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AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

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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.