

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
NO. 2384CV02449 C

kg GLORIA ALCARRAZ, SORONX DE LA CRUZ,  
and DIEULA ALECINTE,  
Plaintiffs,

v.

EXECUTIVE OFFICE OF HOUSING AND  
LIVABLE COMMUNITIES; and EDWARD M.  
AUGUSTUS, in his official capacity as Secretary  
of the Executive Office of Housing and Livable  
Communities,  
Defendants.

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY REQUEST  
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The Executive Office of Housing and Livable Communities (“EOHLC”) (formerly the Department of Housing and Community Development) and Edward M. Augustus, in his official capacity as EOHLC Secretary, hereby oppose Plaintiffs’ request for a temporary restraining order and preliminary injunction preventing them from implementing measures to address a budget deficiency in the Emergency Assistance (“EA”) shelter program. The measures are now set forth in emergency regulations (the “EA Emergency Regulations”), attached hereto as **Exhibit A**; the Secretary has issued the declaration anticipated therein, attached hereto as **Exhibit B**; and corresponding guidance will soon be released.

The EA shelter program for unhoused families and pregnant women is in a crisis and a state of emergency. At the beginning of FY23, approximately 3,600 families were seeking shelter benefits. Since that time, demand for shelter—partly (but not entirely) due to the new arrival of migrants from other countries—has exploded. Currently, the EA program serves close

to 7,500 households. Demand is expected to continue its exponential growth, with 20 to 50 new households applying every single day. On August 8, 2023, Governor Maura Healey declared a state of emergency, and implored the federal government to partner with the state in finding solutions to the program—including but not limited to expediting work authorizations for new arrivals, so that they may earn wages that may support private housing placements. Both prior to and since that time, the Administration has taken a series of extraordinary measures to locate new shelter units and address the looming deficiency, including activation of the National Guard.

While these measures will help, they are not enough. So, the Secretary of EOHLC has determined that it is necessary to put in place, through an emergency regulation and related guidance, a series of temporary emergency measures, to keep the program operating within its existing appropriation, as required by the state constitution and state law. *See* Part II., c. 2, § 1, art. 11 of the Massachusetts Constitution and art. 63 of the Amendments to the Constitution; *Wilson v. Comm'r of Transitional Assistance*, 441 Mass. 846, 854-55 & n.8 (2004). Plaintiffs do not dispute defendants' authority—indeed responsibility—to make adjustments to the EA program to keep it operating within the line item. Instead they raise purely procedural challenges to the emergency measures, arguing that they did not comply with the requirements of the state administrative procedures act, G.L. c. 30A, and did not comply with the proviso in the line item that the Secretary notify the Legislature 90 days prior to making certain changes to the EA program. But because the emergency regulation fully complies with the requirements of c. 30A and because the notice requirement of the EA line-item is not privately enforceable (and, in any event, has not been violated), Plaintiffs have no likelihood of success on the merits of their claims. The balance of harms and the public interest further support denying Plaintiffs' desired injunction, since any such injunction would require EOHLC to spend money it does not have to

meet an ever-increasing demand for shelter benefits, in spite of the Secretary’s authority and duty to make adjustments to the program to keep it operating within the Legislature’s appropriation. Plaintiffs’ motion should therefore be denied.

### **FACTUAL BACKGROUND**<sup>1</sup>

EOHLC has been charged by the Legislature with administering a program of “emergency housing assistance”—including the provision of temporary EA shelter “as necessary to alleviate homelessness when such family has no feasible alternative housing available”—for “needy families with children and pregnant woman with no other children.” G.L. c. 23B, § 30(e).

Significantly, the Legislature directs EOHLC to administer the program “[s]ubject to appropriations.” G.L. c. 23B, § 30. Those are the first three words of the EA enabling statute, *id.*, and the Legislature repeats them in the budgetary line item funding the EA program, stating that “this item shall be subject to appropriation” and noting, with specificity, that “in the event of a deficiency, nothing in this item shall give rise to or shall be construed as giving rise to any enforceable right or entitlement to services in excess of the amounts appropriated in this item.” St. 2023, c. 28, § 2, line item 7004-0101.

Because of an unprecedented and unabating demand for EA shelter units since January 2023, the EA program now has a FY24 deficiency; and the quoted language of line item 7004-0101 is directly implicated. *See* Affidavit of Aditya Basheer, Assistant Secretary of the Executive Office for Administration and Finance, and former Director of the Healey-Driscoll Administration’s Emergency Assistance Incident Command Team, attached hereto as **Exhibit C**, at ¶ 3. Even if the number of families sheltered in the EA program remained constant at last

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<sup>1</sup> Defendants refer the Court to the accompanying affidavits for a more detailed explanation of the facts underlying the projected budget deficiency.

Friday's levels through the end of FY24, the program would exhaust its appropriation *and exceed it by an additional \$210 million*. *Id.* at ¶¶ 14 – 15, 17. But entries into EA shelter are far from static, with more than 20 and as many as 50 newly eligible families seeking placements each day, and a much slower rate of families exiting shelter. *Id.* ¶ 8. Accordingly, in these circumstances, defendants lack the authority and the resources to continue expanding shelter capacity to meet the staggering rise in demand. It follows that defendants must act thoughtfully, and quickly, in the exercise of their reasoned judgment and expertise, to preserve the EA program within the amounts appropriated to support it. They have done just that, filing emergency regulations earlier today that authorize defendants to take certain actions in the event the Secretary determines, “in light of legislative appropriations, [that] the shelter system is no longer able to meet all current and projected demand for shelter from eligible families.” Exhibit A, 760 CMR 67.10(1).

As set forth in the EA Emergency Regulations, and as elaborated upon in written guidance that will soon be released, EOHLC will prioritize eligible household applicants for EA shelter. Families seeking shelter will be assessed and those with high needs, such as health and safety risks, will be prioritized for placement. Families who are not immediately connected with shelter will be placed on a waiting list. In addition, the Emergency Regulations allow for the possibility that a second step will be taken in the coming weeks, after notice is provided, specifically limiting the duration of EA shelter benefits for certain families who have been in EA shelter for extended periods.

## ARGUMENT

Plaintiffs do not dispute that defendants are authorized to act in the face of a budget shortfall. Nor can they, as that authority is recognized by G.L. c. 23B, § 30; St. 2023, c. 28, § 2, line item 7004-0101; and numerous appellate decisions.<sup>2</sup>

Instead Plaintiffs suggest that the *procedures* defendants used to manage the EA program were improper, arguing that defendants (1) did not meet the requirements of the Massachusetts Administrative Procedures Act (“APA”), G.L. c. 30A, §§ 2-3, Complaint (“Compl.”) ¶¶ 51-57 (Count I); and (2) provided inadequate notice to the Legislature by failing, in Plaintiffs’ eyes, to meet a line item proviso (the “Notice Proviso”) directing EOHLC to notify certain legislative officials “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.” *Id.* ¶ 27 (quoting St. 2023, c. 28, § 2, line item 7004-0101); *see id.* ¶¶ 58-63 (Count II). Yet Plaintiffs have no likelihood of success on the merits of these claims.

The Court can—and should—deny Plaintiffs’ motion for that reason alone. *Garcia v. Dep’t of Hous. and Cmty. Dev.*, 480 Mass. 736, 754 (2018) (vacating preliminary injunction awarded to plaintiffs challenging administration of EA program upon finding that plaintiffs “have not shown a likelihood of succeeding on their claim [against EOHLC]”). But even if the Court were to consider other preliminary injunction factors, they would not support the entry of an injunction here, which would compel EOHLC to operate the EA program, during a state of

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<sup>2</sup> *E.g.*, *Wilson v. Comm’r of Transitional Assist.*, 441 Mass. 846 (2004) (recognizing executive authority to alter administration of EA to operate within available appropriation); *Dowell v. Commissioner of Transitional Assistance*, 424 Mass. 610, 615-16 (1997) (same); *Berrios v. Dep’t of Pub. Welfare*, 411 Mass. 587 (1992) (acknowledging executive authority to promulgate emergency regulations to address EA funding limitations).

emergency, at ever-growing levels with funds it does not have.

### **I. The Preliminary Injunction Standard.**

As the parties seeking a preliminary injunction, Plaintiffs must show “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of [their] likelihood of success on the merits, the risk of irreparable harm to the [them, as the moving party] outweighs the potential harm to [defendants, the nonmoving party] in granting the injunction.” *Garcia*, 480 Mass. at 747. Because Plaintiffs seek to enjoin government action, this Court also must “determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” *Id.*

“[T]he significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto.” *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762 (2004); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (noting that, “[a] preliminary injunction is an extraordinary remedy never awarded as of right”).

Plaintiffs have failed to carry their burden here.

### **II. Plaintiffs Have Not Shown—and Cannot Show—a Likelihood of Succeeding on Their Claims.**

#### **A. Now that the EA Emergency Regulations Have Been Filed, Plaintiffs Cannot Sustain their Claim under the Administrative Procedures Act.**

EOHLC’s promulgation of the EA Emergency Regulations defeat Count I of Plaintiffs’ Complaint because those new rules—which satisfy the requirements of the APA and specifically allow defendants to take certain actions in the event the Secretary determines, “in light of legislative appropriations, [that] the shelter system is no longer able to meet all current and projected demand for shelter from eligible families,” Exhibit A, 760 CMR 67.10(1)—were filed

before any of the planned changes go into effect.<sup>3</sup> As such, Plaintiffs are wrong to assert that Defendants violated—or would violate—the APA by implementing the changes referenced at a press conference on October 16, 2023, to EOHLC’s administration of the EA program without first holding a public hearing or engaging in a notice-and-comment period. *See* Compl. ¶¶ 51-57.

Although plaintiffs do not acknowledge the possibility of emergency regulations in their Complaint or motion papers, the APA plainly authorizes EOHLC to proceed in that fashion. *See* G.L. c. 30A, §§ 2-3; *Berrios v. Dep’t of Pub. Welfare*, 411 Mass. 587, 593-595 (1992). EOHLC also has complied with the procedural requirements for adopting the regulations as emergency regulations under G.L. c. 30A, § 2, by explaining its rationale for proceeding on an emergency basis and providing for public review through a notice-and-comment period set to conclude on December 1, 2023. *See* Exhibit A (filing form). Here, EOHLC’s basis for emergency rulemaking was:

Acute actual and projected demand for EA shelter has created an emergency, as reflected by the Governor’s declaration on [August 8, 2023] and statement on [October 16, 2023] that the EA system would soon reach capacity. The capacity will be reached imminently. These regulations immediately adopted processes for EA placements where, in light of available appropriations, the EA system is unable to meet demand.

*Id.* That determination is entitled to considerable deference. *E.g.*, *Professional Fire Fighters of Mass. v. Commonwealth*, 72 Mass. App. Ct. 66, 78 (2008).

Under c. 30A, emergency regulations may go into effect immediately, and may remain in effect for 90 days. For the regulations to remain in effect longer than that, they must go through the notice-and-comment process required by c. 30A. *See id.* §§ 2-3. As part of this notice-and-

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<sup>3</sup> Although defendants do not necessarily concede that rulemaking was required here, the Court need not resolve that issue, because the defendants in fact have complied with c. 30A by issuing emergency regulations today.

comment process, which will be undertaken in the next 90 days, Plaintiffs (and other interested parties) will have a chance to submit comments on the regulations and suggest changes.

Because EOHLC has complied with the requirements of c. 30A, Plaintiffs have no likelihood of success on the first count of their complaint.

**B. Plaintiffs Lack Standing to Enforce the Notice Proviso and, Even if They Were Able to Establish Standing, Their Claim Fails as a Matter of Law.**

Plaintiffs' second count attempts to leverage a legislative notice provision that is not privately enforceable—as the line item expressly states—into a 90-day delay of emergency measures to address a current deficiency in the EA program. During those 90 days, according to Plaintiffs' claim, EOHLC must continue to procure additional shelter units and support services indefinitely, despite having no money with which to do so, and despite having exhausted its ability to procure such units, even with the coordinated efforts of much of the Executive Branch. Plaintiffs do not have standing to assert this claim; the Notice Proviso has not been violated; and, regardless, the Court does not have the authority to grant the remedies sought.

At the outset, we highlight two pertinent provisions of line item 7004-0101, which must be read together, despite Plaintiffs' exclusive focus on only one of them. Specifically, the line item states in subsequent 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 rise 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.”

As explained in the first proviso, Plaintiffs lack standing to enforce *any* “right” or “entitlement to services,” such that they do not have standing to enforce the second proviso. Even if they had such standing, their argument elevates form over substance. The acute spike in demand for EA shelter has been the subject of extensive public debate, and the Executive Branch has openly shared information concerning this crisis, and the need for executive action, with the Legislature. The present circumstances are not the product of inattention to expenditures; they are the result of exigencies facing the Commonwealth about which there has been no shortage of information shared. Moreover, even were the second proviso privately enforceable (which it is not), and violated in substance (which it was not), the plaintiffs seek a remedy beyond the Court’s authority. What they ask is not a preservation of the status quo, but, instead, the continued procurement of EA shelter placements to meet new entrants numbering between 20 and 50 additional families per day, despite insufficient appropriations to do so.

**1. By the Plain Terms of the Line Item and Settled Law, the Plaintiffs Lack Standing to Privately Enforce the Notice Proviso.**

It appears from the complaint that Plaintiffs rely on G.L. c. 231A for standing to enforce the Notice Proviso, but this statute does not provide a basis for standing here. A plaintiff only “has standing pursuant to G.L. c. 231A where the defendant has violated some duty owed to the plaintiff[s], and where the plaintiffs can allege an injury within the area of concern of the statute or regulatory scheme.” *SEIU Local 509 v. Dep’t of Mental Health*, 469 Mass. 323, 328-29 (2014) (Union had standing to enforce Pacheco Law, where Law specifically required state agency to consult with unions before preparing request for proposals to privatize certain state services). On its face, the Notice Proviso only requires notice to the *Legislature*, so that it has an opportunity to

avert a budget shortfall, if it so desires, by making a supplemental appropriation. *See Wilson*, 441 Mass. 859 (interpreting earlier but substantially similar version of the Notice Proviso).<sup>4</sup> As the Superior Court has recognized, there is no suggestion that it confers any specific rights upon individuals who could be affected by the underlying policy change. *See Arise for Social Justice v. Massachusetts Dep't of Hous. & Cmty. Dev.*, 30 Mass. L. Repr. 336, 2012 WL 5362294, \*2 (Suffolk Super. Ct. Civil Action No. 12-2901, August 6, 2012) (declining to enjoin EOHLIC from implementing emergency regulations concerning families who are in housing situations where there is a substantial health and safety risk).<sup>5</sup> Equally important, Plaintiffs have not alleged that they suffered any injury as a “direct result” of defendants’ alleged failure to comply with the Notice Proviso (as opposed to defendants’ adoption of the EA Emergency Regulations themselves). *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322-25 (1998).

This general and well-settled law is embodied, specifically, in the proviso immediately before the Notice Proviso, where the Legislature specifies that, “in the event of a deficiency, nothing in this item shall give rise to or shall be construed as giving rise to any enforceable right or entitlement to services in excess of the amounts appropriated in this item.” St. 2023, c. 28, § 2, line item 7004-0101. In accordance with standard rules of statutory construction and interpretation (which apply to budgetary line items, *see Woods v. Executive Office of*

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<sup>4</sup> In fact, the Administration has sent to the Legislature a request for a supplemental budget appropriation totaling \$250 million, which the Legislature is currently considering.

<sup>5</sup> To the extent Plaintiffs may respond that the Notice Proviso’s “area of concern” nonetheless encompasses the preservation of benefits for current and future EA participants, “[that] characterization is far too broad [to establish standing].” *Enos v. Secretary of Env. Affs.*, 432 Mass. 132, 135 (2000); *see id.* at 134-42 (landowners affected by proposed project lacked standing to challenge, under G.L. c. 231A, Secretary's decision under MEPA that project proponent's Environmental Impact Report was complete; even though MEPA gave property owners the right to comment on the project before Secretary, nothing in statute suggested that Legislature intended to give them the right to judicially challenge Secretary's decision).

*Communities & Dev.*, 411 Mass. 599, 604 (1992)), this proviso bars Plaintiffs' claims. The plain language reflects a legislative intent to extinguish, in the event of a deficiency, "any enforceable rights or entitlement to services" (emphasis added) that may otherwise exist under the EA line item. Thus, even if Plaintiffs had the right to contest the adequacy of defendants' actions under the Notice Proviso at some other point in time, any such right is not enforceable now that the program is in deficiency. The Legislature also has foreclosed the relief Plaintiffs seek, insofar as delaying implementation of the EA Emergency Regulations will push the program into further deficiency and thereby require the provision of services "in excess of the amounts appropriated in this item." St. 2023, c. 28, § 2, line item 7004-0101.

**2. The Substance of the EA Line Item Deficiency, and the Need to Take Executive Action, Has Been Shared with the Legislature.**

The shortfall in EA funding, and the pressures put on the system by an acute spike in demand for EA shelter, has been a point of emphasis by the Executive Branch in recent months and weeks. On August 8, 2023, the Governor publicly declared a state of emergency, caused in substantial part by the demand for EA shelter. *See Exhibit D*. And on September 13, 2023, the Healey-Driscoll Administration requested from the Legislature a supplemental appropriation of \$250 million specifically "[t]o enable our administration to continue to provide shelter and support services to the more than 6,000 families [then enrolled] in our emergency shelter system for this fiscal year." *Exhibit E*. Thus, even if Plaintiffs establish standing and overcome the statutory bar to suit described above, the substance (if not the form) of the Notice Proviso has been fulfilled. *See Wilson*, 441 Mass. at 858.<sup>6</sup>

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<sup>6</sup> Nor is it clear that the steps the Administration is now taking to moderate shelter admissions implicate the Notice Provision, which is triggered by changes to eligibility and level of services, rather than by delay in placement. EOHLC's new emergency regulations and

### 3. This Court Lacks the Authority to Order Continued Procurement of Shelter Placements and Support Services.

The core of Plaintiffs' request is that EOHLC should be ordered to add additional EA shelter capacity, with attendant support services, to meet the acute and indefinite demand for shelter, even though the appropriation for such capacity and such services is in a FY24 deficiency. As noted above, the Legislature included line item language specifically addressing these circumstances, which disclaims any privately enforceable right. St. 2023, c. 28, § 2, line item 7004-0101. That language reflects established separation of powers principles. The Judiciary may not command the Executive Branch to spend resources that have not been appropriated. *See Hancock v. Comm'r of Educ.*, 443 Mass. 428, 461 (2005) (Marshall, C.J.) (plurality) (reflecting the unanimous view of the Court that the Executive Branch cannot be "ordered to implement necessary changes" to the statewide education system that have not been funded by the Legislature); *see also Wilson*, 441 Mass. at 855 n. 8 ("Executive agencies are constitutionally forbidden from making expenditures that exceed legislative appropriation").

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accompanying documents do not alter the previously established definition of eligibility for the EA program. *See generally* Exhibit A. All applications for EA shelter will be assessed for eligibility under established definitions as governed by G.L. 23B, § 30(B) and 760 CMR 67.02. The emergency regulations only address circumstances when the number of eligible families exceeds the number of available units in which families can be placed. In those circumstances, the regulations will affect the timing of a person's placement into shelter, not their eligibility.

As to benefits, the emergency prioritization and waitlist system addresses when the already-existing level of benefits will be provided to new applicants. There will be no changes to the substance, level, or scope of shelter or accompanying services to be provided to families placed in shelter. After any required wait, a person who receives shelter benefits will receive the same level of benefits as any other person who is eligible. *Contrast Wilson*, 441 Mass. at 848-49 (agency reduced EA benefits by reducing monthly housing assistance payment to each recipient by \$35 per month). Additionally, if and to the extent any durational limit on services is established, the EA Emergency Regulations require a notice period before any such limit is implemented.

### **III. The balance of the harms and the public interest counsel against granting Plaintiffs' requested relief.**

Because Plaintiffs cannot demonstrate a likelihood of succeeding on their claims, the Court need not address the question of irreparable harm. *See Wilson*, 441 Mass. at 858 (“Although we sympathize with the recipients, who would bear a significant hardship [absent a preliminary injunction], [plaintiff] has failed to show that the commissioner acted unlawfully, so we do not address the question of irreparable harm.”); *Packaging Indus., Inc. v. Cheney*, 380 Mass. 609, 617 (1980) (“What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits.”).

In any event, while the measures authorized by the EA Emergency Regulations may well impact Plaintiffs’ personal interests in the event they complete applications for and are determined eligible for EA shelter, the risk of harm to them from potential placement on a waitlist must be measured against harm to the state as a whole if the program cannot be managed to mitigate the line item deficiency in light of acute and continuing demand for shelter units. As noted, state agencies are precluded by law from making any expenditures in excess of Legislative appropriations; and defendants here should not be the subject of an injunction requiring them to spend money that they do not have. *See, e.g., Bates v. Director of Office of Campaign & Political Fin.*, 436 Mass. 144, 175 (2002) (agency cannot spend money that has not been appropriated); *Milton v. Commonwealth*, 416 Mass. 471, 474 (1993) (even absent specific language stating that payments to municipalities were “subject to appropriation,” municipalities were not entitled to payment absent such an appropriation).

Further to this point, the public interest demands that the Secretary be permitted to respond to this unprecedented and exponential in demand for EA shelter benefits by making adjustments to the program to keep it within the appropriation made by the Legislature. As explained in the accompanying affidavits, EOHLC and the Administration have already undertaken herculean measures to allow the program to respond to the extraordinary demand—including, to name just a few examples, activating the National Guard, relying upon funds outside the line item, exhorting the federal government to offer housing and to expedite work authorizations for new arrivals who are currently homeless but who are able and willing to work (which would ease demand on the EA program), and looking to other state agencies for help in identifying other shelter resources. But those measures still leave the Administration with a supply of funding (and available shelter) that simply will not meet the exponential growth in demand for shelter—demand that is expected to continue to grow through the fiscal year. The Administration therefore has no choice but to put a cap on the total capacity of the EA program, and to implement the other measures called for by the EA Emergency Regulations. That conclusion is extensively supported in the record, entitled to substantial deference, and should be dispositive on the issue of public interest. As such, both the balance of the harms, and the public interest, support denying Plaintiffs’ motion.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs’ request for a preliminary injunction and temporary restraining order should be denied.

Respectfully submitted,

EXECUTIVE OFFICE OF HOUSING AND  
LIVABLE COMMUNITIES; and EDWARD M.  
AUGUSTUS, in his official capacity as Secretary of  
the Executive Office of Housing and Livable  
Communities,

By their attorney,

ANDREA JOY CAMPBELL  
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Dated: October 31, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that on October 31, 2023, a copy of this document was served by email upon all counsel of record.

/s/ Kimberly Parr  
Kimberly Parr  
Assistant Attorney General