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The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

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January 23, 2014

Mr. Charlie Seelig
Town Administrator
Town of Halifax
499 Plymouth Street
Halifax, Massachusetts 02338

**RE: Section 32 of Chapter 193 of the Acts of 2012 –
An Act Further Regulating Animal Control**

Dear Mr. Seelig:

While it may well be true that a dog is a man's best friend, Massachusetts law, like that of virtually every other state, and as far back as 1792, has provided remedies for the harm that dogs can inflict on other animals. *See, e.g., St. 1791, c. 38* (providing remedies for damage by mischievous dogs). In fact, Massachusetts does not require any proof that the owner or keeper of a dog was at fault or otherwise negligent for damages inflicted by a dog, even though such evidence is required for damages inflicted by other animals. *See M.G.L. c. 140, § 155*. Most likely because it was not always possible to identify the owner of a dog inflicting such damage, Massachusetts has also long provided a means by which the government can compensate owners of animals harmed by dogs. *See, e.g., St. 1858, c. 139, § 4*. Although municipalities were initially responsible for that compensation, that responsibility shifted to counties in 1886. *See St. 1886, c. 259*. Due to the abolishment of most of the counties and other statutory changes, that responsibility has shifted back to cities and towns, and the question has arisen as to whether that shift constitutes an unfunded mandate on municipalities.

This letter is in response to your request on behalf of the Town of Halifax ("Halifax") to the State Auditor's Division of Local Mandates ("DLM") regarding Section

32 of the above-referenced Act, Chapter 193 of the Acts of 2012 ("Chapter 193" or "the Act"), revising M.G.L. c. 140, § 161. You expressed a particular concern that the revision of M.G.L. c. 140, § 161, transferring the responsibility from the counties to the municipalities for the payment of losses incurred by someone whose livestock or fowl is worried,¹ maimed, or killed by a dog outside the premises of the owner or keeper of the dog, may have created an unfunded mandate under M.G.L. c. 29, § 27C ("the Local Mandate Law"). If that is the case, you asked DLM to determine the fiscal impact of this change in the law on Halifax.

As you know, Chapter 193, in major part, amended or repealed M.G.L. c. 140, §§ 136A-175, which has been in effect since at least 1935, relating to dogs and animal control and safety. Earlier this year, in response to a request from the Town of Paxton, DLM issued a determination regarding provisions in the Act relating to the sheltering and identification of stray animals and to training requirements for municipal Animal Control Officers. In that decision, DLM opined that "the pre-1981 provisions of M.G.L. c. 140, §§ 136A-175, relative to the regulation of dogs in cities and towns, have not been substantially changed by Chapter 193 in a manner that would impose new unfunded municipal costs within the meaning of the Local Mandate Law."

Upon receipt of your request, DLM refreshed its research as to whether the numerous changes that the Act made to the pre-existing statute, and in particular to M.G.L. c. 140, § 161, imposed any unfunded mandates on cities and towns. In addition, DLM staff spoke with you, the Halifax Town Administrator, to obtain information on your concern about the provision in the Act transferring the responsibility from the counties to the municipalities for reimbursing someone who has livestock or fowl worried, maimed or killed by a dog. You informed DLM that you had heard that the Town of Rutland has a Section 161 matter pending. Indeed, according to the local paper, *The Landmark*, a Siberian Husky escaped from its yard, ran 3/4's of a mile to a neighboring farmer's laying chicken coop, and broke through a screen killing, maiming, and worrying laying hens, which caused damages close to \$2000. DLM staff then spoke with Jackie O'Brien, the Administrative Assistant to Rutland's Board of Selectmen, regarding the status of that matter, which, she indicated, was nearing a resolution. In addition, DLM staff conducted telephone interviews with personnel from the state Department of Agricultural Resources ("DAR") Division of Animal Health, in an effort to gather additional input regarding the Halifax petition.

In the final analysis, DLM has concluded that the Local Mandate Law does not apply to the issue that you raised because Halifax voluntarily accepted the provisions of M.G.L. c. 140, § 147A. Pursuant to Section 147A, prior to its repeal, any municipality accepting its provisions was empowered to enact By-laws and ordinances for the regulation of dogs, retain all revenues for such regulation, and assume the responsibility, previously assumed by counties, for damage to livestock and fowl harmed by dogs. At a Special Town Meeting on December 4, 1995, Halifax accepted the provisions of Section 147A and enacted its regulation

¹ Under P.S. 1882, c. 102, § 98, as amended by St. 1889, c. 454, "worrying" constitutes any sort of attack by a dog that frightens domestic animals. 2 Op. Atty. Gen. 1901, p. 250.

of dogs as Chapter 82 of its By-laws. At that time, therefore, pursuant to Section 147A, Halifax assumed responsibility for all costs and expenses relating to the regulation of dogs. The following further explains DLM's conclusion.

The Local Mandate Law

In general terms, the Local Mandate Law provides that any post-1980 state law, rule, or regulation that imposes additional costs upon any city or town must either be fully funded by the Commonwealth or subject to local acceptance. Pursuant to the Local Mandate Law, any community aggrieved by an unfunded state mandate may petition the Superior Court for an exemption from complying with the mandate until the Commonwealth provides funding to assume the cost. DLM's determination of the compliance cost of any unfunded mandate is *prima facie* evidence of the amount of state funding necessary to sustain the mandate. Alternatively, a community may seek legislative relief.

To determine whether the anticipated local cost impact of a state law is subject to the Local Mandate Law, we apply the framework for analysis developed by the Supreme Judicial Court in *City of Worcester v. The Governor*, 416 Mass. 751 (1994). Of particular relevance to your petition, the challenged law must take effect on or after January 1, 1981, and the law must effect a genuine change and be more than merely a clarification of existing obligations.

Chapter 193

As you know, Chapter 193 was enacted with broad support from a coalition of animal safety and welfare groups including the Massachusetts Association for the Prevention of Cruelty to Animals, the Animal Control Officers Association of Massachusetts, the Massachusetts Animal Coalition, and DAR. The major amendments to M.G.L. c. 140 championed by these and other stakeholders included:

- the establishment of a statewide dangerous dog provision prohibiting cities and towns from enacting by-laws banning specific breeds of dogs from their communities;
- the inclusion of family pets under the protection of domestic abuse restraining orders;
- the creation of a state Homeless Animal Prevention and Care Fund ("the Fund") designed to pay for the vaccination, spaying, and neutering of homeless dogs, and to assist with the training of municipal ACO's;
- the reduction in the length of time communities can hold and shelter stray

dogs from ten to seven days;

- an increase in both the fees cities and towns can collect for dog and kennel licenses, and fines for animal cruelty and other violations;
- a requirement that, with the exception of emergencies, stray dogs may only be euthanized by the administration of barbiturates;
- a requirement that each municipality purchase a universal scanner so that ACO's can examine stray animals for computer chips prior to euthanasia or turning over the animal to another party; and
- limits on the manner, conditions, and time that owners can keep their dogs outside.

Application of the Local Mandate Law to Chapter 193

As noted above, the Local Mandate Law applies to post-1980 laws that impose substantive new obligations at the municipal level. The relevant provisions of Chapter 193, however, essentially clarify or fill in the details of a law that has been in effect well over 50 years. It should be noted, however, that, in its original form, Section 161 of Chapter 140 imposed on counties the obligation to reimburse the owners of livestock or fowl for damages to livestock or fowls by dogs. Section 161 also includes an appraisal process to determine the amount of such losses and, in its original form, Section 165 of Chapter 140 set forth the manner whereby the counties could have been reimbursed for any such payments from the owner or keeper of any such dog. Chapter 193 amends Section 161 and 165 of Chapter 140 by substituting the cities and towns for the counties for this payment obligation and reimbursement right.

Chapter 193 is not, however, the only law which impacts this situation. Section 147A of Chapter 140 also must be considered. Halifax voluntarily accepted the provisions of Section 147A when it enacted Chapter 82 of its By-laws. Section 82-4 of Halifax's By-laws expressly adopts the statutory provisions of M.G.L. "c. 140, §§ 136A through 174D, inclusive . . . including but not limited to . . . procedure for the investigation of the reimbursement for damage caused by dogs." Section 147A of Chapter 140, at the time of its acceptance by Halifax, provided that "any city or town which accepts this section . . . shall thereupon be responsible for all costs and expenses relating to the regulation of dogs." Chapter 193, therefore, is not imposing a new legal burden, it is codifying one which Halifax already had adopted.

With respect to other municipalities that may have concerns as to whether Chapter 193 may implicate the Local Mandate Law, it should be noted that the legislation that abolished county government in numerous counties also included a provision that, "notwithstanding the provisions of any general or special law to the contrary," all the municipalities of the

abolished counties were "deemed to have accepted the provisions of § 147A of chapter 140." This phrase -- "notwithstanding the provisions of any general or special law to the contrary" -- constitutes an override of the provisions of the Local Mandate Law for municipalities in the abolished counties. See *Lexington vs. Commissioner of Education*, 397 Mass. 593, 595 (1986).

It is unclear whether there are any municipalities within the surviving counties that will be affected by this statutory change. Back in 2004, OSA investigated this question and determined that there were 32 municipalities that are part of the surviving counties -- Barnstable, Bristol, Dukes, Nantucket, Norfolk, and Plymouth -- that had not accepted Section 147A and, therefore, were governed by county dog regulations, and would have been reimbursed for dog-related expenses from the county dog funds. DLM has discovered that at least three of those counties -- Dukes, Norfolk, and Plymouth -- no longer provide county dog services.

Even if there are any communities that are affected by this statutory change, it should be noted that the Act also permits municipalities to charge a higher fee for dog licenses than the \$3 (male) and \$6 (female) previously allowed. Moreover, communities also now have the option to increase dog kennel license fees and fines, as well as fines for unregistered and unlicensed dogs and animal cruelty violations. These changes enable municipalities to increase their revenue from the regulation of dogs and provide a cushion for any losses pursuant to Section 165 of Chapter 140 which are, for whatever reason, not recovered pursuant to the reimbursement right set forth in Section 165.

Conclusion

In summary, DLM has concluded that the pre-1981 provisions of M.G.L. c. 140, §§ 136A-175, relative to the regulation of dogs in cities and towns, have not been substantially changed by Chapter 193 in a manner that would impose upon Halifax new, unfunded municipal costs within the meaning of the Local Mandate Law. The specific concern that you raised in your petition to DLM -- the municipality's responsibility for payment of losses incurred by someone who has livestock or fowl worried, maimed, or killed by a dog outside the premises of the owner or keeper of the dog -- does not appear at this time to be an issue that would come under the purview of the Local Mandate Law, because of Halifax's acceptance of the provisions of Section 147A of Chapter 140.

This opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with Section 27C(e) of Chapter 29. Although we are sympathetic to the fiscal constraints facing all cities and towns, DLM must apply the Local Mandate Law consistently to each issue, as interpreted by the courts. We thank you for bringing this matter to our attention, and encourage you to contact DLM with further concerns on this or other matters impacting your budget.

Sincerely,

A handwritten signature in black ink, reading "Vincent P. McCarthy". The signature is written in a cursive style with a large, prominent initial "V".

Vincent P. McCarthy, Director
Division of Local Mandates

cc: Tara Zadeh, Esq., General Counsel, DAR
Michael Cahill, Director, DAR, Division of Animal Health