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June 5, 2024

By First-Class Mail:

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**RE: Financial Impact of Early Voting Under M.G.L. c. 54, § 25B
on the Town of Plymouth**

Dear Town Manager Brindisi:

On June 29, 2023, on behalf of the Town of Plymouth, you requested that the Office of the State Auditor make a determination whether early voting by mail and early voting in person for municipal elections constitutes an unfunded mandate imposed on cities and towns by the Commonwealth within the meaning of M.G.L. c. 29, § 27C (the Local Mandate Law). In its initial response to your request, the Office of the State Auditor's Division of Local Mandates (DLM) asked for an extension of the deadline for a determination, which the Town of Plymouth granted on August 21, 2023.

In preparation for its determination, DLM conducted extensive legal and policy review regarding this matter. DLM also interviewed individuals with expertise on the applicable law.

M.G.L. c. 29, § 27C — the Local Mandate Law

In general terms, the Local Mandate Law provides that any post-1980 state law, rule, or regulation that imposes additional costs, excluding incidental local administration expenses, upon any city or town is conditional on local acceptance or being fully funded by the Commonwealth.¹ A city or town may request that DLM determine whether a law, rule, or regulation imposes a mandate within the meaning of the Local Mandate Law and, if so, the costs of compliance and the

¹ See M.G.L. c. 29, §§ 27C(a)–(c).

amount of any deficiency in funding by the Commonwealth.² Alternatively, or in addition to asking DLM for such a determination, a community alleging an unfunded mandate may petition the Superior Court for a determination of deficiency and an exemption from compliance until the Commonwealth provides sufficient funding.³

In order to determine that a state law imposes a mandate within the meaning of the Local Mandate Law, the law must take effect on or after January 1, 1981, must be a new law changing existing law, and must result in a direct service or cost obligation imposed on municipalities by the Commonwealth that amounts to more than an incidental local administration expense.⁴ Moreover, the challenged law must not be exempted from application of the Local Mandate Law, whether by express override of the Legislature, application of federal law or regulation, or other exemption.

Once DLM has determined that a law imposes a mandate within the meaning of the Local Mandate Law, the analysis turns to whether the Commonwealth has provided sufficient funding to assume the costs imposed by the law in question. The Local Mandate Law clearly states that “the general court, at the *same session* in which such law is enacted, [must provide], *by general law and by appropriation*, for the assumption by the commonwealth of such cost[s], . . . and . . . by appropriation in *each successive year* for such assumption” (emphasis added).⁵ The Supreme Judicial Court has recognized that “the ‘plain meaning’ of [M.G.L.] c. 29, Section 27C(a), is that funding be provided at the *same time* that [the] mandate is imposed on cities and towns,” and that the language of the statute “means that the Legislature envisioned a scheme wherein cities and towns would be reimbursed *in advance — or, at least, contemporaneously* — for costs incurred pursuant to the mandate” (emphasis added).⁶ Furthermore, funding must be provided by a specific allocation of funds and cannot be fulfilled merely by increasing unrestricted local aid, as “[s]uch an approach would render the [Local Mandate Law] meaningless, for it would always be possible to attribute undesignated increases in State aid to the local mandate being challenged.”⁷ In short, for funding to be sufficient, the imposed costs must be assumed by the Commonwealth and appropriation made contemporaneously with and specific to the mandate in question.

M.G.L. c. 54, § 25B — the Early Voting Law — Overview of Determination

The statutory provisions for early voting are set forth in M.G.L. c. 54, § 25B (the Early Voting Law or § 25B). After review of the Early Voting Law and related regulations, DLM determines the following, as further explained below:

- Determination Number 1: certain provisions of the Early Voting Law governing early voting for federal or state elections and municipal elections that *coincide* with federal or state elections (hereinafter “coinciding municipal elections”) *impose a mandate* within the meaning of the Local Mandate Law;

² See M.G.L. c. 29, § 27C(d).

³ See M.G.L. c. 29, § 27C(e).

⁴ See *City of Worcester v. the Governor*, 416 Mass. 751 (1994).

⁵ See M.G.L. c. 29, § 27C(a).

⁶ See *Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 698–701 (1985).

⁷ See *id.* at 701.

- Determination Number 2: the provisions of the Early Voting Law governing early voting *in person* for municipal elections that *do not coincide* with federal or state elections (hereinafter “non-coinciding municipal elections”) *do not impose a mandate* within the meaning of the Local Mandate Law; and
- Determination Number 3: certain provisions of the Early Voting Law governing early voting *by mail* for non-coinciding municipal elections *impose a mandate* within the meaning of the Local Mandate Law.

See Table 1 for a summary of the aforementioned determinations by election type and early voting method.

Table 1: Determinations by Election Type and Early Voting Method			
Determination Number	Election Type	Early Voting Method	Determination
1	Federal/State	In person	Mandated
1	Federal/State	By mail	Mandated
1	Coinciding Municipal	In person	Mandated
1	Coinciding Municipal	By mail	Mandated
2	Non-coinciding Municipal	In person	Not mandated
3	Non-coinciding Municipal	By mail	Mandated

DLM further determines that the current method of funding by the Commonwealth of early voting costs incurred by municipalities does not satisfy the requirements of the Local Mandate Law, as discussed below. However, funds have been appropriated for early voting for FY 2023 and FY 2024 and DLM has been charged with the collection of information and certification of costs for submission to the Secretary of the Commonwealth.⁸ Accordingly, DLM is in the process of conducting cost surveys of all municipalities for FY 2023 and FY 2024 early voting expenses. After certifying costs, DLM will determine whether any deficiency in state funding exists for FY 2023 and FY 2024.⁹

Application of the Local Mandate Law to the Early Voting Law

The early voting provisions contained in § 25B were added by Chapter 111 of the Acts of 2014, effective November 8, 2016, and amended to their current form by Chapter 92 of the Acts

⁸ See St. 2022, c. 126, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter126>; St. 2023, c. 28, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2023/Chapter28>; St. 2023, c. 77, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2023/Chapter77>.

⁹ To provide clarity and manage expectations, DLM provides guidance regarding its methodology for determining whether to certify an early voting expense incurred by a municipality (see [Appendix A: Early Voting Expense Guidance](#)).

of 2022 (the VOTES Act), effective June 22, 2022.¹⁰ Accordingly, the Early Voting Law is a law that took effect on or after January 1, 1981.

Furthermore, the Early Voting Law is a new law changing, not merely clarifying, existing law.¹¹ Prior to enactment of the Early Voting Law, voting in advance of Election Day was limited to the specific circumstances permitting *absentee* voting under Article 105 of the Articles of Amendment to the Massachusetts Constitution. Section 25B established procedures for municipalities to administer voting in advance of Election Day for *all* registered, qualified voters, initially only for biennial state elections and municipal elections coinciding with biennial state elections, and then for federal, state, and municipal preliminaries, primaries, and elections with passage of the VOTES Act. The Early Voting Law provides instructions to voters and municipalities regarding early voting timelines, methodologies, polling locations and staffing, and notice requirements, all of which constitute a substantive change from how elections were conducted prior to the enactment of the Early Voting Law.

Whether the Early Voting Law results in a direct service or cost obligation imposed on municipalities by the Commonwealth requires separate analysis of the differing provisions governing types of elections and methodology of early voting. The following subsections outline DLM's analyses of these differing provisions, which include early voting for federal or state elections and coinciding municipal elections, early voting in person for non-coinciding municipal elections, and early voting by mail for non-coinciding municipal elections.

(1) Early Voting for Federal or State Elections and Coinciding Municipal Elections

Section 25B(a)(1) provides in relevant part that “[t]he election officers and registrars of every city or town *shall* allow any registered voter . . . to vote early by mail for any . . . presidential or state primary or election . . . or any primary or election held . . . to fill a vacancy for senator or representative in congress; . . . any registered voter . . . *shall* be allowed to vote early by mail for any municipal preliminary or municipal election held on the same day as any presidential or state primary or election or any primary or election held . . . to fill a vacancy for senator or representative in congress . . .” (emphasis added). Section 25B(b)(1) provides in relevant part that “[t]he local election officers and registrars of every city or town *shall* allow any registered voter . . . to vote early in person for any: (i) presidential or state primary or biennial state election or primary or election held . . . to fill a vacancy for senator or representative in congress; and (ii) city or town election held on the same day as a primary or election enumerated in clause (i)” (emphasis added).

With respect to early voting for federal or state elections and coinciding municipal elections, the Early Voting Law imposes mandatory obligations on *every* city and town. It does not require a municipality to accept these particular provisions; on the contrary, these provisions apply uniformly across the Commonwealth. In addition, these provisions utilize the term “shall.” M.G.L. c. 4, § 6 provides that “[w]ords and phrases shall be construed according to the common and approved usage of the language.” Given this, “[t]he word ‘shall’ is ordinarily interpreted as

¹⁰ St. 2014, c. 111, § 12, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2014/Chapter111>; St. 2022, c. 92, § 10, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter92>.

¹¹ See *Worcester*, 416 Mass. at 756; see also *Town of Lexington*, 393 Mass. at 697.

having a mandatory or imperative obligation.”¹² Any exceptions to or carve-outs from mandatory obligations of the Early Voting Law do not apply to federal or state elections or coinciding municipal elections. Accordingly, DLM determines that certain provisions of the Early Voting Law governing early voting for federal or state elections and coinciding municipal elections impose a mandate within the meaning of the Local Mandate Law.

(2) Early Voting in Person for Non-Coinciding Municipal Elections

As stated above, § 25B(b)(1) provides in relevant part that “[t]he local election officers and registrars of every city or town *shall* allow any registered voter . . . to vote early in person for any . . . city or town election *held on the same day* as a [presidential or state primary or biennial state election or primary or election held . . . to fill a vacancy for senator or representative in congress]” (emphasis added). Section 25B(c)(1) provides in relevant part that “[t]he select board, board of selectmen, town council or city council of each city and town *may* vote to authorize early in-person voting for any other city or town preliminary or election *not included in subsection (b)*” (emphasis added).

Regarding early voting in person for non-coinciding municipal elections, a vote of the designated municipal body is a condition precedent to the effectiveness of these particular provisions. The Legislature has specifically included language in various statutes conditioning effectiveness upon local acceptance (local option statutes).¹³ M.G.L. c. 4, § 4 provides that “[w]herever a statute is to take effect upon its acceptance by a municipality or district, or is to be effective in municipalities or districts accepting its provisions, this acceptance shall be, except as otherwise provided in that statute, in a municipality, by vote of the legislative body, subject to the charter of the municipality, or, in a district, by vote of the district at a district meeting.” These provisions do not apply uniformly across the Commonwealth; they, as with other local option statutes, apply only to municipalities that accept them by vote, preemptively removing them from the scope of the Local Mandate Law.

Although DLM recognizes the potential difficulties of not providing early voting in person for non-coinciding municipal elections given the overall framework for early voting contained in § 25B, a municipality must actively vote to accept the provisions of the law governing this method of early voting for this type of election (by definition, a local option). The Early Voting Law, in fact, contains an additional condition precedent — such a vote may only be taken after a request from at least fifty percent (50%) of the municipality’s registrars recommending early voting in person.¹⁴ The statutory language makes clear that early voting in person for non-coinciding municipal elections is a local option and not a mandated service. The potential difficulties arising from not providing early voting in person for non-coinciding municipal elections cannot change this conclusion.¹⁵ Costs incurred in connection with a service that a municipality is not statutorily obligated to provide are not *imposed* on the municipality.¹⁶ Accordingly, DLM must determine

¹² *Galenski v. Town of Erving*, 471 Mass. 305, 309 (2015), quoting *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983).

¹³ See *Galenski*, 471 Mass. 305; see also *Adams v. City of Boston*, 461 Mass. 602 (2012).

¹⁴ See M.G.L. c. 54, § 25B(c)(1).

¹⁵ See *School Committee of Lexington v. Commissioner of Education*, 397 Mass. 593, 596 (1986) (“The Legislature has the power to pursue a scheme which creates . . . hard choices”).

¹⁶ See *Town of Norfolk v. Department of Environmental Quality Engineering*, 407 Mass. 233, 238–239 (1990).

that the provisions of the Early Voting Law governing early voting in person for non-coinciding municipal elections do not impose a mandate within the meaning of the Local Mandate Law.

(3) Early Voting by Mail for Non-Coinciding Municipal Elections

Section 25B(a)(1) provides in relevant part that “[t]he election officers and registrars of every city or town *shall* allow any registered voter . . . to vote early by mail . . .; provided, however, that the select board, board of selectmen, town council or city council of each city and town *may* . . . *opt out* of the provisions of this subsection for any regular or special municipal preliminary or municipal election [other than] any municipal preliminary or municipal election held on the same day as any presidential or state primary or election or any primary or election held . . . to fill a vacancy for senator or representative in congress” (emphasis added).

At issue with respect to early voting by mail for non-coinciding municipal elections is whether statutory language providing a municipality the ability to *opt out* of a provision effectively operates as a local option. Ordinarily, if the intent of the Legislature is apparent from the language of a statute, the analysis ends and effect is given to the legislative intent.¹⁷ Common and approved usage of the term “opt out” would indicate a choice, not a mandatory obligation.¹⁸ The Supreme Judicial Court has opined that it is from *mandatory obligations*, “obligations in which the municipality has *no choice but to comply* and to pay the costs,” that the Local Mandate Law grants relief (emphasis added).¹⁹ A determination that the provisions of the Early Voting Law governing early voting by mail for non-coinciding municipal elections do not impose a mandate would be consistent with this interpretation. However, in determining whether legislative intent is unambiguously expressed, caution must be taken to give effect to *all* of a statute’s terms.²⁰ In addition to the “opt out” language, § 25B(a)(1) initially utilizes the term “shall,” which, as discussed above, “is ordinarily interpreted as having a mandatory or imperative obligation.”²¹ Thus, DLM concludes that no preliminary action need be taken by a municipality in order for early voting by mail for non-coinciding municipal elections to apply; there is no condition precedent to the effectiveness of these particular provisions. Section 25B(a)(1) is therefore distinguishable from statutes structured as local options. Characterizing these provisions as a local option would effectively equate the *non-exercise* of an opt-out with an acceptance, without requiring the action specified in M.G.L. c. 4, § 4 for local acceptance by a municipality. This would undermine the very purpose of the Local Mandate Law to prevent the imposition of mandates without local acceptance or sufficient funding by the Commonwealth.

The Supreme Judicial Court has also opined that the Local Mandate Law “does not exempt municipalities from laws or regulations of general applicability governing activities . . . when the municipality *voluntarily engages* in such activities” (emphasis added).²² The provisions governing early voting by mail for non-coinciding municipal elections therefore find themselves in limbo — they are neither obligations in which a municipality has no choice but to comply nor obligations

¹⁷ See *Adams*, 461 Mass. at 609.

¹⁸ “Opt out.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/opt%20out>. Accessed 21 Feb. 2024.

¹⁹ See *Worcester*, 416 Mass. at 761, citing *Norfolk*, 407 Mass. at 239.

²⁰ See *Adams*, 461 Mass. at 609.

²¹ *Galenski*, 471 Mass. at 309.

²² *Norfolk*, 407 Mass. at 238.

in which voluntary participation, i.e., local acceptance, is required prior to effectiveness. Where the plain language of a statute is ambiguous, the legislative intent is resolved by turning to extrinsic sources, including other sections of the statute.²³ It is significant that early voting by mail and early voting in person are not two independent statutes but rather two sections of the same statute enacted simultaneously. “When the Legislature includes a phrase in one subsection of a statute but not in another, this invites the ‘negative implication’ that the phrase was purposefully excluded.”²⁴ The Legislature had the choice to include identical language with respect to early voting by mail as it did for early voting in person, i.e., requiring a vote of the designated municipal body as a condition precedent to the effectiveness of the early voting by mail provisions, thereby removing them from the scope of the Local Mandate Law. It did not. DLM has no authority to disregard the language chosen and enacted by the Legislature.²⁵ Pursuant to this reasoning, DLM must conclude that the difference in language indicates a difference in legislative intent, and the provisions for early voting by mail should be so construed. Accordingly, DLM determines that certain provisions of the Early Voting Law governing early voting by mail for non-coinciding municipal elections impose a mandate within the meaning of the Local Mandate Law.

Early Voting Law Funding

The Early Voting Law does not provide a funding mechanism for early voting.²⁶ The statutory language of § 25B, the original enacting legislation of Chapter 111 of the Acts of 2014, and the VOTES Act all fail to provide for the assumption by the Commonwealth of the costs imposed by the Early Voting Law.²⁷ Neither was the Early Voting Law specifically exempted from application of the Local Mandate Law by the Legislature.²⁸

Furthermore, although the state budget has, from time to time, included an appropriation pertaining to early voting, the appropriation language has been inconsistent regarding the type of election, method of early voting, nature of expense, and mechanism of cost recoupment, as

²³ See *Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021).

²⁴ *Commonwealth v. Montarvo*, 486 Mass. 535, 538 (2020); see also *Field v. Mans*, 516 U.S. 59, 75 (1995) (when “contrasting statutory sections [were] originally enacted simultaneously in relevant respects,” then negative implication is “more apparently deliberate”).

²⁵ See *Commonwealth v. Young*, 453 Mass. 707, 713 (2009), citing *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 687 (1986) (“We begin with the language of the statute itself and ‘presume, as we must, that the Legislature intended what the words of the statute say’” (emphasis added)).

²⁶ Cf. St. 1983, c. 503, *An Act Extending the Time of Voting in Certain Elections* (“SECTION 3. As hereinafter provided, the commonwealth shall pay to each city and town an amount sufficient to defray the additional costs imposed on the city or town under the provisions of this act.”).

²⁷ See Massachusetts Office of the State Auditor, Division of Local Mandates. (2017, February 14). *Financial Impact of Early Voting in the City of Woburn and the Town of Oxford* (addressing aspects of § 25B pre-VOTES Act). Available at <https://www.mass.gov/decision/financial-impact-of-early-voting-in-the-city-of-woburn-and-the-town-of-oxford>.

²⁸ Cf. St. 1993, c. 71, *An Act Establishing the Education Reform Act of 1993* (“SECTION 67. This act shall apply to all cities, towns, and regional school districts, notwithstanding section twenty-seven C of chapter twenty-nine of the General Laws and without regard to any acceptance or appropriation by a city, town, or regional school district or to any appropriation by the general court.”) See *Town of Lexington*, 393 Mass. at 698 (“[the challenged law] does not indicate any express amendment or repeal of section 27C”); see also *School Committee of Lexington*, 397 Mass. at 595-596 (“One option was to provide specifically that [the challenged law] supersedes [the Local Mandate Law]. . . . [T]he Legislature could either have repealed or superseded an aspect of [the Local Mandate Law] directly.”).

demonstrated in the FY 2023 and FY 2024 budgets. In making its determination, DLM reviewed Chapter 126 of the Acts of 2022 (the FY 2023 budget),²⁹ Chapter 77 of the Acts of 2023 (the FY 2023 supplemental budget),³⁰ and Chapter 28 of the Acts of 2023 (the FY 2024 budget).³¹

Section 2 of the FY 2023 state budget included the following appropriations:

0521-0002	For implementing early voting in the commonwealth for the September 6, 2022 state primary and the November 8, 2022 state election under sections 6 and 7 of chapter 115 of the acts of 2020 and section 25B of chapter 54 of the General Laws, as determined through the collection and certification of accurate accounting by the state auditor and division of local mandates for distribution by the secretary of the commonwealth . . .	\$6,000,000
...		
1599-8909	For a reserve to meet the election administration costs of the secretary of the commonwealth; provided, that funds may be expended for reimbursements to cities and towns for costs certified by the state auditor . . .	\$8,000,000

The early voting appropriation in the FY 2023 budget, which was passed in the same annual session as the VOTES Act (the second annual session of the 2021–2022 biennial legislative session), was limited to the state primary and state election and did not encompass all of the elections under § 25B for which DLM has determined a mandate exists. In addition, the reserve line item at the time did not specify early voting under § 25B as a purpose of that appropriation. Accordingly, because the Legislature did not assume the costs of the Early Voting Law by general law and by appropriation in the 2022 session contemporaneously with the enactment of the VOTES Act, DLM determines that the current method of funding by the Commonwealth of early voting costs incurred by municipalities does not satisfy the requirements of the Local Mandate Law.

During the first annual session of the 2023–2024 biennial legislative session, the Legislature extended and expanded the FY 2023 budget reserve line item in the FY 2023 supplemental budget, which included the following language and appropriation:

SECTION 2CI. For the purpose of making available in fiscal year 2024 balances of appropriations which otherwise would revert on June 30, 2023, the unexpended balances of the appropriations listed below, not to exceed the amount specified below for each item, are hereby re-appropriated *for the purposes of and subject to the conditions stated for the corresponding item in section 2 of [the FY 2023 budget]*. . . . The sums reappropriated in this section shall be in addition to any amounts available for said purposes. . . .

²⁹ St. 2022, c. 126, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter126>.

³⁰ St. 2023, c. 77, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2023/Chapter77>.

³¹ St. 2023, c. 28, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2023/Chapter28>.

1599-8909 Election Costs Reserve . . .

\$8,000,000

...

SECTION 67. Item 1599-8909 of said section 2 of [the FY 2023 budget] is hereby amended by adding the following words:- ; and provided further, that not more than \$5,000,000 shall be expended for grants by the state secretary to cities and towns for additional costs to administer **early voting in person and by mail in all primaries and elections**, including additional municipal personnel and such funds shall be made available until November 30, 2024 (emphasis added).

In the same annual session, prior to passage of the FY 2023 supplemental budget, the Legislature passed the FY 2024 budget, which included the following appropriation:

0521-0002 For implementing **early voting in the commonwealth** under sections 6 and 7 of chapter 115 of the acts of 2020 and **section 25B** of chapter 54 of the General Laws, *as determined through the collection and certification of accurate accounting by the state auditor and division of local mandates* for distribution by the secretary of the commonwealth . . .

\$6,000,000
(emphasis added)

Notwithstanding the determination that the funding requirement of the Local Mandate Law has not been met, based on the determinations herein regarding the provisions of the Early Voting Law which impose a mandate and the above budget language, DLM concludes that it has been charged with the collection and certification of FY 2023 and FY 2024 early voting expenses, in person and by mail, for all elections including municipal elections. The Secretary of the Commonwealth and the Office of the State Auditor are in agreement that the FY 2024 appropriation applies to early voting for all elections, and both offices communicated this opinion in letters to the Joint Committee on Ways and Means in September 2023 and October 2023, respectively. The FY 2023 budget reserve line item, as extended by the FY 2023 supplemental budget after submission of said letters, is consistent with that conclusion.

Currently, DLM is in the process of conducting cost surveys of all municipalities for FY 2023 and FY 2024 early voting expenses, including early voting expenses for the presidential primary.³² After certifying costs, DLM will determine whether any deficiency in state funding exists for FY 2023 and FY 2024. With respect to fiscal years after FY 2024, if budget line item 0521-0002 continues to be funded each year for “implementing early voting in the commonwealth under . . . section 25B of chapter 54 of the General Laws, as determined through the collection and certification of accurate accounting by the state auditor and division of local mandates,” then DLM will conduct cost surveys of early voting expenses consistent with the methodology applicable to FY 2023 and FY 2024. As of the date of this determination, variations on the foregoing have been included in the House and Senate FY 2025 proposed budgets, pending reconciliation by the Conference Committee.

³² See [*Appendix B: FY 2023 and FY 2024 Early Voting Cost Certification*](#).

Conclusion

It is the determination of DLM that (1) certain provisions of the Early Voting Law governing early voting for federal or state elections and coinciding municipal elections *impose a mandate* within the meaning of the Local Mandate Law; (2) the provisions of the Early Voting Law governing early voting *in person* for non-coinciding municipal elections *do not impose a mandate* within the meaning of the Local Mandate Law; and (3) certain provisions of the Early Voting Law governing early voting *by mail* for non-coinciding municipal elections *impose a mandate* within the meaning of the Local Mandate Law. DLM further determines that the current method of funding by the Commonwealth of early voting costs incurred by municipalities does not satisfy the requirements of the Local Mandate Law. However, as stated above, DLM is conducting cost surveys according to these determinations and current appropriations, and will report certification totals when the process concludes.

This opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with M.G.L. c. 29, § 27C(e). This determination does not guarantee that certified expenses will, in fact, be reimbursed, as the Supreme Judicial Court has opined that a municipality's sole recourse for an unfunded mandate is to petition the Superior Court for an exemption from compliance.³³

Given that future budget appropriations are uncertain, I encourage you and other municipalities to inform your legislative delegation, the Speaker of the House of Representatives, the Senate President, and the Chairs of the Committees on Ways & Means of any concerns. This office is sympathetic to the difficulties that uncertainty creates in managing municipal budgets. We strongly encourage municipalities to incur expenses responsibly, with the understanding that, under the current statutory framework, there is no obligation on the Commonwealth to fund early voting expenses beyond what the Legislature and the Administration choose to appropriate for such purposes.³⁴

To ensure the effectiveness of the Early Voting Law, this office recommends that the Legislature take the following actions: (i) amend the law to assume responsibility by the Commonwealth for the mandated costs of early voting³⁵ and (ii) consistently provide an annual appropriation sufficient to cover said costs. DLM anticipates that the 2024 election cycle will provide a solid foundation for statewide cost estimates going forward. My office strongly recommends that the Legislature consider crafting meaningful revisions to the Early Voting Law to provide our municipalities with certainty by creating a sound methodology for fairly calculating early voting reimbursements (e.g., by ballot or by registered voter). We stand ready to work with the Legislature and the Administration to accomplish this goal.

In the meantime, I will continue to advocate for the funding of budget line item 0521-0002 to fulfill the intent of § 25B as expanded by the VOTES Act of increasing access to voting and participation in the democratic process, in addition to any supplemental funding necessary to make

³³ See *Worcester*, 416 Mass. at 761–762.

³⁴ See *Town of Milton v. Commonwealth*, 416 Mass. 471 (1993).

³⁵ See *supra* note 26.

our municipalities whole for FY 2023 and FY 2024. DLM will continue to make certification decisions regarding early voting expenses pursuant to the attached guidance as election and voting technology options change, subject to legislative or regulatory changes or judicial determination.

Thank you for bringing this important matter to our attention. I look forward to future opportunities to work with you in service to the residents of Plymouth and our Commonwealth.

Best regards,

A handwritten signature in cursive script that reads "Diana DiZoglio". The signature is written in dark ink and is positioned above the printed name and title.

Diana DiZoglio
Auditor of the Commonwealth

Appendix A: Early Voting Expense Guidance

DLM cautions that the foregoing determinations and guidance herein are based on DLM’s interpretation and application of current law, applicable regulations, and judicial precedent and, accordingly, are subject to legislative or regulatory changes or judicial determination.

Bolded, italicized terms shall have the meanings specified in [Appendix C: Glossary](#).

References in this guidance to *reimbursable* expenses mean expenses incurred by a municipality in connection with providing services that DLM determines to be mandated services pursuant to the Local Mandate Law that rise above the level of incidental local administration expenses and are not expressly charged to the municipality by statute, rule, or regulation.³⁶

Pursuant to the foregoing determinations, certain provisions of the Early Voting Law governing early voting for federal or state elections and coinciding municipal elections and early voting by mail for non-coinciding municipal elections impose a mandate. In determining whether expenses incurred by a municipality in connection with providing mandated services are *reimbursable*, analysis first turns to whether the expenses rise above the level of incidental local administration expenses. Incidental local administration expenses “are relatively minor expenses related to the management of municipal service and . . . are subordinate consequences of a municipality’s *fulfilment of primary obligations*” (emphasis added).³⁷ The implication is that expenses incurred by a municipality in fulfilling its primary obligations are not incidental local administration expenses and, consequently, one must look to the purpose of the statute to determine the primary obligation imposed on the municipality. Section 25B was enacted for the purpose of providing early voting beyond constitutionally required absentee voting. As Chapter 111 of the Acts of 2014 states in its preamble, its purpose is “to expand and improve forthwith access to voting.” The purpose “to authorize forthwith voter opportunities” is reiterated in the preamble to the VOTES Act. The primary obligation of § 25B is not simply to conduct elections but to expand access to voting via the mechanisms of early voting in person and early voting by mail. Expenses incurred to fulfill the primary obligation rise above the level of incidental local administration expenses. Examples of such primary obligation expenses include expenses incurred for the following:

³⁶ In defining the term *reimbursable*, DLM emphasizes that the term does not mean “required to be reimbursed.” The term is used herein to describe expenses incurred by a municipality in connection with providing mandated services as determined by DLM pursuant to the Local Mandate Law that rise above the level of incidental local administration expenses and that would be included in the calculation by DLM of whether any deficiency in funding by the Commonwealth exists. A determination by DLM that an expense is *reimbursable* does not guarantee that an expense will, in fact, be reimbursed, as the Supreme Judicial Court has opined that a municipality’s sole recourse for an unfunded mandate is to petition for an exemption from compliance. See *Worcester*, 416 Mass. at 761–762.

³⁷ See *Worcester*, 416 Mass. at 758–759 (where the primary obligation imposed by a regulation was “to identify children in need of special education,” written parental notification was “a subordinate administrative task”; where the primary obligation of a law was “to provide school accessibility to students with limited mobility,” the requirement for the annual submission of school building access plan imposed “only administrative expenses incidental (subordinate) to the primary obligation”).

- the establishment of an early voting site and the staffing of such site during the early voting period;³⁸
- the processing of applications for early voting by mail ballots;³⁹
- the creation and mailing of early voting by mail kits (to the extent that the number of kits provided by the Secretary of the Commonwealth is insufficient);⁴⁰
- the providing of a method for early voting by mail ballot return, e.g., a secured municipal drop box;⁴¹ and
- the securing and processing of early voting ballots.⁴²

In contrast, expenses incurred that are subordinate to the fulfillment of the primary obligation do not rise above the level of incidental local administration expenses, *even if expressly required by statute*,⁴³ and are, therefore, not **reimbursable** (e.g., expenses incurred for posting applications for early voting by mail ballots online;⁴⁴ and publishing and posting notice of early voting site locations, dates, and hours).⁴⁵

Pursuant to the foregoing determinations, the provisions of the Early Voting Law governing early voting in person for non-coinciding municipal elections do not impose a mandate. Accordingly, expenses incurred by a municipality in connection with providing services for such elections are **optional**.

References in this guidance to **optional** expenses mean expenses incurred by a municipality in connection with providing services that (i) DLM has not determined to be mandated services pursuant to the Local Mandate Law (e.g., expenses incurred in connection with early voting in person for non-coinciding municipal elections); (ii) are expressly optional by statute, rule, or regulation (e.g., “[a municipality] *may, in its discretion*, provide for additional early voting hours beyond the hours required by [§ 25B(b)(3)]” (emphasis added); the detail of police officers or constables at early voting sites is “*at the discretion of* [the municipality’s] election officers and registrars” (emphasis added)⁴⁶); or (iii) are not expressly required by statute, rule, or regulation, where such statute, rule, or regulation specifies a procedure for providing such services (e.g., expenses incurred in connection with early voting in person check-out procedures exceeding the requirements of § 25B(b)(8)).

Optional expenses are distinguishable from **discretionary** expenses. Where the *provision* of a service is not mandated, expenses incurred in connection with providing such service are

³⁸ M.G.L. c. 54, §§ 25B(b)(2–4).

³⁹ M.G.L. c. 54, § 25B(a)(2).

⁴⁰ M.G.L. c. 54, § 25B(a)(10). Early voting by mail kits and supplies for creating additional kits are provided by the Secretary of the Commonwealth and, therefore, are not costs imposed on cities and towns by the Commonwealth that will be certified. Postage for mailing early voting by mail kits, however, will be certified. *Cf.* Office of the State Auditor, *Financial Impact of Early Voting in the City of Woburn and the Town of Oxford*, *supra* note 27 (“[m]ailing a ballot to a voter who requests a ballot by mail” was an “incidental and subordinate local administration [expense]”).

⁴¹ M.G.L. c. 54, § 25B(a)(13).

⁴² M.G.L. c. 54, § 25B(h).

⁴³ *See Worcester*, 416 Mass. at 758–759.

⁴⁴ M.G.L. c. 54, § 25B(a)(7)(v).

⁴⁵ M.G.L. c. 54, § 25B(b)(5).

⁴⁶ M.G.L. c. 54, § 25B(j).

optional. References in this guidance to *discretionary* expenses mean expenses incurred by a municipality in connection with providing a service that DLM determines to be a mandated service pursuant to the Local Mandate Law, where the *method* of providing such service is subject to discretion.

As an illustration of *discretionary* expense, while securing and processing early voting ballots is a mandated service,⁴⁷ the methodologies to provide said service are themselves *discretionary*. Municipalities *may* open and deposit early voting ballots into a tabulator in advance of the date of the preliminary, primary, or election, *or* in the absence of a tabulator, may open and deposit early voting ballots into a ballot box, which shall be kept secured, locked, and unexamined with no results determined or announced until after the polls close.⁴⁸ Early voting ballots for state elections received prior to Election Day *may* be processed at the polls *or* at centralized tabulation facilities.⁴⁹ Choosing among permitted methods of providing a mandated service does not make the expense incurred *optional*.

As stated above, in order to be *reimbursable*, an expense must be incurred to fulfill a municipality's *primary* obligation (i.e., early voting).⁵⁰ In addition, an expense may not be *indirect* or *speculative*.⁵¹ The term "primary" is commonly used to denote matters "of first rank, importance, or value."⁵² The phrase "not indirect," meaning "direct," describes matters "marked by absence of an intervening agency, instrumentality, or influence."⁵³ While "speculative" means "theoretical rather than demonstrable,"⁵⁴ the phrase "not speculative" is understood to describe matters that are demonstrable rather than theoretical. Accordingly, in order to be *reimbursable*, a *discretionary* expense must be incurred for the *primary* purpose of / *primarily* for early voting and for the *direct* purpose of / *directly* for or due to early voting, and *actually* incurred by / be an *actual* expense of the municipality for early voting. In other words, (i) a *discretionary* expense must be incurred more to implement early voting than for any other purpose (in other words, more than 50% is attributable to early voting), (ii) such expense would not have been incurred but for early voting, and (iii) such expense must be incurred in anticipation of or during the applicable early voting period, or, if incurred on or after Election Day, is exclusively attributable to early voting, for which an ascertainable payment has been or will be made (cf., "comp" time provided to employees would not constitute an actually incurred expense). For services that can be measured by reference to the category or number of ballots, the determination may take into account the number of early voting ballots versus total ballots, and whether the service was provided during the early voting period or on or after Election Day. Expenses for services provided on or after Election Day are outside the scope of the Early Voting Law *unless* the expense incurred is exclusively attributable to early voting ballots (e.g., the processing of early voting ballots received

⁴⁷ M.G.L. c. 54, § 25B(h).

⁴⁸ *Id.*

⁴⁹ 950 CMR 47.12.

⁵⁰ See *Worcester*, 416 Mass. at 758–759.

⁵¹ See *Kennedy v. Commonwealth*, 92 Mass. App. Ct. 644, 651 (2018), *review denied*, 479 Mass. 1107 (2018).

⁵² "Primary." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/primary>. Accessed 18 Apr. 2024.

⁵³ "Direct." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/direct>. Accessed 18 Apr. 2024.

⁵⁴ "Speculative." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/speculative>. Accessed 18 Apr. 2024.

prior to Election Day at centralized tabulation facilities on Election Day,⁵⁵ or the processing of early voting by mail ballots received after Election Day⁵⁶).

An application of the foregoing test can be illustrated with respect to *consumable* supplies and *durable* equipment. References in this guidance to *consumable* supplies mean supplies of which the useful life is not anticipated to exceed the applicable early voting period, e.g., labels, sealing glue sticks, tape rolls, or ink for printing early voting materials. References in this guidance to *durable* equipment mean equipment of which the useful life is anticipated to exceed or which exceeds the applicable early voting period, e.g., printers, ballot envelope openers, organizing trays, or privacy screens. The test can more readily be met with respect to *consumable* supplies. Labels for mailing early voting ballots clearly would not be purchased but for early voting and, as they will be depleted during the early voting process, clearly would be purchased more to implement early voting than for any other purpose. The outcome of the test is less apparent with respect to *durable* equipment. Office equipment that can also be used for non-early voting services or voting equipment that can also be used for Election Day voting may or may not pass the test, depending on whether such equipment was purchased *directly* and *primarily* for early voting. DLM cannot be the arbiter of whether these and other *discretionary* expenses would not have been incurred but for early voting and have been incurred more to implement early voting than for any other purpose. As with the other expenses submitted, DLM must rely on the municipalities. Accordingly, DLM will be incorporating an expanded municipal certification clause in its cost surveys moving forward, that reads substantially as follows: “We hereby certify that we have read this form in its entirety, and further certify that the information provided herein for the city or town named below is true and accurate to the best of our knowledge, information, and belief; submitted expenses have been actually incurred, would not have been incurred but for early voting, and have been incurred more to implement early voting than for any other purpose (more than 50% is attributable to early voting); and supporting documentation will be provided if requested.” The cost surveys will also require certification of estimated percentage use of each item of *durable* equipment over such equipment’s useful life or length of lease pertaining specifically to early voting, which percentage will be the basis of the expense amount certified by DLM. DLM does note, though, that expenses that *result* from a municipality’s decision to incur a *discretionary* expense will not be certified (e.g., ongoing maintenance or repair costs for, or software upgrades or other upgrades of, *durable* equipment). Such expenses are not *directly* incurred for the purpose of early voting; they are factors in the municipality’s decision-making process and consequences of an intervening decision by the municipality to incur a particular *discretionary* expense over another.

DLM provides the above guidance after extensive review of previous determinations, judicial precedent, and legislative intent of the applicable statutes as demonstrated by their plain language and, where the language is ambiguous, extrinsic sources including the legislative history. DLM recognizes that the above guidance may alter certification decisions regarding specific expenses going forward. It is the intention of the Office of the State Auditor to provide a comprehensible framework effective as of the date of publication of the foregoing determination

⁵⁵ 950 CMR 47.12. The expense of central tabulation facilities to process early voting ballots is an expense exclusively attributable to early voting that will be certified. Cf. Office of the State Auditor, *Financial Impact of Early Voting in the City of Woburn and the Town of Oxford*, *supra* note 27 (“municipalities were not . . . mandated to operate central tabulation facilities”).

⁵⁶ M.G.L. c. 54, § 25B(a)(13).

such that municipal election officials can reasonably anticipate DLM certification decisions even if a particular expense has not been previously incurred and submitted for certification or addressed via statute or regulation.

Appendix B: FY 2023 and FY 2024 Early Voting Cost Certification

For purposes of FY 2023 and FY 2024 early voting cost certification pursuant to the language of the FY 2023 budget, the FY 2023 supplemental budget, and the FY 2024 budget, in accordance with the guidance herein, DLM will certify *reimbursable* expenses, including *discretionary* expenses certified by the municipality as *actually* incurred, *primarily* and *directly* for early voting.

Although *optional* expenses are not *reimbursable*, in light of the Secretary of the Commonwealth and this office's agreed interpretation regarding said budget language as applying to early voting for all elections, DLM will also certify certain expenses incurred in connection with early voting in person for non-coinciding municipal elections (i.e., expenses incurred by a municipality in connection with providing services that DLM has not determined to be mandated services pursuant to the Local Mandate Law) certified by the municipality as *actually* incurred, *primarily* and *directly* for early voting. Applying the same test will provide consistency in the certification of expenses for early voting in person.

It is DLM's position that the following expenses are statutory exclusions from funding and, because of this, the exclusion of such expenses from funding must be specifically overridden by the Legislature before DLM will certify them:

- expenses incurred by a municipality in connection with providing services that are expressly optional by statute, rule, or regulation;
- expenses incurred by a municipality in connection with providing services that are not expressly required by statute, rule, or regulation, where such statute, rule, or regulation specifies a procedure for providing such services;
- incidental local administration expenses; and
- expenses expressly charged to a municipality by statute, rule, or regulation.

DLM cautions that the foregoing cost certification decisions apply only to FY 2023 and FY 2024 early voting expenses. Future budget appropriations may impact the scope of what may be certified and cost certification decisions for early voting expenses going forward will be made accordingly, consistent with the guidance herein.

Appendix C: Glossary

As used herein, the following terms have the following meanings:

Actual/actually — In reference to expenses, this term means expenses incurred in anticipation of or during the applicable early voting period, or, if incurred on or after Election Day, are exclusively attributable to early voting, for which an ascertainable payment has been or will be made.

Consumable — In reference to supplies, this term means supplies of which the useful life is not anticipated to exceed the applicable early voting period.

Direct/directly — In reference to expenses, this term means expenses that would not have been incurred but for early voting.

Discretionary — In reference to expenses, this term means expenses incurred by a municipality in connection with providing a service that DLM determines to be a mandated service pursuant to the Local Mandate Law, where the *method* of providing such service is subject to discretion.

Durable — In reference to equipment, this term means equipment of which the useful life is anticipated to exceed or which exceeds the applicable early voting period.

Optional — In reference to expenses, this term means expenses incurred by a municipality in connection with providing services that (i) DLM has not determined to be mandated services pursuant to the Local Mandate Law; (ii) are expressly optional by statute, rule, or regulation; or (iii) are not expressly required by statute, rule, or regulation, where such statute, rule, or regulation specifies a procedure for providing such services.

Primary/primarily — In reference to expenses, this term means expenses incurred more to implement early voting than for any other purpose (in other words, more than 50% is attributable to early voting).

Reimbursable — In reference to expenses, this term means expenses incurred by a municipality in connection with providing services that DLM determines to be mandated services pursuant to the Local Mandate Law that rise above the level of incidental local administration expenses and are not expressly charged to the municipality by statute, rule, or regulation.