

MBTA Communities Act Update, January 2025

Attorney General v. Town of Milton (Docket No. SJC-13580)

On January 8, 2025, the Supreme Judicial Court issued its decision in Attorney General v. Town of Milton (Docket No. SJC-13580) affirming the Attorney General’s authority to enforce compliance with G.L. c. 40A, § 3A, commonly known as the “MBTA Communities Act,” (“Act”). The Court found further that the compliance guidelines (“Guidelines”) issued by the Executive Office of Housing and Livable Communities (“EOHLC”) to enforce the Act were not properly promulgated and are currently unenforceable.

Factual Background

General Laws c. 40A, § 3A mandates that “MBTA Communities” adopt zoning amendments to create at least one zoning district of reasonable size that allows multi-family housing as-of-right. In February of 2024, registered voters of the Town of Milton, a “rapid transit community” under the Guidelines, rejected a change to the Town’s zoning that had been approved by the Milton Town Meeting, which change would have brought the Town into compliance with the statute. The Attorney General brought suit against the Town to enforce the statute.

Court’s Decision

The Supreme Judicial Court reached three conclusions in its decision: (1) the Act is constitutional and does not violate the separation of powers by vesting power in an executive agency, EOHLC, to implement its provisions; (2) the Attorney General has the power to enforce the Act and that the inclusion of certain penalties does not preclude the enforcement power of the Attorney General; and, (3) the “guidelines” issued by EOHLC constitute a “regulation” for purposes of the Administrative Procedure Act, G.L. c. 30A, and EOHLC’s failure to follow the statutory process for promulgating regulations renders the current Guidelines unenforceable. The result is partial judgment for the Town of Milton based on the current unenforceability of the Guidelines and dismissal of the remaining claims.

1. Constitutionality

The Town of Milton argued that the Act was unconstitutional because it violated the separation of powers doctrine by impermissibly vesting EOHLC with the power to make fundamental policy decisions. The Court rejected this argument. The Court found instead that the Legislature, through enactment of the statute, made a fundamental policy decision regarding the creation of housing and, further, gave adequate direction for implementation of that policy through its description of the location and density of the mandated zoning district. Finally, the Court found that the statutory requirement that EOHLC work with three other state agencies to promulgate these “guidelines”, and the right of an aggrieved party to seek judicial review, provide adequate safeguards against agency abuse of discretion.

2. Power of Attorney General

The Court also rejected Milton’s argument that because the Act outlined specific consequences for noncompliance, ineligibility for certain grants and funding sources, and did not specifically grant the Attorney General specific enforcement powers, the Attorney General is unauthorized to enforce the Act. The Court found that the Attorney General has “broad powers to enforce the laws of the Commonwealth” and that the inclusion in the Act of specific penalties for noncompliance does not preclude enforcement by the Attorney General. The Court reasoned that to prevent the Attorney General from exercising her enforcement power would frustrate her ability to protect the public interest, here, increasing housing stock, thereby “converting a legislative mandate into a matter of fiscal choice.”

3. EOHLC Guidelines

Finally, the Court agreed with the Town that EOHLC’s failure to comply with the rule-making process set forth in G.L. c. 30A renders the Guidelines unenforceable. The Court rejected the Attorney General’s argument that EOHLC did not have to follow the G.L. c.30A procedure because the statute directs EOHLC to promulgate “guidelines” rather than “regulations.” The Court found that “[g]iven the breadth, detail, substance, and mandatory requirements of the [EO]HLC guidelines” the guidelines referenced in the statute constitute “regulations” for purposes of G.L. c.30A. The Court also rejected the Attorney General’s contention that these failures constituted harmless error, holding instead that G.L. c. 30A requires strict compliance in order to promulgate rules.

Summary and Implications

The decision of the Supreme Judicial Court upholds the constitutionality of the MBTA Communities Act. The decision also affirms the Attorney General’s position that municipalities must comply with the Act or (a) be subject to the penalties outlined in the Act, i.e, the loss of certain state funding, and/or (b) potential enforcement by the Attorney General through a suit for declaratory and injunctive relief. The Court also stated definitively that the Guidelines, in their present form, including the deadlines for compliance, are unenforceable.

Looking forward, we anticipate that the EOHLC will move forward swiftly to promulgate enforceable regulations establishing new deadlines, and, based upon the history of this matter, that the Attorney General will seek to ensure compliance with the regulations. The decision did not address whether the framework EOHLC established by the Guidelines, once promulgated as regulations under G.L. c.30A, is or will be consistent with the statutory authority of EOHLC under the Act. Further, the decision does not address the scope of the Attorney General’s enforcement authority beyond seeking declaratory or injunctive relief. We will continue to monitor this quickly evolving area of law.

If you have questions about MBTA Communities Act, please contact Attorneys Amy Kwesell at akwesell@k-plaw.com, Lauren Goldberg at lgoldberg@k-plaw.com, or your KP Law Attorney.

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