



RECEIVED  
2024 JUL 30 A 8:58  
TOWN CLERK  
WINTHROP, MASS.

TOWN OF WINTHROP, MASSACHUSETTS  
OFFICE OF THE TOWN ATTORNEY

Date: 30 July 2023  
From: Town Attorney  
To: Winthrop Town Council  
Re: Petition Against MBTA Zoning Compliance

On July 15, 2024, the Clerk of the Winthrop Town Council received a petition entitled "Petition Against MBTA Zoning Compliance." The petition urges the Council to adopt an amendment to the Winthrop Zoning Ordinance that purportedly would preempt the provisions of G. L. Chapter 40A, § 3A.

In accordance with the provisions of the Winthrop Town Charter, the petition was forwarded to my office for review of the petition and advice to the Town Council with respect to its legality. I have completed my research and review, and herewith submit to the Council the attached Report and Advice.

This review is not a comprehensive review of the provisions of C. 40A, §3A or the guidelines promulgated thereunder. Nor do I opine on the validity of the statute. The Charter mandates that I review the petition only and that I submit my findings and advice to the Town Council with respect to the petition..

Respectfully submitted,

/s/ James J. Cipoletta

James J. Cipoletta  
Town Attorney



## TOWN OF WINTHROP, MASSACHUSETTS OFFICE OF THE TOWN ATTORNEY

### REPORT AND ADVICE TO THE WINTHROP TOWN COUNCIL REGARDING THE "PETITION AGAINST MBTA ZONING COMPLIANCE"

#### BACKGROUND

On July 15, 2024, the Winthrop Town Clerk and Clerk of the Town Council received a document entitled "*Petition Against MBTA Zoning Compliance*" ("the petition"). The petition requests amendment of Section 17, the Winthrop Zoning Code, by inserting a new section enumerated as Section 17.04.060. The proposed amendment, which has no section heading, contains the following three sub-parts:

1. That there shall be no further overlay zoning districts, except for purposes of sanitation, sewer, water, environmental purposes, and special utilities.
2. That there shall be no transportation-oriented zoning districts.
3. That there shall be no zoning districts complying with the guidelines of the Executive Office of Housing and Liveable Communities or with G. L. c. 40A, § 3A as currently in effect.

The petition contains signatures of ten (10) individuals purporting to be voters in the Town of Winthrop who constitute the petitioning committee. Additionally, the document contains signatures of eighty-seven (87) individuals purporting to be subscribing voters in the Town of Winthrop.

The petition was submitted to the Office of the Town Attorney pursuant to Section 8-5(b) of the Charter of the Town of Winthrop to “advise the town council whether the measure as proposed may lawfully be proposed by the initiative process and whether, in its present form, may be lawfully adopted by the town council.”

#### DISCUSSION

As Town Attorney, I have reviewed the petition and make the following findings and conclusions, and accordingly provide advice to the Town Council. First, the petition was properly submitted for the Town’s consideration in accordance with provisions of applicable state law and the Town’s Charter. Second, each section of the proposed amendment is inconsistent with state law and would require the town to violate the provisions of G. L. c. 40A, § 3A. This, in turn, would violate the Massachusetts Constitution. The proposed amendment, in its present form, may not be lawfully adopted. My reasons are discussed in detail below.

#### 1. WHETHER SECTION 17 CAN BE AMENDED BY THE PROPOSED INITIATIVE PROCESS

As to the first question, I conclude that G. L. c. 40A, § 5 and Section 8-5 of the Winthrop Town Charter authorize the amendment of the Winthrop Zoning Code by the initiative process followed by the those who submitted the petition. G. L. c 40A, § 5, which is entitled “*Procedure for Adoption or Change of Zoning Ordinances*,” states, in pertinent part:

Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter.”

Assuming the ten individuals who signed the petition are, in fact, registered voters in the Town of Winthrop, the petition complies with the statute as it was submitted to appropriate Town officials as required by Section 5 of the state law. The form of the petition also comports with the requisites of Section 8-5 of the Winthrop Town Charter.

2. WHETHER THE PROPOSED AMENDMENT IS LAWFUL

While the process by which the petition was submitted complies with law, the substance of the proposed amendment cannot be adopted by the Town Council because it does not comply with G. L. c. 40A, § 3A, as amended, and clashes with the statute. G.L c. 40A, § 3A, which is titled “MBTA Community; Multi-Family Housing,” provides:

§ 3A. *MBTA Community; Multi-Family Housing.*

(a) (1) An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing shall be without age restrictions and shall be suitable for families with children. For the purposes of this section, a district of reasonable size shall: (i) have a minimum gross density of 15 units per acre, subject to any further limitations imposed by section 40 of chapter 131 and title 5 of the state environmental code established pursuant to section 13 of chapter 21A; and (ii) be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable. (emphasis added).

(b) An MBTA community that fails to comply with this section shall not be eligible for funds from: (i) the Housing Choice Initiative as described by the governor in a message to the general court dated December 11, 2017; (ii) the Local Capital Projects Fund established in section 2EEEE of chapter 29; (iii) the MassWorks infrastructure program established in section 63 of chapter 23A, or (iv) the HousingWorks infrastructure program established in section 27 of chapter 23B.

(c) The executive office of housing and livable communities, in consultation with the executive office of economic development, 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.

The Guidelines promulgated under § 3A designate which cities and towns are MBTA Communities and set out four community categories: (1) Rapid Transit, (2) Commuter Rail, (3) Adjacent Community, and (4) Adjacent Small Town. Winthrop is designated as an MBTA Community and is categorized as an “Adjacent Community.”

G.L. c. 40A, § 3A(a)(1) states that, “An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right ...” For the purposes of statutory interpretation of the legislative intent, the operative word in Section 3A(a)(1) is “shall.” A canon of statutory construction is that the primary source of insight into the intent of the Legislature is the language of the statute. Perez v. Department of State Police, 491 Mass. 474, 482 (2023); Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 253 (2015), quoting International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853 (1983). The word “shall” is an imperative that indicates the Legislature's intent to prescribe a mandatory act. *See* Emma v. Massachusetts Parole Bd., 488 Mass. 449, 454 (2021), citing Hashimi v. Kalil, 388 Mass. 607, 609 (1983). Here, the language of § 3A(a)(1) is plain, clear, and unambiguous, and establishes a mandatory act upon an MBTA Community.

Since the proposed amendment would directly conflict with the mandatory language of Section 3A(a)(1), it is necessary to consider whether such a conflict is permitted by the Home Rule Amendment to the Massachusetts Constitution and relevant case law.

#### *The Massachusetts Constitution*

Article 89 of the Constitution of the Commonwealth of Massachusetts is the Home Rule Amendment. Winthrop is one of 177 cities and towns that has adopted the Home Rule

Amendment. The intent of the Home Rule Amendment is embodied in Article II, Section 1, entitled “Right of Local Self-Government.” Section 1 states, “It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.”

*Powers of the Cities and Towns*

Section 6 of the Home Rule Amendment prohibits cities and towns from amending local by-laws that conflict with the state constitution and the Legislature’s statutes as follows:

**Section 6. Governmental Powers of Cities and Towns.** - Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three. (emphasis added).

*Powers of the Legislature*

Powers reserved to the General Court are set out in Section 8 as follows:

**Section 8. Powers of the General Court.** - The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or

purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters. (emphasis added).

Accordingly, the Legislature has the authority to enact a measure such as G.L. c. 40A, § 3A by way of its constitutional powers.

Further, a reading of Section 6, *Governmental Powers of Cities and Towns*, indicates that a municipality may only adopt or amend an ordinance or by-law “which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court.” Municipalities can pass zoning ordinances or by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature in accordance with § 8's provisions." Board of Appeals of Hanover, 363 Mass. at 360. See Sturges v. Chilmark, 380 Mass. 246, 253 (1980).

#### *Standard For Determining Legality of Local Law*

The standard for determining the legality of local law in relation to its consistency with state law has been coextensive with principles of federal preemption under the Supremacy Clause since well before the Home Rule Amendment was enacted. See West Street Assocs. LLC v. Planning Board of Mansfield, 488 Mass. 319, 322 (2021), quoting Connors v. Boston, 430 Mass. 31, 35 (1999) ("In determining whether local action is inconsistent with state law, similar to the federal preemption analysis, 'the touchstone of the analysis is whether the state legislature intended to preempt the city's authority to act'"); Bloom v. Worcester, 363 Mass. 136, 155 (1973) ("In determining whether a local ordinance or by-law is 'not inconsistent' with any general law within

the meaning of those words in § 6 of the Home Rule Amendment and in § 13 of the Home Rule Procedures Act, the same process of ascertaining legislative intent must be performed as has been performed in the federal preemption cases ... involving 'inconsistent' or 'repugnant' local ordinances or by-laws").

"Where the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment. St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 129 (2012), citing Connors, 430 Mass. at 39-40.

*The Town of Winthrop Zoning Ordinance:*

Section 17.04.020 of the Winthrop Ordinances, entitled *Authority*, states as follows:

A. *Adoption.* This title is adopted pursuant to the authority granted by G. L. c. 40A and amendments thereto, herein called the "Zoning Act." Where the Zoning Act is amended from time to time after the effective date of this title and where such amendments are mandatory, such amendments shall supersede any regulations of this title which have been set forth on the basis of the Zoning Act in existence on the effective date of this title. (emphasis added).

This provision recognizes the supremacy of state law over our local ordinance and the preemption of the proposed measure by the 3A statute.

CONCLUSION

The petition requests the Town Council to adopt a proposed zoning amendment. Each section of the proposed amendment is inconsistent with state law and would require the town to violate the provisions of G. L. c. 40A, § 3A. This, in turn, would violate the Massachusetts Constitution. The terms of the Winthrop Zoning Ordinance are superseded by the state statute. Therefore, the Town Council is advised that the ordinance proposed to be adopted by way of the petition, in its present form, may not be lawfully adopted.

*Limitation*

This report and advice to the Town Council is, by the provisions of the Charter, limited in scope. It should not be construed as either an endorsement nor a repudiation of the MBTA 3A statute. Nor is it a finding or conclusion on the validity of the MBTA 3A statute. It addresses only “whether the measure as proposed may lawfully be proposed by the initiative process and whether, in its present form, may be lawfully adopted by the town council ” as mandated by the Town Charter.

Respectfully submitted,

/s/ James J. Cipoletta

James J. Cipoletta  
Town Attorney

Dated: July 30, 2024