

Massachusetts towns, state government clash over affordable housing mandate

Massachusetts Supreme Court justices gave a sympathetic ear to communities that have rebelled against state mandates to transform their housing stock.

[THOMAS F. HARRISON](#) / October 7, 2024



The John Adams Courthouse in Boston, home of the Massachusetts Supreme Judicial Court. (Photo by Swampyank from Wikipedia Commons via Courthouse News Service)

BOSTON (CN) — Massachusetts can force scores of towns to allow high-density and low-income housing, the state attorney general told the state’s highest court on Monday, but while the justices appeared divided at oral argument, many of them sounded doubtful.

A state law says communities have to allow the housing or be cut off from several grant programs. The town of Milton voted in a referendum to defy the state and accept the loss of funding, but the attorney general sued and claimed the right to enforce the law anyway.

“How is it that you’re not ... trying to take away the right of the residents of Milton to exercise their franchise?” Justice Gabrielle Wolohojian demanded of assistant attorney general Eric Haskell.

“So the referendum was a meaningless act?” pressed Justice Frank Gaziano.

“I don’t think we have to go that far,” Haskell replied.

“But my question goes that far,” Gaziano shot back. “So the result was meaningless?”

Haskell said the town had a number of options as to how to comply with the law and a referendum could decide among those options. “Our point is that the town needs to enact something.”

Justice Scott Kafker, who appeared far less sympathetic to the town, asked how much money Milton was giving up. Haskell replied “zero,” since the town hasn’t received any money under any of the grant programs since 2012.

“So this is a massive ... piece of legislation dealing with one of the biggest problems in Massachusetts and the legislature’s only remedy is to bar them from a few specific grant programs that most towns don’t get any money on?” Kafker asked skeptically. “They created, instead of a stick, a twig to hit them with?”

Massachusetts’ home prices and rents are among the highest in the nation, due in part to the fact that over the last two decades suburban communities have adopted zoning rules that sharply limit the number of new home sites. In 2021 the state responded with a law that requires the more than 170 communities served by the greater Boston public transit system to allow high-density and low-income housing near transit stops.

Most communities have complied, but a few have rebelled, claiming the law is an unfunded mandate requiring new services and infrastructure they can’t afford. Some small rural communities complain that the law will fundamentally transform their character by requiring 25% of their housing stock to be in a high-density area.

Milton, an affluent Boston suburb that is the birthplace of the President George H. W. Bush, held a referendum in February in which citizens voted 5,115 to 4,346 to defy the new rule. The resulting lawsuit drew a staggering 70 amicus briefs from other towns, real estate agents, construction companies, housing activists, lenders, business groups, religious organizations and the AFL-CIO.

The justices who seemed sympathetic to the town focused on the fact that the state law required a housing agency to develop “guidelines” for towns to follow, but the guidelines weren’t promulgated as binding regulations.

Guidelines are “like background music,” Kafker said, prompting Haskell to argue that these weren’t ordinary guidelines but rather “guidelines with teeth.” He also argued that the failure to promulgate regulations was “harmless error” because the result would have been the same.

But “this is different from our other harmless-error cases,” Justice Dalila Wendlandt objected.

Adopting a regulation would have required a small-business impact statement and a public and private fiscal analysis, which the agency never bothered with, said Milton’s lawyer, Kevin Martin of Goodwin Procter in Boston.

“There’s been a lot of controversy about this, if they redo the process, they might do it differently,” he suggested.

The justices who seemed sympathetic to the town asked Haskell whether, if they found that the guidelines weren’t binding, that would end the case. “If we conclude that the guidelines are unenforceable, is there any other issue we need to reach?” Wolohojian asked.

Gaziano was more pointed. “If ... the agency has run amok, then what?”

Haskell suggested that the court could still force Milton to follow the law, but Wendlandt said, “I don’t understand that at all.” At that point, Milton wouldn’t have violated the law.

“I guess that’s right,” Haskell finally admitted.

“If the guidelines are improper,” Wendlandt said, “I think the answer ... is that this case must be dismissed.”

But Kafker remained convinced that the legislature's intent was being thwarted. “I get it; we don’t want agencies going outside the rules,” he said, “but can’t the legislature say, this is such a big crisis, we want you to act immediately?”

“But they didn’t do that here,” Martin replied.

Nevertheless, “towns can’t vote not to comply with state law,” Kafker told Haskell. “This is significant legislation addressing a societal crisis, and it’s not going to happen without your having a right to enforce it.”

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