

Peter Mello
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September 27, 2023

VIA EMAIL ONLY

Meredith Hall, Chair, Milton Planning Board
525 Canton Avenue
Milton, MA 02186

RE: Advice Concerning M.G.L. c. 40A, § 3A and the EOHLG Guidelines

Dear Ms. Hall:

You asked that we provide a legal opinion concerning the authority of the Executive Office of Housing and Livable Communities (the “EOHLC”), the successor agency to DHCD, to promulgate and enforce guidelines (the “EOHLC Guidelines”) relating to the mandates of M.G.L. c. 40A, section 3A (“Section 3A”), also known as “MBTA Communities” legislation and guidelines. My colleague Karis North and I have collaborated on this analysis, and this letter conveys our jointly held opinion.

G.L. c. 40A, § 3A provides as follows in requiring that an MBTA Community shall have zoning in which multi-family housing is provided as of right, and that EOHLC shall promulgate associated guidelines:

(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; or (iii) the MassWorks infrastructure program established in section 63 of chapter 23A.



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(c) The department of housing and community development, in consultation with 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. 40A, § 3A. In our opinion, in the instant context the word “shall” imposes a mandatory obligation and requires: (1) that the Town comply with the statute, lest it render itself subject to penalties, including those that the statute enumerates expressly; and (2) that EOHLC promulgate guidelines “to determine if an MBTA community¹ is in compliance” with the law. See, e.g., Galenski v. Town of Erving, 471 Mass. 305, 309, 28 N.E.3d 470, 475 (2015) (“The word ‘shall’ is ordinarily interpreted as having a mandatory or imperative obligation.”) (citations omitted).

In addition, the Massachusetts Attorney General has issued an “Advisory Concerning Enforcement of the MBTA Communities Zoning Law (the “AG Advisory,” a copy of which is attached as **Exhibit A**)” that emphasizes that compliance with Section 3A and the EOHLC Guidelines is mandatory. In particular, the AG Advisory states:

All MBTA Communities **must comply** with the Law. Communities that do not currently have a compliant multi-family zoning district must take steps outlined in the DHCD guidelines to demonstrate interim compliance. Communities that fail to comply with the Law may be subject to civil enforcement action. Non-compliant MBTA Communities are also subject to the administrative consequence of being rendered ineligible to receive certain forms of state funding. Importantly, MBTA Communities cannot avoid their obligations under the Law by foregoing this funding. **The Law requires that MBTA Communities “shall have” a compliant zoning district and does not provide any mechanism by which a town or city may opt out of this requirement.**

See AG Advisory, p. 2 (emphasis added). We agree with the Attorney General’s analysis in this regard. We also note, as does the AG, that under home rule, a municipality wields authority to enact local zoning only provided that such zoning is not inconsistent with constitutional or statutory requirements. Mass. Const. Amend. Art. 89 (amending Mass. Const. Amend. Art. 2). See AG Advisory, p. 1.

In our further opinion, in the event of a relevant legal challenge a court likely would accord substantial deference to the EOHLC in interpreting the EOHLC Guidelines broadly to satisfy the legislative purposes that the AG Advisory summarizes. For instance, the Supreme Judicial Court recently affirmed EOHLC’s authority to enact enforceable guidelines with respect

¹ While there may be some disagreement as to which type of MBTA Community best applies to Milton, there does not appear to be any disagreement that Milton is an MBTA Community.

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to comprehensive permits under G.L. c. 40B. Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257, 266–67 (2022). The Superior Court also recently recognized EOHL's authority in this regard, in a decision in which it dismissed a challenge to DHCD/EOHL guidelines and underscored that “an agency’s interpretation of a statute set out in the agency’s guidelines, although not carrying the force of law as do properly promulgated regulations, is entitled to substantial deference.” Fairhaven Housing Authority, et al. v. DHCD, et al., Suffolk Superior Court, C.A. No. 2084CV00078 (“Giving DHCD the substantial deference it is due, the court determines that DHCD’s interpretation of Section 7A as set out in the PHNs is not inconsistent with G.L. c. 121B.”)², citing Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496-497 (2010); Dahill v. Police Dep’t of Boston, 434 Mass. 233, 239 (2001), and cases cited. Cf. Flagg v. AliMed, Inc., 466 Mass. 23, 32, n. 19 (2013) (agency interpretations that are inconsistent with statutory provisions are not entitled to any deference and must be rejected); see also Mod. Cont'l/Obayashi v. Massachusetts Comm'n Against Discrimination, 445 Mass. 96, 106(2005) (“Where the Legislature has expressly delegated to the MCAD the task of ‘formulat [ing] policies to effectuate the purposes’ of G.L. c. 151B and given it authority to ‘adopt, promulgate, amend, and rescind rules and regulations’ to implement the statute, G.L. c. 151B, §§ 2, 3(5), we accord substantial deference to the MCAD’s interpretive guidelines.”). “Moreover, “‘where the focus of a statutory enactment is reform’ . . . ‘the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform.’” Zoning Bd. of Appeals of Milton, supra, 490 Mass. at 266–67 (“HAC’s application of the “significantly more uneconomic” standard is plainly in accord with its legislative mandate, as it allows developers willing to pursue less lucrative projects to avail themselves of the act’s streamlined processes, paving the way for development of more affordable housing.”) (citations omitted). Indeed, the AG Advisory used the word “reform” in observing that Section 3A “directly responds to [the housing] crisis by implementing zoning *reforms* that require MBTA Communities to permit reasonable levels of multifamily housing development near transit stations.” AG Advisory, p. 1 (emphasis added). Accordingly, and consistent with the standards and principles recited in these cases and other legal authority, in our opinion it is likely that in interpreting the EOHL Guidelines a court would substantially defer to EOHL’s judgment and accord it broad latitude to serve the legislative purposes that the AG Advisory summarizes.

In view of the above legal authority, we are compelled to underscore the Attorney General’s cautions that emphasize that non-compliant MBTA Communities could be subject to civil enforcement actions, and potentially liability under state and federal anti-discrimination laws, if the required zoning districts are not created. See AG Advisory, p. 2. In our opinion, these potential penalties, in addition to the risk of loss of certain state funding, are a significant counterweight to arguments that the Guidelines are beyond EOHL’s authority to promulgate and enforce.

² The case currently remains pending on appeal to the SJC.

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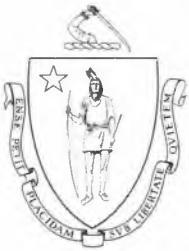
We hope this legal opinion is helpful. We look forward to meeting with the Board on September 28, 2023.

Sincerely

Peter L. Mello

cc: Michael Zullas, Chair, Milton Select Board
Nicholas Milano, Town Administrator
Tim Czerwienski, Director of Planning and Community Development
Karis L. North, Esq.

EXHIBIT A



THE COMMONWEALTH OF MASSACHUSETTS
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Advisory Concerning Enforcement of the MBTA Communities Zoning Law

The Office of the Attorney General is issuing this Advisory to assist cities, towns, and residents in understanding the requirements imposed by the MBTA Communities Zoning Law (G.L. c. 40A, § 3A) (the “Law”). The Law was enacted to address the Commonwealth’s acute need for housing by facilitating the development of transit-oriented, multifamily housing. By any measure, Massachusetts is in a housing crisis that is inflicting unacceptable economic, social, and environmental harms across our state – particularly on working families and people of color. The Law directly responds to this crisis by implementing zoning reforms that require MBTA Communities to permit reasonable levels of multifamily housing development near transit stations.¹

Massachusetts cities and towns have broad authority to enact local zoning ordinances and by-laws to promote the public welfare, so long as they are not inconsistent with constitutional or statutory requirements.² The MBTA Communities Zoning Law provides one such statutory requirement: that MBTA Communities must allow at least one zoning district of reasonable size in which multifamily housing is permitted “as of right.”³ The district must generally be located within half a mile of a transit station and allow for development at a minimum gross density of fifteen units per acre.⁴ MBTA Communities cannot impose age-based occupancy limitations or other restrictions that interfere with the construction of units suitable for families with children within the zoning district.⁵ For example, the zoning district cannot have limits on the size of units or caps on the number of bedrooms or occupants. The required zoning district must also allow for the construction of multifamily units without special permits, variances, waivers or other discretionary approvals.⁶ These measures can prevent, delay, or significantly increase the costs of construction. As directed by the Legislature, the Department of Housing and Community Development has promulgated guidelines regarding compliance.⁷ These guidelines provide

¹ An MBTA Community is a town or city which hosts MBTA service; which abuts a town or city that hosts service; or which has been added to the Transit Authority pursuant to a special law. See G.L. c. 40A, § 3A(a)(1); G.L. c. 40A, § 1. Currently, there are 177 MBTA Communities in Massachusetts. A list of these MBTA Communities, and other information related to the Law, can be found [here](#).

² See generally Mass. Const. Amend. Art. 89 (amending Mass. Const. Amend. Art. 2); G.L. c. 40A, § 1 et seq. (the “Zoning Act”).

³ G.L. c. 40A, § 3A(a)(1) (requiring that MBTA Communities “shall have” a compliant zoning district).

⁴ *Id.*

⁵ *Id.*

⁶ G.L. c. 40A, § 1A.

⁷ G.L. c. 40A, § 3A(c) (“The [D]epartment . . . shall promulgate guidelines”); Department of Housing and Community Development, *Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act* (revised October 21, 2022).

additional information and benchmarks to be utilized in determining whether MBTA Communities are complying with the Law.

All MBTA Communities must comply with the Law. Communities that do not currently have a compliant multi-family zoning district must take steps outlined in the DHCD guidelines to demonstrate interim compliance. Communities that fail to comply with the Law may be subject to civil enforcement action.⁸ Non-compliant MBTA Communities are also subject to the administrative consequence of being rendered ineligible to receive certain forms of state funding.⁹ Importantly, MBTA Communities cannot avoid their obligations under the Law by foregoing this funding. The Law requires that MBTA Communities “shall have” a compliant zoning district and does not provide any mechanism by which a town or city may opt out of this requirement.¹⁰

MBTA Communities that fail to comply with the Law’s requirements also risk liability under federal and state fair housing laws. The Massachusetts Antidiscrimination Law¹¹ and federal Fair Housing Act¹² prohibit towns and cities from using their zoning power for a discriminatory purpose or with discriminatory effect.¹³ An MBTA Community may violate these laws if, for example, its zoning restrictions have the effect of unfairly limiting housing opportunities for families with children, individuals who receive housing subsidies, people of color, people with disabilities, or other protected groups.

⁸ See, e.g., G.L. c. 12, § 10 (the Attorney General shall take notice of “all violations of law” and bring “such...civil proceedings before the appropriate state and federal courts...as [s]he may deem to be for the public interest”); G.L. c. 231A, § 2 et seq. (authorizing declaratory judgment actions to “secure determinations of right, duty, status, or other legal relations under...statute[s]”).

⁹ G.L. c. 40A, § 3A(b).

¹⁰ G.L. c. 40A, § 3A(a)(1).

¹¹ G.L. c. 151B § 1 et seq.

¹² 42 U.S.C. § 3601 et seq.

¹³ See, e.g., G.L. c. 151B, § 4(4A) (prohibiting activities that interfere with the exercise or enjoyment of fair housing rights); 804 C.M.R. § 2.01(2)(f)-(h) (Antidiscrimination Law applies to “persons who...interfere with another person in the exercise or enjoyment of any right under M.G.L. c. 151, § 4...persons who directly or indirectly prevent or attempt to prevent the construction, purchase, sale or rental of any dwelling or land covered by M.G.L. c 151B, § 4...[and] persons who aid or abet in doing any illegal acts...”); 804 C.M.R. § 2.01(5)(f) (“Examples of unlawful housing practices include...to pass an ordinance that unlawfully denies a dwelling, commercial space or land to a person or group of persons because of their protected status.”).