

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

THE ATTORNEY GENERAL,

Plaintiff / Counterclaim Defendant-Appellant,

v.

TOWN OF MILTON,

Defendant / Counterclaim Plaintiff / Third Party Plaintiff-Appellee,

AND

JOE ATCHUE,

Defendant-Appellee,

v.

THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,

Third Party Defendant-Appellant,

On a Reservation and Report by a Justice of
the Supreme Judicial Court for Suffolk County

**BRIEF FOR AMICUS CURIAE MASSACHUSETTS HOUSING
PARTNERSHIP FUND BOARD IN SUPPORT OF APPELLANTS**

BENJAMIN CHAPIN (*pro hac vice* pending) FELICIA H. ELLSWORTH (BBO # 665232)

ANDREW K. WAKS (*pro hac vice* pending) WILMER CUTLER PICKERING

WILMER CUTLER PICKERING

HALE AND DORR LLP

HALE AND DORR LLP

60 State Street

2100 Pennsylvania Avenue NW

Boston, MA 02109

Washington, DC 20037

(617) 526-6000

(202) 663-6000

Felicia.Ellsworth@wilmerhale.com

Benjamin.Chapin@wilmerhale.com

Andrew.Waks@wilmerhale.com

Attorneys for Amicus Curiae

Massachusetts Housing Partnership

September 16, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to S.J.C. Rule 1:21, Massachusetts Housing Partnership Fund Board represents that it is a public instrumentality and body politic and corporate of the Commonwealth of Massachusetts, doing business as the Massachusetts Housing Partnership. MHP does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MHP.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	2
TABLE OF AUTHORITIES	4
STATEMENT OF INTEREST OF AMICUS CURIAE	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	9
I. MUNICIPALITIES AND OTHER STAKEHOLDERS HAD AMPLE, EXTENDED OPPORTUNITY TO COMMENT ON THE GUIDELINES	10
II. THE STATE CAREFULLY CONSIDERED MUNICIPALITIES’ COMMENTS	14
III. MUNICIPALITIES SOUGHT AND RECEIVED SIGNIFICANT ASSISTANCE UNDERSTANDING AND COMPLYING WITH THE GUIDELINES	16
IV. SINCE PROMULGATING THE FINAL GUIDELINES, THE COMMONWEALTH HAS CONTINUED TO ACTIVELY SEEK AND CONSIDER PUBLIC INPUT	20
V. THE RECORD SHOWS THAT MUNICIPALITIES RECEIVED MORE THAN ADEQUATE NOTICE, NOTWITHSTANDING MILTON’S ARGUMENTS OF TECHNICAL NON-COMPLIANCE	22
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Carey v. Commissioner of Correction</i> , 479 Mass. 367 (2018)	26
<i>Central Maine Power Co. v. Federal Energy Regulatory Commission</i> , 252 F.3d 34 (1st Cir. 2001).....	25, 26, 27
<i>Colby v. Commissioner of Public Welfare</i> , 18 Mass. App. Ct. 767 (1984).....	10, 23
<i>Conservation Law Foundation v. Evans</i> , 360 F.3d 21 (1st Cir. 2004).....	23
<i>Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission</i> , 345 Mass. 228 (1962)	24
<i>Milligan v. Board of Registration in Pharmacy</i> , 348 Mass. 491 (1965)	26

STATUTES

G.L. c. 30A, § 2.....	12
G.L. c. 30A, § 5.....	26
St. 2020, c. 358, § 18.....	10

OTHER AUTHORITIES

Executive Office of Housing and Livable Communities, <i>Multi-Family Zoning Requirements for MBTA Communities</i> , available at https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities (last accessed September 16, 2024).....	22, 25
Massachusetts Housing Partnership, <i>MBTA Zoning & Complete Neighborhoods</i> , available at https://www.mhp.net/community/complete-neighborhoods-initiative (last accessed September 16, 2024)	17

Mass.gov, <i>Small Business Impact Statement</i> , available at https://www.mass.gov/doc/small-business-impact-statement	24
Town of Milton, <i>MBTA Communities Multi-Family Zoning Requirement</i> , available at https://www.townofmilton.org/301/ MBTA-Communities-Multi-Family-Zoning-Req (last accessed September 16, 2024).....	23

STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Massachusetts Housing Partnership Fund Board (MHP) respectfully submits this brief pursuant to the Court’s solicitation of amicus briefs on March 22, 2024.

MHP is a public instrumentality that works in concert with the Massachusetts Governor and the Executive Office of Housing and Livable Communities to increase the supply of affordable housing in Massachusetts. MHP’s mission encompasses, among other things, breaking down local barriers to housing development through effective guidance, advocacy, research, and technical support. Toward that end, MHP has used its hands-on experience working with local municipalities, along with its expertise in data analysis and housing policy, to propose, develop, and implement an array of state housing programs, policies, and resources. That includes the MBTA Communities Act and its corresponding Guidelines setting forth the requirements for zoning districts mandated by the Act, which are at issue in this case.

¹ Pursuant to Mass. R. A. P. 17(c)(5), the Massachusetts Housing Partnership Fund Board states that no party or party’s counsel authored this brief in whole or in part; no party, party’s counsel, or other person or entity—other than the Massachusetts Housing Partnership Fund Board, its members, or its counsel—contributed money intended to fund the preparation or submission of the brief; and neither the Massachusetts Housing Partnership Fund Board nor its counsel has represented any of the parties to these cases in any proceeding involving similar issues, or was a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

In addition to advocating for the enactment of the MBTA Communities Act, assisting in its development and implementation, and educating affected communities, MHP has provided technical assistance to over 125 cities and towns—including Milton—to help them comply with the law. MHP has an interest in defending the implementation of the MBTA Communities Act, both because the law advances MHP’s mission of increasing the stock of affordable housing in Massachusetts, and because MHP has invested substantial resources in the law’s success, including \$2.5 million expended to date on directly related technical assistance to cities and towns.

SUMMARY OF THE ARGUMENT

This case concerns (1) “the scope of a municipality’s legal obligations” under the MBTA Communities Act and its corresponding Guidelines, and (2) “whether the Attorney General has authority and standing to enforce compliance with the same.” RA I:45. MHP agrees with the Attorney General that Milton is required by law to adopt a zoning district that complies with the Act and the Guidelines, and that the Attorney General may enforce that requirement through this lawsuit.

MHP submits this brief to provide additional context for the Court’s resolution of the first of these two issues. In its brief, Milton argues that the Guidelines are unenforceable because they were not published in the

Massachusetts Register or accompanied by a small business impact statement.

Milton’s argument elides several critical facts, discussed in this brief: Every affected municipality (including Milton) received direct notice of the Guidelines’ development and was invited to comment; the comment period afforded by the state exceeded the period provided for by the Massachusetts Administrative Procedure Act; numerous municipalities did, in fact, submit comments, which were carefully considered and addressed by the Executive Office of Housing and Economic Development (EOHED) and Executive Office of Housing and Livable Communities (EOHLC)²; and Milton itself took ample advantage of this opportunity to have its comments heard and addressed.

Where, as here, every entity affected by agency action—including the party objecting to the action—had actual notice and extended opportunity to comment on the action, the technical notice deficiencies which Milton alleges cannot provide the basis for invalidating the agency’s well-considered action.

² As explained in the Attorney General’s brief (at 16 n.5), EOHLC was formerly known as the Department of Housing and Community Development and was situated within the Executive Office of Housing and Economic Development, or EOHED. EOHLC became its own secretariat in May 2023, and EOHED was renamed the Executive Office of Economic Development (EOED). For simplicity, like the Attorney General’s brief, this brief uses “EOHLC” and “EOHED” throughout, even when describing times at which those entities went by the names DHCD and EOED, respectively.

ARGUMENT

EOHLC, in coordination with MHP and other organizations, undertook a large-scale outreach campaign to ensure affected municipalities were aware of the agency's Section 3A Guidelines, invite their comments and input, and provide direct technical assistance to help them comply with the law. Milton contends that, notwithstanding the fact that every single affected municipality (including Milton) had ample notice and opportunity to comment on the Guidelines—indeed, far greater notice and comment opportunity than required by law—the 3A Guidelines must be invalidated because they were not also published in the Massachusetts Register and accompanied by a small business impact statement. See Appellees' Br. 37-40.

The law does not require this wasteful and irrational result. For one thing, as the Attorney General's brief explains, the Guidelines are not subject to the Massachusetts Administrative Procedure Act's rulemaking requirements. Appellant's Br. 47-50. When the Legislature intends for those regulatory requirements to apply, it passes statutes that call for "regulations." When, as here, the Legislature selects different language—directing an agency to adopt "guidelines," rather than "regulations"—the APA's notice requirements do not apply.

But even if the Massachusetts APA’s requirements did apply, longstanding precedent instructs that notice need only be “sufficient to give interested parties a reasonable opportunity to know what was involved and to participate in the rule making process.” *Colby v. Commissioner of Pub. Welfare*, 18 Mass. App. Ct. 767, 780 (1984). As this brief explains, municipalities, including Milton, had that and more.

I. MUNICIPALITIES AND OTHER STAKEHOLDERS HAD AMPLE, EXTENDED OPPORTUNITY TO COMMENT ON THE GUIDELINES

To begin with, EOHLC afforded municipalities substantial time to comment on the Guidelines and repeatedly reached out to every affected entity to educate them on the Guidelines and solicit feedback. That notice and comment process—marked by flexibility and robust engagement—went well beyond what is required by law.

The MBTA Communities Act was signed into law on January 14, 2021. St. 2020, c. 358, § 18. Shortly thereafter, EOHLC sent a notice to municipalities discussing the definition of an MBTA community and what the law requires of such communities, and explaining its anticipated process for promulgating more detailed guidelines. RA I:116, 140-141. As EOHLC explained in that widely disseminated initial notice, this process was to include not only “consulting with the Massachusetts Bay Transportation Authority and the Massachusetts

Department of Transportation,” but also ensuring there was adequate time to “seek and consider input from affected MBTA communities as well.” RA I:141.

EOHLC did just that. The agency spent nearly a year conferring with and actively gathering comments from stakeholders before publishing its draft Guidelines. That process began with a series of stakeholder meetings. On May 21, May 28, and June 4, 2021, EOHED (then parent agency of what is now EOHLC) convened three successive gatherings of stakeholders to solicit their input into the development of the agency’s Section 3A Guidelines. These discussions were jointly facilitated by EOHED and MHP and included the EOHED Secretary, multiple state agencies, regional planning agencies, and representatives of the Massachusetts Municipal Association (MMA), which advocates for the interests of the state’s cities and towns. Each stakeholder meeting included a dedicated opportunity for participants to comment on and discuss issues impacting the development of the Guidelines.

During the next several months, MHP, upon the request of and in partnership with EOHED, conducted additional data analyses to address this stakeholder feedback. In particular, MHP and its partners explored alternative definitions of “reasonable” multifamily zoning districts, and extensively modeled how those definitions would affect cities and towns of different sizes and types. This research enabled EOHLC to refine its definition of a “reasonable” district in

the Guidelines in a manner that reflected and was responsive to the feedback received from regulated municipalities and affected stakeholder groups.

EOHED published its draft Guidelines on December 15, 2021. On the same day, EOHED emailed notice to officials of every single municipality affected by the MBTA Communities Act. RA I:157-159. EOHED's letter explained that it was sent in order to "share ... [the agency's] draft guidelines for public comment and review." RA I:158. The letter went on to explain that final Guidelines would only "be issued once [EOHED] has an opportunity to solicit, deliberate on, and respond to comments from MBTA communities and other interested stakeholders." *Id.* EOHED made clear that it anticipated its "draft guidelines may be modified as appropriate based on this additional public input," that it "intend[ed] to spend the next few months focused on this aspect of the work," and that it affirmatively "want[ed] to get [the] thoughts and reactions" of affected municipalities and stakeholders. *Id.* To that end, EOHED's letter provided those municipalities with a link to a website containing the draft Guidelines, information and updates about the Guidelines, and guidance about obtaining technical assistance from organizations like MHP to assist in complying with the Guidelines. RA I:159.

EOHED accepted public comments through March 31, 2022—that is, for more than fifteen weeks. That comment period far exceeded the three weeks' notice that would have been required by the Massachusetts APA. G.L. c. 30A, § 2.

Affected municipalities and other stakeholders accordingly had *more than five times as long* to participate in the formal comment period than required by law.

During that extended public comment period, both EOHED and MHP continued to actively educate municipalities on the Guidelines and to solicit their input and comment. EOHED and MHP hosted or participated in more than 24 public meetings about the Guidelines, during which they presented the Guidelines and engaged in dialogue with stakeholders about them. This public outreach included sessions sponsored by MMA (which, again, represents the interests of towns like Milton), and by several of the state's regional planning agencies, including the Metropolitan Area Planning Council, which is Milton's regional planning agency. RA I:117-118.

EOHED received nearly 400 public comments by the deadline, including comments from MMA, from 90 of the 175 affected cities and towns, and from business community leaders including the Greater Boston Chamber of Commerce and the South Shore Chamber of Commerce, which together represent over 2,300 businesses in the Commonwealth.³ RA I:117. The Town of Milton was among the municipalities that availed themselves of the opportunity to provide comment, submitting a five-page comment letter in March 2022. Milton's submission argued

³ EOHED also received feedback from 25 nonprofit organizations, eight legislators, and around 240 individual community members.

that the Guidelines should permit greater flexibility for municipalities in choosing the size, location, and composition of a compliant zoning district. RA I:117; 160-164. As discussed in the next section, EOHED revised the Guidelines to do exactly that. See *infra* pp.14-15. Notably, Milton recognized in this letter that the law was a “mandate,” and that the town had an “obligation to Zone for additional housing.” RA I:160; 163.

II. THE STATE CAREFULLY CONSIDERED MUNICIPALITIES’ COMMENTS

When finalizing the Guidelines, EOHED and EOHLC took seriously the voluminous public comments they received. An interagency team led by EOHED (with active participation from MHP) analyzed the nearly 400 public comments and, where appropriate, worked to incorporate them into the final Guidelines, which were promulgated on August 10, 2022. RA I:118; 188-213. This interagency group identified several recurring themes in the public comments, particularly regarding (1) the community categories (e.g., “commuter rail communities” and “rapid transit communities”) used to define the “reasonable size” of a municipality’s multifamily zoning district, and (2) the technical manner in which a half-mile proximity to transit stations was used to define community categories and the size and location of zoning districts.

To address these and other issues raised by stakeholders, EOHED and EOHLC made four substantial changes to the Guidelines. First, EOHED

substantially reworked its community categories to eliminate the “bus communities” category (which then defaulted to either “commuter rail” or “MBTA adjacent” status) and to split “MBTA adjacent communities” into “adjacent” and “adjacent small” categories with distinct requirements. RA I:188-189. Second, EOHED modified the criteria for a “reasonable size” district in order to create safety valves for rural and smaller communities for whom the original proposal might have been too burdensome. RA I:195-196. Third, EOHED revised the Guidelines to provide greater flexibility for the location of districts in communities (like Milton) where only part of a transit station’s immediate surroundings fell within the municipality’s borders. RA I:198-199. And finally, EOHED made the Guidelines more flexible by treating required site plan review and affordability requirements as consistent with “as of right” zoning. RA I:193-194.

EOHLC’s responsiveness to public input did not end when it promulgated the Guidelines in August 2022. EOHLC made two further, significant revisions based on additional public comments received after the formal comment period. Those revisions occurred when EOHLC published revised Guidelines on October 21, 2022, and again when it published further revised Guidelines on August 17, 2023. The agency issued its October 2022 revision to address feedback from municipal leaders in some MBTA communities who requested that EOHLC revise the Guidelines to expand the circumstances in which an inclusionary zoning

requirement would be deemed in compliance with the law. RA I:118; RA I:214-258. In August 2023, EOHLC further revised the Guidelines in response to additional feedback from municipal leaders in MBTA communities to offer a path for municipalities to receive some credit for mixed-use development zoning districts, and to outline how Section 3A compliance may affect additional discretionary grant award decisions. RA I:119; RA I:259-306.

Through the above-described process, EOHLC sought and received extensive feedback and data from the public on the draft Guidelines, going above and beyond the minimum activities required under the Massachusetts APA and ensuring the “informed agency decisionmaking” that Milton cites as the fundamental purpose of Chapter 30A. Appellee’s Br. 10.

III. MUNICIPALITIES SOUGHT AND RECEIVED SIGNIFICANT ASSISTANCE UNDERSTANDING AND COMPLYING WITH THE GUIDELINES

Public comments received from many affected municipalities sought either guidance from EOHED and EOHLC regarding whether certain proposals would constitute compliance with the law or direct assistance with developing a compliance plan. EOHED, EOHLC, and MHP addressed those comments, too. Concurrent with the above-described outreach process, MHP and EOHLC provided municipalities with significant assistance to better understand and comply with the law and the Guidelines.

The first component of that outreach was a robust education campaign, spearheaded in large part by MHP on EOHLC's behalf. In early 2022, MHP launched an MBTA Communities website containing background information about the law, tools for understanding the law and explaining it to community members, and directions for how communities could obtain technical assistance to aid their compliance with the law. MHP, *MBTA Zoning & Complete Neighborhoods*, available at <https://www.mhp.net/community/complete-neighborhoods-initiative> (last accessed September 16, 2024). The website also contained an array of resources to help communities fully understand and react to the law, including:

- A 10-part webinar series entitled “More than Compliance: Multifamily Districts that Work in your Community,” which was offered live between September and December 2022, and attended by over 400 individuals from around Massachusetts. The webinars provided a step-by-step walk-through of developing an action plan to establish interim compliance with the law; an overview of the different types and styles of densities that communities could zone for to comply with the law; a discussion of site plan review and the steps required to complete a review; and methods for maintaining affordability in MBTA districts, among other topics.

- A webinar entitled “MBTA Communities for Planners,” first offered on November 27, 2023, which provided an opportunity for planning staff from different communities to describe the approaches they were using to identify district locations, educate their communities, and prepare for votes before Town Meetings or City Councils.
- A video and presentation entitled “Tools and Strategies for Explaining MBTA Communities Zoning,” which captured a discussion among approximately 100 consultants and planners regarding best practices for explaining MBTA Communities to politicians and community planners.

MHP ensured that these educational materials were distributed widely to interested municipalities and other stakeholders, including by leveraging its own internal mailing lists (which include over 600 stakeholders) and the MassPlanners mailing list (the principal mailing list for urban planners in Massachusetts).

In addition to outreach, MHP and other entities provided direct monetary grants and technical assistance to 165 of the 177 MBTA communities impacted by the Guidelines to aid their compliance with the law, at a cost of over seven million dollars. MHP itself provided technical assistance to 125 cities and towns in Massachusetts, including Milton. MHP’s technical assistance included:

- working with municipal staff, officials, boards, and commissions to identify potential MBTA district locations;
- estimating unit capacity and gross density using EOHLC's compliance model;
- determining appropriate use and intensity parameters, including with respect to parking, building height, and setbacks;
- drafting zoning bylaws, ordinances, and amendments;
- supporting local community education and engagement efforts;
- preparing economic feasibility analyses; and
- analyzing the interaction of MBTA districts with preexisting mandatory mixed-use districts.

Milton specifically sought and received significant assistance to aid in its compliance with the law and the Guidelines. MHP and the Metropolitan Area Planning Council provided approximately \$20,000 in consultant assistance and GIS (Geographic Information System) analysis support to Milton. EOHLC awarded Milton an additional \$50,000 community planning grant for MBTA compliance in 2022, and an additional \$30,000 for the same purpose in 2023. RA I:56; RA II:165, 182, 265, 406. This assistance supported a range of services for the town. At Milton's request, MHP entered into a contract with the consulting firm Utile, which worked with Milton town staff and members of the Town Select

Board to identify potential MBTA district boundaries and zoning parameters. Using this and other technical assistance, town officials produced a proposed amendment to the town's zoning code and zoning map to allow multi-family zoning. Milton then submitted a "pre-adoption" application that EOHLC reviewed. Town staff in turn consulted numerous times with EOHLC staff to develop the final zoning plan that was presented on the Special Town Meeting Warrant, which the Special Town Meeting later adopted on December 11, 2023, by a vote of 158 to 76. Milton also shared with EOHLC copies of its compliance materials, including the final zoning text and associated zoning map amendments adopted by the Special Town Meeting, the compliance model and the GIS shapefiles, and other materials that the town had in its possession prior to the compliance deadline. RA II:406.

IV. SINCE PROMULGATING THE FINAL GUIDELINES, THE COMMONWEALTH HAS CONTINUED TO ACTIVELY SEEK AND CONSIDER PUBLIC INPUT

Since publishing the operative Guidelines in August 2023, EOHLC and MHP have continued to solicit feedback and comment from affected municipalities. MHP, for instance, conducted a year-end survey in 2023 to gather information about municipalities' thoughts on technical assistance needs and community outreach. Meanwhile, EOHLC, EOHED, MHP, and other nonprofits continue to conduct webinars and trainings around the Commonwealth, which

offer an opportunity not just to educate municipalities on compliance, but also to take stock of their continuing input and answer whatever questions they may have.

Milton, again, has taken advantage of this opportunity for continuing public engagement. In August and September 2023, the town sent additional comments to the MBTA regarding implementation of the law. In August, Milton's Select Board asked the MBTA to provide a formal explanation for classifying the Mattapan line as rapid transit (a decision which imposed greater density requirements on Milton's MBTA district). RA II:183-186. The MBTA promptly responded to Milton's inquiry. RA II:187-188. And again in September, Milton's Planning Board and Select Board sent a letter requesting that the MBTA reconsider classification of the Mattapan Trolley line as rapid transit. RA II:189-191. The MBTA provided a six-part explanation for its classification of the trolley, and invited the town to continue to reach out if it had any further compliance-related questions. RA II:264-265. And a few months later, in January 2024, EOHLC delayed enforcement of the law against Milton based on the affirmative steps Milton had taken to comply with it—before the town reversed course via referendum. RA II:406. Indeed, even *after* Milton voted against complying with the law, EOHLC repeatedly offered to “continue to work with the Town to ensure that Milton can achieve compliance with the MBTA Communities law.” RA II:411; see also RA II:412 (EOHLC letter to Milton town administrator offering

“to meet[] with you soon” and “work together on a new plan that will bring the town into compliance”). Yet despite all this assistance, Milton remains one of only two covered municipalities not in compliance or interim compliance with the Guidelines. See Executive Office of Housing and Livable Communities, *Multi-Family Zoning Requirements for MBTA Communities*, available at <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last accessed September 16, 2024).

V. THE RECORD SHOWS THAT MUNICIPALITIES RECEIVED MORE THAN ADEQUATE NOTICE, NOTWITHSTANDING MILTON’S ARGUMENTS OF TECHNICAL NON-COMPLIANCE

The public record makes clear that EOHLC, EOHED, and MHP spent years making extraordinary efforts to educate the impacted municipalities and other stakeholders on the Guidelines, gather public comments, respond accordingly, and help municipalities with their efforts to comply with the law and Guidelines. Milton, like other impacted municipalities, was provided actual notice of the Guidelines, extra time to submit comments and engage in the process of finalizing the Guidelines, substantial assistance in understanding the new law’s requirements, and a receptive set of government officials and nonprofit actors ready and willing to receive, consider, and engage on any substantive feedback. Indeed, Milton’s own website makes this clear, listing more than 60 letters, presentations, maps, and briefings prepared by or presented to the town over multiple years, including

documents reflecting back-and-forth with the state and technical assistance providers, as detailed above. See Town of Milton, *MBTA Communities Multi-Family Zoning Requirement*, available at <https://www.townofmilton.org/301/MBTA-Communities-Multi-Family-Zoning-Req> (last accessed September 16, 2024).

Given this long history of direct engagement, the absence of a formal notice of public hearing in the Massachusetts Register or the other procedural formalities pointed to by Milton cannot have made any practical difference to the Guidelines or to the rights of affected entities—least of all Milton. Even where notice of a regulation is technically deficient—and it is not at all clear that it was here—courts do not invalidate a regulation if the notice actually provided was “sufficient to give interested parties a reasonable opportunity to know what was involved and to participate in the rule making process.” *Colby*, 18 Mass. App. Ct. at 780; see also *Conservation Law Found. v. Evans*, 360 F.3d 21, 29-30 (1st Cir. 2004) (agency’s failure to provide formal public comment period under federal APA harmless where agency held fourteen public meetings and solicited public participation, and plaintiffs “took advantage of these opportunities”).

Milton and other towns had such opportunities in spades. Municipalities and the broader public were well aware of the Guidelines, thanks to the painstaking efforts of EOHLC, EOHED, and MHP. Indeed, every single regulated entity was

directly contacted and specifically made aware of the Guidelines, and invited to participate in their development and refinement. Milton itself took advantage of that opportunity on multiple occasions. The purpose of the Massachusetts APA's formal notice requirements has thus been more than achieved. That also distinguishes this case from *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission*, 345 Mass. 228, 235 (1962), on which Milton relies (at 37-38). There, the agency promulgated a regulation without *any* form of notice, hearing, or opportunity for public comment. *Id.* at 230, 234, 235. Here, by contrast, each of those steps was completed—Milton's complaint, unlike in *Kneeland*, is simply that the agency's method of doing so departed slightly from the method contemplated by the Massachusetts APA.

With respect to the absence of a Small Business Impact Statement, such statements are hardly economic treatises. The model statement available on the official Massachusetts website, for instance, consists of a two-page checklist, which includes only two questions applicable to a regulation that imposes no direct regulatory obligation on private businesses: (1) Is the regulation likely to deter the formation of small businesses and (2) Is the regulation likely to encourage the formation of small businesses? Mass.gov, *Small Business Impact Statement*, available at <https://www.mass.gov/doc/small-business-impact-statement>. When EOHED promulgated the Guidelines in August 2022, it emphasized that, by

confronting the housing crisis, the Guidelines would help ensure that Massachusetts “remain[ed] a desirable place for ... businesses.” RA I:187.⁴ EOHLC has publicly stated its conclusion that the Guidelines will help Massachusetts “compete economically against peer states” and reduce the “risk of future job growth moving outside Massachusetts.” EOHLC, *Multi-Family Zoning Requirement for MBTA Communities*, available at <https://mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities>. Milton has not—and cannot—explain how copying-and-pasting these conclusions into a checklist would have made any difference.

Even if the Court believes that these procedural issues were not harmless and that remand for publication in the Register or for a small business impact statement is proper, that *still* would not require vacating the Guidelines. Nothing in Massachusetts law requires that result. In fact, analogous federal law is highly instructive on this point—when it comes to the federal APA, courts have often stressed that vacatur is often not the appropriate remedy for alleged procedural hiccups. “A reviewing court that perceives flaws in an agency’s explanation is not required automatically to set aside the inadequately explained order.” *Central*

⁴ The other questions include queries that are obviously inapplicable to the Guidelines, and which would be answered with a simple “no,” like: “Will small businesses have to implement additional recordkeeping procedures?”

Maine Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001). Rather, “[w]hether to do so rests in the sound discretion of the reviewing court; and it depends inter alia on the severity of the errors, the likelihood that they can be mended without altering the order, and on the balance of equities and public interest considerations.” *Id.*

There is no reason Massachusetts law should operate differently. “The purpose of the Massachusetts Administrative Procedure Act ... is similar to that of the comparable Federal statute.” *Carey v. Commissioner of Correction*, 479 Mass. 367, 371 n.8 (2018); see also *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 500 (1965) (Massachusetts APA and federal APA are “comparable”). Indeed, consistent with this approach from federal cases, Massachusetts law specifically instructs that a regulation is to remain in force while a deficient small business impact statement is reworked: “The requirements to file small business impact statements ... shall be enforceable by a civil action for mandamus relief, but the sufficiency of the statement filed shall not be grounds for invalidating or staying the effect of the regulation.” G.L. c. 30A, § 5.

Here, numerous factors support permitting the Guidelines to remain in force, even if the court finds that further notice and comment or a small business impact statement is required. The Commonwealth provided extensive notice to the public of the Guidelines and studied their likely economic effects. Under those

conditions, failing to formally give notice in the Register or document those economic effects in the specific format of a small business impact statement cannot be considered a “sever[e]” error. *Central Maine Power Co.*, 252 F.3d at 48. The errors can likely be corrected “without altering the order” for the same reason—notice has already been given, and the economic impact of the Guidelines has already been analyzed, meaning that these procedural steps are highly unlikely to bring new information to light. *Id.* And the balance of equities and public interest considerations tip decisively in favor of maintaining the Guidelines’ effect. As the Attorney General’s brief explains, there is a housing affordability crisis throughout the Commonwealth, including in Milton, and enforcement of the MBTA Communities Act is critical to remedying that. Appellant’s Br. 12-16. Most affected communities are well down the road of complying with the law, with more than 70 cities and towns having already adopted zoning districts to comply with it—encompassing over 160,000 multi-family housing units, including existing units and potential future units.⁵ And developers have already begun moving forward with proposals to build units in those new districts. Staying this statewide effort and putting all these plans on hold, only to (in all likelihood) restart them

⁵ To be clear, these new zoning districts merely ensure that multi-family units *can* be produced as of right. They neither mandate nor guarantee that these units will in fact be built, and do not mandate that *any* single-family home must be replaced with multi-family units.

months or years from now, would do nothing but harm the public—keeping affordable homes out of reach for many Bay Staters, and needlessly burdening the entire state with higher housing costs. And if the Guidelines were changed following such a pause, municipalities that have invested substantial resources into complying with the law, as opposed to flouting it, would be faced with unnecessary costs and disruption. Milton’s refusal to comply with the law—after voluntarily taking tens of thousands of dollars in state assistance to do exactly the opposite—does not warrant such a result.

CONCLUSION

Every entity affected by the Guidelines received ample, actual notice of their promulgation and had an opportunity to comment on them, and the Guidelines are otherwise consistent with the law (for the reasons explained in the Attorney General’s brief). Accordingly, the Court should order the Attorney General’s requested relief.

Respectfully submitted,

/s/ Felicia H. Ellsworth

BENJAMIN CHAPIN (<i>pro hac vice</i> pending)	FELICIA H. ELLSWORTH (BBO # 665232)
ANDREW K. WAKS (<i>pro hac vice</i> pending)	WILMER CUTLER PICKERING
WILMER CUTLER PICKERING	HALE AND DORR LLP
HALE AND DORR LLP	60 State Street
2100 Pennsylvania Avenue NW	Boston, MA 02109
Washington, DC 20037	(617) 526-6000
(202) 663-6000	Felicia.Ellsworth@wilmerhale.com
Benjamin.Chapin@wilmerhale.com	
Andrew.Waks@wilmerhale.com	
	<i>Attorneys for Amicus Curiae</i>
	<i>Massachusetts Housing Partnership</i>

September 16, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including Rule 16(a)(13) (addendum), Rule 16(e) (references to the record), Rule 20, and Rule 21.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. A. P. 20(a)(2)(D), the brief contains 4,880 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, version 2407, build 17830.20166, in 14 point Times New Roman font. The undersigned has relied on the word count feature of this word processing system in preparing this certificate.

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH

WILMER CUTLER PICKERING

HALE AND DORR LLP

60 State Street

Boston, MA 02109

(617) 526-6000

Felicia.Ellsworth@wilmerhale.com

September 16, 2024

CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the penalties of perjury, that on September 16, 2024, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, pursuant to Mass. R.

A. P. 13(c):

JAIME A. SANTOS
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4034
jsantos@goodwinlaw.com

KEVIN P. MARTIN
CHRISTOPHER J.C. HERBERT
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
Kmartin@goodwinlaw.com
Cherbert@goodwinlaw.com

PETER L. MELLO
MURPHY HESSE TOOMEY & LEHANE, LLP
50 Braintree Hill Office Park, Suite 410
Braintree, MA 02184
(617) 479-5000
pmello@mhtl.com

ANDREA JOY CAMPBELL
Attorney General

ERIC A. HASKELL
JONATHAN BURKE
ERIN E. FOWLER
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 963-2855
eric.haskell@mass.gov

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP

60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com