

Commonwealth of Massachusetts  
Superior Court

Suffolk, ss.

Winthrop Says No to 3A Committee and  
Diana Viens

v.

Executive Office of Housing & Livable  
Communities

Docket No. \_\_\_\_\_

kg

COMPLAINT FOR ADMINISTRATIVE REVIEW

**INTRODUCTION**

Now comes the Plaintiff, the Winthrop Says No to 3A Committee, for the benefit of the Town of Winthrop, seeking an exemption from compliance with the MBTA Communities Act (G. L. c. 40A, § 3A), on the grounds that the application of this law is neither fair nor equitable concerning Winthrop. The application of this law would have profound, harmful effects on the current residents of the Town.

The Winthrop Says No to 3A Committee seeks relief from this Court as the Executive Office of Housing and Livable Communities (EOHLC) has failed to act upon a Petition for Administrative Rulemaking within the statutory 30-day requirements of MGL ch. 30A, § 4. Given the lack of actual space to accommodate the high-density zoning sought by § 3A, and with Winthrop's deadline to formulate a compliance plan by the end of the year, EOHLC's failure to act has created a timing issue, causing chaos and community division.

**PARTIES**

1. The Winthrop Says No to 3A Committee is a group of 10 residents of Winthrop, Massachusetts.
2. The Executive Office of Housing and Livable Communities (formerly DHCD) is located at 100 Cambridge Street, Suite 300, Boston, MA 02114.

**PROCEDURAL BACKGROUND**

3. On July 20, 2024, a Petition for Administrative Rulemaking (attached hereto as Exhibit 1) regarding an exemption under G. L. c. 40A, § 3A for the Town of Winthrop was filed with Secretary Edward Augustus of the Executive Office of Housing and Livable Communities via the United States Postal Service (USPS).
4. On August 10, 2024, a Notice of Upcoming 30-Day Deadline (attached hereto as Exhibit 2) was sent to Secretary Edward Augustus via USPS, informing him of the impending 30-day deadline for a response and the intent to file an action in Superior Court should there be no response or acknowledgment.

5. The 30-day response period expired on August 20, 2024. No acknowledgment or response was received from the EOHLC by this deadline.
6. The Committee asserts that, in light of a year-end deadline imposed by EOHLC, the failure to act on or even acknowledge the Petition of Administrative Rulemaking is an egregious error of law.
7. As the Committee was preparing to file its failure-to-act challenge, on September 3<sup>rd</sup> they received a single-page rejection letter, dated August 28, 2024, from the EOHLC interim General Counsel, resting primarily on an erroneous interpretation of G. L. c. 30A §4. The EOHLC general counsel contends that the Committee's petition is not a petition for the adoption of a regulation.

### **LEGAL CHALLENGES AND ISSUES**

8. The Town of Winthrop is recognized as one of the most densely populated municipalities in the nation, with approximately 20,000 residents living within 1.6 square miles, and a population density exceeding that of Winthrop's exempt neighbor, East Boston.
9. 65% of Winthrop's housing stock are multifamily housing.
10. Winthrop's designation as an "Adjacent Community" under the MBTA Communities Act is solely due to its proximity to the Orient Heights MBTA train station, which is located in East Boston, not Winthrop.
11. This law, G. L. c. 40A §3A is meant to densify and encourage multifamily housing around transit. Winthrop has no transit and, as stated above, exceeds both the density and multifamily housing aims that this law seeks to encourage.
12. Enforcement of this law in Winthrop would create undue burden and harm to this town by overstuffing this already very stuffed community.
13. Where as this law seeks to "unlock" the potential for greater density in the proposed zones by demanding that there can be no minimum bedroom size, no maximum number of bedrooms, and no occupancy limits, high-density construction is encouraged (a "density bonus" offered to developers), and profitable and becomes by-right under 3A. As a result, the safeguards in place with Winthrop's local zoning boards for development projects in Winthrop (where every project must necessarily be carefully considered due to the tightly-packed neighborhoods and the impact on surrounding residents) become moot.
13. **Winthrop's rare safe harbor to G.L. c. 40B (reserved for small, dense towns) should be exempt MGL 40A section 3A for the same reasons.** Winthrop's small land size and dense population have afforded the Town a rare exemption to 40B development projects through a safe harbor provision that acknowledges compliance when a municipality demonstrates a 1.5% threshold for low or moderate-income housing, relative to the total land area zoned for residential, commercial, or industrial use. Winthrop has exceeded this threshold and meets the safe harbor requirements for 40B, making it exempt from additional 40B development projects.

G. L. c. 40A, §3A frustrates the purpose of 40B by thwarting low-income housing opportunities.

14. The MBTA Communities Act's requirements are in direct conflict with G.L. ch. 40B's purpose of providing housing for low-to-moderate-income families. While 40B defines affordable housing for those making 80% of the Area Median Income (AMI) or below, § 3A does not require affordable housing and considers housing for those making 80% of AMI or above as "affordable." In Winthrop, this means only those earning \$70,000 or above would qualify for 3A housing, contradicting the Town's efforts to meet 40B's low-income housing requirements and potentially knocking Winthrop out of compliance with 40B.

15. The unequal application of the MBTA Communities Act results in a disparate impact on the Town of Winthrop.

16. The calculation used by the EOHLC to assign the number of 3A units to each town disproportionately affects the densest towns, as land size is not considered. Instead, the calculation is based on a percentage of existing housing stock.

17. An illustrative example of this disparity is that Winthrop, with a population of 20,000 residing in 1.6 square miles, is required to zone for 882 units. In contrast, Ashby, which spans 23.66 square miles and has a population of 3,193, is required to zone for only 62 units. East Boston, which is less dense than Winthrop and has five MBTA train stations (Winthrop has zero MBTA train stations), is exempt from the Act's provisions. This highlights the disconnect between the MBTA Communities Act's requirements and the actual conditions and needs of densely populated communities like Winthrop.

18. With respect to East Boston's exemption, Boston is itself deemed among the 177 towns and cities identified as "MBTA Communities" subject to this law. Although Boston is noted as "exempt" on the mass.gov website and is not assigned a specific number of units to zone for, nowhere in the Zoning Act is Boston expressly exempt from compliance with 3A.

19. Unlike other towns such as Lexington and Salem, where there is space to build and capacity for added density, Winthrop has almost no developable land. Implementing this law in Winthrop would change its entire character, as it would necessitate the demolition of existing buildings, many of which are already multi-family residences. Despite Winthrop being deemed "built out" in 2005, construction has continued. The state's effort to increase housing supply to lower values through reduced demand will profoundly impact property values in Winthrop, a town already facing financial constraints.

20. **The MBTA Communities Act presents safety concerns for Winthrop residents by exacerbating already significant congestion.**

21. Increased density will worsen congestion on Winthrop's only two egresses, which are often closed due to flooding. Recent flooding events have increased, with 46.5% of homes situated on flood zone land. Homes along Winthrop's Belle Isle Marsh often experience up to five feet of water in their basements.

22. A 2003 traffic study conducted by HEJEC Associates identified critical traffic and safety issues in Winthrop. The growing population in Winthrop, coupled with the development of 10,000 additional units in the nearby Suffolk Downs area, has created severe traffic congestion, raising serious concerns about the ability to evacuate residents promptly in the event of a natural disaster or access critical services during emergencies.

23. Winthrop also suffers other emergency concerns such as the availability of fire and rescue assistance, limited access by emergency vehicles, emergency response times that are potentially not within NFPA standards, hurricane evacuation concerns, and other issues pled within the Petition for Administrative Rulemaking. Those concerns are hereby incorporated within.

**24. Winthrop should not be subjected to further hardship due to Winthrop's environmental sensitivities.**

25. Winthrop's environmental sensitivities further necessitate an exemption from the MBTA Communities Act. As a designated environmental justice community, all undue hardship should be avoided. The presence of the Deer Island Waste Treatment Plant on Winthrop's peninsula, operated by the Boston Water and Sewer Commission, poses additional health hazards due to the treatment of large volumes of sewage and transportation of hazardous waste through Winthrop's streets. The plant treats between 350 and 1,310 million gallons per day, with harmful chemical waste transported through Winthrop's narrow streets. Local beaches face frequent closures due to high bacteria levels.

26. Logan Airport is located in-part, in Winthrop, and contributes to significant air, water, and noise pollution, impacting the health and safety of residents. The continuous exposure to jet fuel emissions and noise pollution poses significant health risks, including increased cancer rates among residents.

27. Despite Winthrop's small size, environmentally sensitive areas, and high population density, it has historically played a crucial role in protecting Boston Harbor from ocean storms and serving as a strategic location for military sites from the American Revolution through World War II.

## COUNTS

### **Count I—Unlawfully withholding or unreasonably delaying**

28. Reaffirming and realleging as above the Plaintiffs plead that the Defendants have violated the State's Administrative Procedures Act.

29. G. L. c. 30A §14 allows for judicial action to "compel any action unlawfully withheld or unreasonably delayed." G. L. c. 30A §14(7). The Executive Office of Housing and Livable Communities, by failure to respond to the Winthrop Says No to 3A Committee's lawfully filed Petition of Administrative Rulemaking, then failure to respond to the notice of upcoming deadline on the filing, compels judicial action by this Court.

30. The Town Council of Winthrop, and its voters, must determine whether and how they will comply with the year-end deadline set by EOHLIC. This response is necessarily determined by what, if any, response or determination will make to the Petition for Administrative Rulemaking.

### **Count II-- Failure to have mandatory regulations**

31. Reaffirming and realleging as above the Plaintiffs plead that the Defendants have violated the State's Administrative Procedures Act.

32. Under the Massachusetts Administrative Procedure Act, G. L. c. 30A §4, State agencies must provide a mechanism for legal challenges, else deprive people of due process. For the EOHLIC's failure to provide a proper means of adjudicatory challenge to its prejudicial law and guidelines, judicial action by this Court is appropriate and necessary.

### **Count III—*De Novo* Regulatory Review**

32. Reaffirming and realleging as above, the Plaintiffs plead that the Defendants have violated the State's Administrative Procedures Act.

33. Following its federal counterpart, when an Agency procedure is insufficient a complainant under the Administrative Procedures Act may be entitled to *de novo* review. Under such circumstances, the Agency have failed to do its duty and regulate or adjudicate, despite being given an option, may be subject to having the court step into its shoes. In the alternative to the above Count I, the Plaintiffs plead that the Court has the power and ability to undertake factfinding and commence rulemaking, *de novo*. The Court, of course, should invite EOHLIC to make its opinions known, but the Court should nonetheless proceed to regulate on this important and time-sensitive area.

34. Now comes the Plaintiff, the Winthrop Says No to 3A Committee, and respectfully requests that this Court conduct a *de novo* review of the complaint, as outlined below, due to the following reasons:

- Inadequate Response by Executive Office of Housing and Livable Communities (EOHLIC): The Plaintiff's Petition for Administrative Rulemaking was filed on July 20, 2024, and the EOHLIC failed to respond within the statutory 30-day period as required by G. L. c. 30A, § 4. This inaction has caused significant harm and confusion, warranting a fresh and independent review by this Court to ensure the fair and just application of the law.
- Complexity and Impact of the MBTA Communities Act (G. L. c. 40A, § 3A): The Plaintiff contends that the application of G. L. c. 40A, § 3A to the Town of Winthrop is unjust and inequitable. Given Winthrop's unique circumstances—its high population density, limited land area, and existing housing stock—the enforcement of this law in its current form imposes undue burdens and conflicts with the Town's existing obligations

under G. L. c. 40B. A de novo review is necessary to thoroughly assess the implications and discrepancies associated with the Act's application to Winthrop.

- **Significant Procedural and Legal Concerns:** The Plaintiff asserts that the EOHLC's failure to act has resulted in procedural issues that necessitate a de novo review. This includes the lack of regulatory framework for adjudicatory challenges and the potential negative impact on Winthrop's housing landscape and environmental conditions.
- **Need for Comprehensive Judicial Examination:** The Plaintiff seeks a comprehensive examination of all relevant facts, legal principles, and the application of MGL ch. 40A, § 3A to ensure that the enforcement aligns with both legal standards and the specific needs of Winthrop. Given the complexity and potential far-reaching consequences of this matter, a de novo review by this Court is essential.

35. For these reasons, the Plaintiff respectfully requests that this Court review the complaint de novo, considering all relevant information and evidence, to ensure a fair and just resolution. *De novo* rulemaking by the Court is particularly appropriate where the Agency has failed to grant a hearing to the Plaintiffs.

#### **Count IV—Request for Injunctive Relief**

37. Reaffirming and Realleging as above the Plaintiffs plead for injunctive relief:

36. Now comes the Plaintiff, the Winthrop Says No to 3A Committee, and respectfully requests that this Court issue an injunction restraining the Executive Office of Housing and Livable Communities (EOHLC) from enforcing MGL ch. 40A, § 3A in the Town of Winthrop. In support of this request, the Plaintiff alleges as follows:

37. **Irreparable Harm:** The enforcement of MGL ch. 40A, § 3A in Winthrop will cause immediate and irreparable harm to the Town's residents and community. Given Winthrop's already high population density, limited land area, and the adverse impacts outlined in the complaint—such as increased congestion, safety concerns, and negative environmental effects—the application of § 3A would exacerbate existing issues, irreversibly alter the character of the community, and impose undue hardship on its residents.

38. **Likelihood of Success on the Merits:** The Plaintiff has demonstrated a substantial likelihood of success on the merits of its claims. The enforcement of § 3A in Winthrop is contested on grounds of inequity and impracticality, given the Town's unique characteristics, including its dense population, lack of transit, and environmental sensitivities. Furthermore, the Plaintiff has raised valid legal arguments that the enforcement of § 3A is inconsistent with G.L. c. 40B and may conflict with existing zoning and housing policies.

39. **Balance of Hardships:** The balance of hardships weighs heavily in favor of the Plaintiff. The Town of Winthrop faces significant risks and challenges if § 3A is enforced, including potential negative impacts on property values, traffic congestion, and public health. In contrast, the EOHLC will not be unduly harmed by an injunction; rather, an injunction would allow time

for a more thorough consideration of the issues and ensure that the application of § 3A does not unjustly impact Winthrop.

40 **Public Interest:** Granting the requested injunctive relief serves the public interest by allowing for a fair and equitable resolution of the legal challenges posed by § 3A's enforcement in Winthrop. The injunction will provide the Court with an opportunity to address the substantive issues raised by the Plaintiff and ensure that any enforcement of § 3A aligns with both the letter and spirit of the law, while considering the unique circumstances of Winthrop.

41. For these reasons, the Plaintiffs respectfully requests that this Court issue a temporary restraining order and/or preliminary injunction, restraining the Executive Office of Housing and Livable Communities from enforcing G. L. c. 40A, § 3A in the Town of Winthrop, pending further proceedings and resolution of the legal issues presented in this case.

42. The Plaintiffs further request that, upon successfully proving their allegations that the Court permanently enjoin EOHLC as above.

#### **Count V—Request for Declaratory Relief**

43. Reaffirming and Realleging as above the Plaintiffs plead for declaratory relief, including but not limited to, under G. L. c. 231A.

44. Now comes the Plaintiff, the Winthrop Says No to 3A Committee, and respectfully requests that this Court issue a declaratory judgment to address the following issues:

- Declaratory Judgment Regarding the Application of MGL ch. 40A, § 3A to Winthrop:

The Plaintiff seeks a declaratory judgment to determine whether the application of the MBTA Communities Act (MGL ch. 40A, § 3A) to the Town of Winthrop is lawful and consistent with existing state laws and policies. Given Winthrop's unique characteristics—its high population density, limited land area, and existing zoning provisions—the Plaintiff contends that the Act's requirements are neither fair nor equitable when applied to this municipality. The Court's judgment is sought to clarify the legal obligations of the Town under § 3A and to assess whether the law's application to Winthrop violates statutory or constitutional principles.

- Declaratory Judgment on Exemption Eligibility under MGL ch. 40A, § 3A:

The Plaintiff requests a declaratory judgment to ascertain whether Winthrop is eligible for an exemption from the MBTA Communities Act based on its circumstances, including its land use, existing housing stock, and compliance with G.L. ch. 40B safe harbor provisions. This judgment is sought to provide clarity on whether the Town's unique situation justifies exemption from the high-density zoning requirements imposed by § 3A.

- Declaratory Judgment on the Conflict Between MGL ch. 40A, § 3A and G.L. ch. 40B:

The Plaintiff seeks a declaratory judgment to determine whether the MBTA Communities Act's requirements, which do not mandate affordable housing, conflict with the purposes of G.L. ch. 40B, which aims to provide affordable housing for low-to-moderate-income families. The Plaintiff asserts that the implementation of § 3A may undermine Winthrop's compliance with 40B and negatively impact efforts to provide low-income housing. The Court's judgment is requested to resolve this potential conflict and guide the application of these laws in a manner that aligns with their respective objectives.

- **Declaratory Judgment on the Impact of EOHLC's Failure to Act:**

The Plaintiff seeks a declaratory judgment to address the implications of the Executive Office of Housing and Livable Communities' (EOHLC) failure to respond to the Petition for Administrative Rulemaking within the statutory period. This judgment is sought to clarify whether EOHLC's inaction affects the enforcement of § 3A in Winthrop and to establish the legal recourse available to the Town in light of this failure.

45. For these reasons, the Plaintiff respectfully requests that this Court issue a declaratory judgment to clarify the legal issues presented, ensure fair application of the law, and provide guidance on the obligations and rights of the Town of Winthrop under the MBTA Communities Act and related statutes.

### **Count VI—Equitable Relief**

46. Repeating and realleging as above, the Plaintiffs seek equitable relief, including under G. L. c. 214 §1.

47. In addition to the specific relief sought, the Plaintiffs requests that the Court exercise its equitable powers to provide remedies that address the broader implications of the issues presented. This may include measures to prevent further harm, ensure fair application of laws, or rectify any injustices resulting from the actions or inactions of the Executive Office of Housing and Livable Communities (EOHLC).

48. Given the complexity and significance of the issues raised, the Plaintiffs may require relief that is not fully encompassed within the existing counts but is essential to achieving justice.

49. The Plaintiffs especially seek a clarification of rights and obligations of the Town of Winthrop vis-à-vis the MBTA Communities act and its implementing guidelines. The Plaintiffs seek any relief necessary to clarify the rights and obligations of the parties involved, including but not limited to further declarations, injunctions, or orders that ensure compliance with legal standards and address the unique circumstances of the Town of Winthrop. The Plaintiff may require additional relief to fully address the impacts of the MBTA Communities Act (G. L. c. 40A, § 3A) and the failure of the EOHLC to act on the Petition for Administrative Rulemaking. This includes any remedies that the Court deems appropriate based on the evidence and legal arguments presented.

### **Count VII—Mandamus**

50. Repeating and reaffirming as above the Plaintiffs plead for mandamus relief.

51. The EOHLC has materially failed to make decisions and make them timely. They have also failed to have mandatory regulations to create a process for citizen participation by petition for rulemaking. Given a complete absence of will to act in areas where action is mandatory, the extraordinary remedy of mandamus, to compel action, is appropriate.

### **Count VIII—Judicial Review of Regulations**

53. Repeating and realleging as above the Plaintiffs seek judicial review.

52. The failure to act upon the Plaintiffs' Rulemaking petition is a constructive denial of their petition. Denials of petitions for rulemaking are, like regulations themselves, subject to judicial review.

### **Count IX—Erroneous Legal Interpretation of their rights under G. L. c. 30A §4**

54. Repeating and realleging as above, the Plaintiffs seek a declaration of their right to petition under G. L. c. 30A §4.

55. The EOHLC letter, received yesterday, is premised upon an erroneous interpretation of G. L. c. 30A §4, authorizing petitions for rulemaking by interested parties, and G. L. c. 30A §1, which defines "regulation" to include almost every conceivable kind of government regulation subject to specific exceptions.

56. The EOHLC's conclusion about standing of the Committee, as an interested party, under G. L. c. 30A §1, is erroneous. The Committee's petition, incorporated herein adequately pleads the Committee's interests as a citizens group and neighbor association opposing excess development in Winthrop.

### **Miscellaneous**

57. The Superior Court has subject-matter jurisdiction over this case

58. The Court has personal jurisdiction over the parties in this case.

59. Venue is proper in Suffolk County.

60. By means of administrative inaction, the Plaintiffs administrative remedies have been exhausted.

61. Alternatively the EOHLC *brevis* denial letter is the agency's final action entitling the Committee to appeal to this court.

**Conclusion**

Wherefore, the Plaintiffs plead for any and all relief that the Court deems just and proper in this case.

Respectfully Submitted,

Winthrop Says No to 3A Committee  
By its Attorneys

/S/ Diana Viens, Esq.  
Diana Viens, Clerk of the Committee

/S/ Michael Walsh  
Michael Walsh  
BBO 681001  
Walsh & Walsh LLP  
PO Box 9  
Lynnfield, MA 01940  
617-257-5496  
Walsh.lynnfield@gmail.com