



TOWN of BROOKLINE

Massachusetts

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TOWN ADMINISTRATOR

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To: Select Board

From: Charles Carey, Town Administrator
Joe Callanan, Town Counsel

Date: March 3, 2023

Subject: MBTA Communities Act Noncompliance

On February 27, 2023, at a hearing held by the Advisory Committee's Subcommittee on Land Use dedicated primarily to budget matters, Town Counsel's office received a number of questions on the potential consequences of failing to comply with the MBTA Communities Act ([Massachusetts General Law Chapter 40A, Section 3A](#)).

As you know, that law states that Brookline "shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right..." G.L. c. 40A § 3A(a). It also authorizes the Department of Housing and Community Development ("DCHD") to "promulgate guidelines to determine if an MBTA community is in compliance" with the law. *Id.* § 3A(c). Additionally, it states that communities that fail to comply with the act will not be eligible for certain funds, including, most relevantly for Brookline, Local Capital Projects funds. *Id.* § 3A(b). The Brookline Housing Authority ("BHA") has said that it currently relies on such funding for about \$225,000 of its costs.

After the Subcommittee conversation and several follow-ups with Advisory Committee and Select Board members, a member of the Select Board asked Town Counsel's office to prepare a document for the Board addressing frequently asked questions about potential consequences of noncompliance with the Act. This is that document.

We want to emphasize at the outset that this memo should not be viewed as defeatist or doom-saying. It provides honest answers to community questions. *See* Mass. R. Prof. C. 2.1 ("a lawyer shall exercise independent professional judgment and render candid advice"). But beyond the purely legal analysis herein, staff continues to be optimistic that a positive working relationship with other municipalities and the state will result in Brookline achieving compliance with the Act in a forward-thinking way that does not compromise the community's character. And rather than propose a knee-jerk rezoning out of fear of the potential consequences outlined in this memo, we continue to pursue your direction to move deliberately and open-mindedly in order to produce the best possible outcome for the Town, rejecting a "one size fits all" framework.

Can't we just "eat the cost" of noncompliance with the Act?

This is the most frequently asked question staff receives about the Act. The answer is no, both because (1) the potential cost far exceeds the \$225,000 in lost income to BHA due to federal civil rights claims that would likely follow noncompliance, and (2) the mandatory nature of the Act means that a judge could simply draw and impose a compliant district on the Town without our input.

Additional Costs

The fact that the Act outlines a specific consequence for defying it (losing access to certain funding sources) doesn't mean it's the only consequence we'd suffer for ignoring the word *shall* in its first sentence. We would likely be sued, as early as January 2024. Two entities have expressed interest in doing so: Lawyers for Civil Rights ("LCR," formerly known as the Lawyers' Committee for Civil Rights), which has already sent letters to noncompliant communities outlining its views (attached as Appendix A); and the Attorney General, who has said publicly that she would "use every tool in [her] toolbox" to force compliance. Additionally, Governor Healey has said that "opting out is not an option."

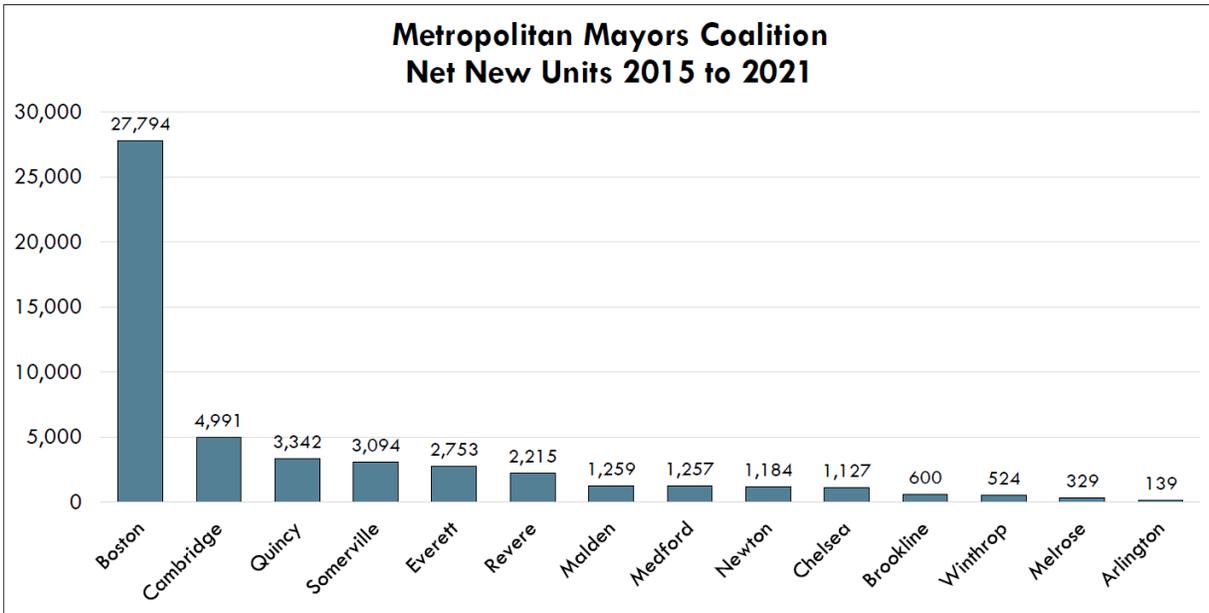
In order to maximize the potential penalty for noncompliance, these entities would likely sue under federal housing law that outlaws exclusionary zoning. In a line of cases dating back to *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), the Supreme Court has consistently held, despite repeated invitations to overturn the conclusion, that zoning decisions which deter low-income housing growth or discriminate against protected classes violate both the federal Fair Housing Act and the 14th Amendment of the U.S. Constitution.

Several opponents of the Act have noted that it does not mandate affordable housing, and indeed its guidelines restrict communities' abilities to use local inclusionary zoning rules as a shield against increased potential density. But the ultimate aim of the Act, per DHCD and the Legislature, is to increase total housing stock and drive down costs so low-income families can afford to live and work in Massachusetts. *See, e.g.*, "Why is multi-family zoning near transit and in neighboring communities important?", available at <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities>. Indeed, the Act itself requires that the housing it permits be built "without age restrictions" and "suitable for families with children," indicating the Act's intent to help protected classes find places to live. G.L. c. 40A § 3A(a).

Opponents may disagree that the Act is the best way to achieve its aims; they may even argue that it simply cannot do so as written. But a court would be unlikely to second-guess the deliberative process that led to the Act's passage. That there is a better way to achieve a law's aims, or that we would rather comply in a different way, are generally not arguments courts consider when determining whether a statute is constitutional and enforceable.

Instead, a court would likely focus on our stated and unstated reasons for failing to comply. Despite our claim to be pulling our weight in terms of development, Brookline built the fourth-lowest amount of net new housing units among members of the Metropolitan Mayors Coalition

Regional Housing Task Force between 2015 and 2021, as the graph below shows, with a significant gap between us and the next-highest community:



Data sources: Metro Mayors Municipalities, Census Building Permit Survey, DHCD Housing Choice Initiative

Nor does North Brookline's existing density give us cover to claim we are simply at capacity around MBTA stops. The forthcoming Harvard Street Study has already identified numerous underutilized parcels of land on one of our busiest mixed-use streets, and other comparably dense neighborhoods in other communities are still building housing. Outside of the process by which developers can avoid local zoning laws in communities that lack adequate affordable housing so long as their projects contain 25% or more affordable units (*see* G.L. c. 40B), only one multi-family structure has been permitted on Harvard Street in the last 20 years.

Flat noncompliance with the MBTA Communities Act would likely be viewed by a court as an amplification of a historic pattern or practice of discouraging any new multi-family housing from being built. Additionally, since the Act is intended to assist low-income residents and protected classes, our noncompliance would be painted as an intentional choice that disproportionately impacts such individuals.

And that, as they say, is the ballgame. While we know Brookline's intentions are not discriminatory, and would obviously vigorously dispute any such allegation using any means available to us (including affirmative litigation if the Select Board so authorizes), it is Town Counsel's opinion that we would likely lose a suit on the matter for the reasons outlined above.

Losing a federal civil rights case means paying the other side's market rate attorneys' fees in addition to any damages awarded at trial. LCR has many large law firms that will gladly volunteer their attorneys to file a lawsuit pro bono on this topic. WilmerHale, Ropes & Gray, Goodwin and Mintz Levin are just some of the white-shoe firms represented on LCR's board of directors. Even if LCR did not employ such high-powered attorneys, or the Attorney General were to sue and prevail first, the cost to Brookline from fee-shifting would still be extremely

high. *See, e.g., Gavin v. Boston*, No. 18-CV-10819 (D. Mass. Mar. 22, 2022) (finding reasonable partner rates of \$500 per hour; associates rates of up to \$380 per hour, and paralegal rates of \$250 per hour for a *mid-sized* Boston firm) (citing *Tuli v. Brigham & Women's Hosp., Inc.*, No. 07CV12338-NG, 2009 WL 10693567, at *2 (D. Mass. June 8, 2009) (finding in a case decided eleven years ago that hourly rates of up to \$735 for partners, up to \$495 for associates, and up to \$275 for career paralegals were reasonable in the context of the litigation)).

As the cost of noncompliance could far exceed \$225,000, which is already a sum of money the Town does not have readily available in its FY24 budget without significant cuts elsewhere, defying the MBTA Communities Act is not a viable option. *See Rosie D. ex rel. John D. v. Patrick*, 593 F. Supp. 2d 325, 335 (D. Mass. 2009) (\$7,106,414 fee award for five years of civil rights litigation, appeal, and six-week trial); *see also Rosie D. v. Baker*, No. 01-CV-30199-RGS (D. Mass. Mar. 22, 2022) (two later fee awards in the amounts of \$1,459,684 in 2010 and \$1,129,490.00 in 2022 for time “spent monitoring implementation”).

Injunctive Relief

Beyond damages and fees, any suit against us will almost certainly ask a court to bring us into compliance with the Act. That could be accomplished by holding us in contempt and charging us onerous monetary penalties until a bylaw is passed. More dangerously, a judge could simply cut us out of the equation and impose compliant zoning without local input.

Nowhere in the law’s requirement that we “*shall* have a zoning ordinance” does it say that the Town must draft it. In past situations where courts have found government entities ignored statutory or constitutional mandates in a discriminatory manner, courts have simply implemented the mandates anyway. Recent court decisions regarding gerrymandered election districts are a current example. In its “[Redistricting Litigation Roundup](#),” the Brennan Center for Justice at NYU Law School noted that “[i]n New York, the courts implemented new maps drawn by a special master appointed by the court” rather than affording that state’s legislature the opportunity to try again.

A court-appointed special master would be unlikely to take the kind of care and effort (to say nothing of expense) the Planning Department has already spent on the question of how best to comply with the Act. It’s extremely doubtful they’d try to implement form-based zoning or height restriction requirements, for example. They would more likely listen to the plaintiffs’ attorneys, as prevailing parties in the litigation, instead of Brookline residents. They would absolutely not ask the state for waivers of any of the Act’s or guidelines’ provisions. We would be left with a far worse outcome which we had no practical ability to influence.

Accordingly, rather than risk any of the above, it is staff’s recommendation that the community begin the process of drafting zoning rules consistent with the Act’s requirements so that it can position itself as a willing partner with the state in achieving its aims while also opening the door for us to seek modifications to or waivers from the guidelines where appropriate.

Couldn't we just argue that the whole Act is unlawful or unconstitutional?

Town Counsel is not aware of any potentially meritorious argument that the MBTA Communities Act is unlawful. It is part and parcel of the state's other zoning laws, nestled in with provisions on items like special permits, variances, and authority for a zoning board of appeals. *Compare* G.L. c. 40A § 3A (MBTA Communities Act); *with id.* § 9 (special permits); § 10 (variances); *and* § 12 (zoning board of appeals). Just as we must comply with the state's requirements elsewhere in chapter 40A, so too are we expected to come into compliance with Section 3A.

Past challenges to Chapter 40B, a comparable (if anything, even more heavy-handed) state law that limits local zoning authority in the name of increased affordability, have repeatedly failed. *See, e.g., Mahoney v. Bd. of Appeals of Winchester*, 366 Mass. 228, 231 (1974) (Chapter 40B does not violate equal protection clause); *Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dep't of Cmty. Affairs*, 363 Mass. 339, 344 (1973) (Chapter 40B neither unconstitutionally vague, nor an unconstitutional delegation of power, nor violative of the Home Rule Amendment).

But DHCD's guidelines aren't a part of the Act itself. Do we have to follow those?

Unless we get a waiver from them, very likely yes. The law specifically tasks DHCD with developing guidelines. G.L. c. 40A § 3A(c) ("The department of housing and community development, in consultation with the Massachusetts Bay Transportation Authority and the Massachusetts Department of Transportation, shall promulgate guidelines to determine if an MBTA community is in compliance with this section").

DHCD did so through a method that comported with administrative procedure requirements: it issued draft guidelines in December 2021, solicited public comment, conducted public engagement sessions, revised the guidelines based on the feedback it received, and issued a final draft on August 10, 2022. *See* Letter from M. Kennealy & J. Maddox to MBTA Communities Leaders, Aug. 10, 2022 (attached as Appendix B).

It's true that "[g]uidelines issued by an administrative agency . . . do not have the same status as regulations adopted pursuant to the [Massachusetts] Administrative Procedure Act. [...] [A]lthough they are entitled to substantial deference, they do not carry the force of law." *Glob. NAPs, Inc. v. Awiszus*, 457 Mass. 489, 496–97 (2010). But "formal rulemaking is not required when an agency seeks to interpret a statute." *Boston Ret. Bd. v. Contributory Ret. Appeal Bd.*, 441 Mass. 78, 83 (2004). Here, where the text of the Act itself is broad and plain without being vague, it's unlikely that a court would depart from the "substantial deference" standard in evaluating DHCD's guidelines. The scheme behind the Act is simple: the Legislature identified a clear preferred outcome and tasked the administrative agency best equipped to bring that outcome about with figuring out the details on how to get there.

And thus, even if we were successful in arguing that the guidelines don't accurately reflect the intent of the Act and thus don't need to be followed, we would still be confronted with the mandatory language of the Act itself. This reinforces that doing nothing is not a viable option.

How can the state get away with punishing BHA for the Town's acts or omissions?

While BHA is a separate government entity and body politic, it is still part of our community. The state has taken the position that Local Capital Projects Fund cannot be used to fund *anything* in a community that's out of compliance with the Act, as a letter DHCD sent to Woburn on December 14, 2022 (attached as Appendix C) attests. And just like the answer to the last question, even if we were to successfully argue that this was unfair to BHA, we'd still be in the position of having to comply with the Act's mandatory language and implement complaint zoning.

So do we have no options except to give up and comply with this coercive law as written?

We don't think so, and we would discourage this downcast framing of the situation. As previously mentioned, staff is aggressively working with other stakeholders to change or get waivers from parts of the guidelines that we don't think apply to Brookline's situation. We appreciate that the state has put us in a bind, but the Planning Department has been striving since this law was signed to put us in the best possible position to address it.

In passing the MBTA Communities Act, the state has issued us a challenge. Rather than ignoring it and suffering the consequences, staff recommends facing it head-on, and viewing it as an opportunity to gather meaningful community input and stand at the vanguard of sustainable inclusionary zoning practices just as we are for climate change policy. By framing our efforts in this way, we are far more likely to win the changes we're seeking from the state, which we hope will be equally eager to see us succeed in achieving the aims the Act purports to support.

END OF DOCUMENT

Appendix A: LCR Compliance Demand Letters (Feb. 6, 2023)

Appendix B: Final DHCD Guidelines Cover Letter (Aug. 10, 2022)

Appendix C: DHCD Compliance Letter to Woburn (Dec. 14, 2022)

APPENDIX A

February 6, 2023

Chairman Anthony M. Renzoni
Holden Board of Selectmen
1204 Main Street
Holden, MA 01520

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairman Renzoni:

As you are aware, Holden is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Holden has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Holden rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Holden, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Holden is one of seven communities that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Holden officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Holden submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Holden is capable of doing so as well.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statuses/download> (last visited Feb. 6, 2023).

⁴ *See supra* note 2.

⁵ *See* Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ *See supra* note 3.

If Holden fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel Holden's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Holden taxpayers need not be saddled with the litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madrigal, Esq.
Lawyers for Civil Rights

CC:

Richard Bates, Holden Board of Selectmen
Stephanie Mulroy, Holden Board of Selectmen
Geraldine A. Herlihy, Holden Board of Selectmen
Thomas Curran, Holden Board of Selectmen
Peter Lukes, Holden Town Manager
Town of Holden Planning & Development Office

February 6, 2023

Chairman George F. Miller
Berkley Board of Selectmen
One North Main Street
Berkley, MA 02779-1336

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairman Miller:

As you are aware, Berkley is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Berkley has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Berkley rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Berkley, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Berkley is one of seven communities that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Berkley officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Berkley submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Berkley is capable of doing so as well.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statutes/download> (last visited Feb. 6, 2023).

⁴ See *supra* note 2.

⁵ See Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ See *supra* note 3.

If Berkley fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel Berkley's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Berkley taxpayers need not be saddled with the litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madriral, Esq.
Lawyers for Civil Rights

CC:

Wendy F. Cochrane, Berkley Board of Selectmen
Dean Larabee III, Berkley Board of Selectmen
Kevin Partridge, Interim Berkley Town Administrator
Town of Berkley Planning Board

February 6, 2023

Chairman Mark E. Townsend
Carver Select Board
108 Main Street
Carver, MA 02330

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairman Townsend:

As you are aware, Carver is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Carver has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Carver rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Carver, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Carver is one of seven communities that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Carver officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Carver submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Carver is capable of doing so as well.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statuses/download> (last visited Feb. 6, 2023).

⁴ See *supra* note 2.

⁵ See Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ See *supra* note 3.

If Carver fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel Carver's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Carver taxpayers need not be saddled with the litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madrigal, Esq.
Lawyers for Civil Rights

CC:

Jennifer M. Bogart, Carver Select Board
John J. Cotter, Carver Select Board
Sarah G. Hewins, Carver Select Board
Jim Hoffman, Carver Select Board
Robert Fennessy, Town Administrator
Town of Carver Planning Board

February 6, 2023

Chairman Mark Germain
Middleborough Select Board
10 Nickerson Avenue, 1st Fl.
Middleborough, MA 02346

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairman Germain:

As you are aware, Middleborough is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Middleborough has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Middleborough rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Middleborough, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, your town is one of seven that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Middleborough officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are perpetuating both of these problems.⁵

Therefore, LCR demands that Middleborough submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Middleborough can do so too.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statuses/download> (last visited Feb. 6, 2023).

⁴ See *supra* note 2.

⁵ See Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ See *supra* note 3.

If Middleborough fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel the town's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Middleborough taxpayers need not be saddled with litigation costs. We would prefer to resolve this quickly and amicably.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madriral, Esq.
Lawyers for Civil Rights

CC:

Nathan Demers, Middleborough Select Board
Arthur Battistini, Middleborough Select Board
Brian Giovanoni, Middleborough Select Board
Neil Rosenthal, Middleborough Select Board
James McGrail, Middleborough Town Manager
Town of Middleborough Planning Board

February 6, 2023

Michael A. Maresco
Town of Marshfield Administrator
870 Moraine Street
Marshfield, MA 02050

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Administrator Maresco:

As you are aware, Marshfield is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Marshfield has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Marshfield rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Marshfield, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Marshfield is one of seven communities that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Marshfield officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Marshfield submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Marshfield is capable of doing so too.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statuses/download> (last visited Feb. 6, 2023).

⁴ *See supra* note 2.

⁵ *See* Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ *See supra* note 3.

If Marshfield fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel the town's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Marshfield taxpayers need not be saddled with litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madriral, Esq.
Lawyers for Civil Rights

CC:
Town of Marshfield Selectboard
Town of Marshfield Planning Department

February 6, 2023

Chairman Richard Schiavo
Raynham Board of Selectmen
558 South Main Street
Raynham, MA 02767

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairman Schiavo:

As you are aware, Raynham is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Raynham has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Raynham rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Raynham, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Raynham is one of seven that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Raynham officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Raynham submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Raynham is capable of doing so too.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statutes/download> (last visited Feb. 6, 2023).

⁴ See *supra* note 2.

⁵ See Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ See *supra* note 3.

If Raynham fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel the town's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Raynham taxpayers need not be saddled with litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madriral, Esq.
Lawyers for Civil Rights

CC:

Patricia Riley, Raynham Board of Selectmen
Joseph Pacheco, Raynham Board of Selectmen
Gregory Barnes, Raynham Town Administrator
Raynham Planning Department

February 6, 2023

Chairperson Justin Sullivan
Seekonk Board of Selectmen
100 Peck Street
Seekonk, MA 02771

Re: Demanding Compliance with MBTA Zoning Law Action Plan Requirement

Dear Chairperson Sullivan:

As you are aware, Seekonk is currently [in violation](#) of the MBTA Zoning Law.¹ This is because Seekonk has failed to meet even the bare minimum requirement that it submit a multi-family zoning “action plan” to the Commonwealth by January 31, 2023. Lawyers for Civil Rights (“LCR”) demands that Seekonk rectify this failure within ten business days.

The MBTA Zoning Law—M.G.L. c. 40A § 3A—obligates cities and towns with MBTA service, including Seekonk, to provide for a multi-family zoning district of “reasonable size” within the next few years.² Under its authority to implement the Law, the Department of Housing and Community Development (“DHCD”) has issued a series of mandatory compliance deadlines. One such deadline required covered communities to submit a short “action plan” by January 31, 2023, explaining how they will adhere to the Law’s zoning specifications. By DHCD’s count, Seekonk is one of seven that have completely abdicated that responsibility.³

The Law explicitly imposes state funding ineligibility for this failure.⁴ But Seekonk officials should be aware that their refusal to comply has far bigger consequences. Greater Boston is mired in an [affordable housing crisis](#) and remains [highly racially segregated](#). Towns that decline to increase their multi-family housing are actively perpetuating both of these problems.⁵

Therefore, LCR demands that Seekonk submit an “action plan” to DHCD within 10 business days. The necessary form is six pages long and can be found [here](#). 168 covered communities have already submitted “action plans”⁶ and Seekonk is capable of doing so too.

¹ Andrew Brinker, *As new housing law takes effect, most towns fall in line, for now*, BOS. GLOBE (Feb. 3, 2023), https://www.bostonglobe.com/2023/02/03/business/new-housing-law-takes-effect-most-towns-fall-line-now/?p1=Article_Feed_ContentQuery&p1=Article_Feed_ContentQuery.

² *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited Feb. 6, 2023).

³ *Section 3A Action Plan Status as of 2/2/2023*, Mass.gov, <https://www.mass.gov/doc/section-3a-action-plan-statuses/download> (last visited Feb. 6, 2023).

⁴ See *supra* note 2.

⁵ See Oren Sellstrom & Jacob Love, *Don’t try to flout the Housing Choice Law*, COMMONWEALTH MAG. (Dec. 13, 2022), <https://commonwealthmagazine.org/opinion/dont-try-to-flout-the-housing-choice-law/>.

⁶ See *supra* note 3.

If Seekonk fails to do so, or otherwise continues to flout the MBTA Zoning Law, LCR will compel the town's compliance. Exclusionary zoning practices have long been successfully challenged under the federal Fair Housing Act ("FHA"). However, Seekonk taxpayers need not be saddled with litigation costs. We would prefer to resolve this amicably and expeditiously.

Sincerely,

/s/

Jacob M. Love, Esq.
Oren M. Sellstrom, Esq.
Iván Espinoza-Madriral, Esq.
Lawyers for Civil Rights

CC:

Christopher Zorra, Seekonk Board of Selectmen
David Andrade, Seekonk Board of Selectmen
Adam Petronio, Seekonk Board of Selectmen
Michael P. Healy, Seekonk Board of Selectmen
Shawn E. Cadime, Seekonk Town Administrator
Town of Seekonk Planning Board

APPENDIX B



Commonwealth of Massachusetts
**EXECUTIVE OFFICE OF
HOUSING & ECONOMIC DEVELOPMENT**
ONE ASHBURTON PLACE, ROOM 2101
BOSTON, MA 02108
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SECRETARY

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August 10, 2022

Dear Local Officials in MBTA Communities:

Today, we are excited to share with you the final guidelines to determine compliance with section 3A of the Zoning Act—the new requirement for every MBTA community to have at least one zoning district in which multi-family housing is allowed as of right, and which is located near a transit station, if applicable.

In December 2021, the Baker-Polito Administration released draft guidelines on the new multi-family zoning requirement for MBTA communities. At the time, we stated that the final guidelines would be issued after consideration of feedback from a robust stakeholder engagement process and public comment period. The public comment period ran from December 15, 2021 through March 31, 2022. During that time, EOHEd, DHCD, and the Massachusetts Housing Partnership (MHP) conducted approximately 24 engagement sessions and collected nearly 400 public comments. We want to express our appreciation for those that participated in that important process. The guidelines we are releasing today are informed by the feedback you provided.

The final guidelines incorporate several changes, including:

- **Revised Community Categories:** MBTA Communities are now categorized as rapid transit, commuter rail, adjacent, or adjacent small town. The “bus service” category has been eliminated.
- **Significant Adjustments for Small and Rural Towns with No Transit Stations:** The final guidelines eliminate the minimum land area requirement and reduce the multi-family unit capacity requirement for communities with a population of less than 7,000 or less than 500 residents per square mile.
- **Changes to the Reasonable Size Criteria:** The guidelines establish “circuit breakers” that prevent multi-family unit capacity from exceeding 25% of a community’s existing

housing stock, or the minimum land from exceeding 1.5% of its total developable land area.

- **Tailored District Location Requirements:** The portion of a multi-family zoning district that must be located within a half mile of a transit station now varies based on the amount of developable station area within each MBTA community. Communities with more developable station area land will be required to have more of their multi-family districts within a half mile of transit stations. A community with less than 100 developable acres within a half mile of a station will be free to choose any appropriate location.
- **Multi-family Unit Capacity Tool:** To help communities calculate multi-family unit capacity in a consistent, transparent, and data-driven way, we built a compliance model workbook tool. The compliance model will provide a GIS land map for each municipality and calculate a zoning district's multi-family unit capacity and gross density based on inputs provided by each community. This tool will be widely available for use in the fall.

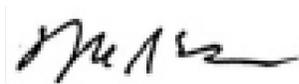
The final guidelines also include refinements and adjustments in other key areas, such as affordability, local site plan review, and other technical matters, including updated definitions.

Please visit mass.gov/mbtacommunities for the guidelines and other relevant information, including forms pertaining to the compliance process. The website also includes an online form for technical assistance requests. With the release of these guidelines, we stand ready, willing, and able to make resources and technical assistance available to help municipalities comply with the law. In that spirit, a webinar will be held on September 8, 2022 at 1:00pm to explain the guidelines in more detail.

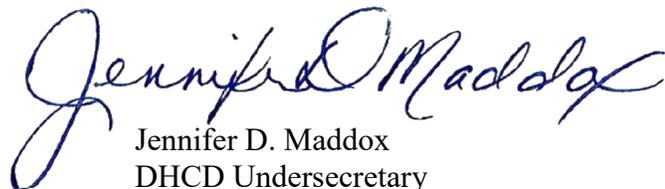
As you review the guidelines and begin work to comply with the new law's zoning requirement, keep in mind: If Massachusetts is to remain a desirable place for individuals, families, and businesses, then we need to confront the housing crisis together. This law is not a housing production mandate. It is all about setting the table for more transit-oriented housing in the years and decades ahead—which is not just good housing policy, but good climate and transportation policy, too.

We are excited to start the next chapter in the implementation of this new requirement, so we can lay the groundwork for a better future in the Commonwealth of Massachusetts.

Thank you,



Mike Kennealy
EOHED Secretary



Jennifer D. Maddox
DHCD Undersecretary

APPENDIX C



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Charles D. Baker, Governor ◆ Karyn E. Polito, Lieutenant Governor ◆ Jennifer D. Maddox, Undersecretary

December 14, 2022

Thomas Maher
Executive Director
Woburn Housing Authority
59 Campbell St.
Woburn, MA 01801

Dear Mr. Maher,

I am writing as a follow-up to the letter sent September 30th regarding the impact on your Housing Authority's budget because the city of Woburn is currently out of compliance with the multifamily zoning requirement for MBTA communities in accordance with [M.G.L c. 40A Section 3A](#). As a reminder, Section 3A of M.G.L c. 40A provides that a MBTA community that is out of compliance shall not be eligible for funds from: (i) the Housing Choice Initiative; (ii) the Local Capital Projects Fund; or (iii) the MassWorks Infrastructure Program.

The Local Capital Projects Fund has been used to support a portion of the operating subsidy for local housing authorities in the annual budget for the past several years. For the [FY2023 General Appropriations Act](#), the public housing operating account (7004-9005) is supported in part (10.63%) by the Local Capital Projects Fund. Housing Authorities in MBTA communities that are currently out of compliance with Section 3A will have their FY23 budgets reduced by that proportion until such time as their community complies with the final guidelines.

Please be advised that DHCD is making an adjustment relative to the implementation and enforcement of this budget reduction. The September 30 letter directed Housing Authorities to submit FY23 budgets with Allowable Non-Utility Expense Level (ANUEL) 10.63% lower than the figures announced in the FY23 DHCD budget guidelines. This effectively mandated a 10.63% reduction in Housing Authorities' budgets for all costs other than utilities. DHCD originally intended to implement the law as it applies to affected housing authorities in this manner to provide budgeting certainty for housing authorities; however, based on a closer review we have concluded that this method reduces Housing Authority budgets by more than is required by the statute.

DHCD recognizes that tenant-paid rents represent a significant portion of Housing Authorities' budgets, in addition to state operating subsidy. Because the law specifically restricts spending from Local Capital Projects Funds, DHCD will apply the reduction required by the legislation only to the state operating subsidy portion of the affected Housing Authorities' budgets. Accordingly, instead of requiring affected Housing Authorities to reduce their overall ANUEL, DHCD will apply the 10.63% reduction only to the affected Housing Authorities' final state operating subsidy, calculated as ANUEL + Exemptions + Utilities – Revenue. The reduction will be calculated and applied after submission of the Housing Authority's year end operating statement. In order to avoid drawing down on operating

reserves, Housing Authorities should submit budgets with spending levels that take into account a 10.63% reduction to projected operating subsidy as of time of budget submission.

In closing, it is important to remember that your community can still come into compliance through the submission of an Action Plan by January 31, 2023, as outlined in the final guidelines which are available [here](#). If your city or town officials submit an Action Plan-and it is approved by DHCD, you may *immediately submit a budget revision to reverse the projected reduction in operating subsidy*.

Sincerely,



Ben Stone
Director, Division of Public Housing

Cc: Daniel Gately, Woburn HA Board Chair
Melanie Loveland-Hale, DHCD Housing Management Specialist
Richard Conlon, Fee Accountant