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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2583CV00303
2577CV00249 ✓

TOWN OF DUXBURY, et al.

vs.

COMMONWEALTH OF MASSACHUSETTS, et al.
(and eight specially assigned cases[1])

# MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTIONS FOR A PRELIMINARY INJUNCTION AND DEFENDANTS' MOTIONS TO DISMISS

The Towns of Duxbury, Hamilton,[2] Hanson, Holden, Marshfield, Middleton, Wenham, Weston, and Wrentham (collectively, the "Municipalities" or "plaintiffs") filed complaints

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[1]Together with Duxbury, the following matters involving the MBTA Communities Act have been specially assigned to this court:

- Ten Taxable Inhabitants of Hamilton vs. Commonwealth of Massachusetts, et al., Suffolk Superior Court, Civil No. 2584CV01171;
- Town of Hanson, et al. vs. Commonwealth of Massachusetts, et al., Plymouth Superior Court, Civil No. 2583CV00209;
- Town of Holden, et al. vs. Commonwealth of Massachusetts, et al., Worcester Superior Court, Civil No. 2585CV00431;
- Town of Marshfield, et al. vs. Commonwealth of Massachusetts, et al., Plymouth Superior Court, Civil No. 2583CV00184;
- Town of Middleton, et al. vs. Commonwealth of Massachusetts, et al., Essex Superior Court, Civil No. 2577CV00249;
- Town of Wenham, et al. vs. Commonwealth of Massachusetts, Essex Superior Court, Civil No. 2577CV00430;
- Town of Weston vs. Commonwealth of Massachusetts, Middlesex Superior Court, Civil No. 2581CV00917; and
- Town of Wrentham, et al. vs. Commonwealth of Massachusetts, et al., Norfolk Superior Court, Civil No. 2582CV00259

[2] This complaint is filed on behalf of "Ten Taxable Inhabitants of Hamilton," rather than Hamilton itself. In moving to dismiss Hamilton's complaint, the defendants raise questions of standing. For purposes of efficiency in cumulatively resolving complaints asserted by Municipalities, the court will treat such complaint as though filed on behalf of Hamilton itself such that it can rule upon substantive issues regarding to the impact of § 3A upon the town, rather than disposing of certain discrete issues on the basis of standing.

alleging that General Laws chapter 40A, Section 3A ("§ 3A"), the Massachusetts Bay Transportation Authority ("MBTA") Communities Act, imposes improper compliance requirements upon municipalities as a condition to receive certain state funding.[3] They named the Commonwealth of Massachusetts (the "Commonwealth") and various state agencies, including the Executive Office of Housing and Livable Communities ("EOHLC"), the Massachusetts Development Finance Agency ("MassDevelopment"), and the Massachusetts Executive Office of Economic Development ("EOED") (collectively, the "defendants"), as defendants.

The Municipalities now seek preliminary injunctions, enjoining the defendants from enforcing the compliance requirements set forth in § 3A and related regulations set forth in 760 Code Mass. Regs. § 72.00. The defendants oppose the motions for a preliminary injunction and move to dismiss the Municipalities' complaints. For the following reasons, the Municipalities' motions for a preliminary injunction are **DENIED** and the defendants' motions to dismiss are **ALLOWED**.

## BACKGROUND

The Municipalities are all towns located within the Commonwealth. The EOHLC, established in 2023, is a state agency that seeks to create more homes and lower housing costs throughout Massachusetts. MassDevelopment provides funding and resources to municipalities

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[3] Briefly stated, the Municipalities' complaints 1) request declarations that § 3A constitutes an unfunded mandate; 2) seek injunctive relief requiring that various Massachusetts executive offices release grant funding; and 3) assert counts for mandamus and accounting that would require various Commonwealth executive offices and departments to provide information concerning the fiscal impact of § 3A.

As to more specific counts of their complaints, several Municipalities seek declarations that they are not properly characterized by EOHLC as either MBTA Adjacent Communities or MBTA Communities. Several Municipalities seek declarations that the regulations concerning § 3A are arbitrary and capricious. Marshfield seeks a declaration that § 3A violates its Town Meeting authority. Hamilton seeks a declaration that the regulations are improperly applied because the EOHLC excluded available land in making its determinations.

in Massachusetts for economic development. The EOED is a cabinet-level office of the Commonwealth that provides grant funding and resources through the MassWorks Infrastructure Program to the Commonwealth's municipalities for economic development.

The Division of Local Mandates ("DLM"), an agency of the Office of the State Auditor, has authorization under G. L. c. 29, § 27C ("§ 27C"), the Massachusetts Local Mandate Statute, to conduct inquiries and issue determinations regarding the fiscal propriety of new statutes and regulations.

## I. The Massachusetts Bay Transportation Communities Act

On January 14, 2021, § 3A went into effect.[4] The Legislature created § 3A to combat Massachusetts' ongoing housing crisis. Section 3A creates new zoning requirements mandating that all MBTA communities zone at least one district in which multi-family housing is permitted as of right, subject to other requirements. See G. L. c. 40A, § 3A. An "MBTA community" is defined as, among other things, "one of the 51 cities and towns as defined in section 1 of chapter 161A; . . . [or one of the] other served communities as defined in said section 1 . . . ." G. L. c. 40A, § 1A. Middleton has been designated one of the "51 cities and towns" that must comply with § 3A. G. L. c. 161A, § 1. Marshfield, Hanson, Wrentham, and Holden are designated as "other served communities" that also must comply with § 3A. *Id.*

Duxbury is designated an MBTA "Adjacent Community" because it borders the Town of Kingston, which has a commuter rail station. Wenham and Hamilton are designated a "Commuter Rail Community" as a commuter rail station straddles the boundary line of the two

[4] The Legislature has since amended § 3A on several occasions. See § 10 of Chapter 29 of the Acts of 2021, effective July 29, 2021, further amended by §§ 152-153 of Chapter 7 of the Acts of 2023, effective May 30, 2023, further amended by § 9 of Chapter 150 of the Acts of 2024, effective August 6, 2024, and further amended by §§ 2, 2A, 2B, and 20-26 of Chapter 238 of the Acts of 2024, effective November 20, 2024.

towns. Weston is also considered a "Commuter Rail Community" due to the Kendal Green station in the town.[5]

Section 3A requires MBTA communities to

> 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.

G. L. c. 40A, § 3A(a)(1). An MBTA community that fails to comply with § 3A becomes ineligible for funds from the Housing Choice Initiative, the Local Capital Projects Fund, the MassWorks Infrastructure Program, and the HousingWorks Infrastructure Program. *Id.* at (b). Section 3A directs the EOHLC, in consultation with other state agencies, to promulgate regulations to determine if an MBTA community complies with § 3A. *Id.* at (c).

The EOHLC passed its final guidelines on August 17, 2023. On January 8, 2025, the Supreme Judicial Court ("SJC"), however, invalidated the guidelines because the EOHLC did not comply with the Administrative Procedure Act ("APA"). See *Attorney General* v. *Milton*, 495 Mass. 183, 185, 193-196 (2025) ("*Milton*"). The SJC otherwise found § 3A to be constitutional and that the Attorney General could enforce it. *Id.* at 185, 188-193.

## II. Revised Regulations

Six days after the SJC's decision in *Milton*, EOHLC filed emergency regulations with the Secretary of the Commonwealth, and committed to adopt new regulations complying with the

[5] Weston alleges that the Massachusetts Department of Transportation plans to close Kendal Green in the near future.

APA within ninety days. See 760 Code Mass. Regs. § 72.00.[6] The emergency regulations provided MBTA communities an additional six months to adopt compliant zoning bylaws, provided they filed an interim action plan with EOHLC by February 13, 2025. If a timely interim action plan was submitted, the MBTA community would have until July 14, 2025, to submit a "District Compliance Application" to EOHLC. The District Compliance Application would set forth information about current zoning, past planning for multi-family housing, and potential locations for a multi-family zoning district, including a timeline for compliance with § 3A and EOHLC's regulations.

## III. DLM Review of § 3A

Wrentham, Middleborough, and Methuen filed written requests with DLM seeking a determination that § 3A imposed an unfunded mandate on the cities and towns required to comply with § 3A. See G. L. c. 29, § 27C.[7] In short, § 27C, provides that any state rule, law, or regulation taking effect after January 1, 1981, that imposes additional costs on a city or town, excluding incidental local administration expenses, is conditional on local acceptance or full funding by the Commonwealth. *Id.*

On February 21, 2025, DLM concluded that § 3A constituted an unfunded mandate. In its letter, DLM stated that § 3A "imposes direct service or cost obligations on municipalities by the Commonwealth that amount to more than incidental local administrative expenses." DLM stated, however, that it could not determine the amount of such deficiency, in part, because EOHLC had failed to provide a fiscal impact analysis as required by chapter 30A, § 5. DLM stated such analysis would be completed when EOHLC provided its statutorily required fiscal

[6] The defendants submitted a copy of the regulations with their submissions. See Appendix at 271-289.

[7] The requests pre-dated the SJC's ruling in *Milton*. DLM initially indicated that it could not make such a determination given the pending litigation.

impact analysis. DLM further indicated that affected MBTA communities could petition the Superior Court to seek exemptions from compliance pending funding or reimbursement of direct costs imposed by the statute or regulation.

Based on DLM's determination, many towns sent letters to their legislators seeking funding to comply with § 3A or an exemption from compliance.

On March 6, 2025, EOHLC sent DLM a statement regarding the fiscal impact analysis, finding that there would be no fiscal effect. Included therein was also a small business impact statement, which indicated that there would be no impact on small businesses.

## IV. The Municipalities' Motions for Preliminary Injunction

In their respective motions for preliminary injunction, the Municipalities collectively seek to enjoin enforcement of § 3A and the accompanying regulations. The Municipalities allege that the construction of 750 housing units, or more, in their respective communities would lead to substantial infrastructure impacts including, but not limited to, impacts to water systems, public safety services, educational services, and buildings, roads, and other general governmental services. The Municipalities further allege that this requires a substantial appropriation of funds for the expenses and improvements necessary to service the additional housing.

Moreover, some Municipalities raise issues unique to their circumstances, seeking further injunctive relief in addition to the universal injunctive relief requested.

### A. Marshfield

On April 22 and December 16, 2024, Marshfield held special town meetings seeking to approve new zoning bylaws. On both occasions, majority votes defeated the articles.[8] On February 10, 2025, during a public town meeting of the Marshfield Select Board to discuss a

[8] The Commonwealth submitted copies of the articles with its submissions. See Appendix at 7-20 (Article 18 and 19), and 22-35 (Articles 12 and 13).

proposed interim action plan, the board voted unanimously not to approve one. On February 19, 2025, EOHLC notified Marshfield in writing that it was not compliant with § 3A, and that continued noncompliance would risk them losing grant programs expressly identified in § 3A, as well as funding from all discretionary grant programs.

On December 12, 2024, Marshfield received a notification from the EOED's Seaport Economic Council that its application for the "Permitting North/South River Dredging" project had been approved in the amount of $261,600. The award letter indicated that the award was contingent on Marshfield's compliance with § 3A, and a final executed contract with EOED. As of February 19, 2025, Marshfield had yet to execute a contract finalizing its award with EOED. EOED alleges that it cannot enter into the contract with Marshfield, and subsequently release the funds, until Marshfield complies with § 3A.

In fiscal year 2024, the Commonwealth's Department of Early Education ("EEC") awarded Marshfield a Coordinated Family and Community Engagement ("CFCE") grant in the amount of $45,700. Marshfield and the EEC executed the contract on July 1, 2023. An affidavit provided by the administrator of that grant, Haji Shearer, attested that the funds from that grant would not be rescinded and Marshfield could seek a renewal of the grant, regardless of their compliance with § 3A.

Other than the universal relief requested above, Marshfield also seeks injunctive relief providing that (1) grant funds already approved by the Commonwealth be released and that Marshfield not be excluded from other grants; and (2) § 3A violates G. L. c. 40A, § 5, which delegates the right to approve zoning amendments to cities and towns.

**B. Middleton**

The EOHLC's emergency regulations identify four categories of MBTA communities that must submit a District Compliance Application: "Adjacent community," "Adjacent small town," "Commuter rail community," and "Rapid transit community." 760 Code Mass. Regs. § 72.02. Middleton alleges that it contains no MBTA facilities and is not immediately adjacent to any communities with mass transit services. Therefore, Middleton alleges it is improperly classified as an MBTA community.

On October 11, 2024, Middleton learned that EOED approved its grant application through the MassWorks Infrastructure Program in the amount of $2 million to support improvements to the intersection of Routes 62 and 114. EOED indicated that Middleton had to comply with § 3, as determined by EOHLC. Furthermore, the award was contingent upon execution of a final contract between Middleton and EOHLC.

Middleton did not submit an interim action plan by February 13, 2025. As such, on February 19, 2025, EOHLC notified Middleton in writing that it was not compliant with § 3A, and that continued noncompliance would risk them losing grant programs in § 3A, as well as all discretionary grant programs. As of that date, Middleton had yet to execute a contract finalizing its award with EOED.

On September 25, 2023, EOHLC notified Middleton of approval of its application for a Community Planning Grant in the amount of $75,000. Middleton executed a contract for the grant on November 17, 2023. Middleton thus far has received $13,250 of the grant, and the remainder of the grant remains available to Middleton provided they submit expenses related to the grant by June 30, 2025.

Aside from the universal relief sought, Middleton seeks injunctive relief enjoining (1) enforcement of § 3A because it is improperly classified as an MBTA Community and is not an "Adjacent community"; and (2) EOED from not signing grants or dispensing funds.

**C. Wrentham/Hanson/Holden**

Wrentham, Hanson, and Holden are all in interim compliance with EOHLC.

As to Hanson, on October 15, 2024, MassDevelopment awarded a grant to Hanson in the amount of $237,000 from the Brownsfield Redevelopment Fund to support the 100 Hawks Avenue Rear Site Remediation. Grant funds would not be disbursed until Hanson fully executed a grant agreement and all disbursement conditions were met, including compliance with Chapter 40A, § 3A.

Hanson seeks injunctive relief enjoining MassDevelopment from not signing or dispensing grants.

With respect to Holden, it alleges it is not an MBTA community because it does not meet the definition of an "Adjacent community," as defined by 760 Code Mass. Regs. § 72.02. Under the regulation, an "adjacent community" must have "within its boundaries less than 100 acres of Developable station area." *Id.* A "developable station area" is defined as "developable land within 0.5 miles of a Transit station." *Id.* Holden alleges it neither contains any MBTA facilities, nor any developable land within one-half mile from a facility. Holden further alleges that the town line to the nearest MBTA facility is approximately four miles away.

Holden seeks injunctive relief that § 3A does not apply to it because it does not meet the definition of MBTA community in the regulations.

### D. Duxbury and Weston

In their Verified Complaints, Duxbury and Weston seek injunctive and declaratory relief alleging that (1) chapter 40A, § 3A is an unfunded mandate, in violation of the Local Mandate Law, and is thus unenforceable because it imposes significant costs exceeding administrative expenses; and (2) the revised regulations are invalid because they mimic the guidelines struck down by the SJC in *Milton*, and are thus *ultra vires*, arbitrary, capricious, invalid on their face, and an abuse of EOHLC's discretion.

### E. Wenham

Wenham makes the same allegations and requests for relief as Duxbury and Weston in its Verified Complaint, but also seeks (1) mandamus relief alleging that EOHLC did not provide its fiscal analysis in good faith and a court order requiring that EOHLC provide an updated analysis; and (2) an accounting and financing from the defendants so Wenham knows the direct costs for complying with the statute.

### F. Hamilton

Hamilton seeks an exemption from § 3A, alleging that it violates the Local Mandate Law because it imposes direct costs on municipalities as opposed to just incidental local administration expenses. It further alleges that Hamilton cannot be considered an "MBTA Community" because one commuter rail station straddles the boundary between Hamilton and Wenham. Instead of an "MBTA Community," Hamilton alleges it should be defined as an "Adjacent Community" because the town does not have at least 100 acres of "Developable Station Area" within a half mile of the station but has "less than 100 acres of Developable station area." 760 Code Mass. Regs. § 72.02.[9]

[9] The regulations define "Developable Station Area" as "land that is within 0.5 miles of a Transit station." 760 Code Mass. Regs. § 72.02.

## V. Procedural History

By Order for Special Assignment from the Chief Justice of the Superior Court, on March 7, 2025, the Hanson, Marshfield, Middleton, and Wrentham matters were assigned to this court.[10] The defendants filed a motion to dismiss on March 18, 2025. Holden filed its Verified Complaint and moved for a preliminary injunction on March 27, 2025. The defendants filed a motion to dismiss on March 18, 2025.

On April 1, 2025, Citizen Housing and Planning Association moved for leave to file an amicus brief in support of the Commonwealth's motion and other defendants' opposition to plaintiffs' motions for preliminary injunctions and in support of the Commonwealth and other defendants' cross-motion to dismiss.[11] On April 2, 2025, the court held a hearing on motions for preliminary injunction filed by Hanson, Holden, Marshfield, Middleton, and Wrentham, and on motions to dismiss filed by the defendants. After the hearing, the court took the matters under advisement.

On April 4, 2025, Duxbury filed a Verified Complaint against the defendants. On April 11, 2025, Weston filed a similar Verified Complaint, as did Wenham on April 22, 2025. On April 30, 2025, the Hamilton Inhabitants filed a Complaint against the defendants and subsequently filed an Amended Complaint on May 7, 2025. On May 9, 2025, the court held a hearing on the Municipalities' respective motions for preliminary injunction and the defendants' motions to dismiss, taking the matters under advisement.

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[10] A suit from the Town of Middleborough was also assigned. On March 27, 2025, Middleborough voluntarily dismissed its lawsuit in accordance with Massachusetts Rule of Civil Procedure 41(a)(1).

[11] The motion was allowed without objection at the hearing on April 2, 2025.

## DISCUSSION

### I. Standard of Review

There are two separate, but interrelated, motions before this court: the Municipalities' motions for a preliminary injunction, and the defendants' motions to dismiss.

As to the Municipalities' motions, a party seeking a preliminary injunction must demonstrate "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction" (citations omitted). *Garcia* v. *Department of Hous. and Community Dev.*, 480 Mass. 736, 747 (2018). "Where a party seeks to enjoin government action, the judge also must determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public" (quotations and citations omitted). *Garcia*, 480 Mass. at 747.

As to the defendants' motions, to survive a motion to dismiss for failure to state a claim pursuant to Mass. R. Civ. P. 12 (b)(6), a complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). The factual allegations must be "more than labels and conclusions" and "raise a right to relief above the speculative level." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555. In assessing a complaint under Rule 12(b)(6), the court accepts as true the well-pleaded factual allegations in the complaint and draws all reasonable inferences in the claimant's favor. See *Fairhaven Hous. Auth.* v. *Commonwealth*, 493 Mass. 27, 30 (2023). The extent of the court's review generally is limited to the factual allegations in the complaint and any facts

contained in any attached exhibits. See *Eigerman* v. *Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007). However, the court also may consider matters of public record, items in the record of the case, and documents cited and relied upon in the complaint. See *Marram* v. *Kobrick Offshore Fund, Ltd*, 442 Mass. 43, 45 n.4 (2004); *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

Taken together, the Municipalities cannot show a likelihood of success on the merits if their complaints are dismissed for failure to state a claim under Mass. R. Civ. P. 12(b)(6). Thus, dismissal of their claims would require denial of their motions for a preliminary injunction.

## II. Unfunded Mandate Analysis as to Alleged Future Infrastructure Costs[12]

### A. Statutory Framework

The parties' dispute whether § 3A is an unfunded mandate. The Municipalities argue they will incur significant costs to improve their infrastructure to accommodate an influx of new residents if § 3A is enforced, and that the Commonwealth must appropriate sufficient funds to absorb the anticipated costs. They further argue they should not be required to comply with § 3A until such funding is appropriated. In moving to dismiss the complaints, the defendants argue that § 3A is not an unfunded mandate and that the statute does not impose any direct service or cost obligation within the meaning of § 27C. Section 27C statute states in pertinent part:

> (a) Any law taking effect on or after January 1, 1981 imposing any direct service or cost obligation upon any city or town shall be effective in any city or town only if such law is accepted by vote or by the appropriation of money for such purposes, in the case of a city by the city council in accordance with its charter, and in the case of a town by a town meeting, unless the general court, at the same session in which such law is enacted, provides, by general law and by appropriation, for the assumption by the commonwealth of such cost, exclusive of incidental local administration expenses and unless the general court provides by appropriation in each successive year for such assumption.

As such, in addressing § 27C, a court must consider whether, and how much, funding should be appropriated to a municipality pursuant to a statute. "Appropriations are made, not in

[12] Costs associated with developing § 3A districts requires a separate analysis, which is set forth below.

the General Laws, but through the operation of the annual budget and appropriation process described in art. 63 of the Amendments to the Constitution of the Commonwealth." *Milton* v. *Commonwealth*, 416 Mass. 471, 473, (1993) ("*Milton*"). "Article 63 describes the process by which the General Court appropriates, i.e., receives and disburses, State revenues." *Mazzone* v. *Attorney Gen.*, 432 Mass. 515, 522 (2000). "The constitutional convention understood the term 'appropriation' to mean something more than legislative authority to spend." *Id.*

Thus, this court must determine whether any possible anticipated costs resulting from increased residential housing pursuant to § 3A may be deemed direct service or cost obligations as classified by § 27C, and thus must be funded through appropriations.

**B. Unfunded Mandate Caselaw**

The unfunded mandate law was enacted to "free[ ] cities and towns from expenditures mandated by State law and of preventing the involuntary imposition on cities and towns of certain direct service cost obligations resulting from statutes and administrative rules or regulations" (quotations omitted). *Norfolk* v. *Department of Env't Quality Eng'g*, 407 Mass. 233, 236 (1990). In this context, the court must look to what constitutes "direct service or cost obligations." G. L. c. 29 § 27C. The juxtaposition between two cases, *Lexington* v. *Commissioner of Educ.*, 393 Mass. 693 (1985) ("*Lexington*") and *Kennedy* v. *Commonwealth*, 92 Mass. App. Ct. 644 (2018) ("*Kennedy*"), demonstrates the contours of § 27C in the context of appropriating funds to support direct costs for public infrastructure.

*Lexington* concerned a statute requiring municipalities to provide transportation services for students at private schools in a manner more extensive, and thus expensive, than previously required. *Lexington*, 393 Mass. at 694. Lexington and Newton opposed the new statute, arguing it constituted an unfunded mandate. They identified specific line-item calculations reflecting the

related costs that would be imposed upon them under the statute. The SJC agreed, ruling that the statute was an unfunded mandate and thus ineffective. *Id.* at 698 ("We conclude that [the disputed statute], because it is a 'law taking effect on or after January first, nineteen hundred and eighty-one imposing [a] direct service or cost obligation upon' cities and towns, is subject to G.L. c. 29, § 27C(a).").

In *Kennedy*, several municipalities operated a regional school district, which included shared costs by the member towns. *Kennedy*, 92 Mass. App. Ct. at 645-646. One of the towns ultimately decided to withdraw from the district. Such withdrawal was subject to a statutory process. *Id.* at 646-647. The regional school district, a member town, and two parents brought suit challenging the withdrawal, arguing that if required to comply with the statutory withdrawal process, the remaining towns would incur increased expenses to support the district with one less school, and thus funds should be appropriated to address this increase. The Appeals Court rejected this argument, stating:

> The amended complaint does not plead any facts that support Huntington's or the school district's position that either is likely to incur direct cost obligations other than a possible increase in what the remaining towns may be required to pay to support the school district. These alleged costs are indirect and in any event are speculative; therefore, they are not sufficient under § 27C(a) to support the plaintiffs' claim.

*Id.* at 651.

Here, the anticipated possible costs alleged by the Municipalities, which are set forth below, closely mirror those in *Kennedy*. In both instances, municipalities are projecting "a possible increase" in infrastructure costs. Thus, consistent with *Kennedy*, the anticipated possible costs asserted by the Municipalities here are indirect and, therefore, § 3A does not constitute an unfunded mandate.

### C. Anticipated Infrastructure Costs Alleged by the Municipalities

Even if § 3A was an unfunded mandate, the Municipalities have failed to allege sufficient facts concerning any anticipated amounts associated with future infrastructure costs beyond a speculative level. As to purported direct costs stemming from large-scale infrastructure improvements, the Municipalities' complaints do not set forth any specific, direct costs. Instead, their respective complaints make the following averments

- Duxbury:
  - The Town will see significant increases across all operating budgets due to the need for additional services resulting from new development authorized as a matter of right under MBTA compliant zoning, particularly with respect to public safety, public schools, transportation, and health and human services. These increases will be ongoing and escalating from year-to-year.

- Hanson:
  - The construction of 750 housing units will result in substantial infrastructure impacts to the Town, including, without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing.

- Holden:
  - The construction of 750 housing units will result in substantial infrastructure impacts to the Town, including, without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing.
  - Specifically, as to public safety, the Town will be compelled to retain several new fire fighters and police officers, and purchase equipment and supplies to support the same, including but not limited new fire and police vehicles.
  - As to education, the unanticipated influx of 750 new units would result in well over two hundred new students. The cost for each student to the taxpayers would be approximately $20,000. Additionally, it is likely that capital improvements would be necessitated to accommodate such new students.

- The influx of new units would also significantly strain existing sewer and water services. The Town would be compelled to allocate substantial operational and capital funds to connect 750 new units to the Town's water and sewer services.
- While 750 new units of housing will result in increased revenue through property taxation, such new growth would be dwarfed by the expenses associated with the services discussed in the preceding paragraphs.

- Marshfield:
  - Marshfield expects to incur additional costs as the direct result of the mandatory requirements of the MBTA Communities Act and HLC's emergency regulations.

- Middleton:
  - The construction of 750 housing units will result in substantial infrastructure impacts to the Town, including, without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing.

- Wenham:
  - The construction of 365 housing units will result in substantial infrastructure impacts to the Town, including, without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 365 new units of housing.
  - Specifically, as to public safety, the Town will be compelling to retain several new fire fighters and police officers in order to comply with accepted standards to ensure public health and safety, and purchase equipment and supplies to support the same, including but not limited to new fire and police vehicles.
  - As to education, the unanticipated influx of 365 new units would likely result in more than one hundred new students. While the Town of Wenham is committed to providing a high-quality education to each and every student that enters into its school district, the cost for each such additional students to taxpayers could be substantial. Additionally, it is likely that capital improvements would be needed to accommodate such new students given space limitations and accepted standards for class sizes.
  - The influx of new units would also significantly strain existing water services. The Town would be compelled to allocate substantial operating and capital funds to connect up to 365 new units to the Town's water

services. Additional expenses relating to expanded services and equipment for waste disposal would also be required.

- Weston:
  - The Town will see significant increases across all operating budgets due to the need for additional services resulting from new development that will have to be allowed as a matter of right under the Act, particularly with respect to public safety, public schools, transportation, and health and human services.
  - The Town recently hired another outside consultant . . . to conduct a fiscal impact analysis of the Act on the Town, who concluded that the total projected municipal costs for Weston to provide necessary services for the required 750 units is $1,288,454, not including projected education costs, which could exceed $5 million by itself.

- Wrentham:
  - The construction of 750 housing units will result in substantial infrastructure impacts to the Town, including, but without limitation, impacts to the Town's water system, public safety services, educational services and buildings, roads, and other general governmental services. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing.

In this regard, the Municipalities have neither pled specific costs for anticipated infrastructure costs, nor provided any specific timeline for anticipated construction projects. Instead, the only allegations and averments before the court are generalized comments about large-scale issues they foresee, which are insufficient to sustain the Municipalities' claims. They merely reference "a possible increase" in infrastructure costs, see *Kennedy*, 92 Mass. App. Ct. at 651, and have thus failed to allege any substantive information about where to appropriate funds in the manner contemplated by § 27C.

In their submissions, the Municipalities provided affidavits and letters from various municipal officials attempting to itemize anticipated costs. However, none of these documents were appended to the complaints, and thus, exceed the bounds of the courts review on a motion to dismiss. Even with considering the various affidavits, in the context of the Municipalities' motions for preliminary injunction, they underscore the speculation demonstrated in the

Municipalities' complaints concerning direct costs. The affidavits repeatedly include terms such as "may," "expect," "possibly," "anticipate," and "estimated." Such speculative averments fail to demonstrate actual, direct costs.

Accordingly, the Municipalities' complaints set forth mere "labels and conclusions," and do not "raise a right to relief above the speculative level." *Iannacchino*, 451 Mass. at 636. Therefore, even if § 3A was an unfunded mandate, the Municipalities' have merely alleged speculative averments regarding any anticipated costs. The speculative nature of such claim is fatal to the Municipalities' claims in the same manner speculative claims were rejected in *Kennedy*.

**D. Deference to DLM**

The Municipalities argue that this court should defer to the DLM's determination that § 3A constitutes an unfunded mandate, as defined by § 27C. Pursuant to § 27C, a municipality

> may submit written notice to the division of local mandates, established under section 6 of chapter 11, requesting that the division determine whether the costs imposed by the commonwealth by any law, rule or regulation subject to this section have been paid in full by the commonwealth in the preceding year and, if not, the amount of any deficiency in such payments.

G. L. c. 29, § 27C (d).

Upon receipt of such request, DLM "shall have the responsibility of determining to the best of its ability and in a timely manner the estimated and actual financial effects on each city and town of laws, and rules and regulations of administrative agencies of the commonwealth either proposed or in effect." G. L. c. 11, § 6B. The Municipalities state that Wrentham, Middleborough, and Methuen followed this statutory process by issuing a determination request to DLM, then DLM performed its statutory role pursuant to G. L. c. 11, § 6B. They argue that the court is bound by the DLM's determination that § 3A constitutes an unfunded mandate.

In *City of Worcester* v. *The Governor*, 416 Mass. 751 (1994), DLM issued a determination that several statutes, rulings, and regulations constituted unfunded mandates. *Id.* at 754. The plaintiffs "then filed a complaint in the Superior Court pursuant to § 27C (e) requesting the court to declare that all the statutes, rules, and regulations examined by DLM, plus others not examined by that office, constitute unfunded local mandates." *Id.* The SJC held "[t]he questions presented are questions of law for this court to resolve. We conclude that none of the statutes, rules, or regulations involved herein constitutes unfunded local mandates." *Id.* Thus, the SJC rejected the notion that the court was bound by the DLM's determination and reached a different conclusion in its unfunded mandate analysis.

Further, the plain language of § 27C states "determination of the amount of deficiency provided by the division of local mandates under subsection (d) of this section shall be **prima facie evidence** of the amount necessary" (emphasis added). G. L. c. 29, § 27C(e). Thus, even if DLM had authority to make an unfunded mandate determination, the statute provides that the court may look to the DLM's determination, however it is not expressly bound by it.

The Municipalities set forth a litany of cases stating that a court owes deference to a department's application of a law or regulation for which the Legislature has delegated decision-making authority. Pursuant to G. L. c. 11, § 6B, DLM is charged with "determining to the best of its ability and in a timely manner the estimated and actual financial effects on each city and town of laws, and rules and regulations of administrative agencies of the commonwealth either proposed or in effect." The court therefore agrees that DLM is entitled to some deference. However, such deference is not unfettered. Instead, a court will not defer to a departments' decisions that "are flawed by an error of law, lack support by substantial evidence, [or] are arbitrary or capricious." *Wolf* v. *Department of Pub. Utilities*, 407 Mass. 363, 367 (1990). In the

manner discussed herein, the DLM's determination was flawed as a matter of law, because § 3A is not an unfunded mandate.[13]

Finally, the Municipalities misinterpret the scope of the DLM's § 3A determination. The DLM's decision speaks specifically to zoning, not large-scale infrastructure considerations. In interpreting § 3A, DLM states "[a]s for costs of implementation, the MBTA Communities Act requires MBTA communities to have 'a zoning ordinance or by-law' providing for a district that meets specific criteria." Further, while the court disagrees with this ultimate conclusion, the DLM's determination stated "[i]t is apparent that, at a minimum, direct costs exist in developing compliant zoning that amount to more than incidental local administrative expenses." Thus, the DLM's "direct cost" consideration focused upon costs incurred in designating a § 3A district.[14]

Therefore, this court is not required to defer to the DLM's unfunded mandate determination in the context of the Municipalities' claims for future infrastructure projects.[15]

**E. Athol and Halifax DLM Letters**

The record includes two DLM determination letters issued to two non-party municipalities, Athol and Halifax, regarding an unrelated statute, G. L. c. 111, § 150A½. This statute involved municipal management of solid waste facilities. Prior to the change in the law, the Massachusetts Department of Environmental Protection ("DEP") reviewed applications and

[13] DLM states in its letter that "the total fiscal impact of implementation cannot be determined without further data collection" and "DLM requires additional time to perform a thorough analysis of the costs imposed as the impact of the MBTA Communities Act is still being determined. Such analysis will include review of the required fiscal impact statements by EOHLC and implementing other data collection measures as necessary." As such, DLM did not even reach a specific financial conclusion. This further belies a claim that the court owes deference to the DLM's determination.

[14] The court acknowledges that the DLM's determination references larger scale infrastructure costs. However, the specific findings relative to its unfunded mandate determination turns on funding towards designating § 3A districts.

[15] As discussed below, costs associated with developing § 3A districts are distinguishable from costs associated with funding future infrastructure projects in the Municipalities.

issued a "site suitability report" for entities seeking permits to operate solid waste facilities. This required review to determine if the proposed facility satisfied statutory criteria for public health, safety, and the environment. Additionally, prior to the change in the law, the DEP was tasked with reviewing applications for entities seeking permits to operate small transfer stations.

Under the new law, the towns would be required to independently review applications for such solid waste and transfer station facilities. Athol and Halifax both sought unfunded mandate determinations, stating that they anticipated that their respective Boards of Health would need to hire consultants to review the applications to determine whether the proposed project complied with necessary public health, safety, and environmental concerns.

Although these DLM determinations concerned potentially hiring experts in the context of performing municipal functions, the issues before the DLM for Athol and Halifax's requests are distinguishable from those asserted by the Municipalities here. Under the new statute, Athol and Halifax were required to perform an entirely new task in reviewing applications for solid waste facilities and transfer stations. The DEP had previously handled such municipal work. Here, by contrast, the new legislation, § 3A, requires the Municipalities to develop zoning bylaws, a municipal role that they continuously play as bylaws are regularly updated. Although the scope and complexity of the zoning responsibilities in implementing § 3A are arguably more complex than those regularly undertaken by a municipality, they remain an aspect of the Municipalities' ongoing role.

**F. Zoning vs. Construction**

Under § 3A, the Municipalities "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." G. L. c. 40A, § 3A(a). Pursuant to Chapter 40A, the statutory chapter controlling zoning, "as of

right" development is "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" (emphasis added). G. L. c. 40A, § 1A. Taken together, the Municipalities must adopt a zoning ordinance for development that may, but not necessarily will, proceed. In interpreting § 3A, the SJC recently "declare[d] that the act creates an affirmative duty for each MBTA community to have a zoning bylaw that allows for at least one district of reasonable size where multifamily housing is permitted as of right." *Milton*, 495 Mass. at 196. Additionally, an applicable regulations states in part:

> Nothing in M.G.L. c. 40A, § 3A or 760 CMR 72.00 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.

760 Mass. Code Regs. § 72.05 (1)(d)(2).

As such, this applicable regulation expressly states that § 3A does require municipalities to engage in construction projects. Further, the stated "purpose of M.G.L. c. 40A, § 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." 760 Mass. Code Regs. § 72.01. "[T]here is a distinction between legislative encouragement and the imposition of binding obligations on the cities and towns" (quotations omitted). *School Comm. of Lexington* v. *Commissioner of Educ.*, 397 Mass. 593, 598 (1986) (Abrams, J., concurring). Thus, § 3A and the related regulations do not compel construction. They merely encourage it.

### G. Grant Funding Process

Notably, the Commonwealth, EOHLC more specifically, has not left the Municipalities without any financial recourse should they incur infrastructure costs upon development of § 3A districts. Instead of receiving appropriations pursuant to § 27C, the Municipalities may be eligible for grant funding specific to the infrastructure improvements they allege will exist in the future. The MBTA Communities legislation specifically contemplates two such grant programs tailored to fund the types of concerns raised by the Municipalities: the MassWorks Infrastructure Program[16] and the HousingWorks Infrastructure Program.[17] The statute expressly states that such grant programs are directly tied to enforcement of § 3A.

Thus, funding projects through grants, rather than appropriations, provides the type of specific funding for such future infrastructure projects that are too speculative under § 27C. As such, the Legislature was mindful of the concerns raised by the Municipalities, and specifically contemplated funding infrastructure updates that a municipality could expressly identify in applying for a grant. This model is consistent with *Lexington* and *Kennedy*, which demonstrate that a municipality was entitled to appropriations upon identifying anticipated and specific line-item costs to be incurred subject to a new law or regulation, but speculative costs did not reflect an unfunded mandate. The parties also mention multiple grants that have already been dispersed,

[16] Per the Commonwealth's official website, the MassWorks Infrastructure Program is identified as "a competitive grant program that provides the largest and most flexible source of capital funds to municipalities and other eligible public entities primarily for public infrastructure projects that support and accelerate housing production, spur private development, and create jobs throughout the Commonwealth."

[17] The HousingWorks Infrastructure Program shares a similar objective, identified as "a competitive grant to municipalities and other public entities for a variety of infrastructure projects associated with housing development. This grant program awards funds based on the project's nexus with housing, transportation, infrastructure, and community development needs."

which further indicates that such funding is the appropriate mechanism for assisting municipalities establishing § 3A districts.

To be sure, there may be shortcomings in costs associated with future projects and the grant funding received by the Municipalities. However, even if appropriations were fashioned in some manner, there could be similar shortcomings as the Legislature is constrained by budgetary concerns. The appropriation process does not create a blank check to municipalities in requesting and obtaining funding, but instead is limited to state funds that are actually accessible. See *Mazzone*, 432 Mass. at 522 ("The constitutional convention understood the term 'appropriation' to mean something more than legislative authority to spend."). Thus, the Municipalities will be able to obtain grant certain funds if they are able to identify spending needs that are more than speculative.

**H. Unfunded Mandate Conclusions**

In summation, the court concludes that: 1) § 3A is not an unfunded mandate; 2) the Municipalities have failed to identify nonspeculative direct costs requiring appropriation for anticipated infrastructure costs; 3) the court is not bound by DLM's determination; 4) § 3A is a zoning regulation that does not compel construction; and 5) the Municipalities have recourse in pursuing grants specifically intended to fund infrastructure considerations upon compliance with § 3A. Thus, the defendants' motions to dismiss the counts of the Municipalities' complaints seeking declaratory and/or injunctive relief specific to deeming § 3A an unfunded mandate as to future anticipated costs are therefore **ALLOWED**.

Given such conclusion, the Municipalities have not shown a likelihood of success on the merits of their claims that § 3A constitutes an unfunded mandate as to future anticipated

infrastructure costs. Their motions for a preliminary injunction are therefore **DENIED** as to this category of costs.

## III. Unfunded Mandate Analysis as to Costs for Designating a § 3A District

In addition to their above arguments concerning anticipated infrastructure costs, several Municipalities argue § 3A is an unfunded mandate because they have incurred costs in designating a compliant district, but funds have not been appropriated for this task. However, several Municipalities acknowledge that they have already received grant funding in their attempts to designate a § 3A district.[18] This underscores the nature of § 3A, for which municipalities can look to grant programs, rather that appropriations, to fund tasks associated with designating compliant districts.

Several municipalities, most notably Duxbury, referenced a protracted course whereby they contacted multiple consultants in their efforts to designate a § 3A district. They argue that the nature and conditions of the geography in the municipality make it seemingly impossible to comply with regulatory requirements and that EOHLC does not take such factors into account in deemed communities noncompliant. However, in *Milton*, the SJC stated:

> Tasking [EOHLC], in consultation with other relevant agencies, to determine whether a city or town has complied with the requirement that it have a zoning ordinance or bylaw providing for a "district of reasonable size" where multifamily housing is permitted "as of right," G. L. c. 40A, § 3A (a) (1), allows subject-matter experts to tailor the guidelines to fit the "real-world" conditions of each MBTA community affected by the act by, for example, taking into account a community's land area, population, existing housing stock, or other relevant factors.

*Id.* at 190.

[18] The Commonwealth's pleadings also identify grants previously received by several municipalities in connection with designating § 3A districts. Although not specifically included in the complaints, such information may be considered by this court as it constitutes matters of public record regarding disbursement of state funds. See *Marram*, 442 Mass. at 45 n.4.

Thus, the SJC held that EOHLC and other relevant agencies are the "subject matter experts" to address the very issues that several Municipalities raise here, namely complexity of factors impacting their options for designating compliant districts. Given such deference by the SJC, this court similarly credits the EOHLC's determination in this context. The mere fact that the Municipalities dispute how and whether § 3A applies to their community does not render the EOHLC's analysis process incorrect. An overwhelming number of communities were able to designate a compliant § 3A district without resorting to litigation. The Commonwealth, with reference to other municipalities that zoned the requisite § 3A districts, notes that some of the Municipalities are attempting to design "bespoke" districts that are nuanced in a manner far beyond the contemplated regulations concerning § 3A. On this basis, the Municipalities that dispute the costs associated with making such designation have not set forth a sufficient legal or factual basis for this court to conclude that they are unique such that the Legislature should appropriate funds to establish a § 3A compliant district.

Further, there does not appear to be any dispute that municipalities are regularly required to amend or add zoning bylaws or, in some instances, hold Town Meetings. Here, the Municipalities have failed to set forth any legal or factual basis for this court to conclude that designating a § 3A district exceeds such regular zoning tasks required by municipalities and therefore are more than "incidental local administration expense[s]." See G. L. c. 29, §27C(a). Such incidental expenses are expressly excluded from the "direct service cost or obligation" requirement for appropriation under § 27C.

As discussed above, the DLM determination stated "[i]t is apparent that, at a minimum, direct costs exist in developing compliant zoning that amount to more than incidental local administrative expenses." However, the court is not bound by DLM's determination concerning

the unfunded mandate statute as applied to this category of costs. As demonstrated in *City of Worcester*, the SJC rejected the DLM's determination and reached a different conclusion from DLM in its own unfunded mandate analysis. Lastly, the DLM's determination is merely prima facia evidence, which this court finds was flawed as a matter of law.

Thus, the defendants' motions to dismiss the counts of the Municipalities' complaints seeking declaratory and/or injunctive relief specific to deeming § 3A an unfunded mandate for costs associated with designating a § 3A district are therefore **ALLOWED.**

Given such conclusion, the Municipalities have not shown a likelihood of success on the merits of their argument that § 3A is an unfunded mandate as to costs incurred in designating a § 3A district, and their motions for a preliminary injunction are therefore **DENIED** as to this category of costs.

## IV. Payment of Alleged Outstanding Grant Funds

Hanson, Middleton, and Marshfield seek disbursement of grant funds they allege were previously promised to them but are now withheld based upon § 3A compliance requirements. Relatedly, they also seek preliminary injunctions holding § 3A in abeyance so that such grants can now be disbursed.

Hanson states in its complaint that it submitted, and received approval of, two grant applications. It appended an October 11, 2024, letter from MassDevelopment that stated "[o]n behalf of the Healy-Driscoll Administration, I am pleased to inform you that a grant in the amount of $70,000 from the Site Readiness Program has been approved to support the 212 Industrial Boulevard project." However, the letter further stated:

> Please be advised that this letter does not constitute an agreement or contract with MassDevelopment or the Commonwealth of Massachusetts, and the grant award is not final until the organization has executed a contract with MassDevelopment. You should not proceed with any grant activities until a contract is in place.

Hanson also appended an October 15, 2024, letter from MassDevelopment that stated "[o]n behalf of the Healy-Driscoll Administration, I am pleased to inform you that a grant in the amount of $237,000 from the Brownfields Redevelopment Fund has been approved to support the 100 Hawks Avenue Rear Site Remediation." However, the letter further stated:

> Please be advised that this letter does not constitute an agreement or contract with MassDevelopment or the Commonwealth of Massachusetts. No MassDevelopment funds will be disbursed until the Grant Agreement is fully executed and all disbursement conditions are met.

Middleton also states in its complaint that it submitted, and received approval of, a grant application. It appended an October 11, 2024, letter from EOED that stated "[o]n behalf of the Healey-Driscoll Administration, I am pleased to you inform you that a grant in the amount of $2,000,000 from the MassWorks Infrastructure Program has been approved to support the Route 62 & Route 114 Project." However, the letter further stated:

> Please be advised that this letter does not constitute an agreement or contract with EOED or the Commonwealth of Massachusetts, and the grant award is not final until the organization has executed a contract with EOED. You should not proceed with any grant activities until a contract is in place.

Each of the letters also stated: "If this project is located in an MBTA Community, please note that a contract will not be executed if the community is noncompliant with Section 3A of M.G.L. Chapter 40A as determined by EOHLC."

Marshfield has similarly identified several grants for which it alleges the defendants have withheld funding. It points to a December 12, 2024, letter that stated, "[o]n behalf of the Seaport Economic Council, I am pleased to inform you that the Council has conditionally approved the Town of Marshfield's application for a grant in the amount of $261,600 for the Permitting North/South River Dredging project." However, the letter stated "[t]he grant award is not final until the Town of Marshfield has executed a contract with EOED. . . . You should not proceed

with any purchases or construction work until a contract is in place." The letter further stated "[p]lease note that this grant award is contingent on the Town of Marshfield being in compliance with the multifamily zoning requirements set forth in section 3A of chapter 40A of the Massachusetts General Laws. Compliance is determined by the Executive Office of Housing and Livable Communities."

On this basis, none of these towns have set forth sufficient facts to establish that they are entitled to disbursement of such grants. Instead, they have alleged that their applications were accepted, but the letters expressly indicated that they did not constitute a contract or confirm that the grant award was finalized. Additionally, the letters expressly stated that they must comply with § 3A before any contracts are executed. Given these conditions, to which these Municipalities object to complying, they are not entitled to disbursement of these grant funds.

Marshfield's motion also states the "Town believes that it is ineligible for a further $400,000 grant from the State Dredge Grant Program for which it the Town has permits in hand for the competition of dredging of Green Harbor" and the "Town School Department is advised that it also will not be eligible for a FY2025 Coordinated Family and Community Engagement Grant offered by the MA Department of Early Education and Care in the amount of $45,700 for which it applied and was otherwise eligible for." None of these statements are supported by documents establishing that any grant contracts were confirmed or that Marshfield had any reliable basis to believe it would receive such grants.

Therefore, none of these municipalities have shown a likelihood of success on the merits that they are entitled to disbursement of these grants. Their motions for a preliminary injunction are therefore **DENIED** as to this argument.[19]

[19] The defendants to not substantively address this issue in their motions to dismiss.

## V. Holden, Middleton, Hamilton, and Wenham's Status as MBTA Communities

Holden and Middleton argue that they should not be subject § 3A because they were improperly classified an "adjacent community" under the statute. They point to the pertinent regulation, 760 Code Mass. Regs. § 72.02, which provides the following definitions:

> Adjacent Community means an MBTA community that:
>
> (a) has within its boundaries less than 100 acres of Developable station area; and
>
> (b) is not an Adjacent small town.
>
> Adjacent Small Town means an MBTA community that:
>
> (a) has within its boundaries less than 100 acres of Developable station area; and
>
> (b) 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.*

760 Code Mass. Regs. 72.02

Holden and Middleton state that they are not adjacent to any communities with MBTA services. In making this argument, they incorrectly apply the term "adjacent." Black's Law Dictionary defines adjacent as "Lying near or close to, but not necessarily touching." Black's Law Dictionary (12th ed. 2024). Thus, proximity to a community with MBTA services establishes the "adjacent" consideration. Holden and Middleton seemingly misconstrue "adjacent" with "contiguous," which is defined as "[t]ouching at a point or along a boundary" or "adjoining," which is defined as "touching; sharing a common boundary." *Id.*

Further, the only information reflected in these Municipalities' complaints are their general averments that they are not adjacent to a municipality with MBTA service. Neither of their complaints substantially addresses both considerations for an adjacent community: population and the amount of developable station area. They do not provide any information to

substantiate their averments regarding developable land in the municipality.[20] Per the applicable regulations,

> Developable Land means land on which Multi-family housing can be permitted and constructed. For purposes of 760 CMR 72.00, Developable land consists of:
>
> > (a) all privately-owned land except Lots or portions of Lots that meet the definition of Excluded land; and
> >
> > (b) Developable public land.
>
> Developable Public Land means any Publicly-owned land that:
>
> > (a) is used by a local housing authority;
> >
> > (b) has been identified as a site for housing development in a housing production plan approved by EOHLC; or
> >
> > (c) 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.

760 Mass. Code Regs. § 72.02

There is insufficient information in these Municipalities' complaints regarding the factual assessment of data reflected in 760 Code Mass. Regs. § 72.02. Middleton summarily states that it "contains no MBTA facilities and is not immediately adjacent to any communities with mass transit services." Holden's averments are somewhat more informative, in stating it does not have the requisite "developable land" as set forth in the applicable regulations. However, this constitutes the type of "labels and conclusions" that do not survive a motion to dismiss. *Iannacchino*, 451 Mass. at 636.

[20] Per the regulation, population considerations are "determined in the most recently published *United States Decennial Census of Population and Housing*." 760 Code Mass. Regs. § 72.02

Further, irrespective of the regulations set forth in Title 760, Chapter 72 of the Code of Massachusetts Regulations, Holden and Middleton have been statutorily classified as MBTA communities. Chapter 40A, which sets forth the Commonwealth's statutory zoning scheme, defines an MBTA Community as:

> a city or town that is: (i) **one of the 51 cities and towns as defined in section 1 of chapter 161A**; (ii) one of the 14 cities and towns as defined in said section 1 of said chapter 161A; (iii) **other served communities as defined in said section 1 of said chapter 161A;** or (iv) a municipality that has been added to the Massachusetts Bay Transportation Authority under section 6 of chapter 161A or in accordance with any special law relative to the area constituting the authority (emphasis added).

G. L. c. 40A, § 1A.

The statutory framework for the MBTA is set forth in Chapter 161A. Per this chapter, Middleton is one of the "51 cities and towns" identified in G. L. c. 161A, § 1, and Holden is one of the "Other served communities." Neither Municipality has set forth a sufficient factual or legal basis for this court to conclude that these municipalities were improperly deemed MBTA adjacent communities, as defined by this statute.

Hamilton and Wenham each argue they were improperly classified as an MBTA Commuter Rail Community. An MBTA station, the Hamilton/Wenham Station, straddles the boundary between the Municipalities. These Municipalities argue that they cannot both be deemed a Commuter Rail Community where the entire station is not within its boundaries.[21] [22]

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[21] Wenham states:

> The Town does host an MBTA station, referred to by the MBTA as the "Hamilton/Wenham Station" on the Newbury/Rockport Line of the Commuter Rail System. However, this station is a shared station between the Towns of Wenham and Hamilton, as the station sits on the shared town-line with its formal address in Hamilton.

Based on the record before this court, however, Wenham has not provided any basis for this court to conclude that the formal address of a station is dispositive of its characterization under the applicable regulations.

[22] Hamilton's motion references "split lots" in the context of zoning. It argues that the "active" portions of the station, namely the platform, building, and parking, are all located in Wenham, and thus the Hamilton portion only reflects the "passive" portion of the station. However, Hamilton has not provided any basis for this court to

However, neither Municipality has set forth any legal or factual basis for this court to conclude that the geographic nature of the shared Hamilton/Wenham Station disqualifies it from characterization as a Commuter Rail Community.

The defendants' motions to dismiss are therefore **ALLOWED** as to this issue. Given such conclusion, the Municipalities have not shown a likelihood of success on the merits of these regulatory characterization arguments, and their motions for a preliminary injunction are therefore **DENIED** as to this argument.

## VI. Arbitrary and Capricious Analysis

Several Municipalities argue the standards and calculations set forth in the various regulations are arbitrary and capricious. In substance, they argue the calculations do not properly reflect the conditions and character of the land within the municipality and the means by which development may be executed. Of note, Duxbury states:

> The Regulations are arbitrary and capricious and invalid on their face insofar as they do not require EOHLC to determine the amount of required land area and unit density based on each regulated community's unique characteristics, and they do not provide any mechanism for an aggrieved community to challenge the output of the computer model or to appeal the decision.

This position is in direct contrast to the *Milton* decision, as the SJC declared that the applicable regulations "allow[ ] subject-matter experts to tailor the guidelines to fit the 'real-world' conditions of each MBTA community affected by the act by, for example, taking into account a community's land area, population, existing housing stock, or other relevant factors." *Milton*, 495 Mass. at 190. As such, the SJC interpreted the applicable regulations as directly requiring EOHLC to consider any unique factors within a municipality. None of the Municipalities have set forth any basis for this court to conclude that EHOLC, or any other

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conclude that location of the "active" portion of the MBTA Commuter Rail stop is dispositive of Hamilton's characterization under the applicable regulations.

related entity, did not fully perform the type of analysis contemplated by the SJC in *Milton*. Thus, the regulations are not arbitrary and capricious in the context of factors for EOHLC to consider.

Several Municipalities also argue that the EOHLC's determinations are arbitrary and capricious because the EOHLC stated that implementing § 3A and the related regulations would have no fiscal impact upon municipalities. A state office or agency submitting a fiscal impact statement must do so in good faith. *American Grain Prods. Processing Ints.* v. *Department of Pub. Health*, 392 Mass. 309, 326 (1984).

Here, the Municipalities' complaints fail to set forth sufficient facts to state a claim that the EOHLC acted in bad faith or arbitrary and capriciously when stating there was no fiscal impact. As discussed herein, the court finds that § 3A and its related regulations do not impose any direct costs requiring funding appropriations. Thus, EOHLC correctly stated there was no fiscal impact.

Relatedly, several Municipalities assert claims, in the nature of mandamus and requests for accounting, that various Commonwealth offices and departments must provide information concerning the fiscal impact of § 3A. In this regard, several Municipalities allege that the Commonwealth's failure to provide necessary information to DLM prevents DLM from making its final determination. Again, where this court finds there were no direct costs, there is no basis to compel EOHLC or any other offices to provide additional information.

Weston further argues that the regulations are arbitrary and capricious because "they fail to provide notice and an opportunity to be heard prior to receiving an adverse decision, nor any meaningful opportunity to appeal such decision." However, there is no legal or factual basis in

the record requiring that the EOHLC classification system is subject to any due process considerations triggering a right to a hearing or an appeal.

The defendants' motions to dismissed are therefore **ALLOWED** as to this issue. Given such conclusion, the Municipalities have not shown a likelihood of success on the merits of their arbitrary and capricious arguments, and their motions for a preliminary injunction are therefore **DENIED** as to this argument.

## VII. Marshfield Town Meeting Authority

Marshfield argues § 3A infringes upon its authority to develop and enforce zoning regulations through its Town Meeting. More specifically, it argues that the Town Meeting has rejected the zoning requirements set forth in § 3A and therefore Marshfield should not be required to comply. In making this argument, Marshfield ignores the well settled principle that "the powers of a town and of its town meeting, and the very existence of the town, are subject to the will of the Legislature." *Commonwealth* v. *Hudson*, 315 Mass. 335, 345 (1943). The SJC has "upheld repeatedly the Legislature's 'supreme' power in zoning matters. *Board of Appeals of Hanover* v. *Housing Appeals Comm.*, 363 Mass. 339, 356 (1973)

Further, there is an "elementary principle that a town is merely a subordinate agency of State government created for convenient administration and has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges." *Atherton* v. *Selectmen of Bourne*, 337 Mass. 250, 255–256 (1958). Taking a position that "the town's vote in enacting the by-law is a judicially unreviewable act" is an "astonishing contention." *Id.* Accordingly, Marshfield's Town Meeting rights are subordinate to the Legislature's enactment of § 3A and Marshfield is thus subject to the terms of § 3A.

The defendants' motions to dismiss are therefore **ALLOWED** as to this issue. Given such conclusion, Marshfield has not shown a likelihood of success on the merits of its Town Meeting argument, and its motion for a preliminary injunction is therefore **DENIED** as to this argument.

**VIII. Hamilton Excluded Land**

The Gordon-Conwell Theological Seminary ("the Seminary") sits within Hamilton's borders. Per the regulations, "[p]rivately-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" is "excluded land." 760 Code Mass Regs. 72.02. Hamilton argues that there are limitations to such excluded land characterization, as the regulation further states "[i]f privately owned land that would otherwise be excluded is no longer being used for such educational or institutional uses, EOHLC may determine that such land no longer being so used is Developable Land." *Id.* Hamilton states that construction is underway on Seminary property and therefore the EOHLC should deem it developable.

However, Hamilton seemingly ignores a critical word in the excluded land definition. Per 760 Code Mass. Regs. 72.02, the EOHLC "may" determine whether to characterize land like the Seminary property, which purportedly is no longer used for such educational purposes, as developable. Thus, EOHLC is not required to deem the Seminary property developable simply because its current use has purportedly changed.

Hamilton states that excluding the Seminary as undevelopable land under § 3A significantly decreases the available acreage in the town and "[i]ncluding the Seminary property would materially change Hamilton's ability to comply by opening up over a hundred additional acres for multi-family housing in the Town of Hamilton." While this may be true, Hamilton has

not alleged sufficient facts to show that this factor makes it unique and thus exempt from § 3A compliance. Instead, as discussed herein, all municipalities are faced with various considerations in designating their § 3A district and, per the *Milton* decision, EOHLC and related entities are the "subject matter experts" in assessing all factors when determining § 3A compliance.

Therefore, Hamilton has not shown a likelihood of success on the merits of its Town Meeting argument, and its motion for a preliminary injunction is therefore **DENIED** as to this argument.[23]

## IX. Affordability Considerations

In its submissions, Wenham argues that implementing § 3A will impede upon affordable housing in Massachusetts. More specifically, it argues:

> Contrary to the goal of creating more affordable housing stock, G.L. c. 40A, § 3A does not permit zoning districts under the statute to include an affordable-unit requirement exceeding 10%. This restrict is at cross-purposes with Wenham's inclusionary zoning goals and its Master Plan, and may also serve to reduce the Town's SHI% from its current level of 12.5%

As stated herein, the purpose of § 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." 760 Mass. Code Regs. § 72.01. Pursuant to 760 Mass. Code Regs. 72.04(1)(b), "§ 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." The regulations set forth the following calculus for addressing affordability:

> 1. For purposes of making compliance determinations with M.G.L. c. 40A, § 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% of the units in a project to be Affordable units**, and the cap on the income of families or individuals who are

[23] The defendants to not substantively address this issue in their motions to dismiss. Instead, they state that Hamilton filed an amended complaint, and the excluded land argument is an "artifact[ ] of legal claims that had appeared in the plaintiffs' original complaint, but which have now been dropped in the plaintiffs' operative Amended Complaint."

eligible to occupy the Affordable units is not less than 80% 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:

a. The affordability requirements applicable in the Multi-family zoning district are reviewed and approved by EOHLC as part of a smart growth district under M.G.L. c. 40R, or under another zoning incentive program administered by EOHLC; or

b. 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 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.

760 Mass. Code Regs. 72.04(1)(b) (emphasis added).

Thus, the regulations provide a 10% limitation on affordable units as a general rule. However, the regulations also explicitly confer EOHLC with discretion to approve a greater number of affordable units in appropriate circumstances. On this basis, § 3A does not conflict with other statutes and regulations that encourage affordable housing. Instead, it reflects the understanding that "[i]f affordability requirements are excessive . . . they can make it economically infeasible to construct new Multi-family housing." *Id.* As such, § 3A does not deter affordable housing, but instead considers its merits in the broader context of construction cost considerations.

Therefore, Wenham has not shown a likelihood of success on the merits of its affordability argument, and its motion for a preliminary injunction is therefore **DENIED** as to this argument.[24]

[24] The defendants to not substantively address this issue in their motions to dismiss.

## ORDER

For the aforementioned reasons, the Municipalities' motions for a preliminary injunction are **DENIED** and the defendants' motions to dismiss are **ALLOWED**.

June 6, 2025

Mark C. Gildea
Justice of the Superior Court