COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

DAR _____

APPEALS COURT NO. 2025-P-1173

TRIAL COURT NO. 2577CV00249

Essex County ss.

TOWN OF MIDDLETON, by and through its SELECT BOARD

Plaintiff/Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS; EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES; MASSACHUSETTS EXECUTIVE OFFICE OF ECONOMIC DEVELOPMENT

Defendants/Appellees.

On Appeal from a Judgment of the Superior Court, Essex County

PLAINTIFF/APPELLANT TOWN OF MIDDLETON, by and through its SELECT BOARD's APPLICATION FOR DIRECT APPELLATE REVIEW

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INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

The Town of Middleton, by and through its Select Board ("the Town") in the above-captioned appeal, and pursuant to Mass.R.App.P. 11, hereby respectfully requests Direct Appellate Review before this Honorable Court of the Decision and Judgment of the Superior Court allowing the Defendants/Appellees' Motion to Dismiss the Town's claims for injunctive relief. Specifically, this appeal addresses two major issues of first impression: (1) whether and to what extent, under the Unfunded Mandate Act, a municipality may be required to comply with a costly statutory mandate for which no appropriation has been made by the Commonwealth; and (2) whether and to what extent, the Town must comply with the mandate when, under the applicable statutory and regulatory scheme, it does not meet the applicable criteria to fall within the scope of the mandate in the first instance. Furthermore, on a fundamental level, this appeal concerns the level of specificity with which a plaintiff such as the Town was required to state its claims in its Verified Complaint in order to satisfy the pleading requirements of Rules 8(a) and 12(b)(6) of the Massachusetts Rules of Civil Procedure.

PRIOR PROCEEDINGS

The Town of Middleton filed its Verified Complaint on March 7, 2025, accompanied by a Motion for Preliminary Injunction and supporting Memorandum

of Law. Addendum, at 44-98. In its Verified Complaint, the Town set out claims for declaratory relief under G.L. 29, § 27C and G.L. c. 223A, § 1, *et seq*. (Count I); for injunctive relief (Counts II and III); for mandamus (Count IV[1]), and for an accounting and reimbursement (Count VI), against the Commonwealth of Massachusetts, the Executive Office of Housing and Livable Communities ("EOHLC" or "HLC") and the Executive Office of Economic Development ("EOED") (collectively "the Commonwealth" or "the Commonwealth Defendants"). Addendum, at 49-53.

Count I of the Town's Verified Complaint sought declaratory relief on two bases: first, that Section 3A constituted an unfunded mandate, from which the Town was excused pursuant to G.L. c. 29, § 27C; and second, that the regulations promulgated by EOHLC were not applicable to the Town because the Town did not meet the criteria for a community that is required to comply with Section 3A. Addendum, at 48. Counts II and III of the Town's Verified Complaint sought injunctive relief against EOHLC and EOED on the bases that the Town was irreparably harmed due to the loss of otherwise available grant funding for necessary infrastructure, the increased direct costs to the Town of constructing vital infrastructure to support the housing mandates imposed by 3A zoning, and the

[1] A claim for mandamus was asserted against the Division of Local Mandates in Count V, but was dismissed without prejudice by the Town on March 27, 2025.

potential for adverse judgments arising from enforcement actions initiated by the Attorney General, due solely to its inability to comply with the mandate[2] to create a 3A zoning district. Addendum, at 49-51. In a related fashion, Count IV of the Town's Verified Complaint sought mandamus compelling EOHLC to provide the required (good faith) estimate of the fiscal impact of its regulations in 760 CMR 72.00, *et seq*. Addendum, at 51.

Specifically, the Town alleged the following:

1. Under the EOHLC regulations, there are four (4) categories of MBTA communities that must submit a "District Compliance Application": Rapid Transit Communities; Commuter Rail Communities; Adjacent Communities; and Adjacent Small Towns. Addendum, at 47, ¶ 23.
2. Middleton does not meet the definition of any one of the four (4) categories of MBTA communities identified in the EOHLC regulations. Specifically, Middleton contains no MBTA facilities and is not immediately adjacent to any communities with mass transit services. Addendum, at 47, ¶ 24.
3. As a purported MBTA Community, the Town's compliance with the provisions of G.L. c. 40A, § 3A and the corresponding EOHLC regulations is purportedly mandatory. Addendum, at 47, ¶ 25.

[2] *See*, Attorney General v. Town of Milton, 495 Mass. 183, 193 (2025) (recognizing the Legislature's purpose in enacting 3A imposed a "legislative mandate" and not a "fiscal choice").

4. Pursuant to G.L. c. 40A, §3A(b), failure by the Town to submit a "District Compliance Application" to EOHLC by July 14, 2025, would result in the Town's ineligibility for funding from, *inter alia*, Housing Choice Initiative, the Local Capital Projects Fund, and the MassWorks infrastructure program[3]. Addendum, at 47, ¶ 26.
5. The Town has not submitted a renewed "District Compliance Application" to EOHLC and is at risk of losing eligibility for funding from those programs identified in G.L. c. 40A, § 3A(b) and 760 CMR 72.09. Addendum, at 47, ¶ 27.
6. The anticipated construction of the 750 housing units required under the Act 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. Addendum, at 47, ¶ 29.
7. The Town has submitted, and received approval of, an application for grant funding to the EOED, MassWorks Infrastructure Program, in the amount

[3] The Commonwealth has now expanded the list of grant programs from which the Town is disqualified.

of two-million dollars ($2,000,000.00) to support improvements to the intersection of Routes 62 and 114, in the Town of Middleton. Such grant is directly related to infrastructure to support a multi-family affordable housing development. However, with respect to the grant, and despite the housing benefits of the underlying project, EOED has stated that "a contract will not be executed if the [Town] is noncompliant with Section 3A of M.G.L. c. 40A as determined by EOHLC". Addendum, at 48, ¶ 30.

8. That, in response to requests from other municipalities, the Office of the State Auditor, Division of Local Mandates ("the Auditor" or "DLM"), had issued a determination that G.L. c. 40A, § 3A constituted an unfunded mandate, but was unable to determine the amount of any deficiency due to HLC's abject failure to complete a fiscal impact analysis as required under G.L. c. 30A, § 5, and accordingly, the Town should be excused from compliance with Section 3A. Addendum, at 48, ¶¶ 31-32.

Based on these facts, in Count I of its Verified Complaint, the Town alleged, in part, the following:

1. G.L. c. 40A, § 3A, along with the regulations promulgated pursuant thereto constitute an unfunded mandate. Addendum, at 49, ¶ 40[4].

[4] Emergency regulations were issued on January 14, 2025, in response to the Town of Milton decision, and were in effect at the time of filing of the Verified Complaint and Motion for Preliminary Injunction. "Final" regulations were promulgated on or

2. G.L. c. 40A, § 3A, and the regulations promulgated thereto fail to identify any applicable criteria to render the EOHLC regulations applicable to the Town. Addendum, at 49, ¶ 41.
3. Because no contemporaneous appropriation was made by the Legislature to fund the provisions of G.L. c. 40A, § 3A, or the corresponding regulations promulgated by EOHLC, the Town should be excused from compliance with the requirements of G.L. c. 40A, § 3A and those regulations. Addendum, at 49, ¶ 42.
4. Because the Town does not meet the EOHLC's definition of either a "Rapid Transit Community", a "Commuter Rail Community", an "Adjacent Community", or an "Adjacent Small Town", the Town should be excused from compliance with the requirements of G.L. c. 40A, § 3A and those regulations. Addendum, at 49, ¶ 43.

Based on the foregoing, in Counts II and III of its Verified Complaint, the Town alleged that the Town would be irreparably harmed by enforcement of Section 3A and the corresponding regulations in form of a loss of funding for important public works, capital improvement and infrastructure projects, imposition of direct costs, and potential adverse judgment from enforcement actions; that the irreparable

about April 11, 2025, which are substantially identical to the Emergency regulations, with the exception of a table in 760 CMR 72.12 setting forth values and categories for MBTA Communities.

harm substantially outweighed any hardship to the Commonwealth, and that the public interest supported in issuance of injunctive relief. Addendum, at 50-51, ¶¶ 46-57.

Based on the foregoing facts, in Count IV of its Verified Complaint, the Town alleged that HLC had a clear-cut, non-discretionary duty to provide an estimate of the fiscal impact of its regulations, that it had not done so, and that as a result, DLM and, by extension the Town, was unable to determine the extent of the unfunded mandate, resulting in irreparable harm to the Town. Addendum, at 51, ¶ 59-65.

Contemporaneous with the filing of its Verified Complaint, the Town also filed a Motion for Preliminary Injunction. Addendum, at 69, 71. In connection with its Reply to the Commonwealth's Opposition to the Town's Motion, on March 28, 2025, the Town submitted the affidavit of Justin Sultzbach, the Town Administrator, ("the Sultzbach Affidavit") in which he amplified the facts already present in the Verified Complaint and attested to the following facts:

1. That addition of 750 housing units in compliance with the MBTA Communities Act would increase the total amount of housing, and correspondingly, population, in the Town of Middleton by more than twenty percent (20%). Addendum, at 439, ¶ 7-9.
2. That, as supported by the accompanying report of the Chief of Police, the multi-family housing required by the MBTA Communities Act would

likely necessitate hiring 12 new police officers, at an additional annual cost of approximately $1,400,000 to the taxpayers. Even if Middleton hired only three new officers, the annual unforeseen impact to the Town's operating budget would be $370,000. The addition of the new officers would also necessitate the addition of up to three new police cruisers, at $75,000 apiece. Addendum, at 440, ¶ 12; Addendum, at 445.

3. That, as supported by the accompanying report of the Fire Chief, the multi-family housing required by the MBTA Communities Act would likely necessitate eight (8) additional fire and rescue personnel firefighters along with the equipment necessary to support the increased workforce. The annual cost increase to the department's operating budget to accommodate new hires would be approximately $1,200,000. The impact would also extend to other extraordinary capital needs, possibly requiring a satellite fire station, which would cost millions of dollars and an additional ambulance at approximately $580,000. Addendum, at 440, ¶ 13; Addendum, at 447-448.

4. That, as supported by the accompanying report of the Superintendent of Public Works, the associated impacts on public works to the Town of Middleton resulting from that housing increase would result in: transfer station costs rising by $200,000 annually; a multi-million dollar water

system expansion; and additional employees to manage the growth, all at great cost to the tax payers. Addendum, at 441, ¶ 14; Addendum, at 450-451.

5. That the associated impacts on public education to the Town of Middleton resulting from that housing increase would be between 150 and 375 new students, far exceeding current capacity in a Town with a population of 9,779 (per 2020 U.S. Census data), and adding millions of dollars of annual operating and capital costs not currently covered by the Commonwealth. Addendum, at 441, ¶¶ 15-16.
6. That funds for necessary infrastructure improvements (exclusive of those direct costs cited above resulting from the MBTA Communities Act), including funds to support affordable housing, are already being withheld by the Commonwealth on the basis of non-compliance with the EOHLC regulations. Addendum, at 441, ¶ 17.
7. That the Town cannot be an "adjacent small town", "a Rapid transit community", or a "Commuter rail community" under the HLC regulations because its population exceeds 7,000 year-round residents; it the Town does not host a commuter rail station, a ferry terminal, a Silver line or high-speed bus line, or a subway station. Addendum, at 442, ¶ 18.

8. That the Town also does not meet the definition of "Adjacent community" under the EOHLC regulations because under the HLC regulations:

    a. an "Adjacent community" is defined as "an MBTA community that (i) has within its boundaries less than 100 acres of Developable station area, and (ii) is not an Adjacent small town"; Addendum, at 442, ¶ 19;

    b. "Developable station area" is defined in the EOHLC regulations as "Developable land that is within 0.5 miles of a Transit station". Addendum, at 442, ¶ 19; and

    c. because there is no transit station within 0.5 miles of the Town of Middleton, it does not fall within the scope of the EOHLC regulations. Addendum, at 442, ¶ 19.

In response to the Town's Motion for Preliminary Injunction, on March 18, 2025, the Commonwealth served a "Cross-Motion to Dismiss", with an accompanying "Memorandum in Opposition to Plaintiffs' Motions for Preliminary Injunction and in Support of Commonwealth's Cross-Motion to Dismiss". Addendum, at 99, 102. Accompanying the Commonwealth's oppositional pleadings, as additional support for their position[5], the Commonwealth submitted an

[5] *See*, Commonwealth's Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction and in Support of Commonwealth's Cross-Motion to Dismiss, at pp. 8-14.

Appendix of Exhibits including multiple affidavits from officials EOHLC and EOED, as well as a purported fiscal impact statement dated January 14, 2025 (six days following the publication of the Town of Milton decision) submitted by HLC to DLM purporting to establish that the fiscal effect of the HLC regulations on the public and private sectors was "none". Addendum, at 403, 406. No data or any further information was provided to support HLC's conclusions. Hearings were held on the parties' respective Motions on April 2, 2025, as well as on May 9, 2025[6].

The Trial Court issued its Memorandum of Decision and Order on June 6, 2025. Addendum, at 549. In denying the Town's Motion for Preliminary Injunction and granting the Commonwealth's Motion to Dismiss, the Trial Court, addressing the Town's unfunded mandate claim, held that "the anticipated possible costs asserted by the Municipalities here are indirect and, therefore, § 3A does not constitute an unfunded mandate". Addendum, at 563. Furthermore, the Trial Court held that "[e]ven if § 3A was an unfunded mandate, the Municipalities have failed to allege sufficient facts concerning any anticipated amounts associate with future infrastructure costs beyond a speculative level." Addendum, at 564. The Trial Court further noted that (although purportedly not considering them in the scope of a 12(b)(6) Motion) "[e]ven with considering the various affidavits, in the context of

[6] An *amicus* brief was filed on behalf of the Citizens' Housing and Planning Association (CHAPA), and the Town filed a Response to that as well. The arguments raised by CHAPA were substantively the same as the Commonwealth's.

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." Addendum, at 566-567. The Court thus held that "the Municipalities' complaints set forth mere 'labels and conclusions,' and do not 'raise a right to relief above the speculative level'.....Therefore, even if § 3A was an unfunded mandate, the Municipalities' [sic] have merely alleged speculative averments regarding any anticipated costs." Addendum, at 567.

Furthermore, the Trial Court's Decision, in addressing the Town's "proximity" claims, relied on the dictionary definition of "adjacent" and not HLC's regulatory definition in dismissing the Town's claims, notwithstanding the Town's clear statement of the issue as necessarily requiring review of the regulatory definitions promulgated by HLC. Addendum, at 578. The Trial Court explained its reasoning as follows: "Middleton summarily states that it 'contains no MBTA facilities and is not immediately adjacent to any communities with mass transit services.'....However, this constitutes the type of 'labels and conclusions' that do not survive a motion to dismiss.'". Addendum, at 580. The Trial Court selectively cited to only a portion of the statutory and regulatory framework and summarily stated that because Middleton

had been statutorily classified as "one of the 51 cities and towns" identified in G.L. c. 161A, § 1, it necessarily fell within the scope of Section 3A. Addendum, at 581.

Finally, with respect to the Town's Mandamus claims, the Trial Court concluded in an abrupt fashion that, "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." Addendum, at 583. The Trial Court endorsed the parties' respective Motions, and entered judgment on June 6, 2025. Addendum, at 589-591. The Town timely appealed, and this matter was docketed in the Appeals Court on September 23, 2025. Addendum, at 592-593. The Town's Appellate Brief has been submitted to the Appeals Court and was accepted for filing on December 3, 2025. The Commonwealth's Response Brief has not yet been submitted.

The Superior Court consolidated the Town's actions with similar complaints raised by other municipalities. The Court issued a single omnibus decision dismissing all of the complaints. Addendum, at 549-588 In addition to the instant appeal, an appeal of the Trial Court's Judgment was also taken by the Town of Marshfield, and is currently before this Court on direct appellate review. Town of Marshfield, et al. v. Commonwealth, et al., SJC-13840 (DAR No. 30542).

STATEMENT OF FACTS

The facts primarily driving this matter are set forth in the Town's Verified Complaint, along with pertinent portions of the record of the Superior Court proceedings.

G.L. c. 40A, § 3A was added by § 18 of Chapter 358 of the Acts of 2020, and was thereafter amended by § 10 of Chapter 29 of the Acts of 2021, effective July 29, 2021. G.L. c. 40A, § 3A was further amended by §§ 152-153 of Chapter 7 of the Acts of 2023, effective May 30, 2023; § 9 of Chapter 150 of the Acts of 2024, effective August 6, 2024 and §§ 2, 2A, 2B, and 20-26 of Chapter 234 of the Acts of 2024, effective November 20, 2024. Pursuant to the terms of Section 3A, HLC was required to (and did) "promulgate guidelines to determine if an MBTA community is in compliance." G.L. c. 40A § 3A(c). The Supreme Judicial Court, in its Town of Milton decision of January 8, 2025, struck down those guidelines on the basis that as they were properly construed as regulations, their promulgation was required to comply with the terms of the Administrative Procedures Act, G.L. c. 30A, § 1, *et seq*. Attorney General v. Town of Milton, 495 Mass. 183, 194 (2005). Following the issuance of "emergency" regulations on January 14, 2025, EOHLC promulgated formal regulations on April 11, 2025. The General Court at no time, whether contemporaneously with enactment of G.L. c. 40A, § 3A, or subsequent thereto, has provided, by general law or by appropriation, funds for the assumption by the

Commonwealth of the direct costs to municipalities imposed by either G.L. c. 40A, § 3A, or the corresponding regulations promulgated by EOHLC.

The Town is identified as one of the "51 cities and towns" pursuant to G.L. c. 161A, § 1 and, as such, pursuant to G.L. c. 40A, § 1A, is nominally considered an "MBTA Community" subject to the provisions of G.L. c. 40A, § 3A. The EOHLC has classified the Town as an "Adjacent community" for the purposes of §3A compliance. 760 CMR 72.12. Pursuant to G.L. c. 40A, § 3A, the Town as an "Adjacent MBTA Community" would ostensibly be required to adopt a zoning by-law providing for at least one (1) district of "reasonable size" in which multi-family housing is permitted by right. G.L. c. 40A, § 3A(a). Under these requirements, the Town would be required to enact zoning bylaws that allow construction, as a matter of right, of 750 multi-family housing units in approved districts. 760 CMR 72.12. That is in excess of a 20% increase in the total number of housing units in the Town. Id. However, notwithstanding these purported requirements, the Town does not host an MBTA station, nor is it adjacent to a community that hosts an MBTA station.

Under the EOHLC regulations, there are four (4) categories of MBTA communities that must submit a "District Compliance Application": Rapid Transit Communities; Commuter Rail Communities; Adjacent Communities; and Adjacent Small Towns. 760 CMR 72.02 ("MBTA Community Categories and Requirements"); 760 CMR 72.12.

Under the EOHLC regulations, an "adjacent community" is defined as follows:

> "an MBTA community that (i) has within its boundaries less than 100 acres of *Developable station area*, and (ii) is not an Adjacent small town." 760 CMR 72.02 ("Adjacent Community") (emphasis added).

"Developable station area" is a defined term for the purposes of the EOHLC regulations as "Developable land that is within *0.5 miles* of a Transit station." 760 CMR 72.02 ("Developable station area") (emphasis added). The definition of "Developable land" is "land on which Multi-family housing can be permitted and constructed" and consists of "all privately-owned land" and "Developable public land". 760 CMR 72.02 ("Developable land").The definition of "Transit station" is "a Massachusetts Bay Transportation Authority Subway station, Commuter rail station, Ferry terminal or Bus station". 760 CMR 72.02 ("Transit station"). Furthermore, a "Bus station" is generally only defined as a "point of embarkation for the Massachusetts Bay Transportation Authority Silver Line", or any other "high-capacity Massachusetts Bay Transportation Authority bus line". 760 CMR 72.02 ("Bus station").

Although EOHLC has classified Middleton as an "Adjacent community", Middleton does not meet that definition, nor the definition of any one of the four (4) categories of MBTA communities identified in the EOHLC regulations. Addendum, at 442, ¶¶ 18-19. Specifically, Middleton contains no MBTA facilities and is not

immediately adjacent to any communities with mass transit services. Id. The Town does not host a commuter rail station, a rapid transit station, a ferry terminal, or a Silver Line or other high-speed bus station. Id. Furthermore, it does not have any developable station area within a half-mile of any MBTA facility. Addendum, at 442, ¶ 19; 760 CMR 72.12[7].

In response to requests from other municipalities, on October 15, 2024, the Office of the State Auditor, Division of Local Mandates ("the Auditor" or "DLM"), had issued a determination that G.L. c. 40A, § 3A constituted an unfunded mandate, but was unable to determine the amount of any deficiency due to HLC's failure to complete a fiscal impact analysis as required under G.L. c. 30A, § 5. Addendum, at 85-94.

Pursuant to the HLC regulations, the Town had a deadline of July 14, 2025, to pass a complying zoning bylaw and submit a "District Compliance Application" to EOHLC, setting forth information about current zoning, past planning for Multi-family housing, if any, potential locations for a Multi-family zoning district and establishing a timeline for various actions needed to create a Multi-family zoning

[7] The most recent iteration of the EOHLC regulations promulgated April 11, 2025 (after the filing of this litigation in Superior Court, and after the oral argument of April 2, 2025) provides a table of data, not present in other iterations, setting forth among other criteria, "Developable station area". 760 CMR 72.12. That field is blank for Middleton, signifying the absence of any "Developable station area". Id.

district in compliance with G.L. c. 40A, § 3A, and EOHLC regulations. 760 CMR 72.09.

Under G.L. c. 40A, §3A, the Town cannot deny construction of housing that complies with approved zoning. 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. Addendum, at 440-442. Mitigating such impacts will require a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing. Addendum, at 441, ¶ 15-16.

The Town had previously submitted, and received approval of, an application for grant funding to the EOED, MassWorks Infrastructure Program, in the amount of two-million dollars ($2,000,000.00) to support improvements to the intersection of Routes 62 and 114, in the Town of Middleton. Addendum, at 57. Such grant is related to infrastructure to support an already-approved multi-family affordable housing development. Addendum, at 441, ¶ 17. However, with respect to the grant, and despite the housing benefits of the underlying project, EOED has stated that "a contract will not be executed if the [Town] is noncompliant with Section 3A of M.G.L. c. 40A as determined by EOHLC". Addendum, at 57. Plainly, this is the only barrier to the Town's receipt of these publicly beneficial grant funds.

Since that time, as pointed out to the Trial Court in its papers and oral argument in support of the Town's Opposition to the Commonwealth's Motion to Dismiss the Commonwealth has publicly touted a number of programs which are expressly intended to reimburse municipalities for increased infrastructure and other costs directly related to the increased infrastructure and other costs that municipalities will face upon adoption of a Section 3A compliant district. Addendum, at 492-502. Public announcements on the stated purpose and effect of these programs expressly identify creation and infrastructure upgrades necessitated under Section 3A. Id.

STATEMENT OF THE ISSUES

The following issues are involved in this appeal, and were properly raised and preserved in the Trial Court.

I. Whether the Trial Court erred in dismissing the Town's Complaint on the basis that it failed to plead sufficient facts that the EOHLC Regulations are not applicable to the Town based on its proximity to any MBTA facilities (the "proximity" issue).

II. Whether the Trial Court erred in dismissing the Town's claims on the basis that it failed to sufficiently allege facts to support a claim for direct costs (the "unfunded mandate" issue).

ARGUMENT

I. The Trial Court Inappropriately Held the Town to a Heightened Pleading Standard

The overarching fault with the Trial Court's dismissal of the Town's claims is that it required that the Town provide more detail in its Complaint than it was required to, and based its Decision on the purported failure to provide details such as "population and the amount of developable station area" in support of its "proximity" claims, and by requiring the Town to state in its Complaint the specific numbers and calculations upon which it based its claims of an unfunded mandate. Addendum, at 566-567; 579-581. The dismissal of the Town's Complaint and denial of its Motion for preliminary Injunction was error because Massachusetts is a *notice* pleading state, which only requires, "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. …" Mass. R. Civ. P. 8(a). The Town's allegations must only broadly support an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008). Under Rule 8, "intendments are to be made in favor of the pleader, rather than against him, and [the Court] resist[s] any tendency to reinstate abandoned pleading requirements." Druker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976). (*citations omitted)*.

Here, the Town articulated sufficient facts in its Complaint. Specifically, as to the unfunded mandate claims, not only did the Auditor determine that

municipalities will incur substantial direct costs in connection with compliance with G.L. c. 40A, § 3A, but also the Town pleaded verified facts to support a threshold conclusion that compliance in the absence of legislative appropriation "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. requir[ing] a substantial appropriation of funds for the expenses and improvements necessary to service 750 new units of housing." Addendum, at 047, ¶ 29.

Furthermore, with respect to the "proximity claims", the Town's Complaint clearly articulated claims that would establish that it fell outside the scope of the EOHLC regulations. Specifically, the Town alleged that § 3A, and the corresponding regulations fail to identify any applicable criteria to render those regulations applicable to the Town. Addendum, at 47, ¶¶ 23-24. Taken for the purposes of Rule 12(b)(6) as true, such a claim "broadly support[s] an entitlement to relief". Iannacchino at, 635-636. Consequently, dismissal on the basis of Rule 12(b)(6) was error.

II. The Trial Court Erred in Dismissing the Town's Claims Based On The "Proximity" Issue

The Commonwealth's position was that Middleton fell under the HLC Regulations as an "adjacent community" because it "has less than 100 acres of *developable land* *in proximity to a transit station* and is not an 'adjacent small

town'". Addendum, at 134 (emphasis added). That definition of an "adjacent community" is not in the regulations, misstates the regulations' language, and omits important language and qualifiers in the regulations which remove Middleton from that definition.

"A properly promulgated regulation is to be construed in the same manner as a statute". Harvard Crimson, Inc. v. President and Fellows of Harvard College, 445 Mass. 745, 749 (2006) (*citations omitted*). In construing a statute and its accompanying regulations, a reviewing court must "determine if they are in conflict, and harmonize them if reasonable." Dant v. Mobile Home Rent Control Board of Chicopee, 105 Mass.App.Ct. 748, 749 (2025). Statutes that relate to the same subject matter must be read "as a harmonious whole and avoid absurd results" Town of Canton v. Commission of Mass. Hwy Dept., 455 Mass. 783, 791 (2010).

Here, even if Trial Court did not consider the Sultzbach Affidavit[8], based upon the regulatory language and the arguments raised by the Town in opposition to the Commonwealth's Motion to Dismiss explaining exactly why it did not meet the regulatory criteria, it erred in requiring the Town to allege more than it was required to at that stage in the pleadings, and erred in ignoring the Town's ***legal*** bases for asserting that, under the Regulations, it could not possibly meet the definition that

[8] Which, if it had, should have prompted the Trial Court to treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56.

the Commonwealth unilaterally foisted upon it. The Trial Court did not consider these legal arguments, let alone the basic facts regarding Middleton's geography. The Trial Court was required to treat as true facts underlying the allegations that Middleton did not meet any definition of any category of MBTA communities and that §3A and the Regulations failed to identify any applicable criteria to render those regulations applicable to the Town.

Trial Court overlooked the full language of the EOHLC definitions articulated by the Town in its filings, and instead relied on a dictionary definition that does not track the Regulations, using that language as pretext to conclude that the Town had failed to plead sufficient facts in its Complaint. Instead, the Trial Court simply concluded that Middleton's Complaint failed to, "substantially address[] both considerations for an adjacent community: population and the amount of developable station area". Addendum, at 579. The Court further noted that, "[t]here is insufficient information in these Municipalities' complaints regarding the factual assessment of data reflected in 760 Mass. Regs. § 72.02." Addendum, at 580. However, in actuality, the Trial Court simply chose to disregard plain language of the regulations as somehow falling outside the pleadings. This was not a sufficient basis upon which to grant the Commonwealth's Motion to Dismiss. *See*, Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45, n.4 (2004) (conversion to summary judgment is not

an absolute requirement where the plaintiff had notice of extrinsic documents and relied on them in framing the complaint). Clearly, at that early point in the pleadings, the Court felt there were lingering questions of fact, notwithstanding that sufficient information on those points was set out in HLC regulations upon which all parties were relying, and in opposition to the Commonwealth's Motion to Dismiss, as clearly articulated in the Sultzbach Affidavit. In other words, if there was a lingering question of fact which the Court felt needed to be addressed, it had two options—consider the Sultzbach Affidavit and convert the Motion to one for Summary Judgment or apply the actual language of the HLC regulations and deny the Motion to Dismiss and allow discovery to proceed on that issue. *See*, Mass.R.Civ.P. 12(b). Clearly those facts exist and formed the basis of the allegations in the Town's Complaint. If proved, those facts would entitle the Town to relief even if not set out in detail in its Complaint.

III. The Trial Court Erred in Dismissing the Town's Claims on the Unfunded Mandate Issue

The Court erred in dismissing the Town's Complaint based on the holdings in City of Worcester v. The Governor, 416 Mass. 751 (1994) and Kennedy v. Commonwealth, 92 Mass.App.Ct. 644 (2018). The Trial Court erroneously accepted the Commonwealth's position that the Town's claims before the Trial Court presented a pure question of law, without any review of the factual circumstances, thereby bypassing deference to the facts as plead. However, that position ignores

the actual language of the City of Worcester and Kennedy decisions, and if accepted would render Rule 8(a) superfluous.

The questions presented to the SJC in City of Worcester concerned two issues regarding a handful of statutory and regulatory amendments. City of Worcester, 416 Mass. at 754. The primary question of law was whether the challenged legislation was a "new law changing existing law". Id. (*quoting*, Lexington v. Commissioner of Educ., 393 Mass. 693, 697 (1985)). Secondarily, if so, the Court considered whether the challenged legislation "resulted in Worcester's having a direct service or cost obligation which it did not voluntarily assume and which was imposed on it by the Commonwealth." Id. (*citations omitted*). An additional consideration was "whether a newly imposed cost obligation relates only to an incidental local administrative expense". Id. In other words, the primary task faced by the Court in City of Worcester was one of statutory interpretation of the challenged legislation. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by the Court, while giving substantial deference to the interpretation of the agency tasked with its administration—in this case, DLM. Attorney General v. Commissioner of Insurance, 450 Mass. 311, 319 (2008).

Here, the unchallenged issue before this Court and before the Trial Court is not whether G.L. c. 40A, § 3A is a "new law changing existing law". There is no question that G.L. c. 40A, § 3A imposes new obligations and costs on municipalities

to whom EOHLC's regulations are directed. As recognized by this Court, G.L. c. 29, § 27C "applies to regulatory obligations in which the municipality has no choice but to comply and to pay the costs." Town of Norfolk, at 239. That point is also not reasonably in question. *See*, Town of Milton, at 192-193 (holding that compliance with G.L. c. 40A, § 3A is mandatory).

In this case, the Town pleaded sufficient facts under Rules 8(a) and 12(b)(6) to survive a motion to dismiss its claims of an unfunded mandate. G.L. c. 29, § 27C(a), provides that no "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 … 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". G.L. c. 29, § 27C(a). G.L. c. 29, § 27C(c) in turn provides that no unfunded mandate can be effective without an appropriation by the Commonwealth. Absent funding for direct costs imposed by an act of the Legislature or by regulation, a municipality's remedy is excusal from compliance. City of Worcester, at 762.

In its Complaint, the Town clearly articulated the existence of substantial direct costs which would be imposed by the development of 750 housing units in terms of infrastructure, public safety services, educational services and buildings, roads, and other general governmental services. Addendum, at 47, ¶ 29.

Furthermore, when challenged by the Commonwealth through its Motion to Dismiss, the Town was able to support its claims with reasonable estimates of those costs, backed up with statistical information and data in support of those costs. Addendum, at 438-451. Furthermore, the Commonwealth's "MBTA Catalyst" program, and the public statements surrounding it, reflects a clear understanding that substantial direct costs would be incurred by municipalities subject to the Section 3A mandate. The Town pled sufficient facts to support a conclusion that the costs of compliance are more than merely incidental costs imposed in connection with compliance with an entirely new set of obligations and which plausibly suggest the Plaintiffs' entitlement to relief. *See*, Kennedy v. Commonwealth, 92 Mass.App.Ct. 644, 648 (2018) (dismissing G.L. c. 29, 27C claims for failing to plead any facts that the plaintiffs would incur any direct costs. "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief.…") (*quoting*, Iannacchino, at 626).

The Trial Court's fundamental error here, in addition to misapplying Rule 8(a), was conflating "speculative" with "direct" costs. Although hard and fast numbers may not be capable of mathematical precision at this point[9], the fact that substantial and direct costs will be imposed on MBTA Communities is in no way "speculative". In this case, the Commonwealth's "Catalyst Fund" establishes the

[9] Due in no small part to HLC's refusal to conduct a full fiscal impact analysis.

real imposition of looming direct costs on municipalities , andSection 3A is indisputably a "new law changing existing law", and indeed a mandate. City of Worcester, at 754; Town of Milton, at 193.

REASONS FOR GRANTING DIRECT APPELLATE REVIEW

Direct appellate review is appropriate here because this matter presents novel questions of law and issues of first impression of broad concern to the public interest regarding the scope of the Commonwealth's authority to impose an unfunded mandate on municipalities by the enactment of G.L. c. 40A, § 3A and by the promulgation of regulations by EOHLC in 760 CMR 72.00, as well as the fundamental underlying issues of notice pleading in the Commonwealth; questions which should, in the interests of justice, be submitted directly to this Court for final determination. Mass. R. App. P. 11(a)(1) & (3). Additionally, another matter arising out of the same judgment on the same issue is currently before this Court on Direct Appellate Review (Town of Marshfield v. Commonwealth, et al, SJC-13840 (DAR No. 30542)), and, in the interests of judicial economy, this Court should grant direct appellate review to provide prompt and final guidance on these issues of widespread public importance.

Accordingly, the Town of Middleton respectfully requests this Application be Granted.

Respectfully submitted,

/s/ Per C. Vaage

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Date: January 5, 2026

CERTIFICATE OF COMPLIANCE

Mass.R.A.P. 16(k) and Mass.R.A.P. 11(b)(5)

I, Per C. Vaage, Esq. hereby certify that the foregoing Application complies with the rules of Court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs; appendices, and other documents);
Mass. R. A. P. 21 (redaction).

I further certify that compliance with the applicable length limit of Rule 11(b)(5) was ascertained by using Times New Roman, size 14, proportional font, consisting of 1,999 non-excluded words including headings, footnotes, and quotations. The word processing program used was Microsoft Word for Office 365.

/s/ Per C. Vaage

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Per C. Vaage

Certificate of Service

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on the 5th day of January, 2026, I have made service of this Application upon the following counsel of record via the electronic service.

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