MEMORANDUM

To: Planning Board Members
From: Marnie Crouch
Re: Discussions about Section 3A and Submission of an Action Plan
Date: February 3, 2025

In advance of the Planning Board meeting on February 4, 2025, I want to take this opportunity to provide Board members with information to assist you in understanding the position espoused by the Select Board in determining that interim compliance is in the interest of the Town at this time, while the Town also participates in the public hearing process. While passions about the merits of Section 3A are strongly held, the Planning Board does not have the authority under state law or local bylaws to abrogate to itself decisions that are properly the domain of citizens of Hamilton.

What follows is a brief review of the laws, cases, and regulations together with my analysis that I hope will assist you in understanding the direction of the Town and constructive opportunities to share views.

I. State Laws Governing Planning Board's Actions

Planning Boards are creatures of statute, *see generally* G.L. c. 41, §81B, Planning Board; Powers and Duties; §81C, Studies and Reports of Board; Acting as Park Commissioners; §81D, Master Plan; Economic Development Supplement; §81E Official Map; Purpose; Recordation; and §81F, Alterations of Official Map; Damages for Injuries. In addition to those specific powers, G.L. c. 40A, §5, captioned "Adoption or change of zoning ordinances or bylaws, procedures," empowers the Select Board, the Planning Board, among others, to adopt or change zoning bylaws. This state law has governed the Planning Board's actions with respect to the five Memoranda that the Planning Board recently transmitted to the Select Board.

Section 5 provides that no zoning bylaw, may be adopted until after the Planning Board conducts a public hearing *"at which interested persons shall be given an opportunity to be heard."* Furthermore, "*No vote to adopt any such proposed ordinance or by-law or amendment thereto shall be taken until a report with recommendations by a planning board has been submitted to the town meeting"* After the requisite notice, hearing, and report and recommendation (or after twenty-one days have elapsed after such hearing without submission of such report), the voters at Town Meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law.

Section 5 of c. 40A can be summarized as follows:

- The Select Board or the Planning Board may initiate adoption of or change to a zoning bylaw to address Section 3A.
- The Planning Board is charged with making a report and recommendation to Town Meeting following a public hearing.
- The adoption of a Section 3A zoning bylaw requires a majority vote at Town Meeting.

II. Hamilton's Zoning Bylaw

In Hamilton, the scope of the Planning Board' role is governed by Section 10.4 of the Zoning Bylaw. It provides the Planning Board with the following powers:

- To hear and decide applications for Special Permits as provided in this Bylaw;
- To hear and decide applications for Site Plan Approval as provided in Section 10.6 of this Bylaw;
- To conduct other business as provided for by Massachusetts law [i.e., G.L. c.40A, §5 and G.L. c.41, 81B et seq.] this Bylaw.

Unlike the Planning Board, the Select Board, pursuant to the Town's General Bylaw, may exercise "all the powers of the Town and shall have general direction and management of its property and affairs."

III. The Milton Case

The Supreme Judicial Court unequivocally ruled in Attorney General v. Town of Milton, __ W.L. __, No. SJC-13580 (Supreme Judicial Court, January 8, 2024), that G. L. c. 40A, §3A is constitutional. The SJC considered three factors in reaching its decision,

> "(1) Did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or . . . sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?"

Attorney General v. Town of Milton, Slip op. at 10 (citations omitted). The SJC answered all those questions in the affirmative.

With respect to the third factor in particular, the Court observed:

> As for guarding against potential abuses of discretion by the agency, the act "sufficiently demarcate[s] the boundaries of regulatory discretion." Tri-Nel Mgt., Inc., 433 Mass. at 226. As explained supra, HLC's regulatory powers must be reasonable as well as guided by other requirements of the act. In addition to the limitations on "content and reasonableness," id., the act requires HLC to promulgate guidelines in consultation with three other State agencies. See Clemmey, 447 Mass. at 138 (consultation with advisory committee safeguards against abuse of discretion). *Moreover, as with any agency regulation, an aggrieved party may seek judicial review. See G. L. c. 30A, § 7; G. L. c. 231A.* See also Tri-Nel Mgt., Inc., supra (*ability to seek judicial review of agency's regulation through action for declaratory relief provides important safeguard against abuse of discretion by agency*).

Town of Milton, Slip op. at 13 (emphasis supplied).

IV. EOHLC Emergency Regulations

The EOHLC recently issued Regulations that are substantially the same as those issued in August 2023. With respect to compliance with Section 3A, the Emergency Regulations provide that the deadline for interim compliance, namely the submission of an action plan, is February 13, 2025 and the deadline for the submission of a district compliance application is July 14, 2025.

Although the Emergency Regulations may be the subject of one or more legal challenges to their legality or effectiveness (the EOHL determined that their immediate adoption was "necessary for the preservation of the public health, safety or general welfare" thereby obviating the requirements of notice and a public hearing), they are only effective for 90 days. Unless a litigant could obtain a declaratory judgment or a permanent injunction as to their enforceability within that short time, they will expire, unless final Regulations, which may or may not differ from the Emergency Regulations, *see* Town of Milton, Slip op. at 23 n.23, are adopted following the public hearing process.

V. Conclusions

- Section 3A is constitutional and mandatory (The SJC stated: "We note that the plain language of § 3A (a) (1) states that municipalities 'shall' have a zoning ordinance that allows for multifamily housing as of right. G. L. c. 40A, § 3A (a) (1). 'The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation." Hashimi v. Kalil, 388 Mass. 607, 609 (1983).' Thus, it is clear that the Legislature intended to require MBTA communities to comply with the act." Town of Milton, Slip op. at 11 n.15.
- The EOHLC is empowered to issue Regulations and the equitable relief the Attorney General sought in the Milton case (i.e., declaratory and injunctive relief) is authorized under her broad statutory power. *See* Town of Milton, Slip op. at 17-18 (The SJC ruled the Guidelines failed to comply with the Administrative Procedures Act; it did not address their substance.).
- Complying with the Regulations by going through the process of filing an action plan logically cannot be determinative of district compliance; district compliance is predicated on a **vote** at Town Meeting. Moreover, compliance with Regulations that may differ from the Emergency Regulations coupled with the need for a Town vote militates against finality of interim compliance.
- If the Select Board determines that the process of filing an action plan to achieve interim compliance is in the Town's interest, the Planning Board is neither authorized nor empowered to reject that conclusion under Section 10.6 of our Zoning Bylaw or any other state law.
- The Planning Board is empowered to issue a report and recommendation as to any potential bylaw delineating Section 3A district(s) in advance of a Town Meeting.
- The Planning Board is neither authorized nor empowered to abrogate the right of the citizens to determine whether district compliance is in the best interest of the Town; the citizen must **vote** on whether to accept or reject Section 3A zoning.
- Challenges to the Regulations by individual citizens and the Town through the public hearing process, which ends on February 21, 2025, is warranted, and arguments and **data** can be collected and used either by individuals or passed on to the Planning Director and the Town Manager for potential inclusion in the Town's formal response to the proposed Regulations during the public hearing process.
- If the citizens of Hamilton were to vote to reject Section 3A compliant district(s) at a Special Town Meeting, and, if the Attorney General were to attempt to obtain some form of equitable relief against the Town to compel compliance, the Town as a party aggrieved by the Regulations, could then seek judicial review through at action for declaratory relief. Town of Milton, Slip op. at 13.
- The Town, at that point, particularly if its positions advanced during the public hearing process are rejected, *potentially* would be in a better position to establish standing to seek equitable relief in the form of a determination that the Regulations are abusive. *See* Id.[1]

[1] Standing is a jurisdictional component of any litigation and is summarized as follows:

> "[t]he question of standing is one of critical significance. 'From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government.'"

Given the foregoing, Planning Board members must evaluate their ability to constructively participate in the meetings involving potential delineation of zoning districts for Section 3A compliance. The determination to let the voters decide at Town Meeting is a reasonable one; it is contemplated by G.L. c. 40A, §5 and is consistent with the most direct form of democracy.

Section 3A is not popular. Its one-sized fits all approach and unrealistic and potentially harmful metrics could be detrimental to Hamilton. Nevertheless, taking steps to achieve interim compliance buys the Town time while it participates in the public hearing process and while legislative initiatives and pending litigation advance. Such an approach enables the Town to determine its own future by delineating districts that are the least harmful to its interests under a worst-case scenario. If pending litigation were to be dismissed, if pending legislation does not advance, and, if the Attorney General were to commence and action against Hamilton following a negative vote at Town Meeting, the Town would be in a better position to determine whether to seek equitable relief as to the abusive nature of the Regulations consistent with the Supreme Judicial Court's decision. Nevertheless, it is best to be clear eyed about the chance of success in any litigation against the Commonwealth. [2]

> Ordinarily, *"[a]lleging '[i]njury alone is not enough; a plaintiff must allege a breach of duty owed to [him] by the public defendant.' Injuries that are speculative, remote, and indirect are insufficient to confer standing.* 'Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review.' Moreover, the complained of injury must be a direct consequence of the complained of action. 'To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury.'"

Perella v Massachusetts Turnpike Auth., 55 Mass App Ct 537, 539, 772 NE2d 70, 72-73 [Mass. App. Ct. 2002] (citations omitted, emphasis supplied).

[2] The EOHLC's proposed Regulations would seem to be intended to make it very difficult for communities to prevail with respect to infrastructure arguments, to quantifying damages, and thus to establish standing. *See* 760 CMR 72:05(e)(1) and (2) ("Compliance with G.L. c. 40A, § 3A does not require a municipality to install new water or wastewater infrastructure, or add to the capacity of existing infrastructure to accommodate future Multi-family housing production within the Multi-family zoning district.").