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## Full Speed Ahead? Where the MBTA Communities Law Stands

SJC's Ruling Clarified Big Questions, But Risk of Further Suits Remains

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**O**n Jan. 8, the Massachusetts Supreme Judicial Court upheld the MBTA Communities law on constitutional grounds, but deemed the guidelines promulgated by the Executive Office of Housing and Livable Communities ineffective and unenforceable because they were not promulgated in accordance with the Administrative Procedures Act.

Specifically, the SJC upheld the Legislature's delegation of authority to the HLC, reasoning that the MBTA Communities law did not violate the separation of powers doctrine despite the legislation requiring, in Milton's words, "transformative zoning changes." Moreover, the court held that Attorney General Andrea Campbell acted within her authority in enforcing the law, citing her office's broad power to "represent the public interest

and enforce public rights," including the power to seek declaratory and injunctive relief to compel compliance with the legislation.

### Administrative Rules Were at Issue

The fundamental purpose of the Administrative Procedures Act, or APA, is to "establish a set of minimum standards of fair procedure below which no agency should be allowed to fall and to create uniformity in agency proceedings."

The state's decision to issue new regulations through emergency action may be challenged.

In other words, the APA aims to ensure fair process: Stakeholders and interested persons must be given an opportunity to present data, views or arguments to the agency that is promulgating regulations.

Among other things, the APA requires that an agency file a notice of proposed regulation and a small business impact statement with the secretary of the commonwealth – both of which HLC admitted it did do not while promulgating guidelines under the MBTA Communities law.

The attorney general's office argued that as a technical matter, the APA applies to "regulations," and because the MBTA Communities legislation directed the agency to promulgate "guidelines," HLC was exempt from the APA procedure. Even if the APA applied, Campbell's office argued, the HLC nonetheless substantially complied with the statute and any omissions were therefore harmless.

Yet, "[g]iven the breadth, detail, substance, and mandatory requirements of the HLC guidelines," the court gave deference to the purpose behind the APA – fair process – and rejected the attorney general's argument that HLC's issuance of guidelines was exempt from the APA's requirements.

In other words, the "guidelines" functioned as "regulations" for the purpose of APA compliance.

### What Happens Now?

After the SJC's Jan. 8 order striking the guidelines issued under the MBTA Communities law, HLC issued emergency regulations on Jan. 14 to replace the guidelines.

The emergency regulations were effective immediately and for 90 days, but may be extended or made permanent following a public comment period. HLC has announced plans to pursue permanent implementation of the regulations.

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HLC contends that the emergency regulations do not substantively change the law's zoning requirements and do not affect any determinations of compliance already issued by the HLC.

Notably, however, HLC extended prior deadlines for MBTA communities that have not already complied with the law – an accommodation given to communities grappling with the uncertainty created by the Milton lawsuit. Specifically, the new deadlines require MBTA communities that did not meet prior deadlines to file an action plan to comply with the law by Feb. 13, and to submit applications for a determination of district compliance by July 14.

While the dust has settled following the SJC's decision earlier this month, the MBTA Commu-

nities law remains a politically sensitive topic. Namely, while the SJC upheld both its constitutionality and enforceability, the court took issue with the implementation process followed by HLC.

### Threat of Lawsuits Remains

Thus, HLC's decision to issue new regulations through emergency action may be challenged as a continued effort to avoid compliance with the APA.

While some MBTA communities may be quick to implement plans under the emergency regulations, other communities have shown resistance in adopting new zoning laws, even in the wake of the SJC's decision.

For example, Needham residents struck down the town's proposed plan during a referendum on Jan. 14 on the basis of the measure authorizing an area of multifamily zoning as-of-right that arguably exceeded the requirements of the now-stricken guidelines.

While Needham is the first MBTA community to reject a zoning proposal since the SJC's Jan. 8 decision, it remains to be seen whether the MBTA Communities law faces more pushback through failed referendums or an additional court challenge to the newly issued regulations. ◀

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