MEMORANDUM

To: **Interested Persons**

From: **Alexander Whiteside**

Re: **Ineffectiveness and Unenforceability of DHCD's Compliance Guidelines for G.L.c. 40A Section 3A**

Date: **March 2023**

I - Enaction of General Law Chapter 40A Section 3A (Multi-family Zoning As-of Right in MBTA Communities). Section 18 of Chapter 358 of the Acts of 2020 (an omnibus bill with 101 sections entitled "An Act Enabling Partnerships for Growth") added a new Section 3A to General Law Chapter 40A (the Zoning Act) entitled "Multi-family Zoning As-of-Right in MBTA Communities."

II - Subsection (a) of Section 3A Requires Multi-family Zoning As-of-right in MBTA Communities. Subsection (a) (sometimes referred to herein as the "statute") contains two sentences. The first sentence provides that "[a]n MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family zoning is permitted as of right; provided however, that such multifamily housing shall be without age restrictions and shall be suitable for families with children."

III - Subsection (a) Specifies Density and Location of Zoning Districts. The second sentence of Subsection (a) requires that such a "district of reasonable size" shall have a minimum gross density of 15 units per acre subject to "any further limitations" imposed by the Wetlands Protection Act (G.L.c.131 Section 40) and Title 5 of the State Environmental Code (G.L.c.21A Section 13) and that such a district of reasonable size shall be "not more than 0.5 miles from a commuter rail

station, subway station, ferry terminal or bus station, if applicable."

IV - Subsection (a) is a Legislative Directive. It requires MBTA Communities to zone for the "district of reasonable size" as specified in the subsection.

V - **The Definition of "MBTA Community."** "MBTA community" is defined in a definition added in 2020 to Section 1A of Chapter 40A. The definition references three definitions contained in Section 1 of Chapter 161A which established the Massachusetts Bay Transportation Authority. These definitions in Chapter 161A list by name the 175 member municipalities in the authority in 3 batches: "51 cities and towns," "fourteen cities and towns," "other served communities." The definition of "MBTA Community" also includes any other municipality which is added to the authority.

VI - Meaning of the Words "if applicable" in Subsection (a). Many of the 175 member municipalities do not contain "a commuter rail station, subway station, ferry terminal or bus terminal" and have no land less than 0.5 miles from a station or terminal in another municipality, and hence the Legislature has added language creating an exception to the requirement that a "district of reasonable size" must be within .05 miles of such a station or terminal.

VII - Subsection (b) of Section 3A Provides for Loss of Potential Grants as a Result of Noncompliance; Possible Other Consequences. Subsection (b) provides that an MBTA community which fails to comply with Section 3A shall not be eligible for funds from the Housing Choice Initiative, the Local Capital Projects Fund, or the Mass Works infrastructure program. Although the subsection does not provide for other consequence of non-compliance with the Legislature's directive in Subsection (a) it seems quite possible that Subsection (a) could be enforced through a court action to compel compliance

VIII - Subsection (c) of the Section 3A Gives the State's Department of Housing and Community Development (DHCD) the Limited Authority to Promulgate Compliance Guidelines. Subsection (c) provides that "[t]he 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." The Legislature could have given DHCD regulatory authority (i.e., the power to issue legally binding regulations) but it did not do so. Instead it limited DHCD's power to the issuance of guidelines which have no independent legal effect

IX - What Should Be in the "Section 3A Compliance Guidelines" issued by DHCD. As set out in the previous paragraph, the Department of Housing and Community Development (DHCD) has been given limited statutory authority "to promulgate guidelines to determine if an MBTA Community is in compliance with [Section 3A Subsection (a)]." Pursuant to this authorization the guidelines should provide guidance to municipalities as to (1) the relevant circumstances which a city or town should consider when creating a zoning district of "reasonable size"; (2) how to determine whether a zoning district is located within 0.5 miles of a transit station or terminal when there is such a station or terminal; (3) how to determine whether zoning provides for multi-family housing which is without age restrictions and suitable for families with children and which provides for a minimum gross density of 15 units per acre.

X - The Section 3A Guidelines Issued by DHCD Impose Impermissible Substantive Directives and Requirements Which Would Require Regulatory Power Which DHCD Does Not Have. Although the Legislature in Subsection (c) has given DHCD limited authority to explain the two sentences in Subsection (a) through issuance of guidelines, the Legislature did not give DHCD regulatory power (the power to promulgate legally

binding regulations). As hereafter discussed, guidelines are not regulations and do not carry the force of law and cannot be the basis for directives and requirements not contained in the underlying law. Guidelines are meant to explain the provisions of a statute or regulation and they cannot be used to impose substantive new legal requirements. An agency which seeks to make new substantive provisions going beyond what a statute specifically provides needs to be given regulatory power to do so. Although the Legislature has given DHCD regulatory power in a number of areas of law, the power is specific to those areas. DHCD has not been given regulatory power to impose the directives and requirements which it seeks to impose upon MBTA Communities by the Guideliines.

XI - The Administrative Procedure Act Requires Legally Binding Regulations for What DHCD Proposes in its Guidelines. The Administrative Procedure Act (APA), General Law Chapter 30A in Section 1(5) defines "Regulation" as follows:

> "Regulation" includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it but does not include (a) advisory rulings … or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities.

If an agency proposes to adopt a rule which meets the definition of "regulation" and does not fall within an exception, in order to adopt the rule the agency must promulgate a regulation under the Administrative Procedures Act. The process for promulgating a regulation is outlined in # **XII.**

The numerous substantive rules and directives imposed by DHCD in the Guidelines are "requirements of general application and future effect" by which DHCD intends to enforce and

administer Section 3A of the Zoning Act. These rules are not set out in the statute and cannot be inferred from the statutory language. If any such rule is to be effective and enforceable it needs to be subject to a duly promulgated regulation pursuant to an appropriate legislative grant of regulatory authority.

XII - Examples of Rules Contained in the Guidelines Which Must Be the Subject of a Regulation. Among the numerous provisions in the Guidelines which contain subject matter which are within the definition of "regulation" set out in the previous paragraph and which the Administrative Procedure Act requires be in a regulation are the following.

1. In Section 2 of the Guidelines there is a definition of "bus station," words which are used in Subsection (a). DHCD's definition defines a "bus station" as a station on the MBTA's Silver Line or another location on an MBTA bus route if approved by DHCD. This definition changes the usual definition of "bus station" which the Legislature likely intended.
2. In Section 4 the provision that a municipal zoning provision for multi-family housing as-of-right must be consistent with DHCD Guidelines and that DHCD itself will determine the consistency with the Guidelines. This is a new substantive provision unsupported by anything in Subsection (a). An inference that the provision was intended by the Legislature cannot permissibly be drawn.
3. In Section 4.b limits are placed on the provision of affordable housing, and DHCD is given power to make exceptions. The statute says nothing about affordable housing, let alone limits on its provision and the ability for DHCD to make exceptions. Requirements in the Guidelines about affordable housing pertain to matters not addressed in the statute.
4. In Section 4.b DHCD's requirement that affordability requirements in a municipality's zoning must be supported by an economic feasibility analysis by a "qualified and independent third party" who is "acceptable to DHCD" are

substantive new requirements. As noted in the previous paragraph Subsection (a) is silent with respect to affordable housing and does not support this requirement.

5. In Section 4.c DHCD's requirement that zoning requirements for multi-family housing must be the same as zoning requirements generally applicable to other uses has is not derived from any provision in Subsection (a). These restrictions on the permissible contents of municipal zoning are new.
6. In Section 5.a DHCD's directive that a "district of reasonable size" in many MBTA communities must have a minimum land area of at least 50 acres (or 1.5% of the municipality's developable land, if less), cannot be inferred from the language in Subsection (a). The prescriptive requirement for district of at least 50 acres is not simply an explanation of what is objectively "reasonable" whatever the circumstances. It is an arbitrary, substantive provision. How this 50-acre minimum was derived is unclear.
7. In Section 5.b DHCD's directive that a "district of reasonable size" must have a "minimum multi-family unit capacity" determined by a percentage of a municipality's total number of housing units adds many new substantive requirements not deducible from the statutory language that an MBTA community must zone a district of reasonable size for multi-family housing with a minimum density of 15 units per acre. The arbitrary requirements that the zoning must permit specific amounts of housing as a "minimum multi-unit housing capacity" is completely new and goes far beyond what Subsection (a) provides.
8. In Section 5.b DHCD makes a specification of varying percentages of total housing units which must be zoned for by municipalities depending whether they are "rapid transit communities" (25%), commuter rail communities" (15%), "adjacent communities" (10%), or "adjacent small towns" (5%). As set out in the previous paragraph,the statute contains no authorization for DHCD to prescribe a "minimum

multi-family unit capacity” let alone to impose standards (such as these varying percentages of total housing units) which are not uniform for the MBTA’s member communities. If DHCD had any objective basis for determining these percentages, it is not clear; the percentages seem completely arbitrary.

9. In Section 5 the failure of DHCD to provide for a determination of reasonableness of the size of a district to be made by the municipality on the basis of an objective consideration of all the relevant circumstances. It can be inferred that when the Legislature used the word reasonable, it intended that the usual measure for determining reasonableness (an objective determination based on consideration of all relevant circumstances) be used in the absence of specific legislative authorization to use a different standard. The Guidelines replace a standard requiring consideration of the relevant circumstances with imposition of prescriptive, arbitrary standards for minimum acreage and “minimum multi-family unit capacity.”
10. In Section 6 DHCD has a directive that gross density must be determined by means of a “compliance model” which DHCD has developed for the purpose. Such a compliance model is not mentioned in the statute and contains numerous requirements not mentioned in the statute. Indeed, many of the requirements in the model are not even mentioned in the Guidelines.
11. In Section 8 regarding the location of districts DHCD imposes a host of substantive rules which are not derived from the provisions of the statute. The statute requires a district of reasonable size with a density of at least 15 units per acre and within “not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station, if applicable.” Although the words “if applicable” apply to situations where an MBTA community has no station or terminal within 0.5 miles of its municipal boundaries and allows allows those cities and towns to locate their districts

anywhere, DHCD interprets the “if applicable” language as authorizing DHCD to provide exceptions for the cities and towns which have land areas within 0.5 miles of a station or terminal. DHCD’s interpetation is mistaken and unauthorized.

XIII - The Procedure for Promulgating a Regulation. If the Legislature grants an agency the power to promulgate regulations on a specific matter, the Administrative Procedure Act specifies the steps which the agency must take to issue the regulation.

1. The agency submits the proposed regulation to the Secretary of State.
2. The agency notifies DHCD and the Massachusetts Municipal Association.
3. The agency advertises notice of a public hearing or comment period on the proposed regulation.
4. The agency holds a public hearing or has a public comment period.
5. A final copy of the regulation is prepared and filed with the Secretary of State.
6. The regulation becomes effective when published in the Massachusetts Register.
7. The regulation is published in the Code of Massachusetts Regulations (CMR).

Before a regulation becomes effective an agency must file “an estimate of its fiscal impact including that on the public and private sector, for its first and second year, and a projection over the first five-year period.” Alternatively, if there is no fiscal impact, a statement of “no fiscal effect” must be filed with the Secretary of State.

With respect to Section 3A DHCD has not been given regulatory power by the Legislature and has no authority to issue regulations. This probably explains why it made no effort to meet the requirements for the promulgation of a regulation.

XIV - The Procedure for Promulgating Guidelines. Guidelines are not the same as regulations. They are sub-regulatory material with no independent legal effect. There are no mandatory procedures for promulgation of guidelines. In order to "promulgate" a guideline an agency need only write down its provisions and then make them known to the public, possibly at a press conference or by a posting on its website. The guidelines can be amended with similar ease. There is no central repository where the guidelines must be deposited or maintained. No estimate of fiscal impact is required.

XV - Court Cases Regarding Whether an Agency Must Use Regulations in Making Rules. There are numerous cases in which agencies seek to justify a failure to use regulations in their rulemaking. A discussion of some of these cases helps show how the courts approach the question whether issuance of guidelines can legally suffice to serve the purpose for which they are issued.

(1) **Massachusetts General Hospital versus Rate Setting Commission**, 371 Mass. 705, 706-707 (1977). In this case guidelines in an informational bulletin were at issue. The bulletin explained certain provisions of a regulation regarding rates. The Supreme Judicial Court (SJC) deemed this bulletin to be an "advisory or informational pronouncement" by an administrative agency which was intending "to fill in the details or clear up the ambiguity in an established policy…" The court held that these guidelines in the bulletin were proper but noted that as a general matter (at page 707) "in the degree that what the agency puts forward is "complex, or of broad or pervasive coverage," or if agency's proposition is seen to involve "difficulties of compliance" the subject matter should be in a regulation and not in guidelines. The court noted that guidelines do not have "the binding force attributable to a full-blown regulation."

(2) **Arthurs versus Board of Registration in Medicine, In Note 26** 371 Mass. 299. In this case the agency applied

standards which were derived in the decisions of past legal cases. The plaintiff argued that the standards should have been in regulations. The Supreme Judicial Court concluded that “it is a recognized principle of administrative law that an agency may adopt policies through adjudication [i.e., legal cases] as well as through rulemaking [i.e., regulations] and that an agency can make “the choice [to proceed…] by general rule or by individual, ad hoc litigation…” In Note 26 the Court cited the Mass General case in saying the following about the use of guidelines: “The agency’s choice is not always limited to adjudication or rulemaking” and that “[a]gencies ‘intending to fill in the details or clear up an ambiguity of an established policy’ may issue interpretation or informational pronouncements without going through the procedures for the promulgation of a regulation.”

(3) Northbridge versus Natick, 394 Mass. 70, 76 (1985). In this case the Supreme Judicial Court considered an interagency agreement specifying how the special education needs of children in state custody will be addressed and a somewhat inconsistent regulation which existed with respect to the subject. The court recognized that agencies have the power to set internal guidelines [i.e., the interagency agreement] for carrying out the duties of the agencies “without going through the procedures required for the promulgation of regulations” but that guidelines do not have the legal force of a statute or regulation and should be be disregarded when they are not consistent with a statute or regulation.

(4) **Carey versus Commissioner of Correction,** 479 Mass. 367. This case concerned a Canine Search Policy announced by the Department of Correction. The plaintiffs argued that this policy should have been contained in a regulation promulgated pursuant to the Commissioner’s powers to “make and promulgate necessary rules and regulations incident to the exercise of his powers and the performance of his duties.” The Commissioner argued that

the policy did not fall under the definition of “regulation” in the APA and that the policy was simply intended “to fill in the details or clear up an ambiguity” of the Department’s regulation on searches of visitors to correctional facilities. The Supreme Judicial Court concluded that introduction of the policy substantially affected procedures available to the public, that it fit within the definition of regulation and that its terms went beyond a simple explanation of the Department’s regulation on searches of visitors. The Court concluded that promulgation of a regulation would be necessary if the policy was to have continued effect. It gave the Department 180 days to promulgate such a regulation if it desired to enforce such a policy.

(5) **Commonwealth versus Trumble** , 396 Mass. 81. This case involves a set of guidelines created by the Department of Public Safety relative to roadblocks intended to deter drunk driving. Several allegedly drunk drivers were stopped and charged with drunk driving. They sought acquittal on the basis that the roadblock guidelines constituted “regulations” as defined in the APA and that they were invalid because they were not promulgated as required by the APA. The Supreme Judicial Court considered that the guidelines concerned the “internal management of the state police” and that they did not substantially affect the rights of the public because the guidelines simply reflected what the Court in a written decision had previously determined to be those rights. Accordingly, the Court found that these guidelines summarizing a court decision fit within an exception to the APA’s definition of “regulation” and were not invalid.

XVI - Conclusion: DHCD’s Guidelines Are Ineffective and Unenforceable. The court cases support a conclusion that DHCD’s “Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act” cannot be legally enforced. These Guidelines are not simply explanations seeking to “fill in

the details or clear up an ambiguity” in the two sentences in Subsection (a) of General Law Chapter 40A Section 3A. Instead, they seek to impose numerous substantive legal requirements and requirements so as to greatly expand the scope of the municipal zoning obligations required by Subsection (a) and to impose a litany of specific steps which MBTA communities must take to meet their newly defined obligations. Perhaps, if the Legislature had given DHCD appropriate regulatory power to impose such zoning requirements and underlying obligations, DHCD’s Guidelines could have been issued as regulations as provided in the Administative Procedure Act. However, the Legislature has not given DHCD regulatory power. It could have done so, but it did not. Instead, it limited DHCD’s power to issuance of guidelines. Without regulatory power DHCD could not issue regulations. Without regulations DHCD could not legally impose the substantive requirements and directives contained in the Guidelines. The conclusion is inescapable that the Guidelines are legally ineffective and unenforceable.