NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV02449

GLORIA ALCARRAZ & Others[1]

v.

EXECUTIVE OFFICE OF HOUSING
AND LIVABLE COMMUNITIES & Another[2]

DECISION AND ORDER ON
PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This case stems from the spike in demand for emergency housing assistance and shelter by families with children and pregnant women under the Commonwealth's Right to Shelter Law, G. L. c. 23B, § 30. Demand that sharply outstrips the amount of money the Legislature has appropriated for the emergency housing program.

Plaintiffs, each of whom is a resident of the Commonwealth facing a need for emergency assistance shelter from the Defendant, the Executive Office of Housing and Livable Communities (EOHLC), filed a Complaint seeking declaratory and injunctive relief. Plaintiffs allege that EOHLC's announced plan to change the rules and regulations governing temporary emergency shelter eligibility violates (i) the Administrative Procedures Act, G. L. c. 30A (APA), and (ii) the statutory mandate to provide the Legislature with a report justifying such changes ninety (90) days before implementation.

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[1] Soronx De La Cruz and Dieula Alectine.

[2] Edward M. Augustus, Secretary of Executive Office of Housing and Livable Communities, in his official capacity (Secretary).

Plaintiffs seek an emergency restraining order and preliminary injunction preventing EOHLC from implementing any changes in the emergency assistance program. The undersigned held a hearing on October 31, 2023, at which EOHLC produced a copy of an emergency regulation, 760 Code Mass. Regs. [CMR], § 67.10, approved by the Governor and filed with the Secretary of the Commonwealth at 11:59 a.m. on the day of the hearing.

After hearing and review, I conclude that EOHLC has complied with the APA in enacting an emergency regulation to address the budgetary crisis facing the emergency assistance program.

I further conclude that Plaintiffs do not have standing to enforce the proviso contained in the Legislature's appropriations line item, requiring 90-day notice of any changes to the law's eligibility requirements for emergency housing assistance. The notice proviso is intended to afford the *Legislature* the opportunity to appropriate additional funding for the program. The evidence before me, however, is clear – more than a month ago, the Governor specifically requested additional appropriations for the emergency assistance program and the Legislature has failed to act. In these circumstances, the predicate purpose of the 90-day proviso has been fulfilled; and, in all events, it is for the Legislature and not clients of the program to enforce any claimed non-compliance.

Finally, I may not, in the guise of requiring the Executive to give notice to the Legislature (for the ostensible purpose of enabling the Legislature to provide additional funding for emergency housing should it choose to do so), prohibit the Executive from exercising its discretionary authority to manage this emergency assistance program within the limits of the funding that has been appropriated.

The Motion for a Temporary Restraining Order is therefore **DENIED**.

BACKGROUND

Pursuant to the Right to Shelter Law, and *"subject to appropriation,"* EOHLC administers "a program of emergency housing assistance to needy families with children and pregnant women," including "temporary shelter as necessary to alleviate homelessness when such family has no feasible alternative housing available." G. L. c. 23B, § 30(A)(e) (emphasis supplied). The Legislature funds the program while, pursuant to the law, EOHLC administers the program and "promulgate[s] rules and regulations to establish the requirements and standards for eligibility." Id. § 30(B).

EOHLC has promulgated regulations detailing eligibility requirements for families needing shelter placement in 760 CMR 67.06. Pursuant to section 67.06(3), "[a]n EA [emergency assistance]-eligible household [that is] homeless due to the lack of feasible alternative housing . . . shall be approved for temporary emergency shelter."

According to EOHLC, the fiscal year 2024 appropriation for the emergency assistance program included funding to support 4,100 families and approximately 4,700 units in the shelter system. As of October 27, 2023, however, there were 7,268 families in the shelter system – a 77% increase over what was contemplated in the FY2024 budget and "the largest number of families ever living in EA family shelters at one time since . . . 2009." Bahseer Aff. ¶ 2. Throughout 2023, significant efforts have been undertaken to address the demand for emergency shelter, but the supply of shelter for families has not kept pace with demand. Nor have the funds.

On September 13, 2023, Governor Healey filed a supplemental budget requesting an additional $130 million for the costs associated with sheltering eligible families under Chapter 23B, § 30's emergency assistance program. This amount would support approximately 6,400 families through the end of FY2024. The Legislature has not acted on that request. According to EOHLC, the estimated date on which the emergency

assistance funding will be depleted, if it is unable to impose a cap this week, and the system continues to grow at current rates, is January 13, 2024.

What prompted the instant lawsuit was a non-compliant (with the APA and ostensibly with the line item proviso) policy change announced by the Governor, effectively changing the eligibility rules for the emergency assistance program.

On October 31, 2023, and in accordance with the APA, EOHLC filed an emergency amendment to 760 CMR 67.00, the regulation governing the emergency assistance program. The amendment adds a new section, 760 CMR 67.10, to address the current circumstances. It provides:

> "[I]n the event the Director (the Secretary) determines that, in light of legislative appropriations, the shelter system is no longer able to meet all current and projected demand for shelter from eligible families considering the facts and circumstances then existing in the Commonwealth, the Director (the Secretary) shall issue a written declaration detailing that determination and [the] basis for it. The declaration shall identify a maximum program shelter capacity . . . that the shelter system shall not be required to exceed during the term of the declaration."

760 CMR 67.10(1). Pursuant to the amended regulation, EOHLC will prioritize eligible households for emergency shelter, and place those not assessed with high needs on a waiting list. The amended regulation also permits EOHLC, after notice, to set limits on the duration of shelter benefits.

DISCUSSION

A party seeking a preliminary injunction must establish both a likelihood of success on the merits of its claim and that irreparable harm will result from denial of the requested injunction. See Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 219 (2001). Because "[a] preliminary injunction is an extraordinary remedy never awarded as of right[,]" Winter v. Natural Resources Defense Council, Inc., 555

U.S. 7, 24 (2008), it "should not be granted unless the [moving party] ha[s] made a clear showing of entitlement thereto," Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004). "Among the factors the motion judge must consider to determine whether a preliminary injunction should issue, likelihood of success on the merits is especially important." Foster v. Commissioner of Correction, 488 Mass. 643, 650 (2021). "The movant's likelihood of success is the touchstone of the preliminary injunction inquiry. [I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Id. at 651 (quotations omitted).

Finally, "[w]here a party seeks to enjoin governmental action, the judge also must 'determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.'" Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc. Yarmouth Lodge # 2270 v. Board of Health of Yarmouth, 439 Mass. 597, 601 (2003) and Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

A. Likelihood of Success on the Merits

Plaintiffs do not dispute that EOHLC may amend its regulations and rules governing eligibility for emergency shelter, or that the Executive may make policy choices regarding implementation consistent with the Right to Shelter Law. Rather, Plaintiffs argue that EOHLC failed to comply with the APA and with its statutory obligation to provide 90-day notice to the Legislature.

1. The Administrative Procedures Act

The APA provides a mechanism to amend a regulation on an emergency basis. General Laws chapter 30A, § 3 provides:

> If the agency finds that the immediate adoption, amendment or repeal of a regulation is necessary for the preservation of the public health, safety or general welfare, and that observance of the requirements of notice and affording

> interested persons an opportunity to present data, views, or arguments would be contrary to the public interest, the agency may dispense with such requirements and adopt, amend or repeal the regulation as an emergency regulation. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency regulation as filed with the state secretary under section five. An emergency regulation shall not remain in effect for longer than three months unless, during that time, the agency gives notice and affords interested persons an opportunity to present data, views, or arguments as required in this section, and files notice of compliance with the state secretary.

G. L. c. 30A, § 3. See G. L. c. 30A, § 2 (containing similar language).

The amended regulation EOHLC filed with the Secretary of the Commonwealth satisfies the requirements of the APA. It allows EOHLC to impose certain limitations on emergency shelter in the event the EOHLC Secretary determines the system is no longer able to meet all current and projected demand. On the information before me, I conclude that the evident emergency facing EOHLC to provide shelter to the increasing numbers of qualifying families within the limits of the appropriation enacted by the Legislature has been established. Indeed, given the exponential growth in families seeking emergency shelter and the prodigious efforts already undertaken to assist those families, the EOHLC Secretary's rationale for emergency rulemaking is sound and subject to judicial deference. See Berrios v. Department of Pub. Welfare, 411 Mass. 587, 593 (1992) ("department's finding of an emergency and the emergency regulations themselves were presumptively valid").

On this record, there exists a "substantial basis" for the Secretary's conclusion that there is an emergency under c. 30A. Id. ("Such a finding 'is given every presumption in its favor and is not subject to question in judicial proceedings unless palpably wrong.'") (citation omitted.) The emergency regulation will remain in effect

for 90 days and no longer, unless EOHLC satisfies the normal notice and comment period the APA requires.

2. Line Item Proviso

In its FY2024 appropriation for the emergency housing assistance program under G. L. c. 23B, § 30, the Legislature included a number of conditions. Two of these conditions are relevant here. Line item 7004-0101 includes the following provisos:

- provided further, that this item shall be subject to appropriation and in the event of a deficiency, nothing in this line item shall give rise to or shall be construed as giving right to any enforceable right or entitlement to services in excess of the amounts appropriated in this item.

- provided further, that notwithstanding any general or special law to the contrary, not less than 90 days before promulgating or amending any regulations, administrative practices or policies that would alter eligibility for or the level of benefits under this program, other than that which would benefit the clients, the executive office shall submit a report to the house and senate committees on ways and means, the clerks of the house of representatives and the senate and the joint committee on children, families, and persons with disabilities setting forth justification for such changes including, but not limited to any determination by the secretary of housing and livable communities that available appropriations will be insufficient to meet projected expenses and the projected savings from any proposed changes.

EOHLC did not give the Legislature advance notice of the emergency amendment to the regulation, as required by the second proviso. Because provisos have the force of law, see Garcia, 480 Mass. at 740, Plaintiffs argue they have shown a likelihood of success on the merits on their requested declaratory judgment that EOHLC failed to comply with the proviso. However, Plaintiffs cite no case in which a court has ever held that an agency that fails to comply with such a proviso may be barred from taking action within the ambit of its statutory and regulatory authority.

In its opposition, EOHLC argues that Plaintiffs lack standing to enforce the proviso, particularly where the Governor has informed the Legislature of the state of emergency caused by the surging demand for temporary shelter and has sought additional funding and the Legislature has not acted. I agree.

The Declaratory Judgment Statute, G. L. c. 231A, " does not provide an independent statutory basis for standing." Enos v. Secretary of Env't Affs., 432 Mass. 132, 135 (2000). A party has standing to bring a declaratory judgment claim "when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." Id., quoting Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977). "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Id. (quotations omitted). Thus, in SEIU, Local 109 v. Department of Mental Health, 469 Mass. 323, 330 (2014), the Court held that the plaintiff union had standing to enforce G. L. c. 7, §§ 52-55 (the Pacheco Law), because the statute conferred "two specific, substantive rights on employee organizations that benefit those organizations in and of themselves." See id. at 331 ("Under the plain language of the Pacheco Law . . . a public agency owes certain duties to a collective bargaining organization.").

Here, the subject proviso imposes no duty on EOHLC owed to Plaintiffs, and confers no rights upon Plaintiffs. Rather, the purpose of providing notice to the Legislature prior to changing the rules or regulations governing emergency shelter eligibility is to "allow[] the Legislature either to authorize the adjustment passively by doing nothing, or to preempt the adjustment by providing additional funding through a supplemental appropriation." Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 853-854 (2004).

Notice is no guarantee of additional funding, a fact made explicit in the plain terms of the provisos. The Legislature might authorize EOHLC's plan passively by failing to appropriate more funds. As discussed above, the Governor has requested additional appropriation from the Legislature to address the financial issues plaguing EOHLC due to the heightened demand for emergency shelter, but has received no affirmative response. In these circumstances, where required notice to the Legislature provides no assurance of additional funding, Plaintiffs have suffered no cognizable injury from EOHLC's failure to provide such notice. Ginther v. Commissioner of Ins., 427 Mass. 319, 323 (1998) ("the complained of injury must be a direct consequence of the complained of action"). Stated differently, the failure to give notice has not injured Plaintiffs where notice is intended to permit the Legislature to act or not act, and the Legislature, having *actual* notice of the fiscal crisis, has failed to act.[3]

The other relevant proviso in the line item makes clear that the Legislature did not confer any rights on Plaintiffs. The proviso provides that, "in the event of a deficiency, nothing in this line item shall give rise to or shall be construed as giving right to any enforceable right or entitlement to services in excess of the amounts appropriated in this item." Thus, Plaintiffs lack standing to bring a declaratory judgment action based on EOHLC's failure to comply with the proviso.

Standing aside, I am also not persuaded that the proviso applies here. The proviso requires notice of any regulatory changes that would alter eligibility for or the level of benefits. The amended regulation does not necessarily do either; it provides flexibility to EOHLC, when there is insufficient funding to provide emergency shelter to

[3] The right to compel compliance with the notice requirement belongs to the Legislature, and it has taken no steps to do so, notwithstanding its actual notice of the shortfall facing EOHLC, and its actual notice of the Executive's efforts to mitigate the pending deficit.

every eligible family, to prioritize some eligible families over others, and to defer the provision of services to some through use of a waitlist.

Finally, EOHLC argues that I may not require the Executive to expend resources that the Legislature has not appropriated. "Executive agencies are constitutionally forbidden from making expenditures that exceed legislative appropriation." Wilson, 441 Mass. at 855 n.8, citing Part II, c. 2, § 1, art. 11, of the Massachusetts Constitution, and art. 63, of the Amendments to the Massachusetts Constitution. I am constrained to agree. As much as I wish that I possessed the power to ensure that all families who need housing have it, and that all families who require safe emergency shelter are given it, I am persuaded that it would be inappropriate to order EOHLC to continue providing emergency shelter it does not have the resources appropriated by the Legislature to fund.[4] EOHLC has both the administrative discretion to expend the monies appropriated by the Legislature to effectuate the purposes of the Right to Shelter Law and the concomitant constitutional obligation not to expend more than appropriated. Wilson, 441 Mass. at 854-855 & n.8.

B. Irreparable Harm and the Public Interest

Having found no likelihood of success on the merits, I need not consider irreparable harm or the public interest. It is clear to me, however, that all parties before the Court are operating with the evident desire to protect families and children. EOHLC seeks to serve the greatest number of families it can with the resources available to it. No one seriously disputes that families living without safe shelter are at

[4] Plaintiffs argue that a temporary restraining order or preliminary injunction in these circumstances simply maintains the status quo. That may be, but the import of such an order would be to maintain an untenable situation.

risk and, in particular, that children without access to stable housing may be irreparably harmed. But the burden EOHLC faces is simply that it no longer has either the money or the space to provide such housing immediately for every family that is eligible for same. In these challenging circumstances, EOHLC has acted, in its discretion, to prioritize the allocation of its resources. I give that discretion due deference.

ORDER

For the foregoing reasons, and having carefully considered the information before me, Plaintiffs' Emergency Request for a Temporary Restraining Order and Preliminary Injunction is **DENIED**.

SO ORDERED.

Debra A. Squires-Lee
Justice of the Superior Court

November 1, 2023