COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13580

THE ATTORNEY GENERAL,
Plaintiff / Counterclaim Defendant – Appellant

v.

TOWN OF MILTON,
Defendant / Counterclaim Plaintiff / Third Party Plaintiff – Appellee, and
JOE ATCHUE,
Defendant – Appellee,

v.

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

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

BRIEF OF *AMICUS CURIAE* NAIOP MASSACHUSETTS, INC.

IN SUPPORT OF PLAINTIFF / COUNTERCLAIM DEFENDANT - APPELLANT

TO DIRECT ENTRY OF THE DECLARATIONS SOUGHT BY APPELLANT

September 16, 2024

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Judicial Court Rule 1:21, NAIOP Massachusetts, Inc. ("NAIOP Massachusetts") states that it is a 26 U.S.C. § 501(c)(6) not-for-profit association organized under the laws of the Commonwealth of Massachusetts. NAIOP Massachusetts does not issue stock or any other form of securities and does not have any publicly owned parent, subsidiary, or affiliate companies.

DECLARATION REGARDING PREPARATION OF AMICUS BRIEF

Under Mass. R. App. P. 17(c)(5), NAIOP Massachusetts 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 other person or entity contributed money that was intended to fund preparing or submitting this brief; and (d) neither NAIOP Massachusetts nor its counsel represents or has represented one of the parties to this appeal in another proceeding involving similar issues, nor were or are either of them a party or a representative of a party in a proceeding or legal transaction that is at issue in this appeal.

NAIOP Massachusetts notes that it was a participant in a task force convened by the Massachusetts Department of Housing and Community Development, predecessor to the Third-Party Defendant / Appellant The Executive Office of Housing and Livable Communities ("EOHLC"), to assist in the

development of the Compliance Guidelines for Multi-family Zoning Districts Under Section 3A of the Zoning Act (the "Guidelines"). Gregory Sampson, one of the undersigned attorneys who contributed to this brief, served as a representative of NAIOP Massachusetts on that task force.

STATEMENT OF INTERESTS OF AMICUS CURIAE

With more than 1,800 members, NAIOP Massachusetts is a not-for-profit organization representing the interests of companies that develop, own, manage, and finance commercial office, lab, industrial, mixed use, multi-family, retail, and institutional real property in the Commonwealth.

The Commonwealth is facing a housing crisis as a result of decades of insufficient production of housing units, caused by and large by systemic barriers to new housing production in local zoning rules. These barriers are particularly acute when it comes to multi-family housing development, such as apartments, condominiums, and townhouses, which often face difficult entitlement processes in local zoning.

To that end, NAIOP Massachusetts' members are active in the development and permitting of the multi-family housing projects that are needed to respond to this crisis. Members face the challenges associated with discretionary entitlements needed from local boards and commissions for multi-family projects. These discretionary entitlement processes impose a multitude of risks and costs to project

proponents, including risk of denial and burdensome conditions, pressure to reduce project size and unit counts, and exceptionally long permitting periods with countless meetings and opportunities for appeal.

The addition of Section 3A to Chapter 40A (the "MBTA Communities Law") creates an opportunity to create new multi-family housing by requiring MBTA communities to have "at least 1 [zoning] district of reasonable size in which multi-family housing is permitted as of right." G.L. c. 40A, § 3A(a) ("Section 3A"). In the communities that have responded to the requirement of Section 3A, new opportunities are being created by zoning changes that allow multi-family housing as-of-right, and NAIOP Massachusetts members are responding.

As the trade group that represents the commercial real estate industry in Massachusetts, NAIOP Massachusetts has a unique perspective on the impact of restrictive zoning on the cost of housing in the Commonwealth, as well as on land use development patterns that encourage single-family home construction on large lots. Large lot development eats up open space and, per capita, results in high relative greenhouse gas emissions because owners are reliant on automobiles for all daily needs, including providing access to work, shopping, and schools. When municipalities adopt restrictive zoning in areas that are in close proximity to job centers and public transportation, or when they adopt zoning that subjects multi-

family development to drawn-out, uncertain, and expensive permitting processes, it simply pushes development further out and to even lower density locations. These land use restriction practices increase the cost of housing because it cannot be built at scale, it consumes open space, adds to the traffic congestion, and results in greenhouse gas emissions at much higher rates than multi-family housing close to jobs and public transportation. To address these public policy concerns, the General Court adopted the MBTA Communities Law to encourage housing production to stabilize prices, and to direct development to places with lower carbon impacts. These public policy considerations can only be addressed on a regional basis, as the housing market, traffic patterns, and the climate crisis do not respect municipal boundaries. Permitting individual municipalities to opt out, even at the cost of certain state funding sources, will make it impossible for the Commonwealth to grapple with these significant policy challenges. For this reason, NAIOP Massachusetts believes that those communities subject to the MBTA Communities Law, which are by design located close to job centers and public transportation, join in the regional land use planning initiatives.

STATEMENT OF THE CASE

NAIOP Massachusetts adopts the Statement of the Case provided by the Plaintiff / Counterclaim Defendant and Third Party Defendant in their brief.

STATEMENT OF THE FACTS

NAIOP Massachusetts adopts the Statement of the Case provided by the Plaintiff / Counterclaim Defendant and Third Party Defendant in their brief.

SUMMARY OF ARGUMENT

The Attorney General has a mandate and broad authority to act in the public interest and address violations of law affecting the general welfare of all of the people in the Commonwealth. Though empowered to craft zoning ordinances, local governments cannot be allowed to willfully ignore state statutory mandates concerning matters of critical public concern without recourse. Recourse for noncompliance must include declaratory relief and, in situations like Milton, where noncompliance was an intentional result of the vote of the Town, injunctive relief should be available. The most logical and appropriate form of injunctive relief for intentional noncompliance is a prohibition on the use of discretionary permitting of multi-family housing. The Court, therefore, should recognize the authority of the Attorney General to seek injunctive relief, which could include, if so determined by a court, the authority to prohibit noncompliant municipalities from imposing discretionary approval processes on multi-family housing projects.

Failing to recognize the authority of the Attorney General to enforce compliance with Section 3A by allowing municipalities to explicitly choose non-compliance with Section 3A would critically undermine the effectiveness of the

legislation to achieve its policy objectives to facilitate new multi-family housing development.

NAIOP Massachusetts urges the Court to direct the entry of the declarations sought by the Attorney General's complaint and affirm that the Attorney General may elect to enforce Section 3A through requests for declaratory and injunctive remedies.

ARGUMENT

A. The Attorney General has Broad Authority to Pursue Causes of Action in the Public Interest.

The Attorney General has broad authority to pursue causes of action in the public interest. In fact, "the Attorney General has a general statutory mandate, in addition to any specific statutory mandate, to protect the public interest," as well as a "common law duty to represent the public interest and enforce public rights." Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984). Dating back to the very foundation of common law both in the United States and England, duties that have come with the office of Attorney General are "so numerous and varied that it has not been the policy of the Legislatures of the states of this country to attempt specifically to enumerate them." Commonwealth v. Kozlowsky, 238 Mass. 379, 390 (1921) (internal citation omitted). This means that "in the absence of some express legislative restriction to the contrary," the Attorney General is authorized to "institute, conduct, and maintain all such suits and proceedings as [she] deems

necessary for the enforcement of the law of the State, the preservation of order, and the protection of public rights." Id. at 390-91.

Moreover, the Attorney General has broad rights to seek relief for a statutory violation "pursuant to the powers conferred by G.L. c. 12, § 10, and in accord with the Attorney General's common law duty to represent the public interest and to enforce public rights." Lowell Gas Co. v. Att'y Gen., 377 Mass. 37, 48 (1979). Under G.L. c. 12, § 10, the Attorney General is authorized and has a duty to "take cognizance of all violations of law ... affecting the general welfare of the people," and to bring "such criminal or civil proceedings ... as [s]he may deem to be for the public interest."[1] More broadly, the Attorney General has power under the legal doctrine of parens patriae to bring suit to protect or vindicate the interests of Massachusetts citizens, where it would be impractical for individual citizens to seek relief on their own behalf. See Healey v. Uber Techs., Inc., No. 2084CV01519-BLS1, 2021 WL 1222199, at *4 (Mass. Super. Mar. 25, 2021) (citing to Commonwealth v. Sch. Comm. of Springfield, 382 Mass. 665 (1981)).

[1] NAIOP Massachusetts believes the actions of the Attorney General are warranted in the unique circumstances of this case based on the decades long duration and severity of the Massachusetts housing crisis, the conscious action of the Town of Milton to resist the requirements of Section 3A, and because the defendant is a political subdivision of the Commonwealth. NAIOP Massachusetts recognizes that the authority of the Attorney General to bring future actions in other situations needs to be evaluated based on the specific circumstances of those cases.

B. The Attorney General is well within her right to pursue a cause of action against Milton seeking to enforce compliance with Section 3A because it is in the public interest.

Enforcement of Section 3A(a) plainly implicates the public interest and public rights. The Legislative intent behind the enactment of Section 3A is well documented. In the past, the Legislature has attempted to increase housing production through "opt-in" zoning programs; however, against a backdrop of systemic barriers to new housing production, those efforts had little success. Today, it is clear that "[g]reater Boston's housing shortage has emerged as one of the region's most urgent policy challenges. The demand for housing in the region is increasingly dwarfing the supply." Amy Dain, THE STATE OF ZONING FOR MULTI-FAMILY HOUSING IN GREATER BOSTON 22 (Mass. Smart Growth Alliance, Jun. 2019).[2] As a result, Massachusetts' home prices and rents are among the highest, and fastest growing, in the nation. Id. Decades of zoning schemes that have excluded denser development patterns and multi-family housing have targeted racial minorities, lower-income and working-class residents, families with school-aged children, religious minorities, and immigrants, raising issues of

[2] https://ma-smartgrowth.org/wp-content/uploads/2019/06/03/FINAL_Multi-Family_Housing_Report.pdf.

environmental justice and general public welfare. Amy Dain, EXCLUSIONARY BY DESIGN 2 (Boston Indicators, Nov. 2023).[3]

In a landmark 1975 decision challenging an overly restrictive zoning ordinance that effectively precluded the development of housing for low and moderate income households, the Supreme Court of New Jersey observed that: "It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 179 (1975). Massachusetts is no different as we face a housing crisis that has widespread implications for economic stability, public health, and social equity. Amy Dain, THE STATE OF ZONING FOR MULTI-FAMILY HOUSING IN GREATER BOSTON at 22.

As described in Part A., the Attorney General has a broad mandate to protect the public interest, enforce public rights, and ensure compliance with state laws. Mass. CRINC, 392 Mass. at 88. This authority extends to bringing actions against local governments that fail to fulfill their obligations under state law, particularly when such failures undermine significant public interests. Att'y Gen. v. Trustees of Boston Elevated Ry. Co., 319 Mass. 642, 652 (1946). By seeking to enforce

[3] https://www.bostonindicators.org/-/media/indicators/boston-indicators-reports/report-files/exclusionarybydesign_report_nov_8.pdf .

Section 3A, the Attorney General is acting in the interest of the public to advance requirements that will spur housing production and help alleviate the crisis we currently face.

The Attorney General's authority under the doctrine of parens patriae further supports her action against the Town of Milton. Healy at 4. Under this doctrine, the Attorney General can bring suit on behalf of the citizens of Massachusetts, particularly when individual citizens are unlikely to pursue such actions themselves due to the impracticality or the collective nature of the harm being addressed. Id. Milton's failure to comply with Section 3A directly affects the ability of Massachusetts residents to access affordable housing in a community with robust public transportation options. The Attorney General's intervention is not only appropriate but necessary to vindicate the rights of these citizens, many of whom would otherwise lack the means or capacity to challenge such noncompliance.

C. Loss of Funding is Not an Exclusive Remedy.

The Attorney General's power to sue to enforce Section 3A cannot be limited by statutorily imposed consequences for non-compliance expressly listed in Section 3A (i.e., loss of state-funding). Exclusion from funding is not an exclusive remedy that prohibits the Attorney General from seeking enforcement of the Section 3A mandate.

The Court has limited the Attorney General's right to pursue equitable remedies, but only where a statute imposes adequate remedies. Att'y Gen. v. Williams, 174 Mass. 476, 484 (1899). Moreover, the Court has recognized that, where the public interest is concerned, statutory remedies may not be sufficient. For example, in Att'y Gen. v. Pitcher, 183 Mass. 513 (1903), although upholding a dismissal of an action by the Attorney General, the Court observed that the acts sought to be enjoined affected only individuals and did not directly affect the public in any way. Id. at 519. Similarly, in Inhabitants of Town of Lexington v. Suburban Land Co., the Court denied the authority of the Attorney General to pursue remedies in a case involving the use of private property, observing that the violations of the statute did not constitute a public or private nuisance. 235 Mass. 108, 113 (1920). This decision reflects the Court's opinion that where public interest is involved, the analysis on remedies differs.

There also remains the question as to when the relief specified in a statute is adequate. See Att'y Gen. v. N. Y., N.H. & H.R. Co., 197 Mass. 194, 199 (1908) ("A remedy by mandamus or quo warranto will not be given where any other *adequate* kind of relief is available.") (emphasis added). With respect to Milton, loss of funding is at best a moderate deterrent for noncompliance with Section 3A. Such a remedy in no way addresses the public welfare associated with the housing

crisis. Accordingly, the loss of funding is not an adequate remedy that restricts the Attorney General from pursuing other remedies.

D. Injunctive Relief is a Proper Remedy Based on the Town's Actions.

The Town of Milton voted to willfully abandon a plan that appeared likely to have allowed it to seek compliance under the Section 3A Guidelines. Prior to the Town's vote, the Town Administrator expressly made the voters aware of the potential impact of the "no" vote and the Attorney General had previously indicated that she would seek all remedies available for noncompliance. Notwithstanding notice from the Attorney General regarding her intended response to Milton's non-compliance, the Town voted to defy the requirements. This type of intransigent behavior by the Town justifies the use of injunctive relief. Benefit v. City of Cambridge, 424 Mass. 918, 927 (1997) ("We assume that public officials will comply with the law once a court has defined it, and injunctions usually are not needed in the absence of intransigence on the part of such public officials."); Id.

In the face of willful decisions to defy the requirements of Section 3A, the Attorney General must have a strong remedy available that addresses the harm to the public interest caused by such defiance and deters future non-compliance. For the reasons set forth below, the most appropriate remedy would be the power to

seek to enjoin a non-compliant municipality from imposing discretionary relief on multi-family housing projects.

Section 3A requires that an MBTA community have at least one zoning district where multi-family housing is allowed "as of right", meaning that such multi-family housing is to be permitted "without the need for a special permit, variance, zoning amendment, waiver, or other discretionary zoning approval." G.L. c. 40A, § 3A(a); G.L. c. 40A, § 1A.

The use of discretionary zoning processes has long been recognized as a barrier to new housing. Excessive use of discretion by local governments increases the cost and the amount of time required to obtain approvals, and it increases the unpredictability for developers seeking approvals. See, e.g., Jakabovics, et al., Bending the Cost Curve – Solutions to Expand the Supply of Affordable Rentals, Urban Land Institute Terwilliger Center for Housing: at 24 (2014) ("Jurisdictions often negotiate with developers over the terms that the project will need to meet to receive necessary permits, variances, and entitlements. While this process can result in a mutually beneficial resolution, efficiency is sacrificed when developers cannot anticipate the specific standards that the development will need to meet. This process can also lead to last-minute changes that further drive up costs."). In a recent study that controlled for project and neighborhood characteristics, as of right projects were permitted 28% faster than discretionary projects and were

subject to less variance in the approval timelines. Michael Manville, *et al*., *Does Discretion Delay Development? The Impact of Approval Pathways on Multifamily Housing's Time to Permit*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, Vol. 89, No. 3 (2022)[4]. In addition, discretionary approval processes allow for ad hoc negotiations about projects, often resulting in decreases to project size and increases to project cost and mitigation, ultimately increasing the overall cost to deliver new housing units. See Amy Dain, THE STATE OF ZONING FOR MULTI-FAMILY HOUSING IN GREATER BOSTON at 53.

The Legislature and Courts throughout the Commonwealth have long recognized that limits to discretionary zoning are necessary. For example, Section 3 of the Zoning Act sets forth several protected uses for which the use of discretion is restricted. These uses include the following:

- *Agricultural uses*, G.L. c. 40A, § 3, p. 1 (a zoning ordinance or bylaw may not "prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture.");
- *Religious or educational uses*, G.L. c. 40A, § 3, p. 2 (a zoning ordinance or bylaw shall not "prohibit, regulate or restrict the use of land or structures for

[4] https://www.tandfonline.com/doi/full/10.1080/01944363.2022.2106291.

religious purposes or for educational purposes on land owned or leased by the Commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.");

- *Child care uses*, G.L. c. 40A, §3, p. 3 ("No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements."); and
- *Solar energy*, G.L. c. 40A, §3, p. 9 ("No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.").

Each of the aforementioned uses, and several others contained in Section 3, are important to the Commonwealth at large, but they often are unpopular at a local level. The Legislature recognized this conflict and in order to protect and prioritize the availability of housing to address an urgent shortage, purposefully limited the discretion that may be applied by municipalities to these uses.

Similarly, in the context of affordable housing, G.L. c. 40B removes the discretionary authority of municipalities that have failed to achieve certain milestones relative to the provision of affordable housing. Bd. of Appeals of Hanover v. Hous. Appeals Comm. in Dept. of Cmty. Affs., 363 Mass. 339, 367 (1973) (G.L. c. 40 "prevents the board from relying on local requirements or regulations, including applicable zoning by-laws and ordinances which prevent the use of the site for low and moderate income housing, as the reason for the board's denial of the permit or its grant with uneconomic conditions.").

Multi-family housing is similar to the uses discussed above. Despite the critical need for new housing units, local opposition to multi-family projects is pervasive throughout the Commonwealth and the nation. See Andrew Mikula, *Supply Stagnation: The Root Cause of Greater Boston's Housing Crisis and How to Fix It*, THE PIONEER INSTITUTE, 11-12 (May 2024). NAIOP Massachusetts members face this opposition on a daily basis, and countless number of new

housing units have been abandoned in the face of discretionary decision-making and local opposition.

Section 3A's "as of right" requirement was adopted to overcome the barriers to new multi-family housing attributable to discretionary approval processes. Without adequate recourse, certain municipalities are likely to choose noncompliance and continue to impose discretionary approval processes on multi-family projects, limiting housing production and shifting the burden of addressing the housing crisis to other municipalities. For this reason, the Court should explicitly affirm that the Attorney General may pursue injunctive relief in the form of a prohibition on the use of discretionary zoning approval processes for multi-family housing projects in noncompliant municipalities.

CONCLUSION

NAIOP Massachusetts respectfully requests that this Court direct the entry of the declarations sought by the Attorney General's complaint, direct the entry of judgment denying relief on the Town's counterclaim, and remand this case for further proceedings regarding an appropriate remedy.

September 16, 2024

Respectfully submitted,

NAIOP MASSACHUSETTS INC.

By its attorneys,

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CERTICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(K)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of amicus briefs, including but not limited to, Mass. R. App. P. 16 and Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limit in Mass. R. App. P. 20 because it uses a 14-point Times New Roman font and contains no more than 7,500 words long.

September 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, I caused this brief to be filed electronically through the Supreme Judicial Court's e-filing system and served via e-mail to all counsel of record listed below.

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