



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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BOSTON, MASSACHUSETTS 02108

A. JOSEPH DeNUCCI
AUDITOR

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March 14, 2006

Gerald M. Moody, Town Counsel
Town of Milford
Town Hall
52 Main Street
Milford, Massachusetts 01757-2622

Dear Mr. Moody:

Auditor DeNucci asked that I respond to your request on behalf of the Milford Board of Selectmen relative to G. L. c. 149, s. 44A1/2, added by St. 2004, c. 193, AN ACT FURTHER REGULATING PUBLIC CONSTRUCTION IN THE COMMONWEALTH. In your letter, you note that section 44A1/2 now requires that public agencies "contract for the services of an owner's project manager" to perform various consulting and oversight functions for projects estimated to cost \$1.5 million or more. You ask for an opinion as to whether the Local Mandate Law, G. L. c. 29, s. 27C, applies to this requirement, and request that the Office of the State Auditor declare that this provision is not effective in the Town of Milford.

After reviewing your argument and the input from relevant state agencies, the State Auditor's Division of Local Mandates (DLM) has reached the opinion that, for certain projects, the owner's project manager requirement imposed by G. L. c. 149, s. 44A1/2 falls within the scope of G. L. c. 29, s. 27C. However, in a given case, there may be factors that would lead to a different result, such as conditions imposed in exchange for state financial assistance. Nonetheless, as explained in earlier correspondence, the Office of the State Auditor does not have the authority to suspend operation of state law. G. L. c. 29, s. 27C provides that a community aggrieved by an unfunded state mandate may petition superior court for an exemption from compliance until the Commonwealth assumes the cost. The following discussion explains this conclusion.

In general terms, the Local Mandate Law provides that any post-1980 law imposing additional costs upon any city or town must either be fully funded by the Commonwealth, or subject to local acceptance. In *City of Worcester v. the Governor*, 416 Mass. 751 (1994), the Supreme Judicial Court further defined the elements of an "unfunded state mandate." Clearly, the law must take effect on or after January 1, 1981. Additionally, it must effect a genuine change in law, and be more than a clarification of existing

obligations. It must also result in direct service or cost obligations that are imposed upon the municipality by the Commonwealth, not voluntarily undertaken at the local level. Finally, it must impose more than “incidental local administration expenses,” as these are explicitly exempted from the Local Mandate Law. *Worcester* at 754 – 755.

As noted above, a 2004 act of the Legislature added the owner’s project manager (OPM) requirement to the Massachusetts General Laws at section 44A1/2 of Chapter 149. As this provision took effect on July 19, 2004, it is a law taking effect on or after January 1, 1981. Moreover, this amendment was not a mere clarification of pre-existing legal requirements. As your letter demonstrates, this requirement is “completely new to the statute and to the system of statutory and regulatory control of the public building construction process.” Under prior law, the first significant, mandatory financial commitment was for the services of an architect, who typically would not only design the project, but also would advise and assist through all phases to completion. Now, in addition to a project designer, the law requires that an individual that meets prescribed standards be hired through a “qualifications based” selections process to perform specific duties. Although the law allows that an existing municipal employee who meets the prescribed standards may perform this role, you accurately point out that few, if any, small or mid-sized communities retain personnel with the precise qualifications and experience required on a regular basis. The OPM selection process and duties are defined in more detail in the Division of Capital Asset Management’s *Owner’s Project Manager Guidelines* issued in December 2004.

Additionally, Chapter 149, section 44A1/2 is not a local option law that takes effect only in cities and towns that vote to accept it. The OPM requirement is imposed by state law that applies uniformly throughout the Commonwealth. Hiring an OPM is not a voluntary local undertaking.

We note that cities and towns may engage in construction projects related to activity that is authorized, but not strictly required by state law. For example, there is no state law that requires communities to provide public libraries for their residents. It has been suggested that case law holds that the Local Mandate Law would not apply to a state requirement that increases the cost of an underlying activity that is not strictly required by law, such as construction or renovation of a library or senior center. See *Town of Norfolk v. Department of Environmental Engineering*, 407 Mass. 233 (1990). However, the *Norfolk* conclusion does not turn solely on the voluntary nature of the underlying activity, in that case, operation of a sanitary landfill. Rather, the *Norfolk* court primarily focused on the fact that the regulations at issue were generally applicable to public and private sector landfill operators. The court ruled that the Mandate Law did not apply to the landfill regulations because they were “...generally applicable environmental regulations which result in indirect costs to those municipalities engaging in voluntary activity.” *Norfolk* at 241.

In contrast, Chapter 149, section 44A1/2 is not a generally applicable regulation of the construction industry. It applies strictly to public sector construction projects.

Given these material differences, the *Norfolk* rationale does not control the determination on the matter at hand, and does not support a conclusion that the Local Mandate Law would not apply to a mandate that increases the cost of an underlying activity that is not also mandated by law. Such a reading would restrict application of the Local Mandate Law so that it would hold significance in only limited aspects of municipal business -- those fields that are strictly required by law, such as education of pupils, election of public officials, and some public health functions. Such an interpretation would defeat "the fiscal protection of local government that Proposition 2 ½ was designed to achieve." *Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 701 (1985).

Finally, the cost of procuring OPM services is not an incidental administration expense. Precedent indicates that such expenses are relatively minor, and in the nature of paperwork activities. *Worcester* at 758. The OPM requirement is a clearly identifiable, direct consequence of the law, that will increase the number of and cost of personnel needed to complete a project of \$1.5 million or more. We note that this requirement is part of an omnibus public construction reform act, that some suggest is contemplated to streamline, and in some aspects, reduce the cost of construction projects. It is suggested that the additional cost of hiring an OPM should be offset by cost savings made possible by other provisions of the act, as well as by potential savings attributable to the presence of the OPM. There is no precedent under the Local Mandate Law to support this approach. In any event, this office solicited evidence to support this argument from its proponents, including the Division of Capital Asset Management; no evidence to quantify potential cost savings was provided. Even if DLM were to adopt this approach to mandate cost analysis, we would not rely on unsupported predictions of future savings to offset a concrete, identifiable cost increase. However, this argument would likely be raised at the time a community seeks mandate relief in court.

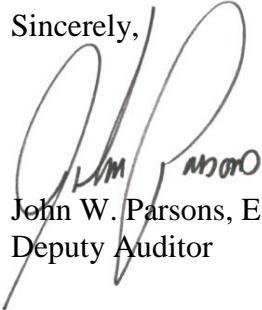
Accordingly, DLM concludes that -- on its face -- the OPM requirement imposed by G. L. c. 149, s. 44A1/2 is subject to the provisions of Local Mandate Law, G. L. c. 29, s. 27C. As mentioned above, however, as applied in certain contexts, this requirement might fall beyond the scope of the Local Mandate Law. For example, such result may occur in the context of a state-assisted construction project, where a community agrees to certain compliances in exchange for state financial aid. In a case where this or other requirements may be imposed as a condition precedent to the distribution or award of state assistance, the Local Mandate Law would not apply. See *School Committee of Lexington v. Commissioner of Education*, 397 Mass. 593, 596 (1986).

Gerald M. Moody, Milford Town Counsel

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As you know, this opinion does not relieve the Town of Milford of the duty to comply with G. L. c. 149, s. 44A1/2. The remedy under the Local Mandate Law is to seek an exemption from compliance in superior court. G. L. c. 29, s. 27C(e). Should the Milford Board of Selectmen wish, this office will prepare a determination of the amount of the cost imposed by the OPM requirement in relation to a specific construction project. Please contact DLM Director, Emily Cousens, should you have questions or comments regarding this opinion.

Sincerely,

A handwritten signature in black ink, appearing to be 'JWP', with a large, stylized flourish extending upwards and to the right.

John W. Parsons, Esq.
Deputy Auditor

cc: Barbara Hansberry, General Counsel, Office of the Inspector General
Mary Kaitlin McSally, Deputy General Counsel, Div. of Capital Asset Management