

MBTA Case heads to full state Supreme Court

By Elaine Cushman Carroll Milton Times staff

On March 18, Supreme Court Justice Serge George sent the Attorney General's case against the town in relation to the MBTA Communities Law to the full State Supreme Judicial Court with oral arguments to take place in October.

"After considering the parties' submissions, I believe that this case raises novel questions of law which are of public importance, and which are time sensitive and likely to recur, i.e., the scope of a municipality's legal obligations under G. L. c. 40A, § 3A, and under the related Guidelines, and whether the Attorney General has authority and standing to enforce compliance with the same," Georges stated in his order.

The Select Board met in an emergency meeting on March 15 to hire its second special counsel in four days to represent the town as it faced imminent

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deadlines in the case brought against it in relation to the landmark lawsuit.

The Select Board chose Kevin P. Martin, an attorney with Goodwin Procter LLP as special counsel to work on the case.

The Select Board had on March 12 selected Foley Hoag LLP as special counsel, but a day later received notice that the firm would be pulling out.

Attorney General Andrea Campbell sued the town after voters on Feb. 14 rejected Article 1, a plan to comply with the law that requires communities with public transportation to create multifamily zoning districts. The same measure passed at a Special Town Meeting in December.

Campbell's office is pushing for the case to be heard quickly, and in filings in the Supreme Judicial Court at Suffolk County cited the need for clarification for 129 other communities that face deadlines to comply with the law at the end of 2024.

At a hearing held March 13 before Georges, the town had asked for an extension of deadlines for filing of documents but those were not approved.

At the March 15 meeting, Select Board Chair Mike Zullas noted that a filing was due later that day and an answering counterclaim was due on March 18. "The process for seeking special counsel has been time sensitive because of the unusually accelerated schedule sought by the Attorney General in its lawsuit against the town," Zullas said. While Town Counsel Peter Mello continues to be listed among the town's defense team, Thaddeus Heuer, an attorney with Foley Hoag is listed as withdrawn. Zullas noted that the Select Board has held several executive sessions on the matter with several lawyers and law firms in its efforts to secure special counsel to help defend the town against the complaint.

On March 12, the Select Board approved the appointment of Foley Hoag to represent the town that included an average contracted rate of roughly \$900 an hour.

Chair Zullas and members Roxanne Musto and Richard Wells voted in favor of the motion, while members Erin Bradley and Ben Zoll abstained.

Zullas said that in its discussions with the town, Foley Hoag had told the town that it had represented the MBTA and the Massachusetts Department of Transportation (MassDOT) in prior litigation that was unrelated to the MBTA Communities Act.

The next day, Foley Hoag told Zullas that they had received a communication from the MBTA and MassDOT that their position was that the past representation did constitute a conflict of interest that would preclude the law firm from also representing the town.

“Although Foley Hoag told the town it continues to disagree with that position, it nevertheless felt it had to withdraw as the special counsel,” Zullas said.

The Planning Board meanwhile is expected to continue its work on new alternate plans for solutions to the MBTA zoning on March 28, including bringing consultants back to help them with the modeling software.

The board has set the course of coming up with two plans, one that complies with the town’s current status as a rapid transit community and one that provides compliance with its requested status of adjacent community.

Town Planner Tim Czerwienski told the board on March 14 that the town can only use the remaining funds from the Executive Office of Housing and Livable Communities (HLC) to work on the plan that complies with its current rapid transit status.

He said the town currently has more than half of an \$50,000 HLC grant available for the compliant work but other revenue sources would need to be found for the work.

Since the work will likely cost more than \$10,000, the board will need to seek three bids for any new contract with the consultants under procurement laws, he said.

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– Select Board Chair Mike Zullas



Town Counsel Peter Mello