

MEMORANDUM§

To: Planning Board Members

From: Marnie Crouch

Re: Reasons to Issue a Favorable Report and Recommendation as to Articles I And II to Preserve the Planning Board's Ability to Avoid a Two-Year Moratorium on Potential Amendments the Town Center Re-zoning Effort in the Event of Unfavorable Votes on the Articles at STM

Date: June 24, 2025

Massachusetts law provides guidance as to the ramifications of an unfavorable report and recommendations as to the adoption of proposed bylaws. It provides in pertinent part the following:

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 or city council, or twenty-one days after said hearing has elapsed without submission of such report. After such notice, hearing and report, or after twenty-one days shall have elapsed after such hearing without submission of such report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. If a city council fails to vote to adopt any proposed ordinance within ninety days after the city council hearing or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

G.L. c. 40A, §5 (emphasis supplied). Because of the two-year moratorium on revisiting bylaw amendments absent a favorable recommendation, this Memorandum is intended to provide you with information that I hope will lead you to vote to recommend approval of Articles I and II. This Memorandum **is not** intended to convince you to how to vote on July 14th; it is intended to convince you to vote to approve a favorable report and recommendation to preserve the Planning Board's ability and flexibility to revisit the Town Center re-zoning amendments, particularly the Form-Based Code components, unencumbered by the two-year moratorium.

I have attached the following chart, highlighting concerns expressed about the adoption of §3A, its Regulations and ramifications juxtaposed against existing statutes, regulations and case law that contains determinations of legal issues that have been addressed both by the Supreme Judicial Court, and, most recently, by the Plymouth Superior Court. While the Plymouth Superior Court’s decision may be appealed, my personal view is that, **as a practical matter**, the legal issues raised by anti-3A§ litigants are not likely to be resolved favorably to their positions within two years, and changes to either G.L. c. 40A, §3A or the EHOLC’s Regulations, 760 CMR §72.00, are unlikely to be made by the Legislature in that window of time either, particularly as long as the Governor and the Legislature prioritize addressing the high costs and limited availability of housing in the Commonwealth.

This chart is not intended to diminish the strongly held convictions that many Hamilton residents hold about state overreach and the one-size fits all approach embodied in the EHOLC’s Regulations. Indeed, I personally may share some of them. Accordingly, I reiterate that **I am not suggesting how you should vote on July 14, 2025**. Nevertheless, **I am urging you to decide that it is in the Town’s best interest to make a favorable report and recommendation to the citizens at STM** so that the Town retains both the flexibility and the power to address the Form-Based Code and other Town Center zoning matters unhampered by a two-year moratorium. The Chart below is intended to show the wisdom of that approach by putting aside what might well be both unfounded optimism and unfounded fear and replacing it with what we know from case law, EHOLC’s Regulations, and common sense.

TOPICS	ANTI- §3A/FORM-BASED CODE ARGUMENTS	STATUTES/CASE LAW/REGULATIONS SUPPORTING THE ISSUANCE BY THE PLANNING BOARD OF A FAVORABLE REPORT AND RECOMMENDATION
I. Does §3A Violate the Home Rule Amendment (Massachusetts Constitution, Article 89)?	<ul style="list-style-type: none"> • The Act undermines municipalities’ constitutional right to local self-governance over zoning. 	<ul style="list-style-type: none"> • Under the Home Rule Amendment (Article 89 of the Amendments to the Massachusetts Constitution), cities and towns have the power to pass local laws exercising the general police power of the state, including the power to zone. However, the Home Rule Amendment only authorizes municipalities to pass laws to the extent they are “<i>not inconsistent with the constitution or laws enacted by the general court.</i>” Mass. Const. Amend. Art. 89, § 6 (emphasis added). • In <u>Attorney General v. Town of Milton</u>, the Supreme Judicial Court unequivocally ruled that Section 3A “is

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		constitutional and the Attorney General has the power to enforce it.” ⁱ
II. Does §3A Violate the Unfunded Mandate law, M.G.L. c. 29, §27C?	<ul style="list-style-type: none"> ● The state mandates zoning changes without providing the funding to manage their consequences. ● Hamilton lacks public sewer, has constrained water capacity, and faces school enrollment and facility instability. ● Although §3A does not require construction, it enables growth that will necessitate costly infrastructure improvements funded locally. ● New housing increases public service demand without guaranteeing offsetting tax revenue. ● Police, fire, DPW, and schools will be stressed further by sudden growth. 	<ul style="list-style-type: none"> ● In <u>Town of Duxbury, et al. v. Commonwealth of Massachusetts, et al.</u>, No. 2583CV00303 (Mass. Super. Ct. June 6, 2025), the Plymouth Superior Court, in consolidated cases, ruled that it was not bound by the unfunded mandate determinations issued by the Division of Local Mandates; that the DLM’s decision were flawed as a matter of law; and that §3A is not an unfunded mandate. ● It concluded that the plaintiff communities failed to identify nonspeculative direct costs requiring appropriation for anticipated infrastructure costs.ⁱⁱ ● Costs associated with increased stress to infrastructure and increased population are difficult to determine and are appear to be easily dismissed by courts as speculative. Accordingly, those indeterminate costs must be <i>realistically</i> weighed against 1) the amount of readily developable land area in downtown Hamilton, 2) the cost of acquiring land and potentially demolishing existing buildings in downtown Hamilton, 3) the cost of installing wastewater treatment facilities and infrastructure, 4) the high costs of construction in Massachusetts exacerbated by potential long-term tariffs, 5) the significant benefits arising from site and dimensional regulations in proposed Section 9.8, including FAR, and 6) Site Plan Review and the potential denial of building permits if water or other safety measures cannot be provided.

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III. Did the EOHLC Improperly Issue Emergency Regulations?	<ul style="list-style-type: none"> EOHLC’s use of emergency regulations after the <u>Milton</u> ruling bypassed required public input and justification. 	<ul style="list-style-type: none"> The Regulations are now final so arguments as to any flaw in the promulgation of the Emergency Regulations is moot. Moreover, in <u>Town of Duxbury, et al. v. Commonwealth of Massachusetts, et al.</u>, <i>supra</i>, the Superior Court rejected all arguments that EHOLC’s Regulations are arbitrary and capricious.
IV. Can EOHLC determine that Article I is not in compliance and reject the FBC?	<ul style="list-style-type: none"> FBC does not shield Hamilton from enforcement or compliance risk. 	<ul style="list-style-type: none"> <i>See</i> May 29, 2025 Pre-Adoption Feedback for Compliance in which the EOHLC did not flag any components of the FBC but identified only a potential issue with Section 10.6 of the Zoning Bylaw. As formulated Article 1 complies with all the requirements set forth in §3A and the Regulations.
V. Does Hamilton Have Inadequate Infrastructure for §3A?	<ul style="list-style-type: none"> No sewer system, limited well water supply, and schools under financial and spatial pressure. FBC cannot address service delivery capacity—it only controls design and dimensional parameters. 	<ul style="list-style-type: none"> <i>See</i> Topic II above. <i>See</i> 760 CMR §72.05(1)(d)(2) (“Nothing in M.G.L. c, 40A, §3A or 760 CMR 72.00 should be interpreted as a mandate to construct a specified number of housing units.”). <i>See</i> 760 CMR §72.05(1)(e)(1) (“Compliance with M.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.”).
VI. Does §3A Undermine Local Affordable Housing Strategy?	<ul style="list-style-type: none"> §3A promotes market-rate multifamily zoning that does not require actual affordable housing. 	<ul style="list-style-type: none"> Under the proposed amendments to Hamilton’s Zoning Bylaw, §3A Multi-family housing districts may be required to have 10% of units affordable at 80% of AMI.

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	<ul style="list-style-type: none"> ● Inclusionary zoning and CPA-driven projects in Hamilton support true affordability. ● §3A introduces volume without equity and destabilizes long-term housing mandates. 	
VII. Does §3A Prevent Organic, Scalable Growth?	<ul style="list-style-type: none"> ● Towns must zone preemptively under §3A, not in response to actual need or capacity. ● Hamilton has historically grown incrementally, allowing infrastructure to scale responsibly. 	<ul style="list-style-type: none"> ● The adoption of §3A does not mean that Hamilton will experience a building boom. As noted, Hamilton lacks a sewer system and ready access to major highways like Lexington which is traversed by I-95. ● The configuration of Hamilton’s downtown with its two rail road crossing may impede development.
VIII. Does §3A Erodes Community Identity and Historic Character?	<ul style="list-style-type: none"> ● Dense development near village centers or preserved areas threatens the fabric of rural towns. ● Hamilton’s identity is tied to green space, historic homes, and modest-scale neighborhoods. ● FBC governs façades—but not the lived reality of density, noise, and traffic. 	<ul style="list-style-type: none"> ● Adoption of the FBC is the best protection for the Town giving it the ability to ameliorate any adverse consequences of §3A zoning. Moreover, the density in the downtown area already approaches that set forth in G.L. c. 40A, §3A. ● The site standardsⁱⁱⁱ and dimensional standards^{iv} in Appendix I and II are designed to preserve the existing scale and density of the Town Center. ● The FBC governs scale and density in a downtown area that is densely developed already.
IX. Does the Adoption of §3A Set a Dangerous Precedent for	<ul style="list-style-type: none"> ● Complying once with §3A—even with safeguards like the FBC—sets a precedent for future regulation by the EOHLC. 	<ul style="list-style-type: none"> ● The Town cannot ignore the decision of the Supreme Judicial Court in the <u>Milton</u> case; it cannot ignore the lack of

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Permanent State Control?	<ul style="list-style-type: none"> ● FBC is a temporary guardrail, not a legal defense against future state overreach. 	<p>success that municipalities and other litigants have had in challenging §3A and the Regulations issued by the EOHLC.</p> <ul style="list-style-type: none"> ● A favorable recommendation will give the Board flexibility and empower it to act if the Articles fail owing to negative votes. ● If the Regulations were to be successfully challenged in the Appeals Court or the Supreme Judicial Court, and the Regulations were modified, the Town can amend the Town Center re-zoning provisions to reflect the new reality.

ⁱ The SJC explored whether the Legislature made a fundamental policy decision in enacting §3A and properly delegated its implementation to the EOHLC. It ruled that it did so.

ⁱⁱ Ten Taxable Inhabitants of Hamilton filed a Complaint under the Unfunded Mandate law. Its case was consolidated with others in the Plymouth Superior Court. In that case, Judge Gildea, stated: “for purposes of efficiency in cumulatively resolving complaints asserted by Municipalities, the court will treat such complaint as though filed on behalf of the Hamilton itself such that it can rule upon substantive issues regarding to the impact of §3A upon the town rather than disposing of certain discrete issues on the basis of standing.” Slip op. at 1, n.1. The decision of the Superior Court has not been appealed but the appeal period has not expired. The Town of Wenham did not appeal and recently voted to approve §3A compliant districts.

ⁱⁱⁱ **TABLE 1: TABLE OF TOWN CENTER SITE DIMENSIONAL STANDARDS**

See Footnotes below for additional requirements and/or clarifying information. [footnotes omitted]

	Lot Dimensions	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
	Lot Size (min)	1,000 square-feet	5,000 square-feet	3,000 square-feet	3,000 square-feet	5,000 square-feet
A	Lot Width (min)	20 feet	40 feet	40 feet	30 feet	40 feet
	Coverage	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
	Open Space (min)	0%	40%	40%	40%	40%
	Building Yards Setbacks	Depot Square ₂	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
B	Front Yard Setback on Streets (minimum / maximum) ₁	0 / 10 feet	20 / 35 feet	10 / 20 feet	10 / 20 feet	20 / 35 feet
C	Side Yard Setback (minimum)	0 feet	5 feet	5 feet	10 feet	10 feet
D	Rear Yard Setback (minimum)	0 feet	15 feet	15 feet	15 feet	10 feet
	Parking Setbacks	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic

E	Front Setback (minimum)	10 feet	Aligned with, or set back further than, Building Frontage			
F	Side Setback (minimum)	0 feet	5 feet	5 feet	5 feet	5 feet
G	Rear Setback (minimum)	0 feet	5 feet	5 feet	5 feet	5 feet
	Parking Requirements	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
	Parking Spaces (minimum)	Per Section 6.1 or by Special Permit				

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See Footnotes below for additional requirements and/or clarifying information. [footnotes omitted]

	Massing	Depot Square ₁	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
A	Building Footprint (maximum per Building)	5,000 square-feet	3,000 square-feet	5,000 square-feet	3,000 square-feet	N/A
B	Facade Buildout (minimum) ₂	60%	35%	35%	35%	35%
C	Height (maximum)	35 feet / 2.5 stories	35 feet / 2.5 stories	35 feet / 2.5 stories for the first 60 feet from the front lot	35 feet / 2.5 stories	35 feet / 2.5 stories

				line, 45 feet / 3.5 stories elsewhere		
	Number of Stories Minimum	N/A	2	2	2	2
D	Ground Floor Height (minimum / maximum)	13 / 15 feet	13 / 15 feet	13 / 15 feet	N/A	N/A
	Floor Area Ratio (maximum)	N/A	0.39, or up to 0.45 by Special Permit only	0.42, or up to 0.45 by Special Permit only	0.39, or up to 0.45 by Special Permit only	N/A
E	Facade Length without Offset (maximum)	70 feet	70 feet	70 feet	70 feet	70 feet
F	Building Separation (minimum)	10 feet	10 feet	10 feet	20 feet	0 feet
	Roof	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
	Allowed Roof Type ₃	Gable, hip, gambrel, mansard, shed, flat	Gable, hip, gambrel, mansard, shed	Gable, hip, gambrel, mansard, shed	Gable, hip, gambrel, mansard, shed	Gable, hip, gambrel, mansard, shed, flat
	Windows	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic

	Ground Story Fenestration (minimum)	50%	N/A	N/A	N/A	20%
	Doors	Depot Square	Bay Road Mixed-Use	Willow Street Mixed-Use	Downtown Residential	Bay Road Civic
	Street Facing Entry Feature	Required	Required	Required	Required	Required