

What Towns Need to Know, Post Milton, About the MBTA Communities Act

Last week, in a long-awaited decision by many communities in eastern Massachusetts, the Supreme Judicial Court (SJC) [ruled](#) that the MBTA Communities Act, a Massachusetts zoning law aimed at increasing housing near public transit was constitutional and that the Attorney General had the power to enforce it. Although it upheld the Act in *Attorney General v. Town of Milton*, the SJC identified missteps of the procedure in the adoption of Guidelines issued by EOHLC (a state agency), which had imposed deadlines for compliance for affected municipalities. The *Milton* decision surely answered the main question at issue – can the state require municipalities to change their local zoning (yes) – but it left open questions about the immediate implications for municipalities that are out of compliance and how the state plans to pursue enforcement.

Here are the main take-aways from the SJC's *Milton* decision:

1. G.L. 40A, § 3A (MBTA Communities Act) is constitutional and MBTA communities are mandated to create a compliant district;
2. Guidelines issued by EOHLC are void because the agency failed to follow the Administrative Procedures Act to develop actual regulations;
3. The AGO cannot enforce the EOHLC Guidelines (such as compliance dates) unless or until EOHLC follows the procedure.
4. Although the statute calls for the loss of certain state funding alone as a consequence, that alone is not enough to achieve the statute's mandatory of creating zoning for multifamily housing in each community; therefore, the AG can use injunctive relief and equitable authority to enforce the.

Where does this leave MBTA Communities?

- The Act remains in full force and every MBTA community must comply, or risk loss of state funding (per the Act) and enforcement by the Attorney General;
- The deadlines set forth in EOHLC Guidelines are now null and may not be enforced;
- It is anticipated that EOHLC will issue draft regulations (likely to be strikingly similar to the Guidelines) shortly for a review and comment period and go through the formal promulgation process, likely to take a few months; and
- In the meantime, the state is likely to issue emergency regulations, which are good

for 3 months. Indeed, they were expected by Friday, January 10, but none have been issued as of publishing.

So, is that it?

No. The SJC left a number of issues undecided, such as whether certain Guidelines went beyond the authority granted to the Commonwealth under the Act and what precisely the AG can do to enforce the Act's requirements. These are questions that will likely reach the SJC, again, for resolution in the future.