



# The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

A. JOSEPH DE NUCCI  
AUDITOR

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October 30, 2007

Mr. Kevin Paicos, Town Administrator  
Town of Ashburnham  
Town Hall  
15 Oakmont Drive  
Ashburnham, Massachusetts 01430

**RE: G. L. c. 253, ss. 44-48 and 302 CMR 10.00 Relative to the Safety of Dams**

Dear Mr. Paicos:

This letter is in response to your request relative to the Local Mandate Law, General Laws Chapter 29, section 27C, and orders of the state Office of Dam Safety (ODS) issued pursuant to the above-captioned law and regulations. These orders require the Town to hire a registered professional engineer to conduct a safety inspection of the Town's Lower Naukeag Lake Dam, and to submit a completed, state-prescribed inspection report to ODS. Additionally, the Town must develop and submit an Emergency Action Plan to be followed in the event the dam fails. You explain that the Town has no funds available to comply with these current requirements, or future orders to make repairs that may be determined necessary as a result of the inspection. You also note that the Town owns three other dams subject to ODS jurisdiction, and that this fact will compound the financial impact of compliance. In light of these concerns, you ask whether the Local Mandate Law applies in this case.

Following a thorough review of this matter, my Division of Local Mandates (DLM) has reached the opinion that the Local Mandate Law does not apply to the dam safety law and regulations at issue. This is primarily because the law imposes obligations that apply generally across both the public and private sectors. The following discussion further explains this conclusion, as well as my intent to undertake a review of the local financial impact of dam safety law in Massachusetts.

As you know, the Local Mandate Law was adopted as part of Proposition 2 1/2 to protect municipalities from state imposed costs. In relevant part, it provides that post-1980 laws and regulations that impose additional costs upon cities and towns must either be fully funded by the Commonwealth, or subject to local acceptance. The law allows municipalities to petition DLM for a determination of the amount of new costs imposed, and to petition superior court for an exemption from complying with the new mandate,

until the Commonwealth assumes the cost. However, it does not shield cities and towns from every type of state requirement resulting in additional local spending. The courts have ruled that Chapter 29, section 27C applies only to state laws and regulations adopted after 1980 that impose cost obligations particularly upon *cities and towns*; it does not apply to generally applicable state requirements that govern public and private sector activities alike. See *Town of Norfolk vs. Department of Environmental Quality Engineering*, 407 Mass. 233 (1990) and *City of Cambridge vs. Attorney General*, 410 Mass. 165 (1991).

The elements of dam safety law that require owners to have their dams professionally inspected periodically and to submit inspection reports to ODS were enacted by the state Legislature after the 1980 trigger date for review under the Local Mandate Law. (See Chapter 330 of the Acts of 2002.) Nonetheless, these and other requirements—including Emergency Action Plans—apply to all entities owning and operating dams. They are not directed particularly at public dam owners. General Laws Chapter 253, section 44 defines the term “owner” as:

the person or persons, including any individual, firm, partnership, association, syndicate, company, trust corporation, municipality, agency, political or administrative subdivision of the commonwealth or any other legal entity of any kind holding legal title to a dam, but excluding the United States...

Information provided by ODS indicates that cities and towns own about 1/3 of the dams that come under the jurisdiction of the agency. Additionally, the elements of the law that provide that owners must ensure the safety and adequacy of the dams they operate have been in effect since 1875, well predating the funding standards of the Local Mandate Law. Because dam safety requirements are generally applicable and many took effect before 1981, DLM concludes that the Local Mandate Law does not apply to General Laws Chapter 253, sections 44-48 and 310 Code of Massachusetts Regulations 10.00. Please note, however, that this conclusion is subject to revision in the event you offer factors we may not have considered that would change this result.

Additionally, this opinion does not prejudice the right of any town to seek independent review of the matter in superior court in accordance with Chapter 29, section 27C(e). I regret that this opinion does not aid your efforts to comply with the ODS orders. Nonetheless, we must apply the Local Mandate Law consistently to each issue, as interpreted by the courts.

Mr. Kevin Paicos, Ashburnham Town Administrator  
Page Three

I appreciate your bringing this matter to my attention, for you have raised important issues of public safety and the financial ability of cities and towns to meet their obligations in this regard. I have directed DLM to undertake a review of the local financial impact of dam safety law in Massachusetts, under the authority of General Laws Chapter 11, section 6B. This statute allows DLM to review state laws that have a significant effect on local spending, regardless of whether they may satisfy the more technical standards of the Local Mandate Law. If warranted, this review will conclude with a report to Legislature, quantifying local compliance costs and recommending means to ease the financial impact of dam safety law.

Please contact me with further questions or comments you may have on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Joseph DeNucci". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping underline.

A. JOSEPH DeNUCCI  
Auditor of the Commonwealth

cc: The Honorable Stephen M. Brewer  
The Honorable Robert L. Rice  
Mr. William C. Salomaa, Director, ODS