COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. No. SJ-2024-____

_____

ATTORNEY GENERAL,

Plaintiff,

v.

TOWN OF MILTON and
JOE ATCHUE,

Defendants

_____

ATTORNEY GENERAL'S COMPLAINT AND BRIEF

_____

1. The Attorney General brings this action to obtain declaratory, injunctive, and other relief against the Town of Milton ("Town" or "Milton") concerning the Town's failure to comply with mandatory state law--specifically, the provision of the MBTA Communities Act, codified at G.L. c. 40A, § 3A(a), that requires the Town to have a zoning by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right, that is located within a half-mile of a transit station, and that satisfies other specified criteria.

PARTIES

2. The Attorney General is the chief law enforcement officer of the Commonwealth. Her principal place of business is at One Ashburton Place in Boston, Massachusetts.

3. The Town of Milton is a Massachusetts municipal corporation with a principal place of business at 525 Canton Avenue in Milton, Massachusetts.

4. Joe Atchue is the Town's Building Commissioner. His principal place of business is at 525 Canton Avenue in Milton, Massachusetts. He is sued in his official capacity only.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over the claims for declaratory relief set forth herein. G.L. c. 231A, § 1.

6. This Court has original jurisdiction over the claims for equitable relief set forth herein. G.L. c. 214, § 1.

7. This Court is an appropriate venue for this action. G.L. c. 214, § 5; G.L. c. 223, § 5.

FACTUAL ALLEGATIONS

The Legislature Attempts to Spur Housing Production Through Voluntary Means

8. It is indisputable that the Commonwealth faces a housing crisis, which is a key factor in the state's exceptionally high cost of living. The Commonwealth's limited housing supply also forms a significant impediment to economic growth, and makes Massachusetts all too unaffordable for its

residents--particularly working families, those with disabilities, and people of color.

9. For several decades, the Legislature has attempted to incentivize housing production by establishing voluntary programs that provide additional funding for municipalities that choose to participate.

10. In 2004, for example, the Legislature enacted Chapter 40R to encourage "smart growth zoning." St. 2004, c. 149, § 92. Chapter 40R encourages municipalities to adopt "40R" overlay zoning districts, which must be located near either a transit station or area of concentrated development and must allow, at minimum, between 8 and 20 units of housing per acre, with at least 20% of those new units being income restricted to 80% of the Areawide Median Income ("AMI"). G.L. c. 40R, §§ 2 & 6. A municipality that does so may receive state payments of up to $600,000, as well as $3,000 for each new housing unit constructed in the 40R district. G.L. c. 40R, § 9. Some may also receive reimbursement for certain costs associated with providing educational services to students in that district. G.L. c. 40S, § 2.

11. As of May 2018 however, only 37 of the state's 351 municipalities had created a 40R district. A I:36.[1] And, although those districts permitted up to 15,391 future housing units, only roughly 3,500 housing units had been actually constructed. Id. As of 2018, only 5% of the future zoned units were located within Greater Boston. A I:48.

12. A 2016 amendment to the 40R program further allowed municipalities to adopt "starter home" zoning districts, which must allow at least 4 units per acre, with at least 20% of those new units being restricted to 100% of AMI. St. 2016, c. 219, §§ 37-54. As of December 2020, however, no municipality had created such a starter home district. See Scott Van Voorhis, "Baker's Starter House Effort a Bust," Commonwealth Beacon (Dec. 3, 2020), https://commonwealthbeacon.org/uncategorized/bakers-starter-house-effort-a-bust/.

13. In November 2014, the Legislature received a report from the nonprofit Massachusetts Housing Partnership concluding that the state would need to build 500,000 new units of housing by 2040 to maintain its existing base of employment. A I:82. The report recommended a new mandatory program that would

[1] This document cites the accompanying two-volume, consecutively-paginated "Appendix to Attorney General's Complaint and Brief" as "A [vol.]:[page]."

require all municipalities to have a zoning district in which multifamily housing was permitted as of right. A I:86.

The Legislature Enacts the MBTA Communities Act

14. Although the power to zone is among those powers granted to municipalities by the Home Rule Amendment to the state Constitution, the Legislature has retained "supreme power in zoning matters," as long as it acts in accordance with the Home Rule Amendment. Bd. of Appeals of Hanover v. Hous. Appeals Comm., 363 Mass. 339, 356 (1973) (internal quotations and citations omitted). The Legislature has, over the years, placed various limits on municipalities' power to zone. See G.L. c. 40A, § 3; G.L. c. 40B, §§ 20-23.

15. On January 14, 2021, Governor Baker signed into law the MBTA Communities Act. St. 2020, c. 358. Among other things, that legislation inserted a new § 3A into the state's Zoning Act, Chapter 40A. See id. § 18; see also A I:9-10 (copy of G.L. c. 40A, § 3A). Section 3A consists of three subsections.

16. Subsection (a) requires municipalities that are "MBTA communities"[2] to "have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family

[2] The definition of "MBTA community" was inserted into G.L. c. 40A, § 1A. By reference to the MBTA's enabling statute, the definition encompasses over 170 specifically identified municipalities, of which Milton is one.

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 [certain environmental laws]; and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable."

17. Subsection (b) prescribes certain administrative consequences for an MBTA community's failure to provide for such a district, namely, that the noncompliant municipality "shall not be eligible for funds from: (i) the Housing Choice Initiative . . . ; (ii) the Local Capital Projects Fund . . . ; (iii) the MassWorks infrastructure program . . . ; or (iv) the HousingWorks infrastructure program . . . ."

18. Subsection (c) states that the Commonwealth's Executive Office of Housing and Livable Communities ("EOHLC")[3] "shall promulgate guidelines to determine if an MBTA community is in compliance with this section." Cf. Fairhaven Hous. Auth. v. Commonwealth, 493 Mass. 27 (2023) (addressing separate

[3] Prior to 2023, EOHLC was known as the Department of Housing and Community Development, or "DHCD." See St. 2023, c. 7. For simplicity, this document refers to that entity as EOHLC throughout.

statutory scheme under which EOHLC is also empowered to "promulgate guidelines").

EOHLC Issues Draft Guidelines and Solicits Public Comment

19. Less than one month after § 3A became law, EOHLC issued a short missive to MBTA communities outlining its anticipated process for establishing compliance guidelines under § 3A(c). See A I:107-108. EOHLC noted that it intended to consult with the MBTA and MassDOT, and "expect[ed] to seek and consider input from affected MBTA [c]ommunities as well." A I:108. EOHLC noted that it "anticipate[d] that its compliance guidelines will account for the fact that different communities have different needs and that communities considering the adoption of new zoning will, in many cases, require time for a planning process and community input." Id.

20. On December 15, 2021, EOHLC issued draft guidelines (the "Draft Guidelines") and invited public comment. A I:109.

21. The Draft Guidelines proposed to categorize MBTA communities based on what transit facilities were present in or near that municipality. A I:113. A municipality with a subway station within its borders, or within 0.5 mile of its borders, would be categorized as a "Rapid Transit Community." A I:111.

22. Milton is served by four stops on the MBTA's Mattapan High Speed Line branch of the Red Line: Milton, Central Avenue, Valley Road, and Capen Street. A I:269. The Draft Guidelines

accordingly categorized Milton as a Rapid Transit Community. A I:122.

23. The Draft Guidelines offered some limited flexibility for a municipality to determine the location of its § 3A(a)-compliant district. A I:115. Specifically, the Draft Guidelines indicated that a Rapid Transit Community's district would comply if a "substantial portion" of the district was located within 0.5 miles of a transit station. Id. Only a municipality with no developable land within 0.5 miles of a transit station could comply by use of a district less than half of which was within 0.5 miles of a transit station. Id.

24. Acknowledging that many MBTA communities lacked a preexisting § 3A(a)-compliant district, the Draft Guidelines also established timelines by which municipalities could establish one. A I:117. Specifically, the Draft Guidelines called for Rapid Transit Communities such as Milton to submit a "proposed action plan" projecting milestones toward compliance by March 31, 2023, and to actually establish a § 3A(a)-compliant district by December 31, 2023. A I:117-118.

The Town Comments on the Draft Guidelines

25. On March 30, 2022, Milton's Select Board[4] submitted a letter to EOHLC commenting on the Draft Guidelines. A I:134.

[4] In 2018, the Town renamed its "Board of Selectmen" to "Select Board." See Milton Town By-Laws § 1-9.

26. That letter stated that the Town "[u]nderstand[s] and take[s] seriously the housing crisis that led the Legislature to draft the MBTA Communities Zoning law," A I:128, and acknowledged that, "like all other communities, [Milton] has an obligation to zone for additional housing to meet regional needs . . . ." A I:127.

27. The letter also acknowledged, without protest, the Town's categorization as a Rapid Transit Community. A I:127.

28. The letter did express concern that the Mattapan High Speed Line's location adjacent to the Milton-Boston border meant that the Town had limited developable area within 0.5 miles of its transit stations. A I:127. The letter observed that one neighborhood, East Milton Square, "is amenity-rich and has multiple potential redevelopment sites" such that it "could be an appropriate location for mixed-use multifamily development." Id. The letter observed, however, that the Draft Guidelines "disqualify East Milton Square from being the location of a compliant district because of its distance from transit." Id.

EOHLC Promulgates Final Guidelines in August 2022

29. On August 10, 2022, EOHLC promulgated final guidelines. (the "August 2022 Final Guidelines"). See A I:129, 131.

30. The August 2022 Final Guidelines retained the category "Rapid Transit Community" and, while making some changes to the

definition of that category, also retained Milton's categorization as a Rapid Transit Community. A I:135.

31. The August 2022 Final Guidelines also afforded new flexibility over the location(s) and features of a § 3A(a)-compliant district. A I:141-142. Specifically, they acknowledged that it may not be practical for a municipality with limited area near transit stations (i.e., like Milton) to situate most or all of its district within 0.5 miles of a transit station. A I:141. So the August 2022 Final Guidelines specified, on a municipality-by-municipality basis, what proportion of that municipality's district must be located within 0.5 miles of a transit station, as well as how many new housing units that district must support. A I:142. They also recognized that a municipality could require site plan review of multi-family housing projects allowed as of right within the district. A I:136-137.

32. As to Milton, the August 2022 Final Guidelines required only half of Milton's § 3A(a)-compliant district to be located within 0.5 miles of a transit station, and permitted the other half of the district to be located anywhere in Milton. A I:150. They also required Milton's district to achieve an estimated unit capacity of at least 2,461 units. Id.

33. The August 2022 Final Guidelines also finalized the process by which a municipality could be deemed compliant with

§ 3A(a). See A I:143-144. Like the Draft Guidelines, the August 2022 Final Guidelines required a municipality to submit an Action Plan proposing information about current zoning, any past planning for multi-family housing, and potential locations for a § 3A(a)-compliant district. A I:143-144. The deadline for all MBTA communities to submit such an Action Plan was set as January 31, 2023. A I:144.

34. The August 2022 Final Guidelines also specified the materials that a municipality would be required to submit to EOHLC in order to apply for EOHLC's determination of full compliance (termed "district compliance") with § 3A(a), including: a certified copy of the municipal zoning by-law and zoning map; an estimate of the district's multi-family unit capacity prepared using a "compliance model" created by EOHLC; a GIS shapefile for the district; and, in the case of a town, evidence that the zoning enactment has been either submitted to the Attorney General's Office for review pursuant to G.L. c. 40, § 32, or approved by the Attorney General's Office pursuant to that same statute. A I:144-145. The deadline to submit such an application was set as December 31, 2023, for Rapid Transit Communities such as Milton. A I:143.

35. The August 2022 Final Guidelines were subsequently revised on October 21, 2022, and again on August 17, 2023. See A I:157, 158, 202, 203. Neither revision altered Milton's

categorization as a Rapid Transit Community or the deadlines or procedures for it to achieve compliance with § 3A(a). See id.

The Attorney General Issues an Advisory Regarding Compliance with the MBTA Communities Act

36. On March 15, 2023, Attorney General Campbell issued an advisory to MBTA communities stating unqualifiedly that "[a]ll MBTA Communities must comply with [§ 3A(a)]" and that the law "does not provide any mechanism by which a town or city may opt out of this requirement." A I:248-249.

37. She added that "MBTA Communities cannot avoid their obligations under [§ 3A(a)] by foregoing th[e] funding" identified in § 3A(b). A I:249. She cautioned that "[c]ommmunities that fail to comply with [§ 3A(a)] may be subject to civil enforcement action." Id.

The Town of Milton

38. Milton has a representative town meeting form of government. See generally St. 1927, c. 27. Its Representative Town Meeting ("RTM") convenes for an annual town meeting each spring, and also convenes for any special town meeting that might be called by the Town's Select Board or by citizens' petition at another time of year.

39. The agenda for each town meeting is set forth in a warrant compiled by the Select Board. The warrant consists of one or more articles, each of which presents an item of Town

business to be discussed, and potentially acted upon, at the town meeting.

40. A warrant article proposing to adopt or amend a zoning by-law may be initiated by the Select Board or Planning Board, among others. G.L. c. 40A, § 5. But, regardless of how the article is initiated, it must be reviewed by the Planning Board before it can be voted upon by RTM. Id. Specifically, the proposal must be referred to the Planning Board, after which that board has sixty-five days to hold a public hearing. Id. RTM may vote on the proposal only after either: (1) the Planning Board has submitted a report and recommendations on the proposal; or (2) twenty-one days have elapsed since the public hearing without the Planning Board submitting such a report. Id.

41. Milton's Town Charter contains a referendum provision, which was granted to the Town by the Legislature in 1927. See St. 1927, c. 27, § 7. That provision states that "[n]o vote passed at any representative town meeting under any article in the warrant, [with exceptions not pertinent here,] shall take effect until after the expiration of seven days, exclusive of Sundays and holidays, from date of such vote. If, within said seven days a petition, signed by not less than five percent of the registered voters of the town . . . is filed with the selectmen asking that the question or questions involved in such vote be submitted to the voters of the town at large, then the

selectmen within fourteen days of the filing of such petition shall call a special town meeting which shall be held within twenty-one days after notice of the call, for the sole purpose of presenting to the voters at large the question or questions so involved." A I:11. "[S]uch question or questions shall be determined by vote of the same [proportion] of the voters at large voting thereon as would have been required by law had the question been finally determined at a representative town meeting." Id.

The Town's Early Response to § 3A(a) and the August 2022 Final Guidelines

42. As of the promulgation of the August 2022 Final Guidelines, the Town was on notice that it had been finally categorized as a Rapid Transit Community and, as such, that its deadlines to submit an Action Plan to EOHLC and to enact § 3A(a)-compliant zoning were January 31 and December 31, 2023, respectively.

43. Even prior to August 2022, the Town had applied to EOHLC for a "technical assistance" grant to hire professional consultants "to analyze alternatives, conduct community outreach, and draft Section 3A-compliant zoning." A I:261. On October 17, 2022, EOHLC notified the Town that it had been approved for a grant of $50,000. A I:268.

44. On September 7, 2022, the Select Board directed the Town's planning staff to prepare an Action Plan in anticipation of the January 31 deadline. A II:487.

45. The Town's planning staff did so and, on January 23, 2023, submitted Milton's Action Plan to EOHLC. A I:269. That Action Plan identified several locations that, preliminarily, appeared to be favorable locations for the Town's § 3A(a)-compliant district, including the Eliot Street corridor, Blue Hills Parkway, Blue Hill Avenue, Brush Hill Road, and two parcels on Granite Avenue near Interstate 93. A I:272. It also projected a series of compliance milestones, including:

- Procuring a consultant by February 14, 2023;
- Creating a compliance model by August 1, 2023;
- Developing zoning by September 1, 2023;
- Conducting public outreach throughout 2023;
- Conducting the Planning Board's public hearing by October 26, 2023; and
- Holding a special town meeting to consider § 3A(a)-compliant zoning on or about December 4, 2023.

A I:273-274.

46. Later in January 2023, the Town used the funds it had been granted to hire Utile, a planning and design consultant, to prepare § 3A(a) compliance models and draft § 3A(a)-compliant zoning. A II:402. Utile prepared those materials using the Town's Action Plan as a guide. A II:410-411. Iterative drafts

of those materials were presented to the Town's Planning Board--either by the Town's planning staff or by Utile's staff--on March 23, April 27, May 11, July 13, August 24, September 7, and September 14, 2023. A II:410-11, 421-422, 424, 435, 442, 444-445, 449; see also A II:692-720 (presentation given by Town planning staff describing its process).

47. On May 23, 2023, the Town applied to EOHLC for a further grant to hire a professional consultant "to draft zoning language to achieve compliance with Milton's MBTA Communities obligations" to "be considered by Town Meeting in December." A A I:279. On June 9, 2023, EOHLC notified the Town that it had been approved for a further grant of $30,000. A I:285.

Opposition to § 3A(a) Emerges

48. As the Town worked toward compliance during the spring and summer of 2023, however, the Town's Planning Board began to expressly oppose § 3A(a), in at least three ways.

49. One line of opposition was to question Milton's categorization as a Rapid Transit Community. The Planning Board's periodic discussions of this issue during the spring and summer culminated in exchanges of letters with the MBTA and EOHLC between August and October 2023, in which the MBTA affirmed the designation of the Mattapan High Speed Line as "rapid transit" and EOHLC affirmed the categorization of Milton as a Rapid Transit Community. A I:253-258, A I:289-365. Of

note, the MBTA observed that the designation of the Mattapan High Speed Line as "rapid transit" is "a technical one based on characteristics of the vehicle, such as whether it operates on a fixed guideway, uses a designated right-of-way, or uses a fixed catenary system," all in accordance with definitions established by federal law. A I:257.

50. A second line of opposition was to question the enforceability of the Guidelines. By September 27, 2023, the Planning Board had requested an opinion from the Town's counsel concerning EOHLC's authority to promulgate and enforce the Guidelines. A II:451-454. Counsel expressed his opinion that § 3A indeed requires EOHLC to promulgate the Guidelines, requires compliance by the Town, and provides no mechanism by which the Town may opt out. A II:453. Nonetheless, one member of the Planning Board subsequently expressed the view that "she did not believe the guidelines are legally enforceable" and sought to authorize the Planning Board to hire "independent counsel" to address the question. A II:469.

51. A third line of opposition was to question whether Milton was obligated to comply with § 3A(a) at all. This view asserted that "the Town should know it has a choice with compliance," and that "the choice to opt out would be decided by members of Town Meeting." A II:437. One member of the Planning Board asserted that the Board should "not be conditioning anyone

to be afraid of the outcome," and insisted that a poll to be conducted at an upcoming public forum should include an "opt out" option. A II:428. At one point, the Planning Board even discussed "[c]easing trolley service through Milton as a means for avoiding the required zoning." A II:391.

The Zoning By-Law Proposed as "Article 1"

52. Against this backdrop, the Town's Select Board voted on August 22, 2023, to affirm its intention to comply with § 3A(a) in anticipation of the special town meeting that had been scheduled for December 4, 2023. A II:558-559.

53. Noting that it had authority to initiate zoning by-law changes, the Select Board then, on September 5, 2023, referred a proposed zoning by-law to the Planning Board for consideration ("Article 1"). A II:573. The Chair of the Select Board noted that, in doing so, the Select Board was giving the Planning Board the full sixty-five days contemplated by G.L. c. 40A, § 5 to conduct a public hearing and to issue its report. Id.

54. Article 1 had been prepared by the Town's planning staff in consultation with Utile during the summer of 2023. A II:558-559. The process of preparing it included eight public forums, 484 online survey responses, 4 "listening posts" at the Milton Farmers' Market, a mailing that was included in every resident's water bill, and outreach on social media. A II:696. Article 1 represented the result of the iterative process

described above at ¶ 46; as the Town's planning staff later noted, "half of the 30 iterations we tested met the thresholds outlined in the compliance guideline[s]. Getting to [Article 1] was an exercise in tradeoffs and prioritizing competing planning priorities. Other potential subdistricts would not meet as many of the [Town's] guiding principles as those in Article 1." A II:719.

55. The express purpose of Article 1 was to create an "MBTA Communities Multi-family Overlay District" ("MCMOD") "to allow multi-family housing as of right in accordance with [G.L. c. 40A, § 3A(a)]." A II:737. The proposed MCMOD would "overlay" the preexisting zoning, in the sense that all regulations imposed pursuant to the preexisting zoning by-law would remain in force, except for uses allowed as of right or by special permit in the MCMOD. Id.

56. The MCMOD consisted of six sub-districts, most (but not all) of which were within a half-mile of a transit station. A II:740-755. As forecasted in the Town's Action Plan, those sub-districts included Eliot Street, Blue Hills Parkway, and Granite Avenue. A II:740, 747, 753. As forecasted in the Town's comments on the December 2021 Draft Guidelines, the MCMOD also included a sub-district in East Milton Square. A II:750.

57. Article 1 called for multi-family housing to be permitted as of right in each sub-district, although such

housing was, in some sub-districts, limited to a maximum number of units on a single lot or limited to lots of a certain size. See, e.g., A II:646, 648. It also specified accessory uses that were allowed as of right, and dimensional standards (i.e., lot size, building height, open space, frontage and setback requirements, and floor area ratios), for each sub-district. See A II:740-755. In some sub-districts, certain mixed-use developments were also permitted as of right. See, e.g., A II:649, 652.

58. Article 1 specified certain "general development standards" applicable to all sub-districts, concerning standards for site design, vehicular access and circulation, and building design, among other things. A II:660-662. Article 1 also specified that at least 10% of housing units in a development of ten or more units must be restricted as "affordable," defined as up to 80% of AMI. A II:665-666. And Article 1 established a process for site plan review to ensure that as-of-right uses complied with all applicable regulations and standards. A II:666-668.

59. Following the Select Board's endorsement of Article 1 on September 5, 2023, the Planning Board spent much of its meetings over the ensuing sixty-five days debating whether it would submit an alternative re-zoning article for RTM's consideration that, in the Planning Board's view, would

purportedly comply with the language of § 3A(a) but not with the Guidelines. See A II:444-479. Ultimately, the Planning Board chose not to do so. A II:469

60. Instead, after holding a public hearing on Article 1, the Planning Board recommended that Article 1 be sent back to the Select Board for further study. A II:482.

The December 2023 Special Town Meeting

61. The Town's Warrant Committee--which reviews, comments on, and recommends town meeting action as to all proposed articles, see Milton Town By-Laws §§ 12-1 et seq.; see also G.L. c. 39, § 16--also recommended that RTM refer Article 1 back to the Select Board for further study. A II:668.

62. Article 1 was discussed at the town meeting that convened on December 4, 2023, and continued on December 11, 2023. There, on December 11, RTM voted favorably on Article 1 as proposed by the Select Board, with one minor conforming amendment, by a margin of 158 to 76. A II:721-736, 737-765.

The Push for a Referendum

63. On or about December 28, 2023, following the certification of signatures accompanying a petition asking that Article 1 be submitted to a referendum, the Select Board voted to call such a referendum for February 13, 2024. A II:768-769; see also A II:775-777 (warrant for referendum), 780 (sample referendum ballot).

The Town Submits Article 1 to EOHLC

64. On January 2, 2024--the first business day following Milton's December 31 deadline to provide EOHLC with an application for district compliance--the Town submitted to EOHLC most (but not all) of the materials required to complete such an application. A II:783-784. It did so in substitution for a formal application, in view of the fact that a referendum on Article 1 was still pending. A II:784. The materials included in the Town's submission represented sufficient information for EOHLC to make a conclusive determination of whether the MCMOD would be compliant with § 3A. Id.

The Referendum

65. On February 12, in the face of a forecasted snowstorm, the referendum was delayed by one day to February 14. A II:778-779.

66. At the referendum held on February 14, the voters determined not to adopt Article 1 by a margin of 5,115 to 4,346 (i.e., approximately 54% to 46%). A II:781.

67. On February 16, EOHLC notified the Town that it was out of compliance with G.L. c. 40A, § 3A. A I:371.

EOHLC's Analysis of Article 1

68. EOHLC's analysis of the materials submitted by the Town on February 2. A II:784-785. That analysis concluded--assuming that the unsubmitted portions of the application

contained no contrary information, and that the Town properly sought review by the Attorney General's Office pursuant to G.L. c. 40, § 32--that the MCMOD would have complied with § 3A. A II:785.

LEGAL POINTS AND AUTHORITIES

I. The Town Is in Violation of § 3A(a) and the Attorney General Is Entitled to Appropriate Remedies.

A. Section 3A(a) Affirmatively Obligates the Town to Have a Compliant Zoning District.

69. As noted, § 3A(a) provides that each "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," that also satisfies other specified criteria. This creates an affirmative obligation on the part of affected municipalities, for at least three reasons.

70. First, § 3A(a) is phrased in terms of what an affected municipality "shall" do. The primary goal of statutory interpretation, of course, is "to effectuate the intent of the Legislature, and the statutory language is the principal source of insight into legislative purpose. Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent." Curtatone v. Barstool Sports, Inc., 487 Mass. 655, 658 (2021) (internal quotations and citations omitted).

71. It is "axiomatic" that a statute's use of the word "shall" connotes a mandatory obligation. Perez v. Dep't of State Police, 491 Mass. 474, 486 (2023) (internal quotations and citations omitted); see also Galenski v. Town of Erving, 471 Mass. 305, 309 (2015) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.") (internal citations and quotations omitted). That the Legislature chose to use the word "shall" in § 3A(a) signifies its intent to create an affirmative obligation on the part of MBTA communities such as Milton.

72. Moreover, to the extent the language of § 3A(a) is ambiguous, available legislative history--specifically, a press release issued by legislative leaders shortly after the MBTA Communities Act became law--confirms that the Legislature intended it to "[r]equire[] designated MBTA communities to be zoned for at least one district of reasonable size, in which multi-family housing is permitted as of right . . . ." A I:101.

73. Second, the final paragraph of G.L. c. 40A, § 7, empowers the judiciary to "restrain by injunction violations [of Chapter 40A]." The Legislature, of course, is presumed to be "aware of the statutory and common law that governed the matter in which it legislates." In re Globe Newspaper Co., 461 Mass. 113, 117 (2011). By codifying the MBTA Communities Act in Chapter 40A, and therefore subject to § 7's preexisting

provision for equitable remedies, the Legislature signaled its intention to make those remedies available to enforce the mandate of § 3A(a).

74. Third, § 3A(a)'s use of mandatory language contrasts with the language that the Legislature chose to use in true "opt-in" zoning statutes. See, e.g., G.L. c. 40R, § 3 (municipality "may adopt a smart growth zoning district") (emphasis added); G.L. c. 40Y, § 2 (municipality "may adopt a starter home zoning district") (emphasis added).

75. That § 3A(b) prescribes administrative consequences for a municipality that fails to comply--specifically, the loss of eligibility for certain kinds of housing and infrastructure funding--does not suggest that § 3A(a) is anything less than obligatory. To the contrary, the prescription of such consequences signifies the Legislature's intent that § 3A(a) is mandatory. 3 S. Singer, Statutes and Statutory Construction § 57:7 (8th ed. 2020) (statute that imposes sanctions for failure to comply is mandatory).

B. The Attorney General May Enforce § 3A(a) Through Declaratory and Injunctive Remedies.

76. The Attorney General, as noted, is the "the chief law officer of the Commonwealth" and, as such, is "clothed with certain common law faculties appurtenant to the office." Commonwealth v. Kozlowsky, 238 Mass. 379, 386, 389 (1921).

Absent "some express legislative restriction to the contrary," she may "exercise all such power and authority as public interests may from time to time require. [She] may institute, conduct, and maintain all such suits and proceedings as [she] deems necessary for the enforcement of the law of the State, the preservation of order, and the protection of public rights." Id. at 390-91; accord Opinion of the Justices, 354 Mass. 804, 809 (1968).

77. The Attorney General's authority to bring suit in the public interest is partially codified in the provision of the General Laws that authorizes her to "take cognizance of all violations of law . . . affecting the general welfare of the people" and to "institute . . . such . . . civil proceedings before the appropriate state and federal courts, tribunals and commissions as [she] may deem to be for the public interest . . . ." G.L. c. 12, § 10. Her authority in this regard is not limited to specific statutory rights of action, see, e.g., Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984), and it encompasses actions that private actors lack power to institute themselves. See Lowell Gas Co. v. Att'y Gen'l, 377 Mass. 37, 43-44 (1979). Indeed, the Legislature's use of the phrase "as [she] may deem to be for the public interest" in G.L. c. 12, § 10, confirms that, in developing the legal policy of the Commonwealth, the Attorney General is the arbiter of the public

interest. Cf. Sec'y of Admin. and Fin. v. Att'y Gen'l, 367 Mass. 154, 163 (1975) (Attorney General is empowered by Legislature "to set a unified and consistent legal policy for the Commonwealth," and has a "common law duty to represent the public interest").

78. The Attorney General's authority to bring suit in the public interest finds expression in a long line of cases brought by the Attorney General against a municipality or municipal official to secure compliance with state law by means of mandamus, declaratory, or injunctive relief. See, e.g., Att'y Gen'l v. City of Boston, 123 Mass. 460 (1877); Att'y Gen'l v. Suffolk County Apportionment Comm'rs, 224 Mass. 598 (1916); Commonwealth v. Town of Hudson, 315 Mass. 335 (1943); Jacobson v. Parks & Rec. Comm'n of Boston, 345 Mass. 641 (1963); Att'y Gen'l v. Sch. Comm. of Essex, 387 Mass. 326 (1982); Commonwealth v. Sch. Comm. of Springfield, 382 Mass. 665 (1981). Such compliance necessarily implicates the public interest and public rights. See, e.g., Quinn v. Rent Control Bd. of Peabody, 45 Mass. App. Ct. 357, 381 (1998) (Kaplan, J.).

79. Moreover, § 3A(b)'s identification of administrative consequences for a municipality's noncompliance with § 3A(a) does not preclude the Attorney General from obtaining judicially ordered declaratory and injunctive relief to secure compliance with § 3A(a).

80. Indeed, a similar situation was presented in Board of Education v. City of Boston, where, amidst a dispute between the Boston School Committee and the Mayor of Boston about the appropriation the School Committee would receive to fund the 1980-81 school year, the state Board of Education, represented by the Attorney General, sought declaratory and injunctive relief to require both municipal entities to provide a minimum school year of 180 days. 386 Mass. 103, 105 (1982). The statutory scheme under which that dispute unfolded indeed purported to obligate a municipality to operate its public schools for a minimum term of 180 days. Id. at 108 (citing G.L. c. 71, §§ 1 & 4). But the statutes also provided that a municipality that failed to do so would forfeit its Chapter 70 school aid funding in an amount proportional to the curtailment of the school year. G.L. c. 71, § 4A. This administrative consequence did not inhibit the SJC from recognizing the Commonwealth's right to seek, and actually awarding, declaratory relief that mandated the municipal entities' compliance with the 180-day school year requirement.[5] 386 Mass. at 112 n.14 & 113;

[5] Although the Commonwealth had also been awarded an injunction by the Superior Court, the SJC's rescript contemplated only declaratory relief--presumably because, by the time of the SJC's opinion in the spring of 1982, the 1980-81 school year had ended and enjoining the municipal entities to provide 180 days of instruction during that year could have had no effect. See 386 Mass. at 113.

see also Perlera v. Vining Disposal Svc., Inc., 47 Mass. App. Ct. 491, 499 (1999) (Attorney General may seek declaration and injunction to force town to comply with prevailing wage mandate of G.L. c. 149, § 27F, even though statute provides criminal penalties for noncompliance; "Section 27F is primarily a remedial statute. The criminal penalty is specified only to encourage compliance with a civil duty. As such, it is properly treated as merely incidental and not as precluding the injunctive relief normally available to enforce legal duties.").

81. Here, in view of the ongoing regional housing crisis--a crisis that, as noted at ¶ 26 above, the Town itself acknowledges--there can be no doubt that the enforcement of § 3A(a) implicates the public interest. As such, the Attorney General is authorized to secure compliance with § 3A(a) through the type of judicially ordered declaratory and injunctive remedies that she seeks in this suit.

COUNT ONE – VIOLATION OF G.L. c. 40A, § 3A(a)

82. The Attorney General repeats and incorporates by reference paragraphs 1-81 as if fully set forth herein.

83. An actual controversy exists between the parties arising out of the Town's failure to comply with the requirements of § 3A(a) and the Guidelines.

84. Resolution of this controversy by entry of judgment declaring the respective rights of the parties will remove any uncertainty about those rights.

85. The Attorney General is authorized to take notice of violations of § 3A(a) and the Guidelines and, in the public interest, to invoke this court's equitable jurisdiction to secure compliance with the same.

PRAYER FOR RELIEF

Wherefore, the Attorney General respectfully requests that this Court:

A. Reserve decision on the merits of this complaint and report the case to the Supreme Judicial Court for the Commonwealth for adjudication of the issues of law presented herein;

B. Declare that § 3A(a) affirmatively obligates the Town to have a zoning by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right and that satisfies the other criteria set forth in § 3A(a) and the Guidelines;

C. Declare that the Town has failed to meet its obligations under § 3A(a) and the Guidelines;

D. Declare that the Attorney General is entitled to injunctive remedies to secure the Town's compliance with § 3A(a) and the Guidelines;

E. Enter an injunction requiring the Town to create a zoning district that complies with § 3A(a) and the Guidelines within three months after entry of such injunction;

F. If, and to the extent that, the Town does not comply with said injunction, enter a further injunction prohibiting the Town and Mr. Atchue from enforcing any aspect of the Town's zoning by-law, rules, or regulations, to the extent that such enforcement is inconsistent with the Town's obligations under § 3A(a) and the Guidelines; and

G. Order such other relief as the Court may deem just and proper. In the event that the Town proves unable or unwilling to comply with the injunctive relief sought above, this may include, but is not limited to, appointment of a Special Master to propose a zoning by-law that complies with § 3A(a) and the Guidelines, or imposition of fines on the Town.

Respectfully submitted,

ANDREA JOY CAMPBELL,
ATTORNEY GENERAL,

By her counsel:

/s/ Eric Haskell
_____

Feb. 27, 2024

Eric A. Haskell, BBO No. 665533
Jon Burke, BBO No. 673472
Erin E. Fowler, BBO No. 707188
Assistant Attorneys General
One Ashburton Place
Boston, Mass. 02108
617-963-2855
eric.haskell@mass.gov

Certificate of Service

Pursuant to Mass. R. Civ. P. 5(b)(1), I certify that I caused the foregoing document to be served on Peter L. Mello, Esq., counsel for the Town of Milton, by e-mail at pmello@mhtl.com.

/s/ Eric Haskell

Feb. 27, 2024

Eric A. Haskell
Assistant Attorney General