

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

CASE NO. SJC-13580

THE ATTORNEY GENERAL,
Appellant—Plaintiff/Counterclaim Defendant

v.

THE TOWN OF MILTON,
Appellee—Defendant/Counterclaim Plaintiff/Third-Party Plaintiff,

and

JOE ATCHUE,
Appellee—Defendant

v.

THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES,
Appellant—Third Party Defendant

ON A RESERVATION AND REPORT BY A JUSTICE OF THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

**BRIEF OF AMICUS CURIAE
MASSACHUSETTS AFL-CIO,
IN SUPPORT OF THE ATTORNEY GENERAL AND
THE EXECUTIVE OFFICE OF HOUSING AND LIVABLE COMMUNITIES**

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Dated September 13, 2024

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I. Statement of Interest

The Massachusetts AFL-CIO, founded in 1887 as the Massachusetts branch of the American Federation of Labor and chartered by the national AFL-CIO in 1958, is the state's largest umbrella labor organization. The Massachusetts AFL-CIO consists of about 800 public- and private-sector local unions representing around 500,000 workers across the Commonwealth. These unions represent employees in all walks of life, including janitors, engineers, teachers, construction workers, and bus drivers.

The Massachusetts AFL-CIO has an interest in ensuring that the Commonwealth's working families have adequate housing, access to public transportation, and good jobs.

II. Rule 17(C)(5) Declaration

The Mass. AFL-CIO declares that: (a) no party or party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; (c) no person or entity—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and (d) neither amicus nor its counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented party in a proceeding or legal transaction that is at issue in the present appeal.

III. Issue as Defined by the Court

Whether and to what extent municipalities are obligated to comply with the requirements of G. L. c. 40A, § 3A (a) and (c), and the related "Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act," issued by what is now the Executive Office of Housing and Livable Communities, including (1) whether G. L. c. 40A, § 3A (b), provides the sole remedy for noncompliance, and (2) whether and to what extent the Attorney General's office is authorized and has standing to enforce compliance with § 3A.

IV. Argument

A. Section 3A addresses a longstanding housing crisis that adversely impacts the Commonwealth's workers.

In passing the MBTA Communities Act (alternatively, the “Act”), the legislature made a significant first step in addressing the Commonwealth’s housing crisis. The MBTA Communities Act is necessary to put into place the housing policies needed for regional workforce development and desegregation.

1. There is a housing crisis in Massachusetts.

The existence and scope of the ongoing housing crisis is a legislative fact appropriate for judicial notice. *See Commonwealth v. Hilaire*, 92 Mass.App.Ct. 784, 789 n.5 (2018), citing Mass. G. Evid. § 201. Amicus offers a few of the key statistics regarding the deepening crisis.

Since 1988, the Commonwealth’s population has risen by more than a million persons. Federal Reserve Bank of St. Louis, Resident Population in Massachusetts, <https://fred.stlouisfed.org/series/MAPOP> (last visited Sep. 6, 2024). New building permits in Massachusetts have dropped significantly over the same period and have yet to fully recover from the Great Recession. Federal Reserve Bank of St. Louis, New Private Housing Units Authorized by Building Permits for Massachusetts, <https://fred.stlouisfed.org/series/MABPPRIV> (last visited Sep. 6, 2024). This has resulted in a housing shortage that has made the Commonwealth increasingly unaffordable for working people. For example, between 2016 and 2022, the median listing price for a house in Massachusetts increased by 45.8%, while median income only increased by 29.4%. Federal Reserve Bank of St. Louis, Housing Inventory: Median Listing Price in Massachusetts, <https://fred.stlouisfed.org/series/MEDLISPRIMA> (last visited Sep. 6, 2024); Federal Reserve Bank of St. Louis, Median Household Income in Massachusetts, <https://fred.stlouisfed.org/series/MEHOINUSMAA646N> (last visited Sep. 6, 2024).

Consequently, the Commonwealth's homeownership rate has dropped in recent years, declining from 65.7% in 2008 to 61.9% in 2023. Federal Reserve Bank of St. Louis, Homeownership Rate for Massachusetts, <https://fred.stlouisfed.org/series/MAHOWN> (last visited Sep. 6, 2024).

This crisis is most acute among low-wage workers, who are steadily being priced out of living in the Commonwealth. In none of the nearly 100 metro-area zip codes in the greater Boston area can a minimum wage worker afford even a one-bedroom apartment. Alex Gagosz, *Making minimum wage? In New England, you can only afford to live in these ZIP codes*, BOSTON GLOBE (July 2, 2024), <https://www.bostonglobe.com/2024/07/02/metro/maps-zip-code-affordable-housing-new-england-hourly-wage/>. Rather, to afford a one-bedroom apartment in the greater Boston area, a worker would need to earn between \$38.08 and \$68.65 an hour, which is between double and four-and-a-half times the Commonwealth's minimum wage. *Id.*

The critical need for general workforce-based housing, both to retain the current workforce and to entice new workers to come to Massachusetts, has been evident for decades and has only grown more acute as the issue has gone unaddressed. *See, e.g.,* Sam Turken, *Labor shortage a growing threat to Massachusetts' economy, business leader says*, GBH (Feb. 14, 2023), <https://www.wgbh.org/news/local/2023-02-14/labor-shortage-a-growing-threat-to-massachusetts-economy-business-leader-says>.

2. Any effective workforce and economic development in the Commonwealth requires substantially more transit-oriented housing.

With a growing population, the Commonwealth needs to build much more housing to accommodate its working families. Urban Land Institute, "Priced Out: Persistence of the Workforce Housing Gap in the Boston Metro Area" p. 21 (2010), available at https://uli.org/wp-content/uploads/ULI-Documents/WH_Boston10.ashx.pdf (correctly predicting that the Commonwealth's shortage of new housing units with a growing population would "lead to

increasing home prices and rents, exacerbating the imbalance between the availability of affordable workforce housing and the proximity of jobs”). Although building workforce housing of any kind in Massachusetts is an important step toward addressing the housing crisis, the Commonwealth must focus its efforts on building housing near public transit, which § 3A enables. This is because access to affordable and efficient transit is essential to retaining Massachusetts workers, as well as to meeting the Commonwealth’s economic development and its ambitious climate goals. *The Impact Of Public Transit On The Workforce And Local Economies In The U.S.*, MODESHIFT (June 3, 2024), <https://www.modeshift.com/thimpact-of-public-transit-on-the-workforce-and-local-economies-us/>. Amicus briefly details some of the benefits associated with transit-oriented housing policy.

a) Transit-oriented housing can help with workforce development.

Permitting plentiful housing near public transit stops creates greater opportunities for workforce development. Researchers have shown that reliable access to public transit substantially reduces household transportation expenses. *Id.* (“Public transportation can also effectively reduce the costs of owning and maintaining a vehicle, such as maintenance expenses, fuel, and parking”). Nationally, Americans spend an average of 16% of household income on transportation, largely because of their dependence on personal vehicles rather than public transportation; lower income populations spend an even higher percentage of total household income. *See* “The High Cost of Transportation in the United States,” Institute for Transportation and Development Policy (January 2024), available at <https://itdp.org/2024/01/24/high-cost-transportation-united-states/> (last visited Sep. 8, 2024).

Increased access to transit allows workers to compete in a larger pool of job opportunities that are farther away from their residences, which in turn grows the workforce and closes employment opportunity gaps between lower and higher income brackets. Christina Stacy et al.,

Access to Opportunity through Equitable Transportation, p. 7 (2020), available at <https://www.urban.org/sites/default/files/2023-08/Access%20to%20Opportunity%20through%20Equitable%20Transportation.pdf>. Conversely, studies have shown that, when access to transit is curtailed, unemployment rate increases follow, while increased access to transit decreases unemployment rates, particularly among younger workers. Federal Reserve Bank of Philadelphia, The Role of Equitable Transit-Oriented Development in Promoting Economic Opportunity, <https://www.philadelphiafed.org/community-development/the-role-of-equitable-transit-oriented-development-in-promoting-economic-opportunity> (last visited Sep. 6, 2024); Christof Brandtner, Anna Lunn, and Cristobal Young, “Spatial mismatch and Youth Unemployment in US Cities: Public Transportation as a Labor Market Institution,” *Socio-Economic Review* (2018) (finding that, in cities where fewer households have access to a vehicle, “an increase in the public transit density by one standard deviation is associated with a two-percentage point reduction in the youth unemployment rate”).

- b) Reliable transportation is critical to maintaining employment, which has grown difficult as personal vehicles become increasingly expensive to purchase and maintain, particularly for those workers who are low income.

Due in large part to the difficulties associated with finding employment without sufficient transit options, those who own personal vehicles are more likely to find a job and remain employed. Rolf Pendall, *For many low-income families, cars may be key to greater opportunity*, URBAN INSTITUTE: URBAN WIRE (Apr. 1, 2014), <https://www.urban.org/urban-wire/many-low-income-families-cars-may-be-key-greater-opportunity>. However, car prices have recently increased at a staggering rate, particularly following manufacturing halts caused by the COVID-19 pandemic. Renee Valdes, *When Will New Car Prices Drop?*, KELLEY BLUE BOOK (Aug. 16, 2024), <https://www.kbb.com/car-advice/when-will-car-prices-drop/#link1>; Dennis Jansen and

Somali Sinha, *Price Trends for New and Used Cars*, TEXAS A&M UNIVERSITY PRIVATE ENTERPRISE RESEARCH CENTER (Feb. 20, 2024), <https://perc.tamu.edu/blog/2024/02/price-trends-for-cars.html>.

As noted above, Americans spend an average of 16% of household income on transportation, due largely to personal vehicle ownership, which substantially cuts into their disposable income. See “The High Cost of Transportation in the United States,” *supra*. The costs associated with owning and maintaining a personal vehicle are substantially greater than the costs associated with regularly riding on public transit. See *The Impact Of Public Transit On The Workforce And Local Economies In The U.S.*, *supra* (“It’s currently estimated that Americans pay an average of \$12,182 per year to own and maintain a personal vehicle. The cost of using public transit is significantly lower as a typical transit pass costs around \$50-\$150 per month.”). For many low-income workers, public transit is the only affordable option for commuting to work.

- c) To meet the Commonwealth’s climate goals, transit-based housing is critical.

It cannot be disputed that personal vehicles that burn fossil fuels are major polluters that both release fumes harmful to public health and that contribute to climate change. United States Environmental Protection Agency, Carbon Pollution from Transportation, <https://www.epa.gov/transportation-air-pollution-and-climate-change/carbon-pollution-transportation> (last visited Sep. 6, 2024). In 2019, “personal vehicles—cars, light-duty trucks (including sport utility vehicles, crossover utility vehicles, minivans, and pickup trucks), and motorcycles—were responsible for 58 percent of emissions in the transportation sector.” Congressional Budget Office, Emissions of Carbon Dioxide in the Transportation Sector, <https://www.cbo.gov/publication/58861#:~:text=Personal%20vehicles%E2%80%94cars%2C%20light%2D,the%20transportation%20sector%20in%202019> (last visited Sep. 10, 2024). In fact,

personal vehicles generate approximately 30 million tons of carbon dioxide each year just from idling alone. United States Department of Energy, Idling Reduction for Personal Vehicles, https://afdc.energy.gov/files/u/publication/idling_personal_vehicles.pdf (last visited Sep. 6, 2024).

The Commonwealth is no stranger to the deleterious effects of personal fossil fuel-burning vehicle use on public health. Indeed, Massachusetts fought at the forefront of the effort to compel the federal Environmental Protection Agency to promulgate regulations addressing carbon dioxide emissions from vehicles. *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007). Because increased accessibility of public transit has been shown to reduce personal vehicle emissions, as would-be drivers opt for public transit instead, it is reasonable to infer that an increase in transit-oriented housing will reduce the negative externalities associated with personal fossil fuel-burning vehicle use. Nyla Holland, *How Transit-Oriented Housing Can Advance Access to Opportunity While Curbing Climate Change*, HOUSING MATTERS: AN URBAN INSTITUTE INITIATIVE (Aug. 2, 2023), <https://housingmatters.urban.org/articles/how-transit-oriented-housing-can-advance-access-opportunity-while-curbing-climate-change>. Therefore, through the MBTA Communities Act, the Commonwealth will accomplish the dual goals of curtailing the burden of costly car ownership on workers and combatting the hazardous effects of vehicle-based fossil fuel emissions.

- d) Increased MBTA ridership will improve funding and service quality, which in turn will improve workers' commutes.

In addition to closing opportunity gaps and improving public health, the MBTA Communities Act will also improve the quality of service that the MBTA provides to the Commonwealth's workers. Public transit experts have noted that two of the most important incentives for increased transit ridership are greater accessibility and more frequent service.

Gregory Thompson et al., “Understanding Transit Ridership Demand for a Multi-Destination, Multimodal Transit Network in an American Metropolitan Area: Lessons for Increasing Choice Ridership While Maintaining Transit Dependent Ridership,” Mineta Transportation Institute (January 2012), available at <https://transweb.sjsu.edu/sites/default/files/1003-multi-destination-multimodal-metropolitan-area-transit-riders.pdf> (last visited Sep. 10, 2024). As more housing is built near MBTA stops, more residents will have ready access to public transportation and are thus more likely to use the MBTA and pay fares. The attendant increase in revenue will provide the MBTA with needed resources to improve its service quality and expand its service areas, especially considering that the MBTA Advisory Board has recently stated that “more ridership is essential for [the MBTA’s] financial sustainability.” MBTA Advisory Board, “MBTA FY 2025 Operating Budget Oversight Report,” pp. 5, 8 (June 6, 2024), <https://mbtaadvisoryboard.org/wp-content/uploads/2024/06/FY25MBTAOpsBud-FINAL06-06-24.pdf>. Improving the MBTA’s service quality should, in turn, increase ridership, creating a virtuous cycle of ridership and service quality increases. Faster and more consistent MBTA trips will further assist workers by curtailing their commuting times and ensuring that they get to work on time without needless delay from slow zones or track malfunctions.

3. Liberalizing local zoning will address longstanding issues of racial segregation affecting workforce development.

The impact of local zoning ordinances on workforce development and racial segregation is not a new phenomenon. In their January 1975 report “Route 128: Boston’s Road to Segregation,” the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights (“USCCR”) and the Massachusetts Commission Against Discrimination (“MCAD”) wrote extensively and compellingly about the workforce development problems created by municipal zoning restrictions:

Initially, the strategies of resisting population increase and avidly pursuing taxable commercial or industrial development were pursued separately, and according to the income of the community and its previous history as a commercial or industrial presence. But over the years, suburban towns near 128 began to pursue both strategies. Towns with heavy restrictions on residential development began to look for painless ways to absorb industry, and towns with an industrial base began to place greater restrictions on the type of housing being developed [These zoning practices] pushed the lowest income people further away from jobs and redistributed the low-income workers into the low-income communities. Not only are housing problems exacerbated by this practice, but also the quest for industries with small, highly paid work forces leaves the whole region in economic imbalance.

Massachusetts Advisory Committee to the USCCR, & MCAD, Route 128: Boston's Road to Segregation, pp. 40-41 (1975), available at <https://files.eric.ed.gov/fulltext/ED118666.pdf>

(emphasis added). These issues have not abated in the nearly fifty years since publication of the MCAD report. See Julián Castro, John B. King & Anthony R. Foxx, Dear Colleagues Letter Regarding Mobility via Education and Socioeconomic Opportunity, U.S. Dep't of Education 1 (June 3, 2016), available at <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> (“Rising economic segregation means that an increasing number of low-income households are located in distressed neighborhoods where they face challenges such as failing schools, high rates of crime, and inadequate access to services and jobs, making it harder for individuals and families to escape poverty. In addition, sprawling urban development patterns correlate with decreased economic opportunity and social mobility”).

In refusing to comply with the MBTA Communities' Act's modest requirements, the municipalities electing to flout the Act are compounding our Commonwealth's decades old system of economic segregation. See Route 128: Boston's Road to Segregation, *supra*, at 99 (“In suburban areas, public officials with narrow outlook and parochial interests control access to housing so as to exclude most black and Spanish speaking families from their communities.”); *id.* at 100 (“In an effort to maintain the status quo and preserve the ‘character’ of their

communities, local residents of suburban areas have sought to restrict the housing supply and exclude outsiders...). Because municipalities acting individually have proven wholly incapable of proactively and holistically combatting geographic and workforce segregation—and many have, in fact, exacerbated the problems through restrictive zoning—the Attorney General’s authority to compel compliance with the Act is crucial to addressing these longstanding barriers to equitable transportation and housing access.

B. The MBTA Communities Act is not unduly restrictive on covered municipalities.

While ambitious in its aims, the MBTA Communities Act is relatively narrow in its scope. The Act itself only requires that covered municipalities provide “for at least 1 district of reasonable size in which multi-family housing is permitted as of right,” provided that the permitted housing “shall be without age restrictions and shall be suitable for families with children.” M.G.L. c. 40A, § 3A(a)(1). In determining “reasonable size,” the Act only requires that the zoning district “have a minimum gross density of 15 units per acre” and “be located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station.” *Id.* That is the sum total of what the Act itself requires.

The implementing guidelines promulgated by the Executive Office of Housing and Livable Communities provide further flexibility to covered municipalities. For example, for covered municipalities with less developable land near transit stations, the guidelines allow for zoning districts required by the Act to be located partially or entirely outside of the 0.5-mile area surrounding those municipalities’ transit stations based on a sliding scale of developable land. Executive Office of Housing and Livable Communities, Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act, <https://www.mass.gov/doc/compliance-guidelines-for-multi-family-zoning-districts-under-section-3a-of-the-zoning-act/download> (last visited Sep. 10, 2024). The guidelines also allow covered municipalities to require site plan

review of multi-family housing projects allowed as of right within their newly created districts.
Id.

Taking both the Act and the guidelines together, municipalities are only required to create a reasonably sized zoning district—which may not necessarily be located within 0.5 miles of a transit station—wherein multi-family housing is allowed as of right. When considering the benefits of transit-oriented housing outlined above, this relatively modest burden placed on municipalities pales in comparison to the potentially life-changing benefits that the Act will create for the Commonwealth’s workers and its citizenry as a whole.

C. The legislature did not intend to restrict the Attorney General’s authority to enforce compliance with Section 3A.

At the heart of Milton’s argument is the suggestion that the legislature, by enacting a provision restricting funding to noncompliant municipalities, barred the Attorney General from her traditional role of enforcing the Commonwealth’s laws. Milton asks this court to ignore its own precedent to the contrary and disregard the stark legislative facts set out above concerning the enormous housing crisis the legislature began to address with its passage of the Act.

Amicus does not, of course, offer these legislative facts to invite the Court to second-guess the legislature’s judgments. *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 772 (2002) (“respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment”) (citation and quotations omitted). Instead, Amicus offers these legislative facts to illustrate the immense scope of the problem the legislature faced when it enacted the MBTA Communities Act and the importance of the Act in beginning to remedy that problem.

With that background in mind, it is absurd to contend that the legislature took the extraordinary step of restricting the Attorney General’s statutory and common law authority to

enforce the Commonwealth's laws *sub silentio*. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88 (1984) (“the Attorney General has a general statutory mandate . . . to protect the public interest,” and a “common law duty to represent the public interest and enforce public rights”). “[T]he Legislature is presumed to know the preexisting law and the decisions of this court.” *Boehm v. Premier Ins. Co.*, 446 Mass. 689, 691 (2006) (internal quotation and citation omitted). If the legislature intended to bar the Attorney General from enforcing the Act, it would have provided “some express legislative restriction.” *Commonwealth v. Kozlowsky*, 238 Mass. 379, 390 (1921) (quotation and citation omitted).

V. Conclusion

Amicus respectfully urges that this Court hold that (1) M.G.L. c. 40A, § 3A(b) does not provide the sole remedy for noncompliance with the MBTA Communities Act; and that (2) the Attorney General is authorized and has standing to enforce compliance with § 3A.

Respectfully submitted,

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Dated: September 13, 2023

CERTIFICATE OF RULE 17(C)(9) COMPLIANCE

Undersigned counsel certifies that this brief complies with the requirements of Mass. R. App. P. 17 and 20. Compliance with Rule 20(a)(3)(E) was drafted in Microsoft Word for Mac, Version 16.88. Counsel used the proportionally spaced font “Times New Roman” in 12-point size. Counsel highlighted the sections of the brief covered by Rule 20(a)(3)(F), and recorded the number of non-excluded words: 3,017.

/s/ Ryan McGovern Quinn
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CERTIFICATE OF SERVICE

Pursuant to Rule 13(e) of the Massachusetts Rules of Appellate Procedure, I hereby certify that this document was served on counsel for all parties who are registered via the Massachusetts Tyler Host electronic filing system. Separately, copies are sent to counsel of record, as follows:

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