., (495 Mass. 183 (2025)) 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.

29.) 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.

30.) The Town has submitted, and received approval of, an application for grant funding to the EOED, MassWorks Infrastructure Program, in the amount of two-million dollars ($2,000,000.00) to support improvements to the intersection of Routes 62 and 114, in the Town of Middleton. **Exhibit 1**, *Correspondence of October 11, 2024*. Such grant is related to infrastructure to support a multi-family affordable housing development. However, with respect to the grant, and despite the housing benefits of the underlying project, EOED has stated that "a contract will not be executed if the [Town] is noncompliant with Section 3A of M.G.L. c. 40A as determined by EOHLC".

31.) The Towns of Wrentham and Middleborough, and the City of Methuen filed written requests with the Office of the State Auditor, Division of Local Mandates ("DLM"), seeking a determination that G.L. c. 40A, § 3A imposed an unfunded mandate on municipalities within the meaning of G.L. c. 29, § 27C.

32.) In response, DLM has issued a Determination dated February 21, 2025, that G.L. c. 40A, § 3A constitutes an unfunded mandate. **Exhibit 2**, *DLM Determination—Wrentham*.

33.) As stated in such DLM determinations, the mandate established under the statute and as affirmed by the SJC, will result in material impacts to the Town's infrastructure, necessitating new investment therein. As noted in the DLM Determinations, 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.

34.) However, the DLM was unable to determine the amount of such deficiency, in part because EOHLC has filed to provide a fiscal impact analysis as required under G.L. c. 30A, §5. DLM concluded that it will complete such analysis when EOHLC completes its statutorily required fiscal impact analysis.

35.) In the interim and as acknowledged by DLM, pursuant to G.L. c. 29, § 27C(e), a municipality saddled with a statutory and/or regulatory unfunded mandate may be exempted from compliance pending funding for and/or reimbursement of direct costs imposed by a statute or regulation.

36.) Because G.L. c. 40A, § 3A and 760 CMR 72.00 impose direct financial obligations on the Town, for which no contemporaneous appropriation has been made by the General Court at the time of the adoption of such statute, the Town should be excused from compliance, unless and until the Town is reimbursed for any direct costs that may be imposed on the Town by G.L. c. 40A, § 3A, and 760 CMR 72.00, and there is legislative appropriation for those costs going forward.

37.) Pursuant to current EOHLC regulations, the Town's deadline to adopt a complying zoning bylaw in accordance with the unfunded mandates of G.L. c. 40A, §3A is July 14, 2025. In order to do so, the Town would be compelled to hold extensive hearings

by its Planning Board and present such bylaw to its annual Town Meeting, which is presently scheduled for May 13, 2025.

38.) Notwithstanding the directives in the DLM determinations, the Commonwealth and EOHLC have publicly asserted, through the office of the Attorney General, that DLM's conclusions are incorrect and that compliance with G.L. c. 40A, §3A will be enforced, notwithstanding the Commonwealth's failure to fund the statute or produce a required fiscal impact statement.

COUNT I
(Declaratory Relief—G.L. c. 29, § 27C(e); G.L. c. 231A)

39.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-38 above, as if set forth in full herein.

40.) G.L. c. 40A, § 3A, and the emergency regulations promulgated pursuant thereto constitute an unfunded mandate.

41.) G.L. c. 40A, § 3A, and the emergency regulations promulgated thereto fail to identify any applicable criteria to render the EOHLC regulations applicable to the Town.

42.) Because no contemporaneous appropriation was made by the Legislature to fund the provisions of G.L. c. 40A, § 3A, or the corresponding regulations promulgated by EOHLC, the Town should be excused from compliance with the requirements of G.L. c. 40A, § 3A and those regulations.

43.) Because the Town does not meet the EOHLC's definition of either a "Rapid Transit Community", a "Commuter Rail Community", an "Adjacent Community", or an "Adjacent Small Town", the Town should be excused from compliance with the requirements of G.L. c. 40A, § 3A and those regulations.

44.) An actual case and controversy exists as to the applicability and enforceability of the provisions of G.L. c. 40A, § 3A, and the corresponding regulations promulgated by EOHLC as against the Town.

45.) Absent a declaration from this Court, there will be continued uncertainty as to the applicability and enforceability of the provisions of G.L. c. 40A, § 3A, and the corresponding regulations promulgated by EOHLC as against the Town.

COUNT II
(Injunctive Relief—EOHLC)

46.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-45 above, as if set forth in full herein.

47.) Plaintiffs will be irreparably harmed by enforcement of the provisions of G.L. c. 40A, § 3A, and the corresponding regulations promulgated by EOHLC, in the form of loss of funding for the Route 62 and Route 114 project through the MassWorks Infrastructure Program, which is an important public works and capital improvement project, imposition of unfunded direct costs, and potential adverse judgments arising from enforcement actions initiated by the Attorney General's Office on behalf of the Commonwealth and EOHLC.

48.) The irreparable harm to the Plaintiffs substantially outweighs any hardship that may be claimed by the Defendants in the imposition of an unfunded mandate or the erroneous application of EOHLC's regulations to the Town.

49.) The public interest and the interests of the Plaintiffs substantially outweigh the interests of the Defendants in the imposition of an unfunded mandate and the erroneous application of EOHLC's regulations to the Town.

50.) Injunctive Relief excusing the Town from compliance with the Commonwealth's unfunded mandate is expressly contemplated under G.L. c. 29, §27C.

51.) The Plaintiffs have no other adequate remedy at law.

COUNT III
(Injunctive Relief—EOED)

52.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-51 above, as if set forth in full herein.

53.) Plaintiffs will be irreparably harmed by the refusal of EOED to execute grant agreements or contracts or to otherwise dispense grant funds on the basis of non-compliance with the provisions of G.L. c. 40A, § 3A or EOHLC's enforcement of the same, and the corresponding regulations promulgated by EOHLC, in the form of loss of funding for the MassWorks Infrastructure Program from EOED, which is an important public works and capital improvement project.

54.) Among the harms of failing to receive the grant is the inability to construct vital infrastructure that will support a multi-family affordable housing project.

55.) Given the inapplicability of G.L. c. 40A, §3A to the Town and the corresponding regulations, as discussed above, there is no legal or just reason to fail to honor the terms of the grant issued to the Town.

56.) The irreparable harm to the Plaintiffs substantially outweighs any hardship that may be claimed by EOED or EOHLC in the imposition of an unfunded mandate or the erroneous application of EOHLC's regulations to the Town.

57.) The public interest and the interests of the Plaintiffs substantially outweigh the interests of said defendants in the imposition of an unfunded mandate and the erroneous application of EOHLC's regulations to the Town.

58.) The Plaintiffs have no other adequate remedy at law.

COUNT IV
(Mandamus-EOHLC)

59.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-58 above, as if set forth in full herein.

60.) Pursuant to G.L. c. 30A, § 5, EOHLC has a clear-cut, non-discretionary duty to provide an estimate of the fiscal effect of any proposed regulation, including that on the public and private sectors, for the first and second year, as well as a projection over the first five-year period, or alternatively must file a statement of no fiscal effect with the Secretary of the Commonwealth.

61.) EOHLC has not provided the estimate required under G.L. c. 30A, § 5.

62.) As stated in the DLM Determination, DLM is unable to complete its full and complete assessment of the deficiency in funding until such time as EOHLC provides DLM with the statutorily required fiscal impact analysis.

63.) The Commonwealth's failure and ongoing refusal to provide such analysis disables DLM from completing its analysis and adversely impacts the Town which is entitled to ascertain the level of required funding prior to complying with the mandate established under G.L. c. 40A, §3A.

64.) Mandamus should issue requiring the Commonwealth to provide such analysis to DLM and for DLM to complete its determination as to the deficiency is funding is required as a matter of law and is a necessary prerequisite prior to the Town's compliance with G.L. c. 40A, §3A.

65.) The Town will be irreparably harmed if mandamus is not issued and, comparatively, the Defendants will suffer no harm in that such mandamus merely ensures compliance with the law.

66.) The public interest supports the issuance of a writ of mandamus.

67.) The Town has no other adequate remedy at law.

Count V
(Mandamus—DLM)

68.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-67 above, as if set forth in full herein.

69.) Pursuant to G.L. c. 29, § 27C(d) DLM has an obligation to issue a determination within sixty (60) days of a municipality's request as to whether the costs imposed by the Commonwealth by any law, rule or regulation subject to this section have been paid in full by the commonwealth in the preceding year and, if not, the amount of any deficiency in such payments.

70.) Pursuant to G.L. c. 29, § 27C(f), DLM has an obligation to issue a determination within sixty (60) days of a municipality's request as to the total annual financial effect for a period of not less than 3 years of any proposed law or rule or regulation of any administrative agency of the commonwealth.

71.) Due to the failures of the commonwealth to provide requisite information, DLM has not issued the determinations required under G.L. c. 29, § 27C(d) and (f) within the required sixty (60) days following the requests from the Towns of Wrentham and Middleborough, and the City of Methuen or within a reasonable time following receipt of the requested and required information from EOHLC.

72.) The Town will be irreparably harmed if mandamus is not issued and, comparatively, the Defendants will suffer no harm in that such mandamus merely ensures compliance with the law.

73.) The public interest supports the issuance of mandamus.

74.) The Town has no other adequate remedy at law.

COUNT VI
(Accounting and Reimbursement—G.L. c. 29, § 27C(e))

75.) Plaintiffs incorporate and reassert the allegations set forth in paragraphs 1-74 above, as if set forth in full herein.

76.) If forced to comply with the unfunded mandate, the Town will be forced to assume substantial costs directly incurred as a result of G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC.

77.) DLM has not yet issued its determination as to the amounts of deficiency resulting from the Commonwealth's failure to assume the direct costs of G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC.

78.) Pending DLM's determination, and pursuant to this Honorable Court's authority under G.L. c. 27, § 27C(e), Plaintiffs request this Honorable Court determine the amount of such deficiency, and order the Defendants to reimburse the Town any such direct costs as may be so determined.

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment as follows:

1.) Entering a declaration that G.L. c. 40A, §3A constitutes an unfunded mandate and that pursuant to G.L. c. 29, § 27C(e) that the Town of Middleton is excused from compliance with the provisions of G.L. c. 40A, § 3A, and the corresponding regulations promulgated by EOHLC.

2.) Entering a declaration that the regulations promulgated by EOHLC do not apply to the Town since the Town does not meet any of the definitions for a community required to demonstrate compliance with the provisions of G.L. c. 40A, § 3A, or those regulations.

3.) Enjoining and restraining EOHLC or the Commonwealth from both enforcing G.L. c. 40A, §3A until such time as the Commonwealth adequately funds the necessary infrastructure improvements for compliance with such statute and from withholding funding under those programs identified in G.L. c. 40A, § 3A(b) and the corresponding regulations promulgated by EOHLC based on any claimed non-compliance on the part of the Town with the requirements submit a District Compliance Application to EOHLC.

4.) Enjoining and restraining EOED from withholding execution of grant agreement or contracts, or dispensing grant funds, on the basis of non-compliance with the provisions of G.L..c. 40A, § 3A.

5.) Issuing a writ of mandamus to EOHLC compelling EOHLC to provide DLM with the required fiscal impact analysis of the impacts of G.L. c. 40A, §3A and excusing the Town from compliance with such statute until DLM completes such analysis and funding is provided.

6.) Issuing a writ of mandamus to DLM compelling DLM to provide the Town with the determinations required pursuant to G.L. c. 29, § 27C(d) and (f).

7.) Determining the amounts of deficiency resulting from the Commonwealth's failure to appropriate funds for and assume the direct costs of the unfunded mandate imposed by G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC.

8.) Ordering the Commonwealth to assume the costs of and reimburse the Town for its direct costs resulting from any compliance with G.L. c. 40A, § 3A and the corresponding regulations promulgated by EOHLC.

9.) Awarding the Plaintiffs their reasonable costs and attorneys' fees.

10.) All other relief this Court deems meet and just.

Plaintiffs,
TOWN OF MIDDLETON,

by and through its SELECT BOARD, RICHARD KASSIOTIS, DEBBIE CARBONE, KOSTA E. PRENTAKIS, BRIAN M. CRESTA, and JEFFREY P. GARBER
by their Attorneys,

/s/ Per C. Vaage

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Dated: March 7, 2025

VERIFICATION

I, Justin Sultzbach, the Middleton Town Administrator, hereby verify and swear under the pains and penalties of perjury that the facts relating to the Town of Middleton, as asserted in the foregoing complaint are accurate to the best of my knowledge and belief. I hereby certify that I have been duly authorized by the Town of Middleton Select Board to verify and approve this Verified Complaint.

Justin Sultzbach, Town Administrator

EXHIBIT 1

Commonwealth of Massachusetts
EXECUTIVE OFFICE OF ECONOMIC DEVELOPMENT
ONE ASHBURTON PLACE, ROOM 2101
BOSTON, MA 02108
https://www.mass.gov/orgs/eoed

MAURA T. HEALEY
GOVERNOR

KIMBERLEY DRISCOLL
LIEUTENANT GOVERNOR

YVONNE HAO
SECRETARY

TELEPHONE
(617) 788-3610

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(617) 788-3605

Justin Sultzbach, Town Administrator
Town of Middleton
49 South Main Street
Middleton, MA 01949

October 11, 2024

Dear Administrator Sultzbach: RE: **Middleton-Middleton-Route 62 & -00776**

Congratulations on Middleton's successful application to the FY25 Round of the Community One Stop for Growth. On behalf of the Healey-Driscoll Administration, I am pleased to inform you that a grant in the amount of **$2,000,000** from the **MassWorks Infrastructure Program** has been approved to support the **Route 62 & Route 114 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.

As a condition of the award, you will be required to submit a completed Pre-Contract Form (to be provided by EOED) no later than January 31, 2024, to begin the contracting process. A MassWorks team member will reach out directly to discuss any additional conditions or requirements, as well as the next steps related to this grant award. If you have any immediate concerns, please contact Senior Director of Communities and Programs, Marc Horne, at marc.horne@mass.gov.

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

Sincerely,

Yvonne Hao
Secretary of Economic Development

EXHIBIT 2

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

[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 <u>not</u> 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 <u>subject to</u> 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.