COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 2012-2901D

ARISE FOR SOCIAL JUSTICE,
COALITION FOR SOCIAL JUSTICE,
MASSACHUSETTS COALITION FOR THE HOMELESS, and
NEIGHBOR TO NEIGHBOR-MASSACHUSETTS,
Plaintiffs,
v.

THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, et al.,
Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S DENIAL OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs ARISE for Social Justice, the Coalition for Social Justice, the Massachusetts Coalition for the Homeless, and Neighbor to Neighbor-Massachusetts, on behalf of themselves and their members, ask the Court to reconsider the denial of their motion for preliminary injunctive relief prohibiting the Department of Housing and Community Development (DHCD) from implementing proposed emergency regulations and policies that will severely restrict access to emergency shelter for homeless families with children.

II. GROUNDS FOR RECONSIDERATION.

Plaintiffs respectfully submit that the Court's August 6, 2012 decision:

1. Does not enforce the plain language of the 60-day notice proviso which applies "notwithstanding any general or special law to the contrary" including "notwithstanding" the 15-day notice proviso.

2. Does not harmonize the 15-day and 60-day notice provisos, and instead allows the 15-day proviso to trump the 60-day proviso.

3. Does not recognize or give weight to prior precedent of this Court finding that organizations such as the Coalition for the Homeless have a private right of action to challenge the failure of the agency administering the EA program to give the required advance notice.

4. Does not recognize or give weight to the Legislature's intent that the advance notice proviso provide an opportunity to protect homeless families through discussions of proposed changes in benefits or eligibility between legislators, advocates including the plaintiffs, and the defendants.

5. Does not credit the evidence that more than100 homeless families will be denied access to shelter under regulations that were implemented before expiration of the statutorily required 60-day advance notice period.

6. Does not properly weigh the balance of harms to the plaintiffs and the defendants in light of the each party's chance of success on the merits. See Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990); Packaging Indus., Inc. v. Cheney, 380 Mass. 609, 616-17 (1980).

Plaintiffs therefore respectfully again ask this Court to reconsider its decision of August 6, 2012 and to issue a preliminary injunction against enforcement of the regulations that were not preceded by 60 days' advance notice.

I. The Court Has a Duty to Interpret the Line Item In Accord with Its Plain Language and to Reconcile Potentially Conflicting Provisions.

The line item expressly requires DHCD – "notwithstanding *any* general or special law to the contrary" – to provide 60 days' advance notice to the Legislature before "promulgating or amending *any* regulations, administrative practice or policy that would alter eligibility . . . other

than that which would benefit the clients. . . ." The Court's August 6 decision did not give effect to the plain and unambiguous language of the 60-day proviso which applies "notwithstanding any general or special law to the contrary." There is no such language in the 15-day proviso. It was therefore incorrect to read the 15-day notice provision as trumping the 60-day notice provision. See Field v. Napolitano, 663 F.3d 505, 511 (1st Cir. 2011) ("[t]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section") (quoting Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993)); see also Hollum v. Contributory Ret. Appeal Bd., 53 Mass. App. Ct. 220, 223 (2001) ("[t]he word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive").

Further, the Court's August 6 decision did not attempt to reconcile this 60-day proviso with the 15-day proviso even though the 60-day proviso states that it applies "notwithstanding any general or special law to the contrary." The correct approach is to reconcile the two provisos by recognizing the difference between "regulations, administrative practice or policy that would alter eligibility" in the 60-day proviso and "written criteria" in the 15-day proviso. Thus, 60 days' notice is required of any proposed regulations or policy materials that "alter eligibility," and 15 days' notice is required of any additional written criteria that do not further alter eligibility. See Water Dep't of Fairhaven v. Dep't of Revenue, 455 Mass. 740, 744-45 (2010) ("[w]here possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction") (citations omitted). The plaintiffs here challenge the implementation of regulations without the requisite 60 days' notice. Since such regulations are expressly governed by the 60-day notice provision and not by the 15-

day notice proviso, implementing them without the required notice unquestionably violates the line item.

Instead of reconciling the two provisos, the Court deferred to the agency on the ground that, "[t]he line item is certainly not a model of clarity, but DHCD's position that only 15 days' notice was required is not an unreasonable one." Memorandum at 3. In so doing, the Superior Court did not comply with the Supreme Judicial Court's admonition that "principles of [agency] deference... are not principles of abdication.... An agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts." Smith v. Dep't of Transitional Assistance, 431 Mass. 638, 646 (2000). Accord Woods v. Exec. Office of Communities and Dev., 411 Mass. 599, 606 (1992) ("[a]n erroneous interpretation of a statute by an administrative agency is not entitled to deference"); Tartarini v Dep't of Mental Retardation, 82 Mass. App. Ct. 217, 222 (2012) ("[w]e are not at liberty to ignore . . . a clear legislative command"); Herrick v. Essex Reg'l Ret. Bd., 77 Mass. App. Ct. 645, 649-51(2010) ("[a]gency expertise or policy preference cannot alter the plain meaning of unambiguous statutory language").

The Court's suggestion that regulations can become effective even without the 60 days' required notice, Memorandum at 3, is particularly troubling. It is hard to imagine how the Legislature could have stated the requirement of 60 days' advance notice any more clearly than it did in the plain language of the 60-day proviso. Indeed, the Supreme Judicial Court in Wilson v. Comm'r of Transitional Assistance, 441 Mass. 846, 858 (2004) emphasized that a similar line item provision requiring advance notice to the Legislature is a "condition" on the appropriation with which the agency must comply before implementing regulations that change eligibility or benefits. Since the 60-day provision is a condition on the appropriation, regulations issued with

only 15-days' notice violate the condition and are not valid. In fact, expenditures for the program are not lawful if conditions in the line item are not met. See Opinion of the Justices, 294 Mass. 616, 621-22 (1936) (conditions in budget provision limit expenditure of funds appropriated by Legislature). The Court therefore erred in concluding that plaintiffs did not have a likelihood of success on the merits of their claim that 60-days notice was required.[1]

II. The 60-Day Notice Proviso Is Enforceable by Affected Individuals and Organizations.

Plaintiffs also respectfully submit that the Court's was not correct in suggesting that plaintiffs are not likely to succeed on the merits because (a) the only purpose of the notice provision "is to give legislators a chance to comment and to appropriate more money if necessary," (b) the 60-day notice proviso does not confer any rights on affected individuals, and (c) there may be no private right of action to enforce it. Memorandum at 3.

By its plain terms, the 60-day proviso says notice is required when the proposed changes do not "benefit the clients." It is therefore clearly intended to protect homeless families and those who represent their interests, as do the plaintiff organizations. As the Supreme Judicial Court recognized in Wilson, 441 Mass. at 858, the purpose of the advance notice period is "to alert the

[1] Defendants asserted at oral argument that the line item itself restricts eligibility for shelter to the four categories of families listed in the item and therefore neither the "health and safety" regulations implementing the fourth category nor the other regulations for which the defendants gave 60 days' notice "alter eligibility" within the meaning of 60-day notice proviso. This argument ignores the plain language of the line item, which only says that eligible families "shall include" the four listed categories, leaving the defendants the discretion to restrict eligibility to those categories or a broader group of families after 60 days' notice. It also is belied by the fact that the defendants did give 60 days' notice of the extensive regulations implementing the other three categories and that the content of those regulations, as well as the "health and safety" regulations are the subject of ongoing negotiations with legislators. See Third Affidavit of Kelly Turley ("Turley 3d Aff."), ¶¶ 2-4, Exs. 1-3. If the defendants were not required to give 60 days' notice of the other changes, it is hard to see why they did so, in light of their claim that giving 60 days' notice of the "health and safety" regulations alone would cost $3 million. *See* Part III, *infra.*

Legislature to any such changes, the slightest of which could have dire consequences for recipients" so that the Legislature can act to avert those consequences. The Legislature may act by providing a supplemental appropriation, id., by enacting other legislation, or by persuading the Executive to make changes to the regulations. See Turley 3d Aff., ¶¶ 2-4, Exs. 1-3. The Legislature is the people's representative; by requiring notice to the Legislature the proviso affords notice not only to individual legislators but to the people, including the plaintiff organizations, who are within the zone of interests protected by the line item. See Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 135 (2000).

Further, plaintiffs' cause of action to enforce the line item proviso is created by G.L. c. 231A and G.L. c. 214, § 1. See Massachusetts Ass'n of Indep. Ins. Agents and Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293-96 (1977) (association of insurance agents has right under G.L. c. 231A, § 1 to challenge insurance regulation); Henderson v. Comm'r of Barnstable County, 49 Mass. App. Ct. 455, 458 (2000) (complaints challenging officials' interpretation of statute are appropriately brought under the declaratory judgment act); Durfee v. Maloney, 2001 WL 810385 at *10-11 (Hinkle, J.)(Mass. Super. June 16, 2001) (private right of action under G.L. c. 231A despite absence of specific right in statute). Indeed, in a prior action the Superior Court found that the Massachusetts Coalition for the Homeless and others had a right to enforce the advance notice provisions in this very line item, Massachusetts Coal. for the Homeless (MCH) v. Dep't of Transitional Assistance, No. 99-5159-C, 2000 WL 776564 at * 6 (Mass. Super. June 1, 2000)(Cratsley, J.), attached as Exhibit 1 to the Second Affidavit of Kelly Turley, including the right to a declaration that the Governor's purported veto of this condition on the

appropriation was unconstitutional. Id. (Feb. 6, 2001), Turley 3d Aff., Ex. 4.[2] The Legislature is presumed to know of this past history of enforcement of the line item. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change") (citations omitted).[3]

III. Properly Weighing the Balance of Harms.

In its prior decision, the Court did not give weight to the fact that the challenged "health and safety" regulations will render more than a hundred of families ineligible for shelter between its ruling and September 17, when the 60-day advance notice period ends. As shown in Exhibit 2 to the Third Affidavit of Kelly Turley, which was provided to the Superior Court at oral argument, in the month of April 2012 more than 100 families were found eligible for EA due to "Overcrowded" conditions or Sanitary "Code Violation[s]." All of these families would be ineligible if they applied under the regulations that went into effect on August 6. In addition, many of those who were found eligible based on "Health and Safety" issues would be ineligible

[2] The MCH case also rebuts defendants' argument that plaintiffs lack standing, which the Superior Court did not reach. Memorandum at 4 n.1. In the June 1, 2000 ruling, the MCH court held that an organization has standing to challenge regulations that it alleges will cause it to expend more organizational resources. MCH, 2000 WL 776564 at * 5. See also Pennell v. City of San Jose, 485 U.S. 1, 7 (1988)(association of landlords has standing to challenge regulations that would harm unspecified members of the association); Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (allegations of harm suffered by non-profit organization held sufficient to establish injury for standing purposes); Mass. Ass'n of Indep. Ins. Agents and Brokers, id. at 292-95 (association of insurance agents has standing to challenge validity of insurance regulation).

[3] At the time of the rulings in these earlier MCH cases the EA line item said that nothing in the line item gave rise to enforceable rights except to the extent that such rights were contained in the agency's regulations. The Legislature has since removed that proviso – another indication that the Legislature intends the provisos in the current line item to create enforceable rights.

now. This is consistent with DHCD's own estimates. 3d Turley Aff., ¶ 6.[4] Therefore, contrary to the Court's original statement, the harm to the families who will denied shelter in the intervening period and to the organizations to which they will instead turn for assistance is not at all "speculative." Memorandum at 4. Indeed, paragraph 6 of the Third Affidavit of Kelly Turley sets forth some of the dire scenarios that are occurring.

Finally, the Court did not correctly calculate the balance of harms. The Court cited the Affidavit of Robert Pulster as suggesting that, if injunctive relief were granted, motel space would fill up between now and September 17 and eligible families would simply be turned away. This dire prediction is unfounded and would itself violate the law which does not authorize the turning away of eligible homeless families. In fact, DHCD has solicited proposals to expand non-motel shelter capacity by 1,400 units. Turley 3d Aff., ¶ 6. And in any case, the Supreme Judicial Court has explicitly stated that the fact that complying with the law will cost money is not sufficient to turn the balance of harms in the state's favor. See Healey v. Comm'r of Pub. Welfare, 414 Mass. 18, 28 (1992).

[4] The Court's prior decision also did not credit precedent that claims of invalid procedure are cognizable without regard to whether, if the proper procedure is followed, the underlying rules will in fact change. For example, in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Supreme Court concluded that an individual had a right to challenge an agency's failure to produce an environmental impact statement, without showing that the production of such a statement would result in any change in the ultimate outcome of the challenged development. Lujan, 504 U.S. at 572-73 n.7 (1992) (Scalia, J.) ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. . . . Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years").

CONCLUSION

Plaintiffs therefore respectfully request that the Court reconsider its earlier decision and issue a preliminary injunction against implementation of any of the new regulations restricting eligibility for shelter until at least September 17, 2012. In the alternative, plaintiffs respectfully request that the Court at least issue a revised decision deleting the suggestions about enforceability of the 60 days'" advance notice proviso found on page 3 of the original Memorandum of Decision and discussed in Part II above.

Respectfully submitted on behalf of plaintiffs,

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Certificate of Service

I, Ruth A. Bourquin, hereby certify that on this 16th day of August, 2012, I caused a copy of the Plaintiffs' Emergency Motion for Reconsideration of the Court's Denial of Plaintiffs' Emergency Motion for Preliminary Injunction and Memorandum in Support to be served by hand delivery on Sookyoung Shin, Assistant Attorney General, One Ashburton Place, Room 2019, Boston, MA 02108.

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Ruth A. Bourquin