No. SJC-13580

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

THE ATTORNEY GENERAL,
Plaintiff / Counterclaim Defendant – Appellant,
v.
TOWN OF MILTON,
Defendant / Counterclaim Plaintiff / Third Party Plaintiff – Appellee,
and,
JOE ATCHUE,
Defendant – Appellee
v.
THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,
Third Party Defendant – Appellant

On Reservation and Report from the
Supreme Judicial Court for Suffolk County

ANSWERING BRIEF OF THE TOWN OF MILTON AND JOE ATCHUE

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INTRODUCTION

This is a case about the separation of powers and the rule of law—about who sets the rules that govern the Commonwealth and how they do so.

Under the MBTA Communities Act ("MCA"), G.L. c. 40A, § 3A, each municipality in the MBTA's service area is required to zone "1 district of reasonable size" in which multi-family buildings are permitted as of right. This is not a toothless mandate: the MCA provides that a non-complaint municipality will lose funding under four state programs. The Legislature might have selected an even more forceful enforcement mechanism, such as an action by the Attorney General ("AG") to require compliance, but it did not. Many municipalities have responded to the MCA by amending their zoning bylaws. Others, including Milton, have not. Under the MCA, non-compliant municipalities will lose access to the specified state funding unless and until they change course.

Looking to speed compliance along, the AG now asks this Court for an injunction *compelling* Milton to comply with the MCA—or for the appointment of a special master to rewrite Milton's zoning bylaws for it. But nothing in the MCA contemplates such remedies; the Legislature opted to apply calibrated financial pressure only. The AG claims she has authority under other statutes and the common law to compel compliance with any statute as she deems it necessary. But nothing the AG cites holds that. This Court instead has explained that when a statute

specifies a particular remedy for non-compliance, as the MCA does, that remedy is exclusive. This is a separation of powers issue. In enacting a new statute, the Legislature is entitled to decide that the statutory goal is best advanced through financial penalties and not injunctive relief. Allowing the AG to always pursue injunctive relief, even if the Legislature specified only some lesser remedy, will make it impossible for the Legislature to balance competing policies and interests when establishing new statutory regimes.

Even if injunctive relief were available under the MCA, there is no basis to find that Milton has violated the law. The MCA is not self-executing; it requires the Executive Office of Housing and Livable Communities ("EOHLC") to "promulgate guidelines to determine if an MBTA community is in compliance." EOHLC's Guidelines impose detailed substantive and procedural obligations on municipalities and so they needed to be adopted using Chapter 30A's rulemaking process. The AG admits the Guidelines were not. The AG's argument that the label "guidelines" means Chapter 30A's rulemaking requirements are inapplicable is contrary to this Court's longstanding precedents—it is substance, not nomenclature, that matters. The AG's backup "harmless error" argument confuses Chapter 30A's judicial review provision for regulations with its judicial review provision for agency adjudications. Chapter 30A's rulemaking requirements are not window dressing; they are intended to ensure informed agency decisionmaking. The AG's proposed

"harmless error" rule would let any agency engage in uninformed decisionmaking by claiming it would have promulgated the same regulation no matter what.

The Guidelines also are unlawful because they are ultra vires. The MCA envisions something modest: one high-density district of "reasonable size" per city or town, with the meaning of "reasonable size" dictated by the MCA's requirement that the district be located not more than a half-mile from an applicable transit station. EOHLC transformed that modest requirement into a mandate that numerous communities, many of which are sparsely populated communities far from Boston, include at least about 25% of their *total* housing stock in one or more high-density districts. Nothing in the MCA grants EOHLC authority to so fundamentally transform cities and towns throughout eastern and central Massachusetts. The Court should reject EOHLC's claim of broad discretion to avoid running afoul of Article 30's non-delegation principle.

Finally, the parties dispute whether the trolley stops on the Mattapan Line are "subway stations" for the separate purposes of the MCA and the Guidelines. EOHLC claims the trolley line is a subway and, on that basis, has required that half of Milton's high-density district be located near the Mattapan Line and that at least 25% of Milton's total housing stock fall within the district. But dictionary definitions and common usage, including the MBTA's own Service Delivery Policy, all recognize that a "subway" operates at least partly underground. It is undisputed

that the Mattapan Line trolleys never do. The AG's various arguments why the trolley line nonetheless is a subway all lack merit.

For these reasons, the Court should dismiss the AG's lawsuit and hold that defendants are not in violation of the MCA or the Guidelines.

QUESTIONS PRESENTED

1. Whether the AG may bring an action for declaratory and injunctive relief to compel compliance with the MCA?

2. Whether the Guidelines are invalid because they were not promulgated consistent with G.L. c. 30A's rulemaking provisions?

3. Whether the Guidelines are ultra vires because they exceed the authority the Legislature granted to EOHLC under the MCA, or alternatively whether the MCA violates Article 30's non-delegation doctrine?

4. Whether the Guidelines are ultra vires and arbitrary and capricious in treating the Mattapan Line trolleys, which never run underground, as a "subway"?

STATEMENT OF THE CASE AND FACTS

I. The MBTA Communities Act.

Under the Home Rule Amendment to the state constitution, zoning in the Commonwealth ordinarily is the province of local governments. *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 50-52 (2003).

As part of its effort to address the supply and cost of housing in the Commonwealth, however, the Legislature enacted the MCA in 2021. *See* G.L. c.

40A, § 3A. On its face, and as Senator Crighton explained in proposing the MCA, the Act imposes only "a modest requirement": it requires designated MBTA communities to zone at least "1 district of reasonable size in which multi-family housing is permitted as of right." G.L. c. 40A, § 3A(a); *see also* https://malegislature.gov/Events/Sessions/Detail/3711/Video1 at 24:45-24:58.

Most of eastern Massachusetts and much of central Massachusetts falls within the definition of "MBTA community." *See* G.L. c. 40A, § 1A; G.L. c. 161A, § 1; RAI:200. The MCA imposes two conditions on an MBTA community's "district of reasonable size": the district should (1) be zoned for a density of at least 15 units per acre, and (2) "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." G.L. c. 40A, § 3A(a).

To spur municipalities to amend their zoning bylaws to conform to the MCA's requirements, the MCA imposes a financial penalty on those that do not: they lose eligibility for funding under four state grant programs, all of which are administered by EOHLC or the Executive Office of Economic Development ("EOED"). G.L. c. 40A, § 3A(b). That is the only remedy for non-compliance set forth in the statute.

Notably, the MCA is not an "affordable housing" law. Indeed, EOHLC's implementing Guidelines generally cap the percentage of "affordable" units a municipality may require in a project permitted under the MCA at 10%, and provide

that any cap on household income for such units must be at least 80% of area median income. Add.070-071.

II. The EOHLC Promulgates Guidelines to Implement the MCA.

The MCA is not self-executing; it directs EOHLC, in consultation with EOED, the Massachusetts Department of Transportation ("MassDOT"), and the Massachusetts Bay Transportation Authority ("MBTA"), to "promulgate guidelines to determine if an MBTA community is in compliance with" the Act. G.L. c. 40A, § 3A(c).

Shortly after § 3A's enactment, EOHLC issued preliminary guidance regarding the MCA. RAI:140-141. EOHLC explained that "[t]he purpose of Section 3A is to *encourage* MBTA communities to adopt zoning districts where multifamily zoning is permitted as of right, and that meet other requirements set forth in the statute." RAI:140 (emphasis added). In response to the question, "What happens if an MBTA Community does not comply?," EOHLC explained, "If an MBTA community does not comply with section 3A, it will not be eligible for funds" under the programs listed in the MCA. RAI:141.

EOHLC issued draft guidelines almost a year later. RAI:117(¶7), 142-152. Again, EOHLC described the MCA as intended "to encourage MBTA communities to adopt zoning districts where multi-family zoning is permitted as of right." RAI:142. And it again listed only a single "Effect of Noncompliance": "If at any

point [EOHLC] determines that an MBTA community is not in compliance with Section 3A, that MBTA community will not be eligible for funds from the" grant programs listed in the statute. RAI:152.

EOHLC accepted comments on the draft guidelines through a portal on its website and conducted a number of webinar-style engagement sessions. RAI:117(¶9). It did not, however, file a notice of public hearing or a notice of proposed adoption/amendment of regulation with the Secretary of State, nor did it undertake any small business impact analysis or file a small business impact statement. RAI:119(¶17).

Eight months later, EOHLC issued its final guidelines—as subsequently amended, the "Guidelines." *See* RAI:118-119(¶¶14-16), Add.064. The Guidelines "describe how an MBTA community can comply with the requirements of Section 3A." Add.069. As relevant here, the Guidelines provide "[t]he metrics that determine if a multi-family zoning district is 'of reasonable size'"; address "[t]he extent to which MBTA communities have flexibility to choose the location of a multi-family zoning district"; and establish deadlines for municipal compliance. Add.069, 078.

To determine a municipality's "district of reasonable size," the Guidelines group governed municipalities into four buckets: "adjacent communities," "adjacent small towns," "commuter rail communities," and "rapid transit communities."

Add.071-075. As relevant to this case, the Guidelines define a rapid transit community as one "that has within its borders at least 100 acres of developable station area associated with one or more subway stations, or MBTA Silver Line bus rapid transit stations." Add.068. They define a "subway station" as "any of the stops along the MBTA Red Line, Green Line, Orange Line, or Blue Line." *Id.*

The Guidelines employ two tests to determine how large the "district of reasonable size" must be for each MBTA community. The Guidelines' "minimum land area" test requires the district's land area to be the lesser of 50 acres or 1.5% of the developable land citywide. Add.071-072. Because the MCA requires the zoned housing density in the district to be at least 15 units per acre, a 50-acre district equates to at least 750 housing units. The one exception to the "minimum land area" test is for "adjacent small towns," where "the multi-family zoning district may comprise as many or as few acres as the community determines is appropriate." *Id.* The Guidelines also put a 25% cap on the percentage of housing units required to be included in a town's high-density district under the minimum land area test. Add.072-073.

The Guidelines' "minimum multi-family unit capacity test," for its part, requires the district to include a specified percentage of the municipality's total housing stock in the high-density district. Add.072. The Guidelines set the required

percentage at 25% for rapid transit communities, 15% for commuter rail communities, 10% for adjacent communities, and 5% for adjacent small towns. *Id.*

While the minimum multi-family unit capacity test requires cities and towns near Boston with subway stations to meet the 25% threshold, the minimum land area test results in many small towns far from Boston also needing to meet about the same threshold. For example, under the minimum land area test Wenham must include at least 25% of its total housing stock in its high-density district. Add.088. Other relatively small communities required to include 20% or more of their housing units in the high-density district are Freetown, Georgetown, Halifax, Hamilton, Lincoln, Manchester-by-the-Sea, Middleton, Millis, Norfolk, Rowley, and Shirley. Add.082-088.

Notably, while the MCA provides that loss of funding under four state programs is the only penalty for non-compliance, EOHLC provides in the Guidelines that *thirteen more* "discretionary grant programs *will* take compliance with [the MCA] into consideration when making grant award recommendations," and that "[d]eterminations of compliance also may inform other funding decisions by EOED, EOHLC, the MBTA and other state agencies." Add.078 (emphasis added).

III. Milton Declines to Create an MCA-Compliant Zoning District.

Soon after EOHLC's promulgation of the Guidelines, the Milton Select Board directed Milton's Director of Planning and Community to prepare an interim

compliance action plan required under the Guidelines. RAII:11. The Planning Board submitted an action plan to the Select Board, which voted to approve it for submission to EOHLC. RAII:20-21; RAII:166-173. Over the next several months, Milton's Planning Board worked to prepare models of potential high-density districts and draft language for a zoning ordinance. RAI:387, 396, 406-407, 409, 420, 427, 429-430, 434; RAII:326-340.

Deliberations between the Planning and Select Boards continued throughout the fall of 2023. Ultimately, the Select Board voted to submit a proposed MCA-compliant zoning bylaw to Milton's representative town meeting, which approved it. RAII:124, 132, 143-144, 148, 370; RAI:126-127(¶57). Consistent with Milton's Town Charter, however, registered voters in Milton successfully petitioned to put the proposed bylaw to a popular vote. RAI:127(¶59), 366. In February 2024, Milton voters rejected the proposed bylaw by a margin of 54% to 46%. RAI:127(¶59).

IV. The Attorney General Files Suit.

In March 2023, the AG issued an "Advisory Concerning Enforcement of the MBTA Communities Zoning Law," informing municipalities of the AG's opinion that loss of state funding was not the only consequence for noncompliance. RAI:119(¶18). Instead, the AG's Advisory explained that "[c]ommunities that fail to comply with the Law may be subject to civil enforcement action." RAI:307-308.

Two weeks after Milton voters rejected the Town's proposed bylaw, the AG filed this lawsuit, naming the Town and its building inspector as defendants. The AG's complaint seeks declaratory relief and "an injunction requiring the Town to create a zoning district that complies with § 3A(a)" or potentially "appointment of a Special Master to propose a zoning by-law that complies with § 3A(a) and the Guidelines." RAI:40-41. Upon the AG's request, the County Court (Georges, J.) reserved and reported the case to this Court. RAI:9; 43-46.

Milton filed an answer and counterclaim. Milton seeks a declaratory judgment that: it is not in violation of the MCA; that the funding penalties in the MCA are the exclusive remedy for non-compliance; that the Guidelines are ultra vires or, in the alternative, that the MCA violates Article 30; and that the Guidelines are ultra vires and arbitrary and capricious to the extent they treat the Mattapan Line trolley in Milton as a "subway." RAI:96-97.

SUMMARY OF THE ARGUMENT

I. The MCA is not enforceable through an action by the AG for declaratory and injunctive relief. The Legislature created the zoning requirement in the MCA and decided how that requirement would be enforced: through a carefully-tailored financial penalty for non-compliance. The Legislature might have selected a different remedy, for example the administrative and judicial enforcement provision for affordable housing in Chapter 40B, or an AG lawsuit to compel

compliance. Indeed, the Legislature has provided in numerous other statutes for the AG to bring actions to compel a public entity to comply with the law, but it did not do so in the MCA. *Infra*, pp. 22-27.

The AG's assertion that other statutory provisions provide her authority to compel compliance with the MCA misreads those laws. And the AG's assertion of common law authority to compel compliance with any statute as she deems it necessary misreads precedent. Where a statute creates a duty and specifies *no* remedy, then the AG may seek equitable relief at common law. But where, as here, the Legislature has specified a remedy, that remedy is exclusive. *Infra*, pp. 27-33.

II. EOHLC's Guidelines are invalid because they were not promulgated consistent with Chapter 30A's rulemaking provisions. Whatever their label, the Guidelines are regulations because they establish substantive and procedural requirements for third parties. The AG admits that the Guidelines were not adopted consistent with Chapter 30A's rulemaking provisions. The AG claims this failure was harmless, but this Court has never recognized a harmless error exception for Chapter 30A's rulemaking provisions—especially those that are substantive, such as the required small business impact statement and fiscal analysis. *Infra*, pp. 33-40.

III. The Guidelines also are ultra vires because they exceed the authority the Legislature delegated to EOHLC. The MCA only requires creation of a single

geographically-compact district, enforceable by loss of funding under four grant programs; it does not authorize the Guidelines' "minimum multi-family unit capacity" test, nor loss of funding under the 13 additional grant programs EOHLC added in the Guidelines. For this same reason, the Guidelines cannot, and in light of Article 30 should not, be read as delegating to EOHLC the fundamental policy decision of how much housing in each municipality must be in a high-density district. On EOHLC's reading, the MCA delegates to it a fundamental policy decision without giving EOHLC an intelligible principle to apply and without any checks on EOHLC's discretion. *Infra*, pp. 40-49.

IV. The Mattapan Line trolleys are not a "subway" for purposes of the MCA and the Guidelines. The consistent dictionary definition of "subway" is a railway that operates at least partially underground, which the Mattapan Line never does. MBTA documents confirm this understanding, distinguishing between "subway" and "surface" stations. The AG's argument that the Mattapan Line is part of the Red Line is inconsistent with numerous MBTA documents treating those lines separately, including documents describing the Red Line as a subway and the Mattapan Line as a surface operation. *Infra*, pp. 49-54.

ARGUMENT

I. The AG cannot bring an action to compel compliance with the MCA.

The AG's lawsuit fails out of the gate because the MCA is not enforceable through an action by the AG for declaratory and injunctive relief. The Legislature specified a different remedy for non-compliance: non-compliant municipalities lose access to specified state funding. Where the Legislature has specified a particular enforcement mechanism for a statute, that remedy is exclusive. The AG cannot use the courts to override the Legislature's calibrated choice of remedy.

A. Loss of state funding is the only remedy for a municipality's violation of the MCA.

This Court has recognized for nearly two centuries that "[w]hen a statute confers some new right, and prescribes a remedy for a violation of that right, then the remedy thus prescribed, and no other, is to be pursued." *Coffin v. Field*, 61 Mass. 355, 358 (1851); *see also Fascione v. CNA Ins. Cos.*, 435 Mass. 88, 94 (2001) (similar); *Commonwealth v. Rainey*, 491 Mass. 632, 639 (2023) (similar). This is an application of the "principle of statutory construction expressio unius est exclusio alterius, i.e., 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 (1st Cir. 1977) (citation omitted). This rule applies as much to actions brought by the AG as actions brought by others: "when a statute provides a remedy for violations of it, the remedy is

generally exclusive." *Att'y Gen. v. Williams*, 174 Mass. 476, 484 (1899); *see also infra*, pp. 29-33.

Here, the Legislature specified the consequence for municipalities that do not comply with the MCA: they lose funding under four specific state programs. G.L. c. 40A, § 3A(b). This penalty is meant to spur municipalities to bring themselves into compliance with the MCA. Before this lawsuit, EOHLC itself acknowledged that the MCA only "encourages" compliance: "[t]he purpose of Section 3A is to encourage MBTA communities to adopt zoning districts where multifamily zoning is permitted as of right." *E.g.*, RAI:140. The MCA contains no mechanism to *compel* compliance.

The Legislature might have selected some stronger mechanism to enforce compliance with the MCA, but it did not. For example, the Legislature might have provided for the loss of even more state funding beyond the four identified programs—indeed, the Legislature already has amended the Act to increase the number of funding programs subject to the penalty provision from three to four. *See* St. 2023, c. 7, § 152. Or it might have provided an appeal process for an applicant impacted by a non-compliant zoning bylaw, akin to that in Chapter 40B for affordable housing. *See* G.L. c. 40B, § 22. Or it might have provided for the AG to bring an action for injunctive relief, as it has in numerous other statutes. *See infra*, pp. 24-25. Or it might have provided for a state agency or special master to dictate

a compliant zoning plan for a non-compliant town. The Legislature selected none of those options.

As especially relevant to this lawsuit, the Legislature's decision not to grant the AG authority to bring an action for injunctive relief is striking given how often the Legislature has expressly granted such authority to the AG to enforce other statutes governing public entities. *See, e.g.*, G.L. c. 30A, § 23(f) ("the attorney general ... may initiate a civil action to enforce the open meeting law"); G.L. c. 66, § 10A(b) (providing that "the attorney general" may "file[] an action to compel compliance" with the Public Records Law); G.L. c. 149, § 6 ½(e) (empowering the attorney general to "bring a civil action for declaratory or injunctive relief to enforce" statute regulating safety standards of "public employers"); G.L. c. 111, § 221(c)-(d) ("attorney general may bring a civil action for equitable relief to restrain or prevent" a "governmental entity" from violating law protecting public breastfeeding); G.L. c. 56, § 60 (if a city violates specified election laws, the state secretary "may order such local official to comply with law" and "[t]he attorney general may enforce the order by civil action"); G.L. c. 6A, § 18E ("The attorney general may … institute civil proceedings against any municipality ... operating [an emergency-response provider], to enforce sections 18A to 18J, inclusive."). When the Legislature wants to provide for an action by the AG to compel a public entity's compliance with a statute, it knows how to do so. Indeed, in the very same bill that

introduced the MCA, the Legislature provided for the AG to enforce a separate provision via actions for declaratory and injunctive relief—but it did not do so for the MCA. *See* St. 2020, c. 358, § 83 (vetoed by Governor).

There are sound reasons why the Legislature might have decided not to provide the AG authority to compel municipal compliance with the MCA. For example: increased housing density is not an unmitigated good. Reasonable people can debate the relative costs and benefits of adding hundreds or thousands of residential units to a particular town or neighborhood. Increased multi-family housing might reduce housing prices but, in an already heavily-developed area like East Milton Square, might drive up costs for commercial tenants. Hundreds of new housing units may increase the tax base, but also could increase the need for public infrastructure, such as a new public school. Given the complexity of the issue and the diversity of the affected municipalities, the Legislature reasonably could have decided to put a thumb on the scale in favor of increased housing density via § 3A(b)'s fiscal penalty, but not to actually *force* compliance by all communities.

The Legislature also may have been taking account of the Home Rule Amendment, which embodies a constitutional value judgment that zoning ordinarily should be decided by local communities. *See* Mass. Const., Art. LXXXIX, § 6. The Legislature can override that constitutional assignation of authority by statute, *id*., but the Legislature reasonably may want to tread carefully in doing so. The

Legislature could have decided that increased housing density is important enough to warrant the MCA's financial nudge, but not important enough either to override municipalities' ultimate control over zoning in general, or to subject them to the costs and burdens of an AG enforcement action in particular.

A comparison of the MCA to Chapter 40B's affordable housing provisions confirms that the Legislature acted deliberately when imposing only financial pressure on municipalities in the MCA. For affordable housing, the Legislature selected a more powerful remedy, expressly providing for review of local permitting decisions by EOHLC's housing appeals committee, and then for judicial review in the superior court. *See* G.L. c. 40B, § 22. Chapter 40B also expressly provides for EOLHC to enforce its orders through actions for equitable relief. *See id*., § 23. Presumably, any enforcement action by EOHLC in the courts would be handled by the AG on EOHLC's behalf. *See* G.L. c. 12, § 3. In effect, the AG's lawsuit asks the Court to override the Legislature's decision that advancing Chapter 40B affordable housing warrants enforcement actions by the AG, but advancing Chapter 40A multi-family housing warrants only financial sanctions.

The Court should not rewrite the MCA by providing a remedy the Legislature might have selected but did not. The Legislature is entitled to weigh competing interests and values and determine what enforcement mechanism, on the continuum between a flyswatter and a bazooka, to deploy. In the MCA, the Legislature chose

a financial penalty to spur municipal compliance. That penalty is scarcely a wet noodle; already, it has led many municipalities to amend their zoning bylaws. Other municipalities may do so over time as financial sanctions continue to bite. If this penalty proves insufficient to obtain complete compliance, the Legislature always can amend the MCA to try something new. Or the Legislature may decide that some degree of non-compliance with the statute is preferable to upping the ante.

This is all a policy judgment for the Legislature that the AG cannot arrogate to herself. "[T]o interpret" the MCA to permit the AG's action for injunctive relief, as the AG asks, "would be expanding this limited statute and the remedies available under it without any evidence that the Legislature desired such a result." *Fascione*, 435 Mass. at 94. The Court therefore should hold that the AG lacks authority to bring this action to compel compliance with the MCA.

B. The AG's contrary arguments lack merit.

The AG contends she needs no specific authority to bring this action because she has statutory and common law authority to compel compliance with *every* statute as she deems it necessary. That is not the law.

1. The AG does not have statutory authority for this action.

The AG argues (at 54) that G.L. c. 12, § 10 provides her authority to bring actions for injunctive relief to compel compliance with any statute she chooses. That

is not correct. Even reading § 10 at its broadest,[1] it provides only that the AG may "institute or cause to be instituted such … civil proceedings" as she deems necessary, without saying anything about the *relief* she may seek in those proceedings. This Court has never held that § 10 allows the AG to brush past a particular statute's specification of a remedy and to demand injunctive relief in all cases. If § 10 were as sweeping with respect to remedies as the AG claims, the Legislature's subsequent express grants of authority to the AG to seek injunctive relief to compel compliance by public entities in so many other statutes (*supra*, pp. 24-25) would be surplusage.

The AG also (at 34) invokes c. 40A, § 7, arguing that it authorizes actions to compel municipal compliance with § 3A. That is wrong. Section 7 concerns disputes over specific parcels of land, *e.g.*, actions to enforce zoning laws against landowners. *See* G. L. c. 40A, § 7 (providing that "[n]otice of an action, suit or proceeding shall include the name of not less than 1 of the owners of record, the name of the person initiating the action and adequate identification of the structure and the alleged violation"). It says nothing about the AG challenging local zoning bylaws. A challenge to an order or decision of town building officials that is "in violation of any provision of this chapter" is brought under §§ 8 and 17, which say

[1] On its face § 10 concerns only anticompetitive conduct, and the civil cases concerning the relevant statutory language that have come before this Court have all involved such subject matter or consumer protection. *See Lowell Gas Co. v. Att'y Gen'l*, 377 Mass. 37 (1979); *Commonwealth v. Mass. CRINC*, 392 Mass. 79 (1984); *Att'y Gen. v. Dime Sav. Bank of New York, FSB*, 413 Mass. 284 (1992).

nothing about injunctive relief to compel amendments to zoning bylaws. And if § 7 were controlling here, then this Court would be an inappropriate forum, as § 7 places jurisdiction in "[t]he superior court and the land court."

Notably, Chapter 40A, § 22 *previously* provided the AG authority to challenge local zoning bylaws. *See* St. 1954, c. 368, § 2. But the Legislature repealed that provision. *See* St. 1975, c. 808. In the years since, the AG had disclaimed authority to enforce Chapter 40A. *See* Office of the Attorney General, OML Declination 7-2-2018 Edgarton Planning Board, available at 2018 WL 7500492 (Mass.A.G.) (stating that "the Attorney General does not enforce" Chapter 40A). The AG argues (at 57-58) that the repeal of § 22 is uninformative because a pre-approval process remains. Whatever the Legislature's motivation, since 1975 no provision in Chapter 40A has authorized the AG to bring an action challenging existing zoning bylaws, as the AG does here.

2. The AG does not have common law authority for this action.

The AG also asserts (at 54-57) common law authority to seek injunctive relief to compel compliance with any statute. That too is wrong.

The Court has recognized that the AG may pursue common-law equitable remedies when a statute imposes legal obligations but provides *no remedies at all*. *See Williams*, 174 Mass. at 484-485 ("The statute does not provide a remedy for its enforcement, and therefore the remedies must be sought at common law."). But this

common-law authority is displaced when a statute creates both a legal duty and prescribes the remedy for a violation of that duty: "when a statute provides a remedy for violations of it, the remedy is generally exclusive; but, if it provides no remedy, relief from wrongs against it is to be sought at common law." *Id.* at 484.

The Court has reiterated this principle on multiple occasions. In *Att'y Gen. v. Bd. of Aldermen of Everett*, 351 Mass. 193 (1966), for example, the Attorney General filed a bill in equity challenging municipal election results. The Court explained that "[t]he conduct of elections and election contests is controlled entirely by statute. Unless the Legislature has granted to the Attorney General the right to the relief here sought he is not entitled to it, and the court may not grant it." *Id*. at 196 (citation omitted). The Court then reviewed the numerous remedies provided by the election laws, none of which covered the AG's action, and so affirmed a demurrer. *Id*. at 196-197. As another example, in *Att'y Gen. v. N. Y., N.H. & H.R. Co.*, 197 Mass. 194, 198 (1908), the Court explained that the AG might normally pursue an information in law against a company that violates a statute. But the statue specified a remedy, and "[t]he remedy thus given is exclusive for this class of cases, where no relief is needed other than an injunction against such unauthorized acts in the future. … Since the passage of this statute, the Attorney General cannot maintain an information at law in the nature of quo warranto." *Id*. at 198-199. And in *Att'y Gen. v. Pitcher*, 183 Mass. 513, 519 (1903), the Court observed in dicta that where a

statute imposed specific sanctions for its violation, "[t]here is much ground for holding that these remedies expressly provided are exclusive of others." The Court also has made this point in actions brought by other public officers.[2]

The AG does not cite any case recognizing common law authority to compel statutory compliance when the Legislature has specified some different remedy for non-compliance. The cases the AG cites are either readily distinguishable or, as the AG admits (at 56 n.27), silent on the issue before the Court.

The AG (at 58-59) relies heavily on *Board of Education v. City of Boston*, 386 Mass. 103 (1982), calling that case an "apt comparison." It is not. The statute at issue there expressly provided that "in the event of noncompliance the commissioner of education shall refer all such cases to the attorney general of the commonwealth for appropriate action to obtain compliance." G.L. c. 69, § 1B. There is no similar "action to obtain compliance" language applicable to the MCA.

[2] In an action by the Commissioner of Banks, the Court stated "[i]f the statute … had established the stockholders' liability without providing a remedy for its enforcement, the common law would furnish an appropriate remedy. But where the statute which creates the right and imposes the liability also prescribes the form of remedy, that form of remedy alone must be pursued." *Cosmopolitan Tr. Co. v. Cohen*, 244 Mass. 128, 134 (1923); *see also Inhabitants of Town of Lexington v. Suburban Land Co*., 235 Mass. 108, 113 (1920) ("The statute contains … specific consequences in the nature of penalties … . The consequences imposed by a statute of such a character are commonly regarded as exclusive and no general relief against violation of its terms is conferred upon public officers by implication.").

The AG's reliance (at 59) on *Perlera v. Vining Disposal Serv., Inc.*, 47 Mass. App. Ct. 491, 492 (1999), is likewise misplaced. The statute at issue there provided for enforcement by the AG, in addition to actions for civil penalties, damages, and injunctive relief. G.L. c. 149, §§ 27C, 27F; *see also* G.L. c. 149, § 2 (providing the AG authority to "enforce the provisions of this chapter" and "all necessary powers therefor"). In that case, the AG filed an enforcement action and private plaintiffs sued for their damages; in the AG's docket, the Appeals Court noted the existence of the private action and ordered the damages awarded. *See* 47 Mass. App. Ct. at 499. Since the statute provided for the relief awarded, *Perlera* says nothing about the AG's ability to sue for injunctive relief when the Legislature has specified some different remedy.

Other cases the AG cites likewise involve statutes granting enforcement authority either to the AG or to a state agency presumably represented by the AG. In *Commonwealth v. Town of Hudson*, 315 Mass. 335, 336 (1943), for example, the statute gave the agency authority to order the town to act and this Court "jurisdiction in equity to enforce any such order." In *Att'y Gen. v. Sheriff of Worcester County*, 382 Mass. 57, 59-60, 62 (1980), the statute permitted the agency to "enforce" its rules, including by forcing the closure of non-compliant detention facilities, and the AG represented the agency in litigation. And *Jacobson v. Parks & Recreation Commission of Boston*, 345 Mass. 641, 641 (1963), involved a dispute brought by

taxpayers against Boston under G.L. c. 213, § 3(11), which expressly provides for intervention by the AG. The remedy/enforcement provisions at issue in those cases bear no resemblance to the MCA.

Finally, the AG relies (at 55-56) on dicta from cases that did not involve the issue of statutory remedies. *Att'y Gen. v. Trustees of Boston Elevated Railway Co.*, 319 Mass. 642, 653 (1946), for example, was a contractual dispute between the Commonwealth and a railway company; the Court held the AG could not sue under his common-law authority. *Att'y Gen. v. Suffolk County Apportionment Comm'rs*, 224 Mass. 598, 600-602, 609-610 (1916), involved constitutional claims, not enforcement of a statute. *Opinion of the Justs.*, 354 Mass. 804, 804-805, 809 (1968), held that the tax commissioner could produce tax returns to the AG because of the AG's "unquestionable" authority "to conduct and manage all criminal prosecutions" for the Commonwealth. And *Commonwealth v. Kozlowsky*, 238 Mass. 379, 390 (1921), held that the AG has the right to present before the grand jury. None of those cases have any bearing on the question before the Court here.

II. Milton is not violating the MCA because the required guidelines have not been properly promulgated.

The Court also should hold that Milton is not presently violating the MCA and so cannot presently be sanctioned under § 3A(b). The MCA is not self-executing; instead, § 3A(c) requires EOHLC to "promulgate guidelines to determine if an MBTA community is in compliance with this section." The Guidelines

constitute regulations that needed to be promulgated consistent with Chapter 30A's rulemaking provisions. The AG concedes the Guidelines were not, and so there is no basis on which to find Milton in violation.

A. EOHLC violated Chapter 30A when promulgating the Guidelines.

Regulations must be promulgated consistent with the rulemaking procedures found in Chapter 30A. The AG concedes that EOHLC did not comply with these requirements in promulgating the Guidelines. RAI:106(¶37), 119(¶17). The AG argues (at 47-50) that compliance with Chapter 30A was unnecessary because the MCA calls for "guidelines" rather than "regulations," and "guidelines" are not subject to Chapter 30A's rulemaking provisions. That argument based on labels lacks merit.

Chapter 30A contains a definition of "regulation" that is functional and broad: "the whole or any part of every rule, regulation, standard *or other requirement of general application and future effect*, including the amendment or repeal thereof, adopted by an agency *to implement or interpret the law* enforced or administered by it." G.L. c. 30A, § 1(5) (emphases added). When an agency promulgation "substantially affect[s] the rights of or the procedures available to the public" it is a "regulation" subject to Chapter 30A. *Carey v. Comm'r of Correction*, 479 Mass. 367, 368 (2018) (DOC visitor search policy was a "regulation" because it "substantially affected the procedures available to the public").

Nomenclature is irrelevant to this standard. The drafters of Chapter 30A expressly noted that "the definition of 'regulation' might include 'letters or bulletins issued by agencies' though 'not entitled regulations'; in other words, *the substance, not the name, was to control*." *Mass. Gen. Hosp. v. Rate Setting Comm'n*, 371 Mass. 705, 708 n.9 (1977) (emphasis added). Indeed, even "blackjack rules" can be regulations, if they "are promulgated … to regulate licensees' activity." *DeCosmo v. Blue Tarp Redevelopment, LLC*, 487 Mass. 690, 695 (2021).

The AG points (at 49) to the fact that in *Fairhaven Housing Authority v. Commonwealth*, 493 Mass. 27 (2023), the Court held that certain "guidelines" did not need to be promulgated as regulations. *Fairhaven*'s holding, however, did not turn on nomenclature. Instead, the Court held that the "guidelines" in question fell within a statutory exception because they governed only "internal management or discipline of the adopting agency or any other agency." *Id.* at 33 n.14 (explaining that the guidelines "do not purport directly to regulate public conduct" (citation omitted)). The AG also (at 49-50) highlights other statutes calling for "guidelines," for which the guidelines were not promulgated through Chapter's 30A's rulemaking process. But maybe they should have been, or maybe the symbolic nature of many of those programs means they do not "substantially affect" public rights. The AG identifies no litigation challenging those other guidelines under Chapter 30A and so their mere existence is uninformative.

Here, EOHLC's Guidelines are regulations because they impose significant substantive and procedural obligations on regulated municipalities. They are not merely EOHLC's non-binding reading of the statute: the MCA directs EOHLC to "promulgate guidelines *to determine* if an MBTA community is in compliance." G.L. c. 40A, § 3A(c) (emphasis added). In this way, the Guidelines are akin to the AG's own regulations under c. 93A, which "set standards the violations of which would constitute violations of c. 93A." *Purity Supreme, Inc. v. Att'y Gen*., 380 Mass. 762, 771 (1980). The Guidelines go into far more substantive and procedural detail than the MCA itself. As the Guidelines themselves state, they establish:

> - What it means to allow multi-family housing "as of right."
> - The metrics that determine if a multi-family zoning district is "of reasonable size."
> - How to determine if a multi-family zoning district has minimum gross density of 15 units per acre ….
> - The meaning of Section 3A's mandate that "such multi-family housing shall be without age restrictions and shall be suitable for families with children."
> - The extent to which MBTA communities have flexibility to choose the location of a multi-family zoning district.

Add.069. The Guidelines also impose procedural requirements on regulated municipalities found nowhere in the MCA. Add.078-081.

The AG notes that the Legislature can specify a different rulemaking procedure for a particular statute. *See* AG Br. 47-48 (citing *New England Milk Dealers Ass'n, Inc. v. Dep't of Food & Agric.*, 33 Mass. App. Ct. 935 (1992)). That may be true, as shown by the law at issue in *New England Milk Dealers*—that statute set forth in painstaking detail the procedures the agency needed to apply. But this principle applies only "[w]here the express provisions of the enabling or organic act ... prescribe a mode and method of procedure for the promulgation of rules or regulations." *Id*. at 1005 (citation omitted). If "no mode and method of procedure for rulemaking are provided, the provisions of [Chapter 30A] are generally applicable." *Id.* (citation omitted). Here, there is no rulemaking procedure in the MCA, only the bare command to "promulgate guidelines" "in consultation with" certain other government entities. G.L. c. 40A, § 3A(c). That is an invocation of Chapter 30A's existing procedures, not the specification of different procedures.

B. EOHLC's Chapter 30A violation was not "harmless error."

EOHLC's admitted failure to comply with Chapter 30A means the Guidelines are invalid and have no legal effect. *See Kneeland Liquor, Inc. v. Alcoholic Beverages Control Comm'n*, 345 Mass. 228, 235 (1962). The AG resists that conclusion by pointing (at 50-53) to the "prejudice" provision in § 14(7) and arguing that Milton cannot show prejudice. But § 14 applies only to judicial review of an "adjudicatory proceeding," not a rulemaking. *See* G.L. c. 30A, § 14. Rulemakings

are subject to review under § 7, which says nothing about prejudice. For the same reason, the AG's citation of *United Food Corp. v. Alcoholic Bevs. Control Comm'n*, 375 Mass. 238 (1978), is off-point; that case concerned an adjudication subject to § 14. *See id*. at 242.

The AG points to no decision of this Court adopting a "harmless error" exception for Chapter 30A's rulemaking requirements. *Kneeland* suggests strict compliance is necessary; in the context of a rulemaking, it rejected an agency's argument that because "petitioners never sought to be heard or questioned the prices" they "should be estopped" from challenging the regulation, explaining "[t]he right to a hearing under c. 30A is not to be treated as waived merely by not insisting upon the right to be heard." *Kneeland*, 345 Mass. at 234. Put differently, the hearing must be held even if no one asked to speak. The AG cites *Colby v. Comm'r of Pub. Welfare*, 18 Mass. App. Ct. 767, 780 (1984), as an example of the Appeals Court finding harmless error, but that case involved a technical defect—a public notice omitted the regulation number but otherwise made clear what regulation was at issue. *Colby* did not involve, as here, complete failure to comply with Chapter 30A.

The AG cites (at 51-53) a number of federal cases holding that failure to conduct public hearings required by the federal Administrative Procedure Act is not fatal if the agency has otherwise solicited the public's views. Even if this Court were to adopt a harmless error exception for public hearings, defendants' argument has

always highlighted EOHLC's failure to conduct the required small businesses impact analysis, and EOHLC also failed to analyze the Guidelines' impact on public finances. None of the federal cases the AG cites forgive an agency's failure to conduct substantive analyses required by law.

The AG's basic position is that EOHLC still would have adopted the same Guidelines had it actually complied with Chapter 30A. But Chapter 30A requires agencies to act on the basis of information and analyses, not assumptions. Having never conducted the analyses required under Chapter 30A, EOHLC and the AG have no informed basis to say how additional information may, or may not, have changed the Guidelines. The AG's argument also ignores that § 3 requires a small business impact statement to be filed with the notice of proposed rulemaking, giving the public an opportunity to comment on it. EOHLC's failure to file the statement robbed the public of that opportunity.

The AG finally argues (at 53) that absence of prejudice means Milton "lacks standing to challenge the procedure EOHLC used." This "standing" argument is just another improper attempt to read a harmless error exception into c. 30A, § 7. In any event, Milton is prejudiced; the AG has sued it for failing to comply with an improperly-promulgated regulation, and so Milton may raise the regulation's invalidity as a defense. *Ginther v. Comm'r of Ins*., 427 Mass. 319 (1998), on which the AG relies, dismissed a third-party challenge to regulatory approval of a merger

because the New York plaintiffs did not participate in the Massachusetts insurance market, did not show injury, and did not fall within the zone of interest of the statute. It could not be more different from this case.

III. The Guidelines are ultra vires because they exceed the authority the Legislature granted to EOHLC under the MCA.

The Guidelines also are unlawful because they exceed the authority the Legislature delegated to EOHLC in the MCA.

A. The "minimum multi-family unit capacity" test is ultra vires.

"[A] department or agency does not have the authority to promulgate a regulation for the enforcement or administration of a statute that is contrary to the plain language of the statute and its underlying purpose." *Buckman v. Comm'r of Correction*, 484 Mass. 14, 23 (2020) (quotation marks omitted). Agency regulations are "invalid ... when the agency utilizes powers neither expressly nor impliedly granted by statute." *Commonwealth v. Maker*, 459 Mass. 46, 49-50 (2011) (quotation marks omitted).

In the Guidelines, EOHLC has determined the "size" of the "district of reasonable size" for each regulated municipality by employing two tests: a "minimum land area" test and a "minimum multi-family unit capacity" test. Add.071-075. A "rapid transit community," as EOHLC has designated Milton, must include at least 25% of its total housing stock in the high-density district. Add.072.

As "reasonable size" is used in the MCA, however, it is unambiguously a reference to land area, not total housing stock. First, the statute requires the district to "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." G.L. c. 40A, § 3A(a). This locational limit necessarily imposes a geographic cap; EOHLC could not require a district stretching for miles from a covered transit station. Second, and relatedly, the statute only requires a municipality to enact "1 district of reasonable size." *Id.* Even if a municipality is geographically expansive and has a widely-dispersed population, it still need create only a single district "located not more than" a half mile from an applicable transit station. If the Legislature were focused on total housing stock rather than land area it would not have required only a single district within a circumscribed distance of a single point. And third, the statute provides that the district shall "have a minimum gross density of 15 units per acre." *Id.* In this formula the minimum number of zoned units is a function of a given land area; land area is not determined based upon a given number of zoned units, which is the functional result of the minimum multi-family unit capacity test.

Accordingly, by using the "minimum multi-family unit capacity test" *at all*, EOHLC acted ultra vires and the Guidelines are unlawful.

B. The MCA does not grant EOHLC authority to transform regulated communities.

As relevant to both the minimum land area test and the minimum multi-family unit capacity test, EOHLC overstepped the limited authority granted it by the Legislature by using the Guidelines to order transformative zoning changes in numerous municipalities throughout Massachusetts.

Housing density and type have tremendous implications for cities and towns, affecting the size and nature of the local economy, the need for public infrastructure (roads, water and sewer service, public services (schools, first responders)), and preservation of the natural environment. Only Boston and a handful of mostly adjacent communities currently meet § 3A(a)'s "15 units per acre" benchmark on a citywide basis. *See* Residensity, https://residensity.mhp.net/ (Massachusetts Housing Partnership's residential density map). EOHLC has now decided that numerous other municipalities both near and far from Boston must allow, as of right, that same level of housing density for at least about 25% of their total housing stock. If the units so authorized are all built, that would cause significant changes in the affected communities.

Whether those changes are net positive or negative is not at issue in this litigation. What matters for present purposes is that nothing on the face of the MCA grants EOHLC so much authority. The MCA speaks only to housing density within a "district of reasonable size," where the district should "be located not more than"

a half mile from various transit stations. This shows, as Senator Crighton said in introducing the Act, *supra*, p. 13, that the Legislature had something "modest" in mind: increased housing density within an area small and compact enough to be a short walking distance from a transit station. Consistent with that modest vision, the MCA requires each MBTA community—even geographically expansive MBTA communities or communities with multiple transit stations—to establish only one such compact district.

EOHLC's claim that the MCA grants it sweeping authority contravenes the principle that "the Legislature 'does not ... hide elephants in mouseholes.'" *See Matter of Est. of Mason*, 493 Mass. 148, 165 (2023) (quoting *Patel v. 7-Eleven, Inc.*, 489 Mass. 356, 364 (2022)). Had the Legislature intended to give EOHLC authority to mandate dramatic changes for towns across the Commonwealth, it would have said so clearly. *Cf. Frechette v. D'Andrea*, 494 Mass. 167, 177 (2024) ("If the Legislature intended the Commonwealth and its taxpayers to assume the much greater expense of unpaid rent by indigent defendants, in addition to court costs and fees, it would have said so expressly."). The MCA's requirement of a district of "reasonable size" within a short walking distance of a transit station does not remotely signal such sweeping changes.

The lack of any clear delegation of so much authority to EOHLC is particularly problematic given the Home Rule Amendment's dedication of

presumptive authority over zoning to local governments. *See supra*, p. 12. To be sure, that municipal power has limits—the Legislature can override it by statute. But given the *presumptive* authority the state constitution grants municipalities over zoning, if the Legislature intends to delegate to an agency authority to override municipal zoning decisions, then it must say so clearly. An agency should not be able to use an aggressive reading of an at-best ambiguous statute to seize authority granted to local governments in the constitution.

C. EOHLC's interpretation of the MCA would violate Article 30.

Reading the MCA as granting EOHLC the broad discretion it claims would mean the statute violates the nondelegation principle embodied in Article 30, because the statute would delegate to EOHLC the power to make a fundamental policy decision with essentially no direction for implementation and no safeguards against abuses of discretion. This nondelegation concern provides further reason to interpret the MCA not to authorize EOHLC to require such expansive high-density districts. But if the Court concludes that the MCA cannot be interpreted to avoid the constitutional question, then the Court should declare the MCA unconstitutional.

1. Under Article 30, "the Legislature cannot delegate the power to make laws." *Constr. Indus. of Mass. v. Comm'r of Labor Indus.*, 406 Mass. 162, 171 (1989). The constitutional question is one "of degree," *id.*, and "[n]o formula exists for determining whether a delegation of legislative authority is 'proper' or not,"

Chelmsford Trailer Park v. Chelmsford, 393 Mass. 186, 190 (1984). Instead, three factors tend to guide the analysis:

> (1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?

Id. Here, all three considerations weigh against finding the EOHLC's reading of the MCA consistent with Article 30.

First, the decision that numerous towns across the Commonwealth must now include at least about 25% of their total housing stock in a district zoned for high-density, multi-family housing—with all of the potential implications noted above—represents a fundamental policy decision incapable of delegation. *See Oracle U.S., Inc. v. Comm'r of Revenue*, 487 Mass. 518, 526 (2021) (collecting cases finding improper delegations). The fundamental nature of zoning policy is confirmed by the Home Rule Amendment—subjects that are not fundamental seldom are the subject of constitutional amendments.

EOHLC points to nothing in the statute that "clearly spells out" a decision by the Legislature to impose such dramatic changes on towns near and far from Boston. *Contrast Constr. Indus. of Mass.*, 406 Mass. at 173 ("The statute clearly spells out

the legislative policy"). The Legislature only said "reasonable size," and within a short walking distance of certain transit stations. If the MCA truly grants EOHLC the discretion to decide which cities and towns must include up to about 25% of their total housing units in a high-density district, that is a delegation of a fundamental policy decision.

Second, under EOHLC's reading, there is no "intelligible principle" in the MCA to guide EOHLC's implementation of the statute. For a delegation to be proper, "the Legislature must provide clear standards to guide the exercise of delegated authority." *Oracle*, 487 Mass. at 525. Those standards must "sufficiently limit the discretion of the" agency. *Risk Mgmt. Found. of Harvard Med. Inst. v. Comm'r Ins*, 407 Mass. 498, 507 (1990). Under EOHLC's interpretation of the MCA, no such guidance exists—the acreage and percentages it adopted for the minimum land area and minimum multi-family unit capacity tests have no grounding in the statute, and EOHLC's brief identifies no "clear standards" cabining its discretion. EOHLC's decision that numerous small, semi-rural communities far from Boston must include up to about 25% of their total housing stock in a high-density district, while a "commuter rail community" close to Boston need include only 15%, illustrates the point. No "intelligible principle" in the statute indicates the Legislature meant EOHLC to impose such incongruously differential treatment.

The AG argues (at 40) that the statute provides an intelligible principle by its "reasonable size" limitation. Whether an instruction to regulate "reasonably" is sufficient to satisfy Article 30, however, must take into account the subject matter being regulated. Numerous statutes, for example, require that public notices be printed in a "reasonable size" font, but font size is hardly a "fundamental policy decision." On the other hand, the Legislature could not just tell the Commissioner of Revenue to set "reasonable" tax rates. *Oracle*, 487 Mass. at 356 (under Article 30, Commissioner could not determine whether to apportion sales tax). Giving EOHLC complete discretion to decide what percentages of each town it is "reasonable" to zone at an urban level of density is no less constitutionally impermissible.

The AG relies on *Tri-Nel Mgmt., Inc. v. Bd of Health of Barnstable*, 433 Mass. 217 (2001), but that case is distinguishable because the delegation of authority to local health boards to "make reasonable health regulations" was, as the Court explained, deeply "rooted in the legal history of this Commonwealth," with local governments having been responsible for public health for centuries. *Id*. at 225-226. The Court further noted that additional statutes supported the town's smoking ban. *Id*. at 226. EOHLC has no similarly hoary tradition of making fundamental decisions concerning housing density and type.

Finally, the MCA provides no safeguards to control abuses of the discretion EOHLC claims to possess. There is not, for example, any requirement for EOHLC to make findings before regulating, and no opportunity for an MBTA community to challenge its classification level. *Contrast Robinhood Fin. v. Sec'y of the Commonwealth*, 492 Mass. 696, 716 (2023). That EOHLC is directed to promulgate guidelines "in consultation with" EOED, MassDOT and MBTA does not solve the problem, as the AG suggests (at 40-41). The statute does not require EOHLC to accept whatever input those other public entities give—only that they be consulted. Even if their advice must be heeded, all that does is improperly delegate fundamental policy decisions to multiple agencies.

2. "When statutory language is susceptible of multiple interpretations, a court should avoid a construction that raises constitutional doubts and instead should adopt a construction that avoids potential constitutional infirmity." *Oracle*, 487 Mass. at 525. For the reasons given above, nothing in the MCA compels EOHLC's minimum multi-family unit capacity test or its requirement that numerous municipalities include at least about 25% of their total housing units in a high-density district. Reading the MCA to instead require the zoning of only a relatively compact district in terms of land area, with acreage reasonable in relation to a given municipality's existing population, would sufficiently limit EOHLC's discretion to avoid Article 30 concerns.

If, however, the Court concludes that the MCA cannot be read to sufficiently cabin EOHLC's discretion, then it should declare the MCA unconstitutional under Article 30.

D. EOHLC and other agencies cannot condition additional grant funding on MCA compliance.

The Legislature carefully calibrated the MCA's financial penalty for non-compliance, even amending the statute to add a fourth grant program. *Supra*, p. 23. EOHLC, however, drastically expanded the statutory penalties for noncompliance by including in the Guidelines 13 additional grant programs, beyond the four selected by the Legislature, that "*will* take compliance with Section 3A into consideration when making grant award recommendations." Add.078 (emphasis added). As authority for these new penalties, EOHLC cited nothing. For the same reasons that rule out the AG seeking common law remedies to compel compliance with the MCA, the agencies that administer the 13 additional grant programs identified by the Guidelines cannot expand the statutory penalty. And they certainly cannot say that they "will" take MCA non-compliance into consideration without undertaking a rulemaking, which did not happen here.

IV. The Mattapan trolley is not a "subway."

Finally, the Guidelines are ultra vires and arbitrary and capricious because they treat the stations for the Mattapan Line trolley as "subway stations." This matters for two reasons. First, under the MCA itself, the "district of reasonable size"

must "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." G.L. c. 40A, § 3A(a). Second, under the Guidelines, EOHLC requires a "rapid transit community" to zone at least 25% of its housing units with the multi-family zoning district, with a "rapid transit community" defined as one with "subway stations." Add.068.

A. The Mattapan Line is not a "subway" and the stops on the Mattapan Line are not "subway stations" as used in the MCA.

The plain meaning of "subway," consistently reflected in dictionary definitions, is a "railway" that runs "partly or entirely underground." *See* Webster's Third New Int'l Dictionary ("a usually electric railway built partly or entirely underground and usually for local transit in metropolitan areas"); The American Heritage Dictionary (defining subway as "an underground urban railroad, usually operated by electricity"); Concise Oxford English Dictionary (defining subway as "an underground railway"). The AG cites no dictionary definitions to the contrary. These dictionary definitions are the best evidence of the meaning of "subway" in the MCA. *See Garcia v. Steele*, 492 Mass. 322, 328 n.6 (2023) ("Dictionaries are useful aids in determining a word's ordinary meaning" (quotation marks omitted)); *Commonwealth v. Rossetti*, 489 Mass. 589, 593 (2022) ("we interpret a statute to effectuate the Legislature's intent, looking at words' plain meaning in light of sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions" (quotation marks omitted)).

The AG concedes that the Mattapan Line trolleys only operate aboveground. RAI:102-103(¶12); RAI:121(¶27). The Mattapan Line stations therefore are not "subway stations" and there are no "subway stations" applicable to Milton.

The AG contends (at 46) that "subway" and "subway station" possess something other than their ordinary meaning "in the context of § 3A and the MBTA's rapid transit system." None of the AG's arguments on this point have merit. According to the AG (at 44), the Legislature meant § 3A(a)'s listing of stations and terminals to cover "the entire universe of MBTA service." That is clearly not true. For example, "the entire universe of MBTA service" includes bus *stops*, not just "bus stations," but even the Guidelines acknowledge that the term "bus stations" does not include bus stops. Add.065. The Legislature therefore did not mean the enumeration of specific transit facilities in § 3A(a) to cover "the entire universe of MBTA service." If the AG's point is that the Legislature meant to include the entire universe of MBTA *stations*, the Legislature could have saved words by just saying so: "located not more than 0.5 miles from any MBTA station or ferry terminal." The Legislature's decision to instead enumerate specific types of MBTA stations—commuter rail, bus, and subway—while excluding trolley stations must be accorded significance.

The AG also relies on MBTA materials for support, but those materials show that the MBTA regularly distinguishes between "subways" and above-ground transit

services. For example, in describing its "Heavy Rail" line system (consisting of the Red Line, Blue Line, and Orange Line) and "Light Rail" line system (consisting of the Green Line and Mattapan Line), the MBTA notes that the Heavy Rail system "provide[s] core subway services" while the Light Rail system "provides local service … via its surface operations and core subway services." RAI:320. Thus, the MBTA itself distinguishes between "subway services" and "surface operations," adding "surface operations" when discussing the rail category that includes the Mattapan Line. Other MBTA literature likewise differentiates between "subway stations" and "surface stations." *E.g.*, RAII:201 (describing heavy-rail trains "with surface and subway stations"); RAII:206 (distinguishing between the Green Line's "subway stations" and "surface stations"); RAII:212 (describing MBTA's "underground (subway) stations," "above-grade heavy rail stations," and "surface Green Line or Mattapan light rail stations,"); RAII:225 (describing the Green Line's "surface and subway" stations); RAII:240 (describing the "31 surface and four subway stations on Green Line").

The AG argues (at 46) that EOHLC's interpretation of "subway station" in the implementing Guidelines as "any of the stops along the MBTA Red Line, Green Line, Orange Line, or Blue Line" is "reasonable" and entitled to deference. But no deference is owed if "the statute 'speaks clearly on the topic in the regulation." *McCauley v. Superintendent, Mass. Corr. Inst.*, 491 Mass. 571, 583-584 (2023)

(quotation marks omitted). Here, the MCA speaks clearly: dictionaries confirm that an entirely above-ground train line is not a "subway." Moreover, no deference is owed to EOHLC given its failure to promulgate the Guidelines as regulations under Chapter 30A. *See Mass. Gen. Hosp.*, 371 Mass. at 707-708. And, in any event, the Guidelines are arbitrary and capricious to the extent they include the Mattapan Line as part of the Red Line, for the reasons given in the next section.

B. The stops on the Mattapan Line are not "stops along the MBTA Red Line" for purposes of the Guidelines.

The Guidelines define a "subway station" as "any of the stops along the MBTA Red Line, Green Line, Orange Line, or Blue Line." Add.068. EOHLC concluded that the Mattapan Line trolley stations are "stops along the MBTA Red Line," but that decision was arbitrary and capricious.

To start, the Mattapan Line's trolleys never operate on the same "line" as the Red Line's subway cars. Only a single station services both lines, and passengers wishing to transfer lines at that station must depart the line they are on and walk to a separate platform to board the other line. RAI:121-122(¶31). The MBTA's Service Delivery Policy also recognizes that the Red Line and the Mattapan Line are distinct lines. It categorizes the Red Line as one of the MBTA's "three heavy rail lines," while it categorizes the "Mattapan High Speed Line" as a "light rail system" that "services as a Red Line extension from Ashmont Station to Mattapan Station via light rail." RAI:320; *accord* RAI:352-353. Other MBTA literature takes the

same approach—listing the "Mattapan Trolley" or "Mattapan Line" as separate from the Red Line. *See, e.g.*, RAII:202, 203, 212, 213, 217, 218, 225, 231, 232.

The AG argues (at 44-45) that the MBTA's schedule includes the Mattapan Line and the Red Line together. But the online schedule has separate sections for the two lines. *See* RAII:190; *compare* MBTA, Red Line Stations & Departures, https://www.mbta.com/schedules/Red/line, *with* MBTA, Mattapan Trolley Stations & Departures, https://www.mbta.com/schedules/Mattapan/line. The AG notes (at 45) that the MBTA "offer[s] free passenger transfers between the Mattapan Line and the Ashmont branch." There are two major problems with that argument. First, the need for a "transfer" itself demonstrates the two lines are not the same. And second, it proves too much: the MBTA also offers free transfers from the subway to buses, RAI:121-122(¶¶31-33), yet bus stations obviously are not subway stations. Finally, the AG's observation (at 45) that the MBTA uses the same "color and typeset" for the two lines would be an arbitrary and capricious basis on which to conclude that an entirely above-ground line is a "subway," much less to require Milton to have 25% of its housing in a high-density district instead of 10%.

CONCLUSION

The Court should hold that (1) the AG lacks authority to bring this action and (2) Milton is not in violation of the MCA.

Dated: August 19, 2024

TOWN OF MILTON AND JOE ATCHUE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18, and 20.

This brief was prepared using Microsoft Word 2016 in 14-point Times New Roman, a proportionally-spaced typeface, and contains 10,949 words.

Dated: August 19, 2024

Kevin P. Martin

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13, I certify that I caused the foregoing document to be served by email to the following counsel of record for Plaintiff/Counterclaim Defendant-Appellant Andrea Joy Campbell, Attorney General, and Third Party Defendant-Appellant, the Executive Office of Housing and Livable Communities:

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ADDENDUM TABLE OF CONTENTS

G.L. c. 40A, § 1A (excerpt)

As used in this chapter the following words shall have the following meanings:

* * *

"MBTA community", 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.

* * *

G.L. c. 40A, § 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 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 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.

G.L. c. 161A, § 1 (excerpt)

As used in this chapter, the following words shall, unless the context otherwise requires, have the following meanings:--

* * *

"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, Boxborough, 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, Middleborough, 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, Wayland, 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.

* * *

Massachusetts Declaration of Rights Article XXX

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Massachusetts Declaration of Rights Article LXXXIX (excerpt)

Article II of the Articles of Amendment to the Constitution of the Commonwealth, as amended by Article LXX of said Articles of Amendment, is hereby annulled and the following is dopted in place thereof:

* * *

Section 6. Governmental Powers of Cities and Towns. - Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

* * *

Commonwealth of Massachusetts
EXECUTIVE OFFICE OF HOUSING & LIVABLE COMMUNITIES

Maura T. Healey, Governor ◆ Kimberley Driscoll, Lieutenant Governor ◆ Edward M. Augustus, Jr., Secretary

Issue Date: August 10, 2022
Revised: October 21, 2022
Revised: August 17, 2023

Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act

1. Overview of Section 3A of the Zoning Act

Section 3A of the Zoning Act provides: *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.*

The purpose of Section 3A 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, and that meet other requirements set forth in the statute.

The Executive Office of Housing and Livable Communities (EOHLC), in consultation with Executive Office of Economic Development, the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, is required to promulgate guidelines to determine if an MBTA community is in compliance with Section 3A. EOHLC promulgated preliminary guidance on January 29, 2021. EOHLC updated that preliminary guidance on December 15, 2021, and on that same date issued draft guidelines for public comment. These final guidelines supersede all prior guidance and set forth how MBTA communities may achieve compliance with Section 3A.

2. Definitions

"Adjacent community" means an MBTA community that (i) has within its boundaries less than 100 acres of developable station area, and (ii) is not an adjacent small town.

"Adjacent small town" means an MBTA community that (i) has within its boundaries less than 100 acres of developable station area, and (ii) either has a population density of less than 500 persons per square mile, or a population of not more than 7,000 year-round residents as determined in the most recently published United States Decennial Census of Population and Housing.

"Affordable unit" means a multi-family housing unit that is subject to a restriction in its chain of title limiting the sale price or rent, or limiting occupancy to an individual or household of a specified income, or both. Affordable units may be, but are not required to be, eligible for inclusion on EOHLC's Subsidized Housing Inventory. Nothing in these Guidelines changes the Subsidized Housing Inventory eligibility criteria, and no affordable unit shall be counted on the Subsidized Housing Inventory unless it satisfies the requirements for inclusion under 760 CMR 56.03(2) or any other regulation or guidance issued by EOHLC.

"Age-restricted housing" means any housing unit encumbered by a title restriction requiring a minimum age for some or all occupants.

"As of right" means development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval.

"Bus station" means a location with a passenger platform and other fixed infrastructure serving as a point of embarkation for the MBTA Silver Line. Upon the request of an MBTA community, EOHLC, in consultation with the MBTA, may determine that other locations qualify as a bus station if (i) such location has a sheltered platform or other fixed infrastructure serving a point of embarkation for a high-capacity MBTA bus line, and (ii) the area around such fixed infrastructure is highly suitable for multi-family housing.

"Commuter rail community" means an MBTA community that (i) does not meet the criteria for a rapid transit community, and (ii) has within its borders at least 100 acres of developable station area associated with one or more commuter rail stations.

"Commuter rail station" means any MBTA commuter rail station with year-round, rather than intermittent, seasonal, or event-based, service, including stations under construction and scheduled to being service before the end of 2023, but not including existing stations at which service will be terminated, or reduced below regular year-round service, before the end of 2023.

"Compliance model" means the model created by EOHLC to determine compliance with Section 3A's reasonable size, gross density, and location requirements. The compliance model is described in further detail in Appendix 2.

"Determination of compliance" means a determination made by EOHLC as to whether an MBTA community has a multi-family zoning district that complies with the requirements of Section 3A. A determination of compliance may be determination of interim compliance or a determination of district compliance, as described in section 9.

"Developable land" means land on which multi-family housing can be permitted and constructed. For purposes of these guidelines, developable land consists of: (i) all privately-owned land except lots or portions of lots that meet the definition of excluded land, and (ii) developable public land.

"Developable public land" means any publicly-owned land that (i) is used by a local housing authority; (ii) has been identified as a site for housing development in a housing production plan

approved by EOHLC; or (iii) has been designated by the public owner for disposition and redevelopment. Other publicly-owned land may qualify as developable public land if EOHLC determines, at the request of an MBTA community and after consultation with the public owner, that such land is the location of obsolete structures or uses, or otherwise is suitable for conversion to multi-family housing, and will be converted to or made available for multi-family housing within a reasonable period of time.

"Developable station area" means developable land that is within 0.5 miles of a transit station.

"EOHLC" means the Executive Office of Housing and Livable Communities.

"EOED" means the Executive Office of Economic Development.

"Excluded land" means land areas on which it is not possible or practical to construct multi-family housing. For purposes of these guidelines, excluded land is defined by reference to the ownership, use codes, use restrictions, and hydrological characteristics in MassGIS and consists of the following:

(i) All publicly-owned land, except for lots or portions of lots determined to be developable public land.
(ii) All rivers, streams, lakes, ponds and other surface waterbodies.
(iii) All wetland resource areas, together with a buffer zone around wetlands and waterbodies equivalent to the minimum setback required by title 5 of the state environmental code.
(iv) Protected open space and recreational land that is legally protected in perpetuity (for example, land owned by a local land trust or subject to a conservation restriction), or that is likely to remain undeveloped due to functional or traditional use (for example, cemeteries).
(v) All public rights-of-way and private rights-of-way.
(vi) Privately-owned land on which development is prohibited to protect private or public water supplies, including, but not limited to, Zone I wellhead protection areas and Zone A surface water supply protection areas.
(vii) Privately-owned land used for educational or institutional uses such as a hospital, prison, electric, water, wastewater or other utility, museum, or private school, college or university.

"Ferry terminal" means the location where passengers embark and disembark from regular, year-round MBTA ferry service.

"Gross density" means a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial, and other nonresidential uses.

"Housing suitable for families" means housing comprised of residential dwelling units that are not age-restricted housing, and for which there are no zoning restriction on the number of bedrooms, the size of bedrooms, or the number of occupants.

“Listed funding sources” means (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 2EEEE of chapter 29; and (iii) the MassWorks infrastructure program established in section 63 of chapter 23A.

“Lot” means an area of land with definite boundaries that is used or available for use as the site of a building or buildings.

“MassGIS data” means the comprehensive, statewide database of geospatial information and mapping functions maintained by the Commonwealth's Bureau of Geographic Information, within the Executive Office of Technology Services and Security, including the lot boundaries and use codes provided by municipalities.

“MBTA” means the Massachusetts Bay Transportation Authority.

“MBTA community” means 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.

“Mixed-use development” means development containing a mix of residential uses and non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.

"Mixed-use development zoning district” means a zoning district where multiple residential units are allowed as of right if, but only if, combined with non-residential uses, including, without limitation, commercial, institutional, industrial or other uses.

“Multi-family housing” means a building with 3 or more residential dwelling units or 2 or more buildings on the same lot with more than 1 residential dwelling unit in each building.

“Multi-family unit capacity” means an estimate of the total number of multi-family housing units that can be developed as of right within a multi-family zoning district, made in accordance with the requirements of section 5.b below.

“Multi-family zoning district” means a zoning district, including a base district or an overlay district, in which multi-family housing is allowed as of right; provided that the district shall be in a fixed location or locations, and shown on a map that is part of the zoning ordinance or by-law.

“One Stop Application” means the single application portal for the Community One Stop for Growth through which (i) the Executive Office of Housing and Economic Development considers requests for funding from the MassWorks infrastructure program; (ii) EOHLC considers requests for funding from the Housing Choice Initiative, (iii) EOED, EOHLC and other state agencies consider requests for funding from other discretionary grant programs.

"Private rights-of-way" means land area within which private streets, roads and other ways have been laid out and maintained, to the extent such land areas can be reasonably identified by examination of available tax parcel data.

"Publicly-owned land" means (i) any land owned by the United States or a federal agency or authority; (ii) any land owned by the Commonwealth of Massachusetts or a state agency or authority; and (iii) any land owned by a municipality or municipal board or authority.

"Public rights-of-way" means land area within which public streets, roads and other ways have been laid out and maintained, to the extent such land areas can be reasonably identified by examination of available tax parcel data.

"Rapid transit community" means an MBTA community that has within its borders at least 100 acres of developable station area associated with one or more subway stations, or MBTA Silver Line bus rapid transit stations.

"Residential dwelling unit" means a single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.

"Section 3A" means section 3A of the Zoning Act.

"Sensitive land" means developable land that, due to its soils, slope, hydrology, or other physical characteristics, has significant conservation values that could be impaired, or vulnerabilities that could be exacerbated, by the development of multi-family housing. It also includes locations where multi-family housing would be at increased risk of damage caused by flooding. Sensitive land includes, but is not limited to, wetland buffer zones extending beyond the title 5 setback area; land subject to flooding that is not a wetland resource area; priority habitat for rare or threatened species; DEP-approved wellhead protection areas in which development may be restricted, but is not prohibited (Zone II and interim wellhead protection areas); and land areas with prime agricultural soils that are in active agricultural use.

"Site plan review" means a process established by local ordinance or by-law by which a local board reviews, and potentially imposes conditions on, the appearance and layout of a specific project prior to the issuance of a building permit.

"Subway station" means any of the stops along the MBTA Red Line, Green Line, Orange Line, or Blue Line, including any extensions to such lines now under construction and scheduled to begin service before the end of 2023.

"Transit station" means an MBTA subway station, commuter rail station, ferry terminal or bus station.

"Transit station area" means the land area within 0.5 miles of a transit station.

"Zoning Act" means chapter 40A of the Massachusetts General Laws.

3. General Principles of Compliance

These compliance guidelines describe how an MBTA community can comply with the requirements of Section 3A. The guidelines specifically address:

- What it means to allow multi-family housing "as of right."
- The metrics that determine if a multi-family zoning district is "of reasonable size."
- How to determine if a multi-family zoning district has 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.
- The meaning of Section 3A's mandate that "such multi-family housing shall be without age restrictions and shall be suitable for families with children."
- The extent to which MBTA communities have flexibility to choose the location of a multi-family zoning district.

The following general principles have informed the more specific compliance criteria that follow:

- MBTA communities with subway stations, commuter rail stations and other transit stations benefit from having these assets located within their boundaries and should provide opportunity for multi-family housing development around these assets. MBTA communities with no transit stations within their boundaries benefit from proximity to transit stations in nearby communities.
- The multi-family zoning districts required by Section 3A should encourage the development of multi-family housing projects of a scale, density and aesthetic that are compatible with existing surrounding uses, and minimize impacts to sensitive land.
- "Reasonable size" is a relative rather than an absolute determination. Because of the diversity of MBTA communities, a multi-family zoning district that is "reasonable" in one city or town may not be reasonable in another city or town.
- When possible, multi-family zoning districts should be in areas that have safe, accessible, and convenient access to transit stations for pedestrians and bicyclists.

4. Allowing Multi-Family Housing "As of Right"

To comply with Section 3A, a multi-family zoning district must allow multi-family housing "as of right," meaning that the construction and occupancy of multi-family housing is allowed in that district without the need for a special permit, variance, zoning amendment, waiver, or other discretionary approval. EOHLC will determine whether zoning provisions allow for multi-family housing as of right consistent with the following guidelines.

a. Site plan review

The Zoning Act does not establish nor recognize site plan review as an independent method of regulating land use. However, the Massachusetts courts have recognized site plan review as a permissible regulatory tool, including for uses that are permitted as of right. The court decisions establish that when site plan review is required for a use permitted as of right, site plan review involves the regulation of a use and not its outright prohibition. The scope of review is therefore limited to imposing reasonable terms and conditions on the proposed use, consistent with applicable case law.[1] These guidelines similarly recognize that site plan review may be required for multi-family housing projects that are allowed as of right, within the parameters established by the applicable case law. Site plan approval may regulate matters such as vehicular access and circulation on a site, architectural design of a building, and screening of adjacent properties. Site plan review should not unreasonably delay a project nor impose conditions that make it infeasible or impractical to proceed with a project that is allowed as of right and complies with applicable dimensional regulations.

b. Affordability requirements

Section 3A does not include any express requirement or authorization for an MBTA community to require affordable units in a multi-family housing project that is allowed as of right. It is a common practice in many cities and towns to require affordable units in a multi-family project that requires a special permit, or as a condition for building at greater densities than the zoning otherwise would allow. These inclusionary zoning requirements serve the policy goal of increasing affordable housing production. If affordability requirements are excessive, however, they can make it economically infeasible to construct new multi-family housing.

For purposes of making compliance determinations with Section 3A, EOHLC will consider an affordability requirement to be consistent with as of right zoning as long as the zoning requires not more than 10 percent of the units in a project to be affordable units, and the cap on the income of families or individuals who are eligible to occupy the affordable units is not less than 80 percent of area median income. Notwithstanding the foregoing, EOHLC may, in its discretion, approve a greater percentage of affordable units, or deeper affordability for some or all of the affordable units, in either of the following circumstances:

(i) The affordability requirements applicable in the multi-family zoning district are reviewed and approved by EOHLC as part of a smart growth district under chapter 40R, or under another zoning incentive program administered by EOHLC; or

(ii) The affordability requirements applicable in the multi-family zoning district are supported by an economic feasibility analysis, prepared for the municipality by a qualified and independent third party acceptable to EOHLC, and using a methodology and format acceptable to EOHLC. The analysis must demonstrate that a reasonable

[1] *See, e.g.*, *Y.D. Dugout, Inc. v. Board of Appeals of Canton,* 357 Mass. 25 (1970); *Prudential Insurance Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986); *Osberg v. Planning Bd. of Sturbridge,* 44 Mass. App. Ct. 56, 59 (1997) (Planning Board "may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use").

variety of multi-family housing types can be feasibly developed at the proposed affordability levels, taking into account the densities allowed as of right in the district, the dimensional requirements applicable within the district, and the minimum number of parking spaces required.

In no case will EOHLC approve alternative affordability requirements that require more than 20 percent of the units in a project to be affordable units, except in a smart growth zoning district under chapter 40R with a 25 percent affordability requirement approved and adopted prior to the issuance of these guidelines, including any such existing district that is expanded or amended to comply with these guidelines.

c. *Other requirements that do not apply uniformly in the multi-family zoning district*

Zoning will not be deemed compliant with Section 3A's requirement that multi-family housing be allowed as of right if the zoning imposes requirements on multi-family housing that are not generally applicable to other uses. The following are examples of requirements that would be deemed to be inconsistent with "as of right" use: (i) a requirement that multi-family housing meet higher energy efficiency standards than other uses; (ii) a requirement that a multi-family use achieve a third party certification that is not required for other uses in the district; and (iii) a requirement that multi-family use must be combined with commercial or other uses on the same lot or as part of a single project. Mixed use projects may be allowed as of right in a multi-family zoning district, as long as multi-family housing is separately allowed as of right.

5. Determining "Reasonable Size"

In making determinations of "reasonable size," EOHLC will take into consideration both the land area of the multi-family zoning district, and the multi-family zoning district's multi-family unit capacity.

a. *Minimum land area*

A zoning district is a specifically delineated land area with uniform regulations and requirements governing the use of land and the placement, spacing, and size of buildings. For purposes of compliance with Section 3A, a multi-family zoning district should be a neighborhood-scale district, not a single development site on which the municipality is willing to permit a particular multi-family project. EOHLC will certify compliance with Section 3A only if an MBTA community's multi-family zoning district meets the minimum land area applicable to that MBTA community, if any, as set forth in Appendix 1. The minimum land area for each MBTA community has been determined as follows:

(i) In rapid transit communities, commuter rail communities, and adjacent communities, the minimum land area of the multi-family zoning district is 50 acres, or 1.5% of the developable land in an MBTA community, whichever is *less.* In certain cases, noted in Appendix 1, a smaller minimum land area applies.

(ii) In adjacent small towns, there is no minimum land area. In these communities, the multi-family zoning district may comprise as many or as few acres as the community

determines is appropriate, as long as the district meets the applicable minimum multi-family unit capacity and the minimum gross density requirements.

In all cases, at least half of the multi-family zoning district land areas must comprise contiguous lots of land. No portion of the district that is less than 5 contiguous acres land will count toward the minimum size requirement. If the multi-family unit capacity and gross density requirements can be achieved in a district of fewer than 5 acres, then the district must consist entirely of contiguous lots.

b. *Minimum multi-family unit capacity*

A reasonably sized multi-family zoning district must also be able to accommodate a reasonable number of multi-family housing units as of right. For purposes of determinations of compliance with Section 3A, EOHLC will consider a reasonable multi-family unit capacity for each MBTA community to be a specified percentage of the total number of housing units within the community, with the applicable percentage based on the type of transit service in the community, as shown on Table 1:

Table 1.

Category	**Percentage of total housing units**
Rapid transit community	25%
Commuter rail community	15%
Adjacent community	10%
Adjacent small town	5%

To be deemed in compliance with Section 3A, each MBTA community must have a multi-family zoning district with a multi-family unit capacity equal to or greater than the minimum unit capacity shown for it in Appendix 1. The minimum multi-family unit capacity for each MBTA community has been determined as follows:

(i) First, by multiplying the number of housing units in that community by 0.25, 0.15, 0.10, or .05 depending on the MBTA community category. For example, a rapid transit community with 7,500 housing units is required to have a multi-family zoning district with a multi-family unit capacity of 7,500 x 0.25 = 1,875 multi-family units. For purposes of these guidelines, the number of total housing units in each MBTA community has been established by reference to the most recently published United States Decennial Census of Population and Housing.

(ii) Second, when there is a minimum land area applicable to an MBTA community, by multiplying that minimum land area (up to 50 acres) by Section 3A's minimum gross density requirement of 15 units per acre. The product of that multiplication creates a floor on multi-family unit capacity. For example, an MBTA community with a minimum land area of 40 acres must have a district with a multi-family unit capacity of at least 600 (40 x 15) units.

(iii) The minimum unit capacity applicable to each MBTA community is *the greater of* the numbers resulting from steps (i) and (ii) above, but subject to the following limitation: In no case does the minimum multi-family unit capacity exceed 25% of the total housing

units in that MBTA community.

Example: The minimum multi-family unit capacity for an adjacent community with 1,000 housing units and a minimum land area of 50 acres is determined as follows:(i) first, by multiplying 1,000 x .1 = 100 units; (ii) second, by multiplying 50 x 15 = 750 units;(iii) by taking the larger number, but adjusting that number down, if necessary, so that unit capacity is no more than 25% of 1,000 = 250 units. In this case, the adjustment in step (iii) results in a minimum unit capacity of 250 units.

c. Reasonable Size – Consideration Given to Unit Capacity in Mixed-Use Development Districts

In making determinations of whether an MBTA Community has a multi-family zoning district of "reasonable size" under this section, EOHLC shall also take into consideration the existence and impact of mixed-use development zoning districts, subject to the requirements below.

EOHLC shall take these mixed-use development districts into consideration as reducing the unit capacity needed for a multi-family zoning district to be "reasonable" (as listed in Appendix I) where:

(i) the mixed-use development zoning district is in an eligible location where existing village-style or downtown development is essential to preserve pedestrian access to amenities;

(ii) there are no age restrictions or limits on unit size, number of bedrooms, bedroom size or number of occupants and the residential units permitted are suitable for families with children;

(iii) mixed-used development in the district is allowed "as of right" as that phrase has been interpreted by EOHLC (for example, in section 4(c) with respect to affordability requirements);

(iv) the requirement for non-residential uses is limited to the ground floor of buildings, and in no case represents a requirement that more than thirty-three percent of the floor area of a building, lot, or project must be for non-residential uses;

(v) the requirement for non-residential uses does not preclude a minimum of three residential dwelling units per lot;

(vi) the requirement for non-residential uses allows a broad mix of non-residential uses as-of-right in keeping with the nature of the area; and

(vii) there are no minimum parking requirements associated with the non-residential uses allowed as of right.

An MBTA community asking to reduce the unit capacity requirement for its multi-family zoning district(s) based on the unit capacity for one or more mixed-use development districts shall submit to EOHLC, on a form to be provided by EOHLC, a request for a determination that the mixed-use development district is in an eligible location meeting the requirements of subparagraph (i). This request must be submitted at least 90 days prior to the vote of the MBTA community's legislative body.

An MBTA community also may submit a broader inquiry as to Section 3A compliance in accordance with section 9(b). EOHLC shall respond prior to the vote of the MBTA community's legislative body if the request is timely submitted.

In any community with both a multi-family zoning district and a mixed-use development district that meets these considerations, the unit capacity requirement for the multi-family zoning district listed in Appendix I shall be reduced by the lesser of

(i) the unit capacity of residential dwelling units in the mixed-use development district or subdistrict (as calculated by EOHLC using a methodology similar to that in section 5(d) which takes into account the impact of non-residential uses), or

(ii) twenty five percent of the unit capacity requirement listed in Appendix I. This consideration shall not affect the minimum land area acreage or contiguity requirements for a multi-family zoning district otherwise required by these Guidelines.

d. *Methodology for determining a multi-family zoning district's multi-family unit capacity*

MBTA communities seeking a determination of compliance must use the EOHLC compliance model to provide an estimate of the number of multi-family housing units that can be developed as of right within the multi-family zoning district. The multi-family unit capacity of an existing or proposed district shall be calculated using the unit capacity worksheet described in Appendix 2. This worksheet produces an estimate of a district's multi-family unit capacity using inputs such as the amount of developable land in the district, the dimensional requirements applicable to lots and buildings (including, for example, height limitations, lot coverage limitations, and maximum floor area ratio), and the parking space requirements applicable to multi-family uses.

Minimum unit capacity is a measure of whether a multi-family zoning district is of a reasonable size, not a requirement to produce housing units. Nothing in Section 3A or these guidelines should be interpreted as a mandate to construct a specified number of housing units, nor as a housing production target. Demonstrating compliance with the minimum multi-family unit capacity requires only that an MBTA community show that the zoning allows multi-family housing as of right and that a sufficient number of multi-family housing units could be added to or replace existing uses and structures over time—even though such additions or replacements may be unlikely to occur soon.

If an MBTA community has two or more zoning districts in which multi-family housing is allowed as of right, then two or more districts may be considered cumulatively to meet the minimum land area and minimum multi-family unit capacity requirements, as long as each district independently complies with Section 3A's other requirements.

e. *Water and wastewater infrastructure within the multi-family zoning district*

MBTA communities are encouraged to consider the availability of water and wastewater infrastructure when selecting the location of a new multi-family zoning district. But compliance with Section 3A does not require a municipality to install new water or wastewater infrastructure, or add to the capacity of existing infrastructure, to accommodate future multi-family housing production within

the multi-family zoning district. In most cases, multi-family housing can be created using private septic and wastewater treatment systems that meet state environmental standards. Where public systems currently exist, but capacity is limited, private developers may be able to support the cost of necessary water and sewer extensions. While the zoning must allow for gross average density of at least 15 units per acre, there may be other legal or practical limitations, including lack of infrastructure or infrastructure capacity, that result in actual housing production at lower density than the zoning allows.

The multi-family unit capacity analysis does not need to take into consideration limitations on development resulting from existing water or wastewater infrastructure within the multi-family zoning district, or, in areas not served by public sewer, any applicable limitations under title 5 of the state environmental code. 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.

6. Minimum Gross Density

Section 3A expressly requires that a multi-family zoning district—not just the individual lots of land within the district—must 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. The Zoning Act defines "gross density" as "a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses."

a. *District-wide gross density*

To meet the district-wide gross density requirement, the dimensional restrictions and parking requirements for the multi-family zoning district must allow for a gross density of 15 units per acre of land within the district. By way of example, to meet that requirement for a 40-acre multi-family zoning district, the zoning must allow for at least 15 multi-family units per acre, or a total of at least 600 multi-family units.

For purposes of determining compliance with Section 3A's gross density requirement, the EOHLC compliance model will not count in the denominator any excluded land located within the multi-family zoning district, except public rights-of-way, private rights-of-way, and publicly-owned land used for recreational, civic, commercial, and other nonresidential uses. This method of calculating minimum gross density respects the Zoning Act's definition of gross density—"a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses"—while making it unnecessary to draw patchwork multi-family zoning districts that carve out wetlands and other types of excluded land that are not developed or developable.

b. *Achieving district-wide gross density by sub-districts*

Zoning ordinances and by-laws typically limit the unit density on individual lots. To comply with Section 3A's gross density requirement, an MBTA community may establish reasonable sub-

districts within a multi-family zoning district, with different density limits for each sub-district, provided that the gross density for the district as a whole meets the statutory requirement of not less than 15 multi-family units per acre. EOHLC will review sub-districts to ensure that the density allowed as of right in each sub-district is reasonable and not intended to frustrate the purpose of Section 3A by allowing projects of a such high density that they are not likely to be constructed.

c. *Wetland and septic considerations relating to density*

Section 3A provides that a district of reasonable size shall 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." This directive means that even though the zoning district must permit 15 units per acre as of right, any multi-family housing produced within the district is subject to, and must comply with, the state wetlands protection act and title 5 of the state environmental code—even if such compliance means a proposed project will be less dense than 15 units per acre.

7. Determining Suitability for Families with Children

Section 3A states that a compliant multi-family zoning district must allow multi-family housing as of right, and that "such multi-family housing shall be without age restrictions and shall be suitable for families with children." EOHLC will deem a multi-family zoning district to comply with these requirements as long as the zoning does not require multi-family uses to include units with age restrictions, and does not limit or restrict the size of the units, cap the number of bedrooms, the size of bedrooms, or the number of occupants, or impose a minimum age of occupants. Limits, if any, on the size of units or number of bedrooms established by state law or regulation are not relevant to Section 3A or to determinations of compliance made pursuant to these guidelines.

8. Location of Districts

a. General rule for determining the applicability of Section 3A's location requirement

Section 3A states that a compliant multi-family zoning district shall "be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable." When an MBTA community has only a small amount of transit station area within its boundaries, it may not be possible or practical to locate all of the multi-family zoning district within 0.5 miles of a transit station. Transit station area may not be a practical location for a multi-family zoning district if it does not include developable land where multi-family housing can actually be constructed. Therefore, for purposes of determining compliance with Section 3A, EOHLC will consider the statute's location requirement to be "applicable" to a particular MBTA community only if that community has within its borders at least 100 acres of developable station area. EOHLC will require more or less of the multi-family zoning district to be located within transit station areas depending on how much total developable station area is in that community, as shown on Table 2:

Table 2.

Total developable station area within the MBTA community (acres)	**Portion of the multi-family zoning district that must be within a transit station area**
0-100	0%
101-250	20%
251-400	40%
401-600	50%
601-800	75%
801+	90%

The percentages specified in this table apply to both the minimum land area and the minimum multi-family unit capacity. For example, in an MBTA community that has a total of 500 acres of transit station area within its boundaries, a multi-family zoning district will comply with Section 3A's location requirement if at least 50 percent of the district's minimum land area is located within the transit station area, *and* at least 50 percent of the district's minimum multi-family unit capacity is located within the transit station area.

A community with transit station areas associated with more than one transit station may locate the multi-family zoning district in any of the transit station areas. For example, a rapid transit community with transit station area around a subway station in one part of town, and transit station area around a commuter rail station in another part of town, may locate its multi-family zoning district in either or both transit station areas.

b. MBTA communities with limited or no transit station area

When an MBTA community has less than 100 acres of developable station area within its boundaries, the MBTA community may locate the multi-family zoning district anywhere within its boundaries. To encourage transit-oriented multi-family housing consistent with the general intent of Section 3A, MBTA communities are encouraged to consider locating the multi-family zoning district in an area with reasonable access to a transit station based on existing street patterns, pedestrian connections, and bicycle lanes, or in an area that qualifies as an "eligible location" as defined in Chapter 40A—for example, near an existing downtown or village center, near a regional transit authority bus stop or line, or in a location with existing under-utilized facilities that can be redeveloped into new multi-family housing.

c. General guidance on district location applicable to all MBTA communities

When choosing the location of a new multi-family zoning district, every MBTA community should consider how much of a proposed district is sensitive land on which permitting requirements and other considerations could make it challenging or inadvisable to construct multi-family housing. For example, an MBTA community may want to avoid including in a multi-family zoning district areas that are subject to flooding, or are known habitat for rare or threatened species, or have prime agricultural soils in active agricultural use.

9. Determinations of Compliance

Section 3A provides that any MBTA community that fails to comply with Section 3A's requirements will be ineligible for funding from any of the listed funding sources. EOHLC will make determinations of compliance with Section 3A in accordance with these guidelines to inform state agency decisions on which MBTA communities are eligible to receive funding from the listed funding sources. The following discretionary grant programs will take compliance with Section 3A into consideration when making grant award recommendations:

i. Community Planning Grants, EOHLC,
ii. Massachusetts Downtown Initiative, EOED,
iii. Urban Agenda, EOED,
iv. Rural and Small Town Development Fund, EOED,
v. Brownfields Redevelopment Fund, MassDevelopment,
vi. Site Readiness Program, MassDevelopment,
vii. Underutilized Properties Program, MassDevelopment,
viii. Collaborative Workspace Program, MassDevelopment,
ix. Real Estate Services Technical Assistance, MassDevelopment,
x. Commonwealth Places Programs, MassDevelopment,
xi. Land Use Planning Grants, EOEEA,
xii. Local Acquisitions for Natural Diversity (LAND) Grants, EOEEA, and
xiii. Municipal Vulnerability Preparedness (MVP) Planning and Project Grants, EOEEA

Determinations of compliance also may inform other funding decisions by EOED, EOHLC, the MBTA and other state agencies which consider local housing policies when evaluating applications for discretionary grant programs or making other discretionary funding decisions.

EOHLC interprets Section 3A as allowing every MBTA community a reasonable opportunity to enact zoning amendments as needed to come into compliance. Accordingly, EOHLC will recognize both *interim* compliance, which means an MBTA community is taking active steps to enact a multi-family zoning district that complies with Section 3A, and *district* compliance, which is achieved when EOHLC determines that an MBTA community has a multi-family zoning district that complies with Section 3A. The requirements for interim and district compliance are described in more detail below.

Table 3.

Transit Category (# of municipalities)	Deadline to Submit Action Plan	Deadline to Submit District Compliance Application
Rapid transit community (12)	January 31, 2023	December 31, 2023
Commuter rail community (71)	January 31, 2023	December 31, 2024
Adjacent community (58)	January 31, 2023	December 31, 2024
Adjacent small town (34)	January 31, 2023	December 31, 2025

a. Process to achieve interim compliance

Many MBTA communities do not currently have a multi-family zoning district of reasonable size that complies with the requirements of Section 3A. Prior to achieving district compliance (but no later than the deadlines set forth in Table 3), these MBTA communities can achieve interim compliance by taking the following affirmative steps towards the creation of a compliant multi-family zoning district.

i. *Creation and submission of an action plan.* An MBTA community seeking to achieve interim compliance must first submit an action plan on a form to be provided by EOHLC. An MBTA community action plan must provide information about current zoning, past planning for multi-family housing, if any, and potential locations for a multi-family zoning district. The action plan also will require the MBTA community to establish a timeline for various actions needed to create a compliant multi-family zoning district.

ii. *EOHLC approval of an action plan*. EOHLC will review each submitted action plan for consistency with these guidelines, including but not limited to the timelines in Table 3. If EOHLC determines that the MBTA community's action plan is reasonable and will lead to district compliance in a timely manner, EOHLC will issue a determination of interim compliance. EOHLC may require modifications to a proposed action plan prior to approval.

iii. *Implementation of the action plan*. After EOHLC approves an action plan and issues a determination of interim compliance, an MBTA community must diligently implement the action plan. EOHLC may revoke a determination of interim compliance if an MBTA community has not made sufficient progress in implementing an approved action plan. EOHLC and EOED will review an MBTA community's progress in implementing its action plan prior to making an award of funds under the Housing Choice Initiative and Massworks infrastructure program.

iv. *Deadlines for submitting action plans*. To achieve interim compliance for grants made through the 2023 One Stop Application, action plans must be submitted by no later than January 31, 2023. An MBTA community that does not submit an action plan by that date may not receive a EOHLC determination of interim compliance in time to receive an award of funds from the listed funding sources in 2023. An MBTA community that does not achieve interim compliance in time for the 2023 One Stop Application may submit an action plan to become eligible for a subsequent round of the One Stop Application, provided that an action plan must be submitted by no later than January 31 of the year in which the MBTA community seeks to establish grant eligibility; and provided further that no action plan may be submitted or approved after the applicable district compliance application deadline set forth in Table 3.

b. *Assistance for communities implementing an action plan.*

MBTA communities are encouraged to communicate as needed with EOHLC staff throughout the process of implementing an action plan, and may inquire about whether a proposed multi-family zoning district complies with Section 3A prior to a vote by the municipal legislative body to create or

modify such a district. Such requests shall be made on a form to be provided by EOHLC. If a request is submitted at least 90 days prior to the vote of the legislative body, EOHLC shall respond prior to the vote.

c. Requests for determination of district compliance

When an MBTA community believes it has a multi-family zoning district that complies with Section 3A, it may request a determination of district compliance from EOHLC. Such a request may be made for a multi-family zoning district that was in existence on the date that Section 3A became law, or for a multi-family zoning district that was created or amended after the enactment of Section 3A. In either case, such request shall be made on an application form required by EOHLC and shall include, at a minimum, the following information. Municipalities will need to submit:

(i) A certified copy of the municipal zoning ordinance or by-law and zoning map, including all provisions that relate to uses and structures in the multi-family zoning district.
(ii) An estimate of multi-family unit capacity using the compliance model.
(iii) GIS shapefile for the multi-family zoning district.
(iv) In the case of a by-law enacted by a town, evidence that the clerk has submitted a copy of the adopted multi-family zoning district to the office of the Attorney General for approval as required by state law, or evidence of the Attorney General's approval.

After receipt of a request for determination of district compliance, EOHLC will notify the requesting MBTA community within 30 days if additional information is required to process the request. Upon reviewing a complete application, EOHLC will provide the MBTA community a written determination either stating that the existing multi-family zoning district complies with Section 3A, or identifying the reasons why the multi-family zoning district fails to comply with Section 3A and the steps that must be taken to achieve compliance. An MBTA community that has achieved interim compliance prior to requesting a determination of district compliance shall remain in interim compliance for the period during which a request for determination of district compliance, with all required information, is pending at EOHLC.

10. Ongoing Obligations; Rescission of a Determination of Compliance

After receiving a determination of compliance, an MBTA community must notify EOHLC in writing of any zoning amendment or proposed zoning amendment that affects the compliant multi-family zoning district, or any other by-law, ordinance, rule or regulation that limits the development of multi-family housing in the multi-family zoning district. EOHLC may rescind a determination of district compliance, or require changes to a multi-family zoning district to remain in compliance, if EOHLC determines that:

(i) The MBTA community submitted inaccurate information in its application for a determination of compliance;
(ii) The MBTA community failed to notify EOHLC of a zoning amendment that affects the multi-family zoning district;

(iii) The MBTA community enacts or amends any by-law or ordinance, or other rule or regulation, that materially alters the minimum land area and/or the multi-family unit capacity in the multi-family zoning district;

(iv) A board, authority or official in the MBTA community does not issue permits, or otherwise acts or fails to act, to allow construction of a multi-family housing project that is allowed as of right in the multi-family zoning district (or any mixed-use zoning development district taken into account in determining the required multi-family unit capacity in the multi-family zoning district);

(v) The MBTA community takes other action that causes the multi-family zoning district to no longer comply with Section 3A; or

(vi) An MBTA community with an approved multi-family zoning district has changed transit category as a result of a newly opened or decommissioned transit station, or the establishment of permanent, regular service at a transit station where there was formerly intermittent or event-based service.

11. Changes to MBTA Service

Section 3A applies to the 177 MBTA communities identified in section 1A of the Zoning Act and section 1 of chapter 161A of the General Laws. When MBTA service changes, the list of MBTA communities and/or the transit category assignments of those MBTA communities in Appendix 1 may change as well.

The transit category assignments identified in Appendix 1 of these guidelines reflect certain MBTA service changes that will result from new infrastructure now under construction in connection with the South Coast Rail and Green Line Extension projects. These service changes include the opening of new Green Line stations and commuter rail stations, as well as the elimination of regular commuter rail service at the Lakeville station. These changes are scheduled to take effect in all cases a year or more before any municipal district compliance deadline. Affected MBTA communities are noted in Appendix 1.

Municipalities that are not now identified as MBTA communities and may be identified as such in the future are not addressed in these guidelines or included in Appendix 1. New MBTA communities will be addressed with revisions to Appendix 1, and separate compliance timelines, in the future.

Future changes to Silver Line routes or stations may change district location requirements when expanded high-capacity service combined with new facilities creates a bus station where there was not one before. Changes to other bus routes, including the addition or elimination of bus stops or reductions or expansions of bus service levels, do not affect the transit categories assigned to MBTA communities and will not affect location requirements for multi-family zoning districts. Any future changes to MBTA transit service, transit routes and transit service levels are determined by the MBTA Board of Directors consistent with the MBTA's Service Delivery Policy.

List of Appendices:

Appendix 1: MBTA Community Categories and Requirements
Appendix 2: Compliance Methodology/Model

Appendix 1:

MBTA Community Categories and Requirements

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Abington	Commuter Rail	6,811	1,022	50	307	40%
Acton	Commuter Rail	9,219	1,383	50	246	20%
Amesbury	Adjacent Community	7,889	789	50	-	0%
Andover	Commuter Rail	13,541	2,031	50	587	50%
Arlington	Adjacent Community	20,461	2,046	32	58	0%
Ashburnham	Adjacent Small Town	2,730	137	-	-	0%
Ashby	Adjacent Small Town	1,243	62	-	-	0%
Ashland	Commuter Rail	7,495	1,124	50	272	40%
Attleboro	Commuter Rail	19,097	2,865	50	467	50%
Auburn	Adjacent Community	6,999	750	50	-	0%
Ayer	Commuter Rail	3,807	750	50	284	40%
Bedford	Adjacent Community	5,444	750	50	-	0%
Bellingham	Adjacent Community	6,749	750	50	-	0%
Belmont	Commuter Rail	10,882	1,632	27	502	50%
Berkley	Adjacent Small Town	2,360	118	-	79	0%
Beverly	Commuter Rail	17,887	2,683	50	1,435	90%
Billerica	Commuter Rail	15,485	2,323	50	308	40%
Bourne	Adjacent Small Town	11,140	557	-	-	0%
Boxborough	Adjacent Small Town	2,362	118	-	-	0%
Boxford	Adjacent Small Town	2,818	141	-	-	0%
Braintree	Rapid Transit	15,077	3,769	50	485	50%
Bridgewater	Commuter Rail	9,342	1,401	50	181	20%
Brockton	Commuter Rail	37,304	5,596	50	995	90%
Brookline	Rapid Transit	27,961	6,990	41	1,349	90%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Burlington	Adjacent Community	10,431	1,043	50	-	0%
Cambridge	Rapid Transit	53,907	13,477	32	1,392	90%
Canton	Commuter Rail	9,930	1,490	50	451	50%
Carlisle	Adjacent Small Town	1,897	95	-	-	0%
Carver	Adjacent Small Town	4,701	235	-	-	0%
Chelmsford	Adjacent Community	14,769	1,477	50	-	0%
Chelsea	Rapid Transit	14,554	3,639	14	608	75%
Cohasset	Commuter Rail	3,341	638	43	241	20%
Concord	Commuter Rail	7,295	1,094	50	519	50%
Danvers	Adjacent Community	11,763	1,176	50	-	0%
Dedham	Commuter Rail	10,459	1,569	49	507	50%
Dover	Adjacent Small Town	2,046	102	-	-	0%
Dracut	Adjacent Community	12,325	1,233	50	-	0%
Duxbury	Adjacent Community	6,274	750	50	-	0%
East Bridgewater	Adjacent Community	5,211	750	50	-	0%
Easton	Adjacent Community	9,132	913	50	-	0%
Essex	Adjacent Small Town	1,662	83	-	-	0%
Everett	Rapid Transit	18,208	4,552	22	200	20%
Fall River	Commuter Rail	44,346	6,652	50	324	40%
Fitchburg	Commuter Rail	17,452	2,618	50	601	75%
Foxborough	Adjacent Community	7,682	768	50	-	0%
Framingham	Commuter Rail	29,033	4,355	50	270	40%
Franklin	Commuter Rail	12,551	1,883	50	643	75%
Freetown	Commuter Rail	3,485	750	50	346	40%
Georgetown	Adjacent Community	3,159	750	50	-	0%
Gloucester	Commuter Rail	15,133	2,270	50	430	50%
Grafton	Adjacent Community	7,760	776	50	82	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Groton	Adjacent Small Town	4,153	208	-	-	0%
Groveland	Adjacent Small Town	2,596	130	-	-	0%
Halifax	Commuter Rail	3,107	750	50	300	40%
Hamilton	Commuter Rail	2,925	731	49	184	20%
Hanover	Adjacent Community	5,268	750	50	-	0%
Hanson	Commuter Rail	3,960	750	50	218	20%
Harvard	Adjacent Small Town	2,251	113	-	-	0%
Haverhill	Commuter Rail	27,927	4,189	50	415	50%
Hingham	Commuter Rail	9,930	1,490	50	757	75%
Holbrook	Commuter Rail	4,414	662	41	170	20%
Holden	Adjacent Community	7,439	750	50	-	0%
Holliston	Adjacent Community	5,562	750	50	-	0%
Hopkinton	Adjacent Community	6,645	750	50	79	0%
Hull	Adjacent Community	5,856	586	7	34	0%
Ipswich	Commuter Rail	6,476	971	50	327	40%
Kingston	Commuter Rail	5,364	805	50	345	40%
Lakeville	Adjacent Small Town	4,624	231	-	30	0%
Lancaster	Adjacent Small Town	2,788	139	-	-	0%
Lawrence	Commuter Rail	30,008	4,501	39	271	40%
Leicester	Adjacent Small Town	4,371	219	-	-	0%
Leominster	Commuter Rail	18,732	2,810	50	340	40%
Lexington	Adjacent Community	12,310	1,231	50	-	0%
Lincoln	Commuter Rail	2,771	635	42	130	20%
Littleton	Commuter Rail	3,889	750	50	244	20%
Lowell	Commuter Rail	43,482	6,522	50	274	40%
Lunenburg	Adjacent Small Town	4,805	240	-	-	0%
Lynn	Commuter Rail	36,782	5,517	50	637	75%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Lynnfield	Adjacent Community	4,773	607	40	-	0%
Malden	Rapid Transit	27,721	6,930	31	484	50%
Manchester	Commuter Rail	2,433	559	37	305	40%
Mansfield	Commuter Rail	9,282	1,392	50	327	40%
Marblehead	Adjacent Community	8,965	897	27	-	0%
Marlborough	Adjacent Community	17,547	1,755	50	-	0%
Marshfield	Adjacent Community	11,575	1,158	50	-	0%
Maynard	Adjacent Community	4,741	474	21	-	0%
Medfield	Adjacent Community	4,450	750	50	-	0%
Medford	Rapid Transit	25,770	6,443	35	714	75%
Medway	Adjacent Community	4,826	750	50	-	0%
Melrose	Commuter Rail	12,614	1,892	25	774	75%
Merrimac	Adjacent Small Town	2,761	138	-	-	0%
Methuen	Adjacent Community	20,194	2,019	50	-	0%
Middleborough	Commuter Rail	9,808	1,471	50	260	40%
Middleton	Adjacent Community	3,359	750	50	-	0%
Millbury	Adjacent Community	5,987	750	50	-	0%
Millis	Adjacent Community	3,412	750	50	-	0%
Milton	Rapid Transit	9,844	2,461	50	404	50%
Nahant	Adjacent Small Town	1,680	84	-	-	0%
Natick	Commuter Rail	15,680	2,352	50	680	75%
Needham	Commuter Rail	11,891	1,784	50	1,223	90%
New Bedford	Commuter Rail	44,588	6,688	50	744	75%
Newbury	Adjacent Small Town	3,072	154	-	69	0%
Newburyport	Commuter Rail	8,615	1,292	35	213	20%
Newton	Rapid Transit	33,320	8,330	50	2,833	90%
Norfolk	Commuter Rail	3,601	750	50	333	40%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
North Andover	Adjacent Community	11,914	1,191	50	5	0%
North Attleborough	Adjacent Community	12,551	1,255	50	-	0%
North Reading	Adjacent Community	5,875	750	50	-	0%
Northborough	Adjacent Community	5,897	750	50	-	0%
Northbridge	Adjacent Community	6,691	750	50	-	0%
Norton	Adjacent Community	6,971	750	50	-	0%
Norwell	Adjacent Community	3,805	750	50	-	0%
Norwood	Commuter Rail	13,634	2,045	50	861	90%
Paxton	Adjacent Small Town	1,689	84	-	-	0%
Peabody	Adjacent Community	23,191	2,319	50	-	0%
Pembroke	Adjacent Community	7,007	750	50	-	0%
Plymouth	Adjacent Community	28,074	2,807	50	-	0%
Plympton	Adjacent Small Town	1,068	53	-	-	0%
Princeton	Adjacent Small Town	1,383	69	-	-	0%
Quincy	Rapid Transit	47,009	11,752	50	1,222	90%
Randolph	Commuter Rail	12,901	1,935	48	182	20%
Raynham	Adjacent Community	5,749	750	50	-	0%
Reading	Commuter Rail	9,952	1,493	43	343	40%
Rehoboth	Adjacent Small Town	4,611	231	-	-	0%
Revere	Rapid Transit	24,539	6,135	27	457	50%
Rochester	Adjacent Small Town	2,105	105	-	-	0%
Rockland	Adjacent Community	7,263	726	47	-	0%
Rockport	Commuter Rail	4,380	657	32	252	40%
Rowley	Commuter Rail	2,405	601	40	149	20%
Salem	Commuter Rail	20,349	3,052	41	266	40%
Salisbury	Adjacent Community	5,305	750	50	-	0%
Saugus	Adjacent Community	11,303	1,130	50	11	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Scituate	Commuter Rail	8,260	1,239	50	373	40%
Seekonk	Adjacent Community	6,057	750	50	-	0%
Sharon	Commuter Rail	6,581	987	50	261	40%
Sherborn	Adjacent Small Town	1,562	78	-	-	0%
Shirley	Commuter Rail	2,599	650	43	338	40%
Shrewsbury	Adjacent Community	14,966	1,497	50	52	0%
Somerville	Rapid Transit	36,269	9,067	24	1,314	90%
Southborough	Commuter Rail	3,763	750	50	167	20%
Sterling	Adjacent Small Town	3,117	156	-	-	0%
Stoneham	Adjacent Community	10,159	1,016	27	12	0%
Stoughton	Commuter Rail	11,739	1,761	50	317	40%
Stow	Adjacent Small Town	2,770	139	-	-	0%
Sudbury	Adjacent Community	6,556	750	50	-	0%
Sutton	Adjacent Small Town	3,612	181	-	-	0%
Swampscott	Commuter Rail	6,362	954	20	236	20%
Taunton	Commuter Rail	24,965	3,745	50	269	40%
Tewksbury	Adjacent Community	12,139	1,214	50	-	0%
Topsfield	Adjacent Small Town	2,358	118	-	-	0%
Townsend	Adjacent Small Town	3,566	178	-	-	0%
Tyngsborough	Adjacent Community	4,669	750	50	-	0%
Upton	Adjacent Small Town	2,995	150	-	-	0%
Wakefield	Commuter Rail	11,305	1,696	36	630	75%
Walpole	Commuter Rail	10,042	1,506	50	638	75%
Waltham	Commuter Rail	26,545	3,982	50	470	50%
Wareham	Adjacent Community	12,967	1,297	50	-	0%
Watertown	Adjacent Community	17,010	1,701	24	27	0%
Wayland	Adjacent Community	5,296	750	50	-	0%

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area
Wellesley	Commuter Rail	9,282	1,392	50	921	90%
Wenham	Commuter Rail	1,460	365	24	111	20%
West Boylston	Adjacent Community	3,052	587	39	-	0%
West Bridgewater	Adjacent Small Town	2,898	145	-	-	0%
West Newbury	Adjacent Small Town	1,740	87	-	-	0%
Westborough	Commuter Rail	8,334	1,250	50	194	20%
Westford	Adjacent Community	9,237	924	50	-	0%
Westminster	Adjacent Small Town	3,301	165	-	30	0%
Weston	Commuter Rail	4,043	750	50	702	75%
Westwood	Commuter Rail	5,801	870	50	470	50%
Weymouth	Commuter Rail	25,419	3,813	50	713	75%
Whitman	Commuter Rail	5,984	898	37	242	20%
Wilmington	Commuter Rail	8,320	1,248	50	538	50%
Winchester	Commuter Rail	8,135	1,220	37	446	50%
Winthrop	Adjacent Community	8,821	882	12	14	0%
Woburn	Commuter Rail	17,540	2,631	50	702	75%
Worcester	Commuter Rail	84,281	12,642	50	290	40%
Wrentham	Adjacent Community	4,620	750	50	-	0%
			296,806			

* Minimum multi-family unit capacity for most communities will be based on the 2020 housing stock and the applicable percentage for that municipality's community type. In some cases, the minimum unit capacity is derived from an extrapolation of the required minimum land area multiplied by the statutory minimum gross density of 15 dwelling units per acre. In cases where the required unit capacity from these two methods would exceed 25% of the community's housing stock, the required unit capacity has instead been capped at that 25% level.

** Minimum land area is 50 acres for all communities in the rapid transit, commuter rail and adjacent community types. There is no minimum land area requirement for adjacent small towns. Where 50 acres exceeds 1.5% of the developable land area in a town, a cap has been instituted that sets minimum land area to 1.5% of developable land area in the town.

*** Developable station area is derived by taking the area of a half-mile circle around an MBTA commuter rail station, rapid transit station, or ferry terminal and removing any areas comprised of excluded land.

Community	Community category	2020 Housing Units	Minimum multi-family unit capacity*	Minimum land area**	Developable station area***	% of district to be located in station area

******** This Appendix was updated on 3/13/2023 to add two new MBTA communities (Fall River and New Bedford, which became MBTA communities on 1/1/2023)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0078

ATTORNEY GENERAL

vs.

TOWN OF MILTON and JOE ATCHUE, in his official capacity

RESERVATION AND REPORT

This matter came before the court, Georges, J., on a complaint in which the Attorney General sought declaratory, injunctive, and other relief. I hereby reserve and report this case for determination by the Supreme Judicial Court for the Commonwealth.

In her complaint, the Attorney General sought a declaration that G. L. c. 40A, § 3A (a), affirmatively obligates the Town of Milton (Town) to have a zoning bylaw providing for at least one district of reasonable size in which multi-family housing is permitted as of right, which district also satisfies the other requirements of § 3A (a) and the related "Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act" (Guidelines), issued by what is now the Executive Office of Housing and Livable Communities (EOHLC). Further, the Attorney General sought declarations to the effect that the Town has

failed to meet its obligations under the statute and the Guidelines, as well as injunctive and other relief compelling compliance.

The Attorney General moved the court to reserve and report this matter to the Supreme Judicial Court for the Commonwealth. The Town and Joe Atchue[1] opposed the motion, and a hearing was held. The defendants speculated that fact disputes may arise but did not point to any specific material fact in the Attorney General's complaint which they dispute. Rather, they argued that the case did not raise a novel issue, and they made a number of legal arguments, including (1) that the exclusive remedy against municipalities failing to comply with § 3A (a), is to be found in § 3A (b), which makes such municipalities ineligible for certain funds, and (2) that the Attorney General's Office lacks authority and standing to enforce compliance. In effect, the former is a legal argument that the statute permits the Town to "opt out" of the obligations described in § 3A (a) and the Guidelines.

[1] Atchue is sued only in his official capacity as the Town's Building Commissioner. See Porter v. Treasurer & Collector of Taxes of Worcester, 385 Mass. 335, 343 (1982), quoting Monell v. Department of Social Servs. of the City of N.Y., 436 U.S. 658, 690 n.55 (1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent").

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. Therefore, in my opinion, the matter would best be decided by the full court, and as noted above, I hereby reserve and report this case for its determination.

The parties shall prepare and file in the full court a comprehensive statement of agreed facts necessary to resolve the issues raised. The statement of agreed facts shall be prepared in time for inclusion in the parties' record appendix. The failure to agree on all necessary facts could impair the court's ability to resolve the matter.

The record before the full court shall consist of the following:

1. All papers filed in SJ-2024-0078;

2. The docket sheet in SJ-2024-0078;

3. The statement of agreed facts; and

4. This reservation and report.

The Attorney General, as the plaintiff, shall be deemed the appellant, and the defendants shall be deemed the appellees.

Oral argument shall take place in October 2024 or such other time as the full court may order. The parties shall confer with the Clerk of the Supreme Judicial Court for the Commonwealth to determine a schedule for the service and filing of briefs and the date of oral argument. This matter shall otherwise proceed in all respects in accordance with the Massachusetts Rules of Appellate Procedure.

By the Court

/s/ Serge Georges, Jr.
Serge Georges, Jr.
Associate Justice

Entered: March 18, 2024

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2024-M011

SUPREME JUDICIAL COURT
NO. SJC-13580

ATTORNEY GENERAL

v.

TOWN OF MILTON and JOE ATCHUE, in his official capacity

ORDER

This matter came before the court, Georges, J., on a motion referred by the full court to the single justice for disposition. The defendants, Town of Milton and Joe Atchue, moved for leave to file a proposed answer and counterclaim in the above-captioned full court case. After the motion was referred to the single justice for disposition, the Attorney General filed in the county court a partial assent and partial opposition to the motion.

Upon consideration, the motion of the defendants Town of Milton and Joe Atchue is hereby ALLOWED in part. The defendants are ordered to file their answer and counterclaim forthwith with the Office of the Clerk of the Supreme Judicial Court for Suffolk County, so that it may be docketed in No. SJ-2024-0078,

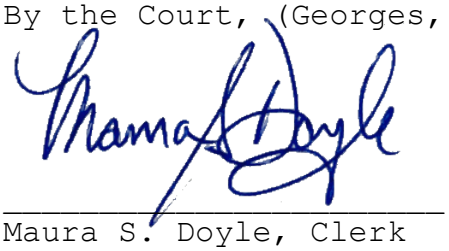
that is, the county court proceeding underlying the above full court matter. The counterclaim defendants, the Attorney General and the Executive Office of Housing and Livable Communities (EOHLC), shall file responsive pleadings within 20 days of the filing of the defendants' answer and counterclaim. Such responsive pleadings also shall be filed in Docket No. SJ-2024-0078, with the Office of the Clerk of the Supreme Judicial Court for Suffolk County.

Consistent with the reservation and report issued on March 18, 2024, in Docket No. SJ-2024-0078, the defendants' answer and counterclaim and the counterclaim defendants' responsive pleadings, once so filed, will become part of the record before the full court (and shall be included in the record appendix filed before the full court).

As the case has been reserved and reported without limitation, the Attorney General's requests to defer or to separate out the issue of whether the Town of Milton was properly deemed a "rapid transit community," and to file a status report regarding that issue, are hereby DENIED. The parties are reminded that the March 18, 2024, reservation and report requires them to "prepare and file in the full court a comprehensive statement of agreed facts necessary to resolve the issues raised," which "shall be prepared in time for inclusion in the parties' record appendix," and further, that "failure to

agree on all necessary facts could impair the court's ability to resolve the matter."

By the Court, (Georges, J.)



Maura S. Doyle, Clerk

Entered: May 3, 2024