

Commonwealth of Massachusetts  
Superior Court

Essex, ss.

John Kolackovsky, Zenas Seppala, Jonathan Ring, )  
Geoffrey Watson, William Proposki, Anne Hyde )  
Michael Seaton, Jeffery Santos, Tim Rose, )  
Phil Hopkins, on behalf of themselves and all )  
Others similarly situated )

v. )

Docket No. 2277CV00947-C

Town of Rockport, Department of Housing and )  
Community Development, Attorney General )

**Complaint**

Now comes the Plaintiffs, residents, and abutter in the Town of Rockport, who seek a declaratory relief that certain pro-development policies and statutes changing long-standing zoning laws are unconstitutional and illegal under state law.

**Plaintiffs**

1. John Kolackovsky is a resident and voter of Rockport
2. Zenas Seppala is a resident and voter of Rockport
3. Jonathan Ring is a resident and voter of Rockport
4. Geoffrey Watson is a resident and voter of Rockport
5. William Proposki is a resident and voter of Rockport
6. Anne Hyde is a resident and voter of Rockport and, living within 100 yards of the drawn district, is an abutter under state law.
7. Michael Seaton is a resident and voter of Rockport and, living within 100 yards of the drawn district, is an abutter under state law.
8. Jeffery Santos is a resident and voter of Rockport and, living within 100 yards of the drawn district, is an abutter under state law.
9. Tim Rose is a resident and voter of Rockport and, living within 100 yards of the drawn district, is an abutter under state law.
10. Phil Hopkins is a resident and voter of Rockport.

## Defendants

11. The Town of Rockport is a municipality on Cape Ann. It has a comprehensive zoning code. It is governed by a traditional open town meeting and selectmen form of government.
12. The Department of Housing and Community Development (DHCD) is a state agency charged with enforcing and overseeing the state's housing policy. The Department administers large amounts of state and federal grants to municipalities and private acts. The Department also sets standards for and administers public housing. The Department also designs ideal design elements for communities and uses its grant authority to support these design elements, such as the Complete Streets program and the Complete Neighborhood programs.
13. The Attorney General is the State's chief legal officer. Among many roles she certifies town bylaws as constitutional and compliant with state law. G. L. 40 §30 and G. L. c. 40A §5.

## Background

14. In January 2021, the Governor signed a new economic development law. St. 2020, c. 358 (An Act for Enabling Partnerships for Growth). This law is aimed at the production of new housing units for the State. This new law has three particularly troublesome features. This new law also has a companion law which makes further minor changes, and both are treated as the same herein.
15. Firstly, the law inserts a new §3A into the Zoning Enabling Act, Chapter 40A. The new law requires that an "MBTA Community" must have an MBTA Zoning District. The definition of MBTA community encompasses 175 communities, roughly being every community served by or adjacent to MBTA mass transit services: bus, train, or subway. The MBTA Zoning District is left partially to DHCD to determine the standards for, but it requires a density of at least 15 housing units per acre. The new §3A also provides a punishment for failure to comply with the requirement of having a MBTA Zoning District, namely that the municipality will be ineligible for 3 specified state grants administered by DHCD.
16. Secondly, the new law heavily promotes the use of accessory units, so-called in-law apartments. Accessory units are separate units contained within the same structure, but they normally have their own entrance and their own kitchen facilities to enable completely independent use. In legal function, accessory units function much like multi-family use, and for that reason are heavily regulated by many suburban municipalities, including Rockport. The new law has provisions which allow encourage and enable municipalities to override their single-family residential districts to allow both accessory uses and multi-family uses. The proponents of the law hope that this provision will create roughly 160,000 additional housing units in the metro-Boston area.

17. Thirdly, the new law changes the voting threshold. For four policy choices favored by the Legislature, including the adopting of accessory dwelling use and MBTA Zoning districts, the law lowers the threshold from a 2/3 supermajority to a simple majority. From 1973, the last major revision of the Zoning Enabling Act which collected several laws and deposited them together in a new Chapter 40A, all zoning changes have required a 2/3 supermajority vote of the local legislature, either town meeting or a city council. The new law specified that so long the proposal is one of the four favored changes, only a simple majority vote is required.
18. The State Government has been slow in implementing the MBTA Zoning law. It was only in March 2022 that DHCD published for comment draft regulations for the formula of qualifying MBTA Zoning Districts.
19. The draft regulations have since been superseded by an announcement, on August 10, 2022, that DHCD has released final regulations.
20. The regulations have not been published in the Massachusetts Register. Although DHCD has sought comment upon them, informally, it has not submitted them to the G. L. c. 30A regulatory process.
21. Rockport's Planning Board, through its chairman, criticized the planned one-size-fits-all formula requiring an MBTA District of 50 acres, pointing out that Rockport is a small town and that fifty acres would encompass the whole downtown.

### **Rockport**

22. Rockport has considered transit-oriented district zoning several times since 2015, as the concept became a new phenomenon in urban planning circles. This consideration has, over the years not advanced outside of general discussions by the Planning Board, but pre-dates the MBTA Zoning law by years.
23. The Planning Board of Rockport brought in a team of consultants from MAPC to assist in rewriting and modernizing their zoning law. The result produced four proposals: an open space zoning proposal, an MBTA Zone, a general allowance of accessory dwelling units Townwide, and a general revision of the zoning bylaws to update enforcement and remove provisions no longer in use.
24. The Planning Board, with its consultant, held hearings on the four zoning proposals on January 25, 2022, and January 26, 2022. The hearings were well attended with thoughtful public comment.
25. After brief consideration, a decision was made not to include the zoning proposals in Rockport's regular annual town meeting on April 2, 2022.
26. Instead, a special town meeting was summoned for May 16, 2022. The Town Meeting lasted 5 hours. The Town Meeting rejected the general revision, which was the only one

of the four zoning articles to require a 2/3 supermajority. The MBTA Zoning Article, locally named a Transit-Oriented Village Overlay District (TOVOD), passed by 89-83. The Accessory unit article passed by 118-116. Had the supermajority requirement remained in effect, neither article would have passed.

27. On June 6, 2022, Plaintiff Kolackovsky submitted an opposition letter to the Attorney General's Municipal Law Unit. He outlined the arguments relating to the Home Rule Amendment and the unconstitutionality of both the MBTA Zoning Law and the lower vote threshold (and its accompanying effect of invalidating the TOVOD and Accessory Dwelling Use bylaw).
28. On August 13, 2022, a second letter, a petition of 213 Rockport voters and abutters, was also submitted to the Attorney General's office.
29. The Attorney General's office has not yet acted upon the bylaw but is expected to approve it, as it has approved other bylaws enacted under the new housing law.

### **Constitutional Background on Home Rule in Massachusetts**

30. In 1965, the State Home Rule Amendment, Article 89 of Amendment, was adopted which permanently changed the power dynamic between municipalities and the State Legislature.
31. Previously, the Legislature had been the paramount power, able to dispense with, change, alter, or destroy municipality power and government at its whim. This was an outgrowth of the American common law rule known as the Dillon rule, which held that municipalities had no sovereignty themselves, only holding delegated municipal power which could only be exercised on terms proscribed by the Legislature.
32. The pre-1965 cases specifically hold that the Legislature's power of municipal zoning was supreme.
33. The Home Rule Amendment is a complicated and intricate arrangement. In general, it poses the strongest form of municipal home rule available in the United States. The Amendment prohibits the Legislature from specifically legislating against an individual town without municipal consent. The Amendment prohibits municipal regulation of some topics, such as elections. The Amendment preserves the right of the State to preempt municipal laws. However, the Amendment also carves a sovereign area of independent municipal power, in which the municipality is free to legislate as it will.
34. Zoning has been held to be part of this independent municipal power under the Home Rule Amendment.
35. The Zoning law, as existing when the Home Rule Amendment, came primarily from St. 1954, c. 368, itself a celebrated reform measure cleaning up disparate zoning laws dating into the 1920s.

36. The case law on the Home Rule Amendment gave pre-existing law, in effect when the Amendment was adopted, a grandfathering effect. The Supreme Judicial Court specifically rejected the idea that the Home Rule Amendment repealed all existing law which invaded the sphere of power
37. The recognition that the Legislature now had to deal with its municipal partners in zoning matters caused the 1973 Zoning Enabling Act reform to be very procedural. St. 1973, c. 808. Indeed, Section 2A of the Zoning Enabling Act explicitly cited to the Home Rule Amendment:

Section 2A. The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and achieve greater implementation of the powers granted to municipalities thereunder.

This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws...

St. 1975, c. 808, §2A. The 1973 enactment was almost entirely procedural dealing with how municipalities could regulate zoning and providing some prohibitions. The new MBTA Zoning Act tries to introduce some substantive content into zoning regulation and does so without paying heed to the grandfathered status of portions of the Zoning Enabling Act.

38. The substantive content nature of economic development law is readily apparent in its structure. For example, though it lowers the vote threshold to adopt accessory use, provide for MBTA Zoning, or to adopt Chapters 40R and 40S, the same does not work in reverse. Under the plain text of G. L. c. 40A §5, as amended by St. 2020, c. 358, the lowered threshold only applies to the adopt of the four favored policy choices, not to amending them or repealing them.

**Count I—Declaratory Relief Against the Town and DHCD—MBTA Zoning is Unconstitutional**

39. The Plaintiffs seek a declaration that the MBTA Zoning Law is unconstitutional.
40. The Home Rule Amendment makes the municipalities sovereign in the area of zoning.
41. The Legislature, recognizing this, has attempted to coerce the municipalities to adopt MBTA Zoning Districts which it, itself, is not constitutionally empowered to draw.
42. The coercion comes in the form of a statutory denial of access to 3 specific grant programs.

43. DHCD has, illegally, added additional coercion by announcing that it would hold noncompliance against municipalities competing in other grant programs.
44. This violates the Unconstitutional Conditions doctrine, which holds that the government may not, by withhold benefits or access to grants, to regulate or do that which it is otherwise prohibited from.
45. The Supreme Judicial Court has also interpreted the Home Rule Amendment to provide some protections to municipalities similar to those given to States under the Federal 10<sup>th</sup> Amendment. Which is to say that the Legislature, and DHCD, may not withhold grants or funding because they're attempting to violate municipal independence guaranteed by the Home Rule Amendment indirectly. The Federal 10<sup>th</sup> Amendment has a guarantee which prohibits the national government from "commandeering" either state legislatures to make laws or state executive officials to enforce federal law. Similarly, the Home Rule Amendment has, embedded in it, a guarantee which prohibits the Legislature from commanded municipalities to exercise their independent power.
46. Consequently, the MBTA Zoning law is unconstitutional as is the zoning district and bylaw adopted pursuant to it.

**Count II—Declaratory Relief against the Town and DHCD—The Lowered Threshold is Unconstitutional**

47. The Plaintiffs seek a declaration that the MBTA Zoning Law is unconstitutional.
48. The Zoning laws in the 1920s and 1930s regularly required a 9/10ths or, sometimes, a 75% supermajority. These vote thresholds eventually settled at the 2/3rds supermajority before the Home Rule Amendment was adopted.
49. The 2/3<sup>rd</sup> threshold, although republished in 1973 law with an appropriate deference to Article 89, was a pre-existing law. It is, under the SJC's caselaw, grandfathered even though it regulates an area in which municipalities are sovereign.
50. The new law, St. 2020, c. 358, lowering the threshold is not so grandfathered. It is the Legislature unconstitutionally making provisions for areas which are within the independent municipal power. The Legislature is without power to so invade the municipal sphere and its voting majority changes should deemed constitutionally ineffective.

**Count III—Declaratory Relief against the Town of Rockport—Chapter 40A**

51. The Plaintiffs seek a declaration that the TOVOD and Accessory Dwelling Use zoning bylaws have not been properly adopted.
52. The Town did not comply with the notice requirements of Chapter 40A in adopting the bylaws.

53. The Town has made other fatal procedural flaws in adopting the TOVOD and Accessory Dwelling Unit bylaws, such as not complying with the requirement of a report from the Planning Board.

**Count IV – Declaratory Relief against the Attorney General for wrongful certification of the bylaws**

54. The Plaintiffs seek a declaration that the TOVOD and Accessory Dwelling Use zoning bylaws have been improperly certified.
55. This count must be stayed pending final action of the Attorney General's office.

**Count V—Declaratory Relief against DHCD—Chapter 30A**

56. The Plaintiffs seek declaration that the regulations announced on August 10, 2022, are invalid.
57. The Regulations have not been published in the Massachusetts Register.
58. The Regulations have not been subject to notice and comment under Chapter 30A.
59. The Regulations do not otherwise comply with the requirements of Chapter 30A, including a financial impact or small business impact statement.
60. DHCD has exceeded its authority is purporting to use noncompliance to affect municipal eligibility for other grant programs not specified in the statute.

**Count VI—Declaratory Relief against Rockport—Illegal Spot and Contract Zoning**

61. The Plaintiffs seek a declaration that the adopted TOVOD bylaw, and district, are illegal as either Spot Zoning or Contract Zoning.
62. The TOVOD district is centered primarily upon the strip mall parcel near the rail station.
63. The TOVOD bylaw was created expressly to benefit, and burden, the strip mall parcel with the idea that the commercial purpose could be abandoned or subordinated to a multi-family residential use.
64. Because the TOVOD district is designed primarily to affect a single parcel, it is illegal as contrary to the statutory uniformity zoning requirements.
65. Because the TOVOD district is designed to affect a single parcel, it is illegal Spot Zoning.

66. Because the TOVOD district is designed to affect a single parcel, it is illegal Contract Zoning.

**Miscellaneous**

67. Venue is proper in Essex County since the Plaintiffs and the Town of Rockport are all located within Essex County.

68. The Court has personal jurisdiction over the parties.

69. The Superior Court has subject-matter jurisdiction over the matter and the cause. The Superior Court is a superior court of record and general jurisdiction. Under Chapter 231A, Chapter 40A, Chapter 30A, and the general equity jurisdiction of the Superior Court, the Court has power to hear and determine this case.

**Prayer for Relief**

Wherefore the Plaintiffs seek declaratory relief as prayed for above, in addition to any other relief the Court deems just and proper.

October 1, 2022

Respectfully Submitted,

John Kolackovsky, et al  
By their Attorney

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