

HOUSING

# Towns gear up after auditor declares MBTA Communities law an “unfunded mandate”

*Wrentham considers how to stall compliance, Middleborough sues*



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**A DETERMINATION FROM** the state auditor’s office that the MBTA Communities housing law is an “unfunded mandate” dropped like a grenade into the controversy over the rezoning requirements for municipalities served by mass transit. It sent some towns scrambling to figure out next steps and others straight for the courthouse.

Days after State Auditor Diana DiZoglio’s office issued its determination, the Wrentham select board was already gearing up for a fight.

Last year, the 12,000-person town, at Town Meeting, shot down a zoning proposal to comply with the multi-family housing law while it waited for the state’s high court to rule on the constitutionality of the legislation. Select board

members urged voters to vote against the proposal while it awaited information from the state auditor on the cost of compliance and whether or not the law was an unfunded legislative mandate.

Under the MBTA Communities Act, Wrentham is obligated to zone for a potential 750 new multi-family units. But researchers examining the law and others like it around the country **caution** only about 5 to 10 percent of rezoned lots usually change ownership – and therefore could be built with more units on the same parcel of land – in a decade.

Last Tuesday evening, members of the board sounded notes of vindication.

“I never thought we should be an early adopter on this,” Wrentham vice-chair Chris Gallo said in a **special board meeting**. The board should continue to have “a steady hand, not be intimidated by threats or any other nonsense or a tiny, little, small majority of mouth pieces in our community that don’t know the facts,” he said. “As I’ve said before, asking us to vote this in without knowing the price tag is ridiculously irresponsible, and anyone who wanted us to do that, I think, should be ashamed of themselves.”

The board, which is **scheduled to continue** its discussion at its regular meeting on March 4, is weighing whether it should go to court to request a delay in compliance until legislators appropriately fund the housing law.

Members openly mulled whether they should pursue a class action suit with other recalcitrant towns, go it alone, or wait to see if the auditor’s office and the state attorney general, who has been defending the law, will fight it out before Wrentham’s summer deadline to rezone.

Just **five paragraphs** added to a sweeping 2021 economic development bill, the housing law requires 177 cities and towns served by the MBTA system to zone for a multi-family district of reasonable size near transit.

All but six of the **MBTA Communities** are already **on board**, technically. Almost 120 have either had plans approved or are under review, and 53 have a preliminary action plan approved but have yet to complete the rezoning process. As a precaution while awaiting the auditor’s response, Wrentham is one of the 53 communities to submit a plan that would put it on a path to compliance by a February 13 deadline.

But Middleborough on Friday took the question to the courts.

The town of about 24,000 residents is one of six municipalities to ignore the mid-February deadline, established **under emergency regulations** earlier this year. It is **now suing** Gov. Maura Healey, the Commonwealth of Massachusetts, and the Executive Office of Housing and Livable Communities, arguing that although its existing zoning is not in line with the law’s requirements, it should be considered compliant for its prior rezoning efforts.

“For generations, Middleborough’s leaders have been thoughtful, responsible stewards of its future. While many towns have fought growth, we’ve embraced it and are a stronger community because of it,” said Town Manager Jay McGrail in a statement. “The one-size-fits-all interpretation of the MBTA Communities Act is unreasonable and is

not what the Legislature intended. What we've done in Middleborough should be modeled and celebrated, not punished."

**W**rentham town counsel Jay Talerma – of the law firm Mead, Talerma & Costa that [represents 33 municipalities](#), some also mulling legal action – told the Select Board that the [Supreme Judicial Court decision](#) was a “mixed bag” and, in his opinion, far from a clear win for the state.

But a few things are certain: the law is constitutional, enforceable by the attorney general, and mandatory, he said.

Yet, in declaring the law a mandate, the court also opened up a narrow line of resistance for the 30-some communities that chose to miss their rezoning deadline while the court deliberated. Communities including Wrentham, Middleborough, and Methuen reached out to the auditor's Division of Local Mandates last year, asking for a determination on whether there should be funding to help implement the required rezoning.

State [law](#) declares that legislation that imposes any direct service or cost obligation on a municipality beyond “incidental local administration expenses” must be either accepted by the city or town, or it must be covered by a funding appropriation.

The auditor's office looked specifically at the MBTA Communities law itself, concluding that it does not lay out funding for compliance.

Despite a [somewhat testy back-and-forth](#) with Attorney General Andrea Campbell's office, which has vigorously defended the housing law and released a statement Friday calling DiZoglio's determination “an incorrect legal assessment,” both the auditor and the AG agree that the law remains in force.

“The attorney general is right that this does not have an impact on the law or whether or not any community has to follow it. That's been decided,” DiZoglio said on the radio. If anything, the unfunded mandate determination letter was an “FYI,” she said, adding it's actually “a pretty easy fix on the funding component.”

Grant funding already exists through the Executive Office of Housing and Livable Communities, DiZoglio noted. Gov. Maura Healey [announced](#) a three-year, \$15 million MBTA Communities Catalyst Fund in October, which will typically fund projects with grant requests between \$250,000 and \$1 million.

A spokesperson from the housing office said the state has provided the 125 MBTA communities who have requested support with more than \$7 million worth of grants and technical assistance to help local officials draft their districts. Technical assistance, according to the office, includes regional planning authority staff support or design and planning consultants who work with the towns at no cost.

The housing office spokesperson said every community that requested technical assistance, including Wrentham, has been provided with support. The housing office did not provide the details of Wrentham's request and a full account of awarded state grants by press time.

In its determination, the auditor's office concluded that because the grants did not exist at the time of the MBTA Communities law creation and are an application-based model rather than a specific appropriation available to all communities, it technically doesn't meet the funding requirements under the local mandate law.

"I'm happy to help draft legislation," DiZoglio said on GBH, "alongside of some of our reps and senators who have already agreed to file legislation to get this fixed pretty quickly to ensure that [funding] those costs are guaranteed."

**T**here is still a chance for dispute over the extent of those costs. Talerman, the counsel for Wrentham, told Select Board meeting attendees that they could choose to wait until their new rezoning deadline in July to see if there is movement from the state. Or they could take the matter to court and petition for a delay.

"If we sought an injunction, it wouldn't be for the purposes of stopping the statute dead in its tracks or having it be ruled invalid," Talerman said. "Rather, as the auditor has already said in their letter, the purpose of seeking an injunction against the Commonwealth would be to just preserve the status quo where it is right now: excuse us from compliance until such time as we know what that fiscal impact analysis says and what degree of funding is required to fund this particular mandate."

While larger cities and towns like Worcester have existing planning departments, many of the smaller MBTA Communities have minimal staff. Hence, the housing office and attorney general's office providing assistance with drawing up new zoning.

Some on the Wrentham Select Board suggested that the scale of rezoning could create costs beyond just the staff needed to draft and put forward a rezoning plan.

Talerman said the funding formulas are complex and will likely take months for the auditor's office to calculate. Along with potential impacts on schools, there could be impacts on police and fire department staffing or water and sewer systems, Talerman suggested.

The MBTA Communities regulations acknowledge that there may be downstream impacts of the rezoning, making reference to future funding needs. The auditor's report notes that the regulations expect that any developers will propose projects that work within the existing constraints of town infrastructure, or else seek funding from local and state sources later if a specific project called for it.

Proponents of the law note that the rezoning would also come with financial upsides down the line, such as increased property tax revenue.

Other efforts to force the state into funding the rezoning process are playing out across Massachusetts. A group of 10 Rockport residents last year filed suit arguing that the housing law was an unfunded mandate and unconstitutional, which was rejected by an Essex County Superior Court judge in Lawrence. The residents did not have standing to sue, the judge ruled in dismissing the case without reaching the unfunded mandate question. An appeal was filed and the lead plaintiff [wrote in a December letter](#) that residents of other towns would be joining as a class action.

After the announcement of Middleborough's suit, Campbell said "it is regrettable that the Auditor's incorrect legal assessment has spurred challenges to a law meant to address our housing crisis."

Middleborough, Milton, Middleton, Ipswich, Marshfield, and Halifax are refusing to meet the February interim compliance deadline. The affluent Boston suburb of Milton kicked off the winding court battle last year after it repealed by referendum its planning board's attempt to comply with the new zoning law and is struggling to chart a path forward.

Even towns that reluctantly started the rezoning process after the SJC ruling may or may not ultimately come into compliance by the summer. MBTA Communities holdout Holden agreed to submit a preliminary plan last week. Holden used state grant funding to contract with the Central Massachusetts Regional Planning Council to help create a plan to propose at Town Meeting in May, the town manager told the *Worcester Telegram*.

As members of the Wrentham Select Board signaled their intention to "fight the good fight" and argued that "for the government to be treating us this way is totally unfair," Talerma offered a note of caution.

"We're not fighting old fights. We're not opening old wounds," he said. "We're trying to preserve our rights as a community, as fully illustrated in the auditor's letter, to do exactly what the state law allows us to do, nothing more, nothing less."