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 FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF AMICUS CURIAE

THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.

IN SUPPORT OF PLAINTIFF/COUNTERCLAIM DEFENDANT – APPELLANT

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September 18, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the amicus curiae states that the Real Estate Bar Association for Massachusetts, Inc. ("REBA" or the "Amicus"), is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts. No publicly traded corporation owns more than 10% of the stock of REBA.

DECLARATION REGARDING PREPARATION OF AMICUS BRIEF

In accordance with Rule 17(c)(5) of the Rules of Appellate Procedure, the Amicus declares that the undersigned counsel authored the brief, and that no party or party's counsel authored it in whole or in part. The Amicus also declares that no outside party, person, or entity contributed money intended to fund preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Regulations

Other Authorities

STATEMENT OF INTERESTS OF THE AMICUS CURIAE

REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 150 years. It has nearly 2,000 members practicing throughout the Commonwealth. Through its meetings, educational programs, publications, and committees, REBA assists its members in remaining current with developments in the field of real estate law and practice, and in sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards, and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases, and established legal principles to a wide variety of circumstances that practitioners face in evaluating titles and handling real estate transactions. From time to time, REBA files amicus briefs on important questions of law. On several occasions it has been requested to do so by this court or the Appeals Court.

Of particular interest here, members of REBA represent project proponents and abutters alike before local boards and in the courts of this Commonwealth.

These representations often involve the use of land or structures for housing and residential development, affordable and market-rate, single and multi-family, and how local and state zoning regulations authorize, impede, and/or steer such development.

In particular, the undersigned authors are co-chairs of REBA's Land Use and Zoning, Affordable Housing, and Litigation Sections. As reflected by these sections, REBA members include permitting counsel who can attest to the many months, if not years, that attend the process of seeking, with no guarantee of obtaining, discretionary municipal approval for multi-unit residential developments. These long processes, which G.L. c. 40A, § 3A was intended to curtail in targeted areas of mass transit hubs, are how most multi-family developments are permitted in Massachusetts, and end in denial as often as approval. Even when approved, multi-family projects are routinely materially scaled-back and relegated to formerly industrial or commercial land far from village centers, through these permitting processes.

Given its longevity, REBA members have observed, first-hand, the Town of Concord, like the Town of Milton here, resist the pre-emptive power of G.L. c.

40B when it was first enacted many decades ago. Even with c. 40B's pre-emptive force sustained, and decades of the statute deployed to create much needed affordable housing, many cities and towns remain below the act's modest affordable housing threshold. While an effective tool, c. 40B has proven inadequate, on its own, to guarantee the Commonwealth's citizens the affordable housing that they need. Likewise, while subsidy funding, such as in the recently enacted Housing Bill, is essential to provide urgent relief to the housing insecure, a durable solution to housing unaffordability requires increased housing production, which necessitates *both* money *and* regulatory relief.

Even when uses have been protected by the General Court through, *inter alia*, G.L. c. 40B and c. 40A, § 3, REBA members have experienced years of litigation, which is often needed to compel recalcitrant municipalities to honor state-law preemption. Home Rule, as the Town's brief in this case demonstrates, frequently generates the false municipal impression that local zoning authority is boundless. The Home Rule Amendment, however, creates an intra-state federalist system, predicated on state-law supremacy.

Since Home Rule is as much cultural as it is doctrinal in Massachusetts, most pre-emptive land use regulatory statutes reflect forms of cooperative federalism, with municipalities retaining some residuum of local regulatory authority. These cooperative frameworks are certainly laudable in the abstract, but, in practice, all too often retained local jurisdiction is mistaken for the right to deny state-law mandates. This litigation falls squarely into these dynamics that REBA members—permitting counsel, affordable housing practitioners, and real estate litigators—live on a daily basis.

For REBA members, the highly illustrative data cited in the Commonwealth's brief, this brief, and those of other amici are not simply academic; the data reflect the lived experience of REBA's members who are engaged in efforts to create housing in Massachusetts. The MBTA Communities Act (the "MCA") was intended to foster the development of multi-family housing. For the following reasons, this legislative intent is only advanced by the Attorney General's positions in this action; if the town's claims were adopted, then legislative intent would be fatally frustrated.

SUMMARY OF ARGUMENT

Municipal Home Rule authority over local zoning regulations is broad, but not absolute. The Zoning Act, G.L. c. 40A, subjects that authority to express limitations. For instance, Section 4 of the Zoning Act requires uniformity for the types of structures or uses allowed in locally created zoning districts; Section 6 exempts, *inter alia*, lawful uses or structures in existence from more onerous zoning regulations; and Section 3, the so-called Dover Amendment, is the Zoning Act's anti-discrimination section, enacted to protect socially productive, but locally unpopular, uses of land.

These pre-emptive provisions of the Zoning Act are not advisory. They mandate compliance from municipalities – limiting the otherwise extensive local authority over zoning. The Zoning Act operates as the primary source of checks and balances on municipal Home Rule authority over local zoning regulations.

It is within this statutory, mandatory framework that the General Court enacted MCA, inserting it as Section 3A of the Zoning Act. Like the other

provisions of the Zoning Act, Section 3A mandates compliance from municipalities.

Noncompliance must be met with not only the loss of subsidies set forth in Section 3A(b), but, like all other instances of municipal violations of the Zoning Act, injunctive relief ordering such compliance as may be necessary to effectuate the express terms of the statute. In this particular instance, where the Town of Milton has refused to comply with any part of Section 3A, the Attorney General not only has the authority, but is best suited to seek redress from this Court.

The Attorney General has broad authority to enforce the laws of the Commonwealth and has standing to seek damages and equitable relief for a statutory violation pursuant to 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. Moreover, as a practical matter, a challenge to a municipality’s failure to comply with Section 3A cannot effectively be brought by individual property owners under the typical framework provided by G.L. c. 40A, § 17 and G.L. c. 240, § 14A. Where, here, a municipality has chosen to completely ignore the

requirements of Section 3A by failing to adopt new, compliant zoning outright, the Attorney General is authorized to seek such compliance, and the Town's argument that the Commonwealth's sole remedy for non-compliance is withholding funds is in error. It would render a clear pre-emptive mandate dead-letter surplusage.

As to the question of municipalities' compliance with the MCA, the General Court directly and specifically instructed the Executive Office of Housing and Livable Communities ("EOHLC") to promulgate "guidelines" (the "MCA Guidelines"). EOHLC has done so, duly and properly, pursuant to a lengthy public outreach process that, in many ways, provided greater notice to and more robust opportunities for municipalities to participate in the formulation of the MCA Guidelines than the G.L. c. 30A process requires with respect to the formal promulgation of regulations.

While the Town of Milton has taken issue with a few specific provisions of the MCA Guidelines (e.g., how the Mattapan Line is categorized), this is irrelevant to the present dispute; the case presented here is not one in which a municipality has made a

good faith effort to bring its zoning into compliance with the MCA, yet was determined by EOHLC to have been unsuccessful in doing so based on substantive requirements of the MCA Guidelines. Rather, the Town of Milton has flouted the MCA by outright refusing to comply. This Court should hold that compliance with the MCA is mandatory, and can be compelled by more than the withholding of subsidies.

ARGUMENT

I. Interplay of Local Home Rule and State-Law Preemption.

Massachusetts cities and towns have broad regulatory authority over local land use and zoning policy pursuant to the Home Rule Amendment to the Massachusetts Declaration of Rights. See MASS. CONST. art. 89; see, e.g., Roma III, Ltd. v. Bd. of Appeals of Rockport, 478 Mass. 580, 585-586 (2018), citing Bobrowski, Handbook of Massachusetts Land Use and Planning Law, § 2.03 (3d ed. 2011). "[T]he zoning power is one of a city's or town's independent municipal powers included in art. 89, § 6's broad grant of powers to adopt ordinances or by-laws for the protection of the public health, safety, and general welfare." Bd. of Appeals of Hanover v. Housing Appeals

Comm. in Dep't. of Comm. Aff., 363 Mass. 339, 359 (1973).

Yet, "[t]he adoption of the Home Rule Amendment [did] not alter[] the Legislature's supreme power in zoning matters as long as the Legislature acts in accordance with § 8" of the Amendment. Bd. of Appeals of Hanover, 363 Mass. at 360. Particularly relevant here, local zoning authority "cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature in accordance with § 8's provisions." Id. See Sturges v. Chilmark, 380 Mass. 246, 253 (1980).

Milton does not argue otherwise, and with good reason. It is well established that the provisions of 40A which protect socially productive uses that are frequently locally unpopular are mandatory. See G.L. c. 40A, § 3; Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 113 (1995) ("Section 3's "purpose is "'to prevent local interference with the use of real property' -- whether of land or of structures thereon for the exempt purposes identified in the statute."). It was no accident, then, that the MCA was inserted into the Zoning Act as Section 3A. Where Section 3 tells municipalities what they must,

at a minimum, *avoid* in terms of their zoning, Section 3A prescribes what those same municipalities must, at a minimum, *include* in their zoning. Both are mandates from the General Court; Milton is not free to ignore the mandate to act, as it is not free to ignore the mandate to refrain from acting.[1]

It is well recognized that the strong local authority over zoning can make, and has made, the implementation of state-wide policy goals very difficult, if not impossible. Indeed, the technical legal protection provided to Section 3's expressly exempt uses has not served to fulfill the legislative intent to protect and curtail municipal interference therewith. Cities and towns have engaged in multiple rounds of litigation, and leveraged permitting authority in adjacent fields, to thwart the state-wide use priorities. See, e.g., McLean Hosp. Corp. v. Lincoln, 483 Mass. 215 (2019); Regis College v.

[1] Indeed, as a practical matter, Section 3's prohibition against proscribing certain uses has resulted in many, if not most, cities and towns adopting zoning to treat these protected or exempt uses as allowed as-of-right in all zoning districts. But, as the forthcoming summary of the history under the Dover Amendment shows, even this self-apparent and logically necessary consequence of Section 3's pre-emptive prohibitions has not been without controversy.

Weston, 462 Mass. 280 (2012); Martin v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001); Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. 796 (1997); Henry v. Bd. of Appeals of Dunstable, 418 Mass. 841 (1994); Trustees of Tufts College v. City Medford, 415 Mass. 753 (1993); Gardner-Athol Area Mental Health Assoc. v. Zoning Bd. of Appeals of Gardner, 401 Mass. 12 (1987); Whitinsville Retirement Soc. v. Northbridge, 394 Mass. 757 (1985); Rosenfeld v. Zoning Bd. of Appeals of Mendon, 78 Mass. App. Ct. 677 (2011); Trustees of Boston College v. Board of Alderman of Newton, 58 Mass. App. Ct. 794 (2003); Newbury Junior College v. Brookline, 19 Mass. App. Ct. 197 (1985); Comm'r of Code Inspection of Worcester v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97 (1980).

Section 3 plaintiffs have been forced to endure years of protracted litigation to vindicate their rights. See, e.g., Trustees of Boston College, 58 Mass. App. Ct. 794 (2003) (Boston College denied local relief for project in 1996; obtained a final favorable decision on appeal in 2003). Given any legal toehold, cities and towns will expend tremendous public resources fighting the implementation of state-wide

policy goals, even mandated ones, in a misguided effort to protect what they perceive as their inalienable right to govern themselves at the expense of broader public goals.[2] That right, however, is and has always been subject to the General Court's superintendency. Municipalities may not exercise their zoning power "in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature." Board of Appeals of Hanover, 363 Mass. at 360.

Indeed, this lawsuit exemplifies the issue: it is the direct product of one, self-interested municipality, attempting to supplant the General Court's clearly articulated goals for the entirety of eastern Massachusetts. Thus, even from the vantage of wanting to preserve the Home Rule system, this court should not countenance such "repugnant" local action – a full rejection of the Town of Milton's obligations under the MCA. Bloom v. Worcester, 363 Mass. 136, 155

[2] The Town of Milton itself has engaged in efforts to this effect prior to the present case, to great expense to the taxpayers of Milton and detriment to the production of affordable housing. See Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257 (2022) (concluding the town's final appeal of a Chapter 40B development project, 8 years after the project was proposed).

(1973). Our intra-state federalist system requires the supremacy of state law to remain viable, or the Commonwealth will find itself incapable of meeting the policy challenges of our polity. And, the view of the "State agency charged with the administration of State statutes" "is an important practical consideration" in the pre-emption analysis. Id. at 160.[3]

II. Express Preemption and a Mandate.

Section 3A obligates cities and towns to adopt or amend local zoning to provide for a district suitable for certain residential density and located within a specific distance to certain transportation infrastructure. See G.L. c. 40A, § 3A. Milton has refused to do so. This Court should declare that Milton must comply with the statute, and that, should

[3] Assuming that the EOHLC has been delegated the authority to interpret G.L. c. 40A, § 3A—which is what § 3A(c) expressly provides—and the Attorney General is authorized to act as the Commonwealth's and the EOHLC's lawyer—which she plainly is—the Attorney General's position on state-law pre-emption, and the meaning and effect of § 3A, as embodied in the MCA Guidelines, is entitled to "substantial deference" under this Court's decisions, if the statute were ambiguous on the pre-emption and mandate question. Goldberg v. Board of Health of Granby, 444 Mass. 627, 633 (2005). As discussed herein, however, REBA does not believe that the statute is ambiguous; REBA is of the opinion that the statute unambiguously contains a pre-emptive mandate.

it not, the Attorney General has the authority to bring suit to force compliance, through an injunction or other equitable measures.

"Where the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment." St. George Greek Orthodox Cathedral of Western Mass., Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 129 (2012). Section 3A requires a zoning bylaw for an MBTA Community to have "at least 1 district of reasonable size in which multi-family housing is permitted as of right." Milton's Zoning Bylaw does not presently comply, and Milton has expressly articulated its intention not to comply. Therefore, the Attorney General brought this suit to force compliance notwithstanding the latitude given municipalities under the Home Rule Amendment (and G.L. c. 40A, § 3A, as well as the MCA Guidelines).

This Court has sought to strike an appropriate balance, affording robust protection to exempt uses, while honoring the General Court's intent to reserve only limited regulatory authority in cities and towns in such instances. See Martin, 434 Mass. at 148, quoting Trustees of Tufts College, 415 Mass. at 757 (§

3 "seeks to strike a balance between preventing local discrimination against a religious use and honoring legitimate municipal concerns that typically find expression in local zoning laws") (citation omitted). However, a municipality is not permitted to exercise its zoning powers in a manner which nullifies the protections given to an exempt use. Martin, 434 Mass. at 151, quoting Tufts, 415 Mass. at 758-759 & n. 6 (zoning "requirement that results '*in something less than nullification* of a proposed exempt use may be unreasonable within the meaning of the Dover Amendment.'" (emphasis added)). Milton's refusal to amend its Zoning Bylaw to comply with Section 3A results in a nullification of the protection the Legislature intended to afford to multi-family housing in proximity to mass transit hubs in adopting Section 3A.

a. "Shall" means "shall"; compliance is mandatory, not a matter of foregoing funds.

Compliance with Section 3A is not optional. The language of the statute is clear: "[a]n MBTA community **shall** have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right; provided, however, that such multi-family housing

shall be without age restrictions and shall be suitable for families with children." G.L. c. 40A, §3A(a)(1) (emphasis added). Applying the familiar principles of statutory interpretation, this Court can only conclude that compliance with Section 3A is not optional, and that Milton must amend its noncompliant Zoning Bylaw.

The Court's analysis of Section 3A begins with the statutory language itself, and the Court interprets the statute "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Commonwealth v. Young, 453 Mass. 707, 713-14 (2009) (internal quotations and citations omitted). "[W]ords in a statute must be considered in light of the other words surrounding them." Commonwealth v. Brooks, 366 Mass. 423, 428 (1974). The Court must "presume that in interpreting a statute the Legislature had knowledge of constitutional requirements existing when it enacted or amended the statute." School Comm. of

Greenfield v. Greenfield Education Ass'n., 385 Mass. 70, 79-80 (1982) (internal citation omitted). And absent legislative direction, this Court presumes the Legislature intended the terms to be given their usual and customary definitions. Fordyce v. Hanover, 457 Mass. 248, 258 (2010).

Where the text of the statute is clear and unambiguous, the Court applies its ordinary meaning. Bronstein v. Prudential Ins. Co. of Am., 390 Mass. 701, 704 (1984). And the Court looks to the "language of the entire statute, not just a single sentence, and attempt[s] to interpret all of its terms 'harmoniously to effectuate the intent of the Legislature.'" Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013), quoting Commonwealth v. Raposo, 453 Mass. 739, 745 (2009). "The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation." Hashimi v. Kalil, 388 Mass. 607, 609 (1983); see, e.g., Sullivan v. Brookline, 435 Mass. 353, 360 (2001); Commonwealth v. Cook, 426 Mass. 174, 180-181 (1997), and cases cited (interpreting "shall" as mandatory, in accord with general rule of statutory interpretation).

The language of the statute being clear, the Court need not analyze further. The use of the word

"shall" imposes a mandatory obligation on MBTA Communities as defined by the statute. This conclusion is only buttressed by consideration of "the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Young, 453 Mass. at 713–714.

As discussed above, municipalities have a long history of utilizing their zoning power in a manner which, directly and indirectly, excludes certain uses, such as multi-family housing. The Legislature has repeatedly adopted legislation aimed at promoting housing in the Commonwealth; these efforts have generally failed. See Dain, Amy, The State of Zoning for Multi-Family Housing in Greater Boston, at 101 (Mass. Smart Growth Alliance Jun. 2019).[4] ("Even with Chapter 40B, building levels have not sufficed to meet demand for housing."). It is entirely reasonable that, after years[5] of "encouraging" municipalities to allow

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

[5] As the Court states in Marengi v. 6 Forest Rd. LLC, 491 Mass. 19, 28 (2022), "Decades ago, the Comprehensive Permit Statute, St. 1969, c. 774, now codified at G. L. c. 40B, §§ 20 through 23, was

higher density housing through measures such as G.L. c. 40R and c. 40Y, the Legislature concluded that encouragement is insufficient. Given the intractability of the housing shortage that the Commonwealth faces, a mandate is necessary. A different interpretation would not further the purposes of Section 3A, or, indeed, the Zoning Act in toto.

Section 3A functions as such a mandate. It requires the adoption of, or amendment to, a zoning law which creates a district which allows for multi-family housing as-of-right. However, in a nod to the balance which this Court has striven to maintain, see Trustees of Tufts College, 415 Mass. at 757; Section 3A also allows municipalities significant latitude

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adopted by the Legislature to address the shortage of low-and moderate-income housing in Massachusetts and to reduce regulatory barriers that impede the development of such housing." (internal citation and quotation omitted). "The Act reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements, while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. 811, 822–23 (2002). The Legislature's latitude has not been repaid; housing, particularly affordable housing, has failed to appear organically.

regarding the location, size, and shape of that district, and the dimensional, parking and other regulations to be applied to that use within said district. See G.L. c. 40A, § 3A. This Court should conclude that, like the other provisions of G.L. c. 40A, Section 3A requires compliance by all applicable municipalities.

b. A mandate must be enforceable to be effective

A mandate that cannot be enforced is ineffectual; the Court must interpret the statute so as to give effect to the Legislature's intent. See Bankers Life & Cas. Co. v. Comm'r of Ins., 427 Mass. 136, 140 (1998). The withholding of funds in Section 3A(b) is not, and cannot be, the sole "remedy" for addressing a municipality's failure to adopt zoning which complies with Section 3A(a) & (c). In fact, there is a serious question, as the Commonwealth identified in its reply, whether the denial of such funds, to which no municipality is inherently entitled, qualifies as a penalty or remedy at all. In this Commonwealth, the question of state-law pre-emption is governed by the same standard as federal pre-emption, see West Street Assocs. LLC v. Planning Bd. of Mansfield, 488 Mass. 319, 322 (2021); Bloom, 363 Mass. at 151-152; and

federal case law treats pre-emption as wholly distinct from the lawful withholding of conditional federal subsidies. See e.g. N. Ill. Chapter of Assoc. Builders & Contrs., Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005) (Easterbrook, J.); Sierra Tel. Co. v. Reynolds, 703 F. Supp. 3d 1163, 1186 (9th Cir. 2023) (McAuliffe, J.), as is true here. A federal-law mandate can be pre-emptive, but it also can be a condition upon federal funding, and it can be both pre-emptive and a condition on funding. See e.g., 435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC, 164 A.D.3d 411, 414 (2018).

The Town argues that it is free to ignore Section 3A's mandate if it were willing to forego the funds identified in Section 3A(b). The Town's position is incorrect and, if accepted, would nullify the mandate of Section 3A(a). A mandate that can be ignored merely by declining free money from the government is no mandate at all. Such an interpretation of the statute would not give effect to the intent of the Legislature - requiring MBTA Communities to adopt zoning for multi-family housing. It would effectively re-write Section 3A(a)'s "shall" to read "may." A town "may" adopt as-of-right multifamily zoning in proximity to a

mass transit hub, if it were interested in receiving state subsidies. Otherwise, if it has no desire for state funding, a municipality would be free not to enact such zoning. (A municipality would not even need to pay to opt-out; all it would have to do is forego state housing subsidies.)

In this way, the Town's argument renders Section 3A(a)'s mandate and Section 3A(b)'s delegation of authority upon the EOHLC to promulgate guidelines to further define that mandate surplusage; violating the superfluity super canon of statutory construction. See, e.g., Connors v. Annino, 460 Mass. 790, 796 (2011). Indeed, "'[t]he canon against surplusage is strongest when,' as here, 'an interpretation would render superfluous another part of the same statutory scheme[.]'" Donis v. American Waste Servs., LLC, 485 Mass. 257, (2020), quoting City Elec. Supply Co. v. Arch Ins. Co., 481 Mass. 784, 790 (2019). The Town wishes to elevate Section 3A(b) so that it would effectively eclipse the balance of Section 3A. However, the Town has failed to identify a positive rule that would require this absurd reading.

On the contrary, additional remedies are required to ensure that Section 3A(a)'s mandate is

effective; in this instance, the statutory identification of one remedy does not preclude the availability of others. First, "[t]he presumption underlying the maxim of expressio unius est exclusio alterius -- that specific intent can be inferred from silence -- has been viewed with some skepticism. As one court put it, 'Not every silence is pregnant; expressio unius est exclusio alterius is therefore an uncertain guide ....'". Lyons v. Sec'y of Commonwealth, 490 Mass. 560, 578 (2022), citing Illinois, Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) (Posner, J.).

"The maxim is not a rule of law but an aid to interpretation, and it should not be applied where to do so would frustrate the general beneficial purposes of the legislation, or if its application would lead to an illogical result." Bank of Am., N.A. v. Rosa, 466 Mass. 613, 619–620 (2013). To apply the maxim here would be to frustrate the purpose of Section 3A, which is to promote the development of multi-family housing across eastern Massachusetts by mandating that each MBTA Community zone for a district which permits such housing by right. That this litigation exists at all is at least some evidence of the ineffectiveness of

the threatened loss of funding

Second, there are other potential remedies available. Though, as discussed in more detail below, they are unlikely to be effective, the provisions of G.L. c. 40A §§ 7-8, 15, and 17 provide an avenue to contest a municipality's zoning bylaw. And the provisions of G.L. c. 40A have never encompassed the full panoply of remedies available – G.L. c. 240, § 14A provides an avenue for property owners to challenge zoning regulations, and in limited circumstances a mandamus claim may be available. Suit by the Attorney General is simply yet another manner of compelling compliance with a mandatory statutory provision.

Where the requirement of adopting a bylaw which complies with Section 3A is mandatory, not discretionary, effective enforcement is the only solution; the loss of funding in Section 3A(b) is but one means of attempting to encourage compliance. Clearly, the "remedy" of withholding funding is not a true remedy, as it has failed to ensure that Milton complies with its obligations under Section 3A. This gambit had already proven ineffectual by the under-utilized G.L. c. 40R, and the unutilized G.L. c. 40Y,

before Section 3A was adopted. The General Court was well aware of this reality at the time of Section 3A's enactment; it was not seeking to repeat past policy failures, but to produce housing, consonant with best planning practices, in the face of continued opposition at the local level.

From both a legal and practical perspective, the appropriate remedy is suit by the Attorney General to enforce the requirements of the statute. Legally, the commencement of this suit is well within the Attorney General's powers; should the Town's argument that the only repercussion for ignoring Section 3A's mandate be the loss of state funds, the Legislature's purpose of creating multi-family housing will be frustrated. Practically, only the Attorney General is situated so as to effectuate the Legislature's intent in adopting Section 3A.

The Attorney General has broad authority to enforce the laws of the Commonwealth,[6] as set forth at

[6] Though the Attorney General has the power to disapprove a town's zoning bylaw, that power is inadequate here where the Attorney General's office is not, and will not, be asked to weigh in on a new bylaw, as Milton has refused to amend its bylaw to comply with Section 3A. See Amherst v. Attorney Gen., 398 Mass. 793, 795 (1986) ("In contrast to the Attorney General's broad general power to prosecute

length in the Commonwealth's Brief and the briefs of other amici. In sum, under Massachusetts law, the Attorney General has standing to seek damages and equitable 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. Attorney Gen., 377 Mass. 37, 48 (1979) (standing to sue utility for fraud, based on allegedly charging rates in violation of rate-setting statute).

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." G.L. c. 12, § 10. Moreover, the Commonwealth, acting through the

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actions which he believes are in the interest of the Commonwealth, Feeney v. Commonwealth, 373 Mass. 359, 366 (1977), the Attorney General's power to disapprove town by-laws is limited. The Attorney General only may disapprove a by-law if it violates State substantive or procedural law. See Concord v. Attorney Gen., 336 Mass. 17, 24(1957).).

Attorney General, has broad power to bring suit as parens patriae to protect or vindicate the interests of individual Massachusetts citizens, where it would be impractical for individual citizens to seek relief on their own behalf. See Commonwealth v. School Committee of Springfield, 382 Mass. 665, 665 n.1 (1981). This is such a situation; it is impractical for individual citizens to file suit seeking to force compliance with Section 3A.

Section 3A is an affirmative mandate, and the typical statutory processes for enforcing municipalities' compliance with the Zoning Act are not intended to challenge the failure of a municipality categorically to adopt specific zoning regulations that state law requires – they are intended to challenge the applicability of existing zoning regulations to a specific parcel of land. Simply put, the typical zoning appeal process is well-suited to review the legality of *existing* controls on *an individual property*. An ordinary zoning appeal is poorly set up to address a situation where the Legislature has mandated that municipalities take affirmative action to amend their zoning laws to include a particular district and/or to authorize a

certain use, but a municipality has refused outright to amend its zoning laws in accordance with those state-law mandates.[7]

The Attorney General's challenge provides the solution and the only practical manner of enforcing Section 3A's provisions. The Attorney General is

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[7] A hypothetical highlights the challenge: an owner of property within a half mile of an MBTA station in a non-3A-compliant MBTA community wishes to build multi-family housing would appear to be able only to seek relief through the circuitous procedure of G.L. c. 40A, §§ 8 & 15. Even here, however, relief would be unlikely, as the Court would be constrained to interpret and impose *existing* zoning requirements, but the problem here is a town's refusal to enact zoning as mandated by the Zoning Act, i.e., the absence of required zoning. Likewise, an action for declaratory relief would fare no better since such an action would be foreclosed by the failure to exhaust administrative remedies. See, e.g., Gill v. Bd. of Reg. of Psychologists, 399 Mass. 724, 728-729 (1987). A petition pursuant to G.L. c. 240, § 14A would pose substantial practical difficulties because, at best, assuming such an action would lie, the Land Court would have to speculate whether locus would be included in an MCA district that does not exist, but which is permitted by the MCA Guidelines to be flexible and amorphous.

This hypothetical also only illustrates the problems in this case. If taken to their logical conclusions, the Town's positions in this action would render wholesale noncompliance with G.L. c. 40A by a municipality wholly unreviewable in court. Would the same then hold for a city that enacted a zoning law containing no protection for preexisting, nonconforming structures, uses and lots as required by G.L. c. 40A, § 6, or refused to recognize any process to obtain a dimensional variances under G.L. c. 40A, § 10?

authorized to act where it would be impractical for individual citizens to seek relief on their own behalf. See School Committee of Springfield, 382 Mass. at 665 n.1. It is also the manner of enforcement which will ensure that the Legislature's purpose is effectuated.

III. EOHLC's Authority to Promulgate the MCA Guidelines

It is well-settled that "an administrative agency may use sub-regulatory guidance to 'fill in the details or clear up an ambiguity of an established policy' without resort to formal rulemaking as long as it does not contradict its enabling statute or preexisting regulations." Genworth Life Ins. Co. v. Comm'r of Ins., 95 Mass. App. Ct. 392, 396 (2019), quoting Mass. Gen. Hosp. v. Rate Setting Comm'n, 371 Mass. 705, 707 (1977); see also Boston Ret. Bd. v. Contributory. Ret. App. Bd., 441 Mass. 78, 82-83 (2004) (noting G.L. c. 30A's amendment in 1970 to eliminate "interpretation" from the definition of "regulation"); Arthurs v. Bd. of Registration in Med., 383 Mass. 299, 313 n.26 (1981) (administrative agency's authority to enact policies is not limited to formal regulatory rulemaking); Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm., 457 Mass. 748,

759, n. 17 (2010) (same); Zoning Bd. of Appeals of Milton *v.* HD/MW Randolph Ave., LLC, 490 Mass. 257, 265-266 (2022) ("absent a clear directive to contrary from the Legislature, regulatory agencies are entitled to fill [ ] gaps [in statutory and regulatory regimes]" including by quasi-judicial rule making).

In this instance, the relevant sub-regulatory MCA Guidelines were promulgated by the EOHLC in accordance with a specific statutory directive to do so. RA I: 116, 118-119, 186-308. The specific term used in the MCA is "guidelines". AG Br., p. 16. As stated in the MCA, the purpose and function of the MCA Guidelines is to enable EOHLC "to determine if an MBTA community is in compliance with this section." G.L. c. 40A, § 3A.

Contrary to the Town of Milton's suggestion that the Court should ignore the MCA's use of the term "guidelines" rather than "regulations" because, it argues, "it is substance, not nomenclature, that matters", Town Br. p. 10,[8] the Court "must choose an interpretation that 'lends meaning and purpose' to all the statutory language." Marengi v. 6 Forest Rd. LLC,

[8] The Town of Milton's argument here is notably inconsistent with its insistence on strict statutory construction when it comes to enforcement of the MCA.

491 Mass. 19, 32 (2022), quoting DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 690, 701 (2021); see also id. at 34, quoting Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 621 (1997) (it should be assumed that the General Court "knows how" to use the language that it uses); id., quoting Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 354 (1995) ("We decline to imply language which the Legislature has omitted, particularly where, unlike here, the Legislature has expressly provided [for as much] elsewhere in the general laws."); cf. AG Br. pp. 48-50 (examples of statutory authorization to issue "regulations" rather than "guidelines", vice versa, or both). These precedents compel the conclusion that this Court should not read the term "regulation" into the MCA.

Where EOHLC was statutorily directed to promulgate the MCA Guidelines – and in any event has the inherent authority to issue sub-regulatory guidelines even absent that directive – there was no obligation for EOHLC to go through the formal rulemaking procedures of G.L. c. 30A. Nonetheless, it is worth briefly examining what EOHLC actually did in this instance to determine if there would have been any meaningful difference if EOHLC had jumped through

the (two) procedural hoops that the Town of Milton contends EOHLC were required, but failed, to jump through.[9]

First, EOHLC didn't publish notice of the promulgation of the MCA Guidelines in the Massachusetts Register per G.L. c. 30A, §§ 3 and 6. There is no dispute that the Town of Milton nonetheless had actual notice of the promulgation of the MCA Guidelines, and that the notices provided by EOHLC satisfied all of the applicable content requirements of G.L. c. 30A, § 3 – the Town of Milton merely objects to the *manner* of that notice.[10]

Second, EOHLC didn't file a small business impact statement in accordance with G.L. c. 30A, § 3. However, such a statement would have been of no

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[9] Notably, the Town of Milton does not claim that any prejudice occurred as a result of EOHLC's alleged failure to comply with any procedural requirements of G.L. c. 30A; rather, the Town of Milton positions itself as seeking to require strict compliance with administrative procedure for its own sake. The consistency of this position is undermined by the fact that the Town of Milton does not question the validity of EOHLC's prior determination of interim compliance with the MCA. See RA I: 140-141; 157-159.

[10] As the AG notes, the manner of notice provided here was more fulsome than is required by G.L. c. 30A, § 3 and was directly calculated to ensuring that each MBTA community had *actual* notice of the promulgation of the Guidelines – not mere constructive notice based on publication.

relevance or importance here, where the MCA Guidelines merely announced EOHLC's interpretative rules for determining whether a municipality would be in compliance with the MCA, while providing municipalities time to come into such compliance. In that sense, the MCA Guidelines had no direct and immediate applicability even to municipalities (see Mass. Gen. Hosp., 371 Mass. at 707, n. 8) – let alone small businesses, which are not affected in any meaningful sense. That being the case, it would be the ultimate elevation of form over substance to invalidate the MCA Guidelines because EOHLC did not fulfil the box-checking exercise of filing a perfunctory small business impact statement.

Even if the Court does determine that EOHLC should have jumped through the procedural hoops of G.L. c. 30A when enacting the MCA Guidelines, the Court should reject any notion that any state executive policy that creates any "significant substantive [or] procedural obligations", Town. Br. pp. 35-36, is invalid and unenforceable if it has not been promulgated through the formal rulemaking procedures of G.L. c. 30A – a position that is not supported by case law. See, e.g., DeCosmo, 487 Mass.

at 701-702 (upholding substantive policies enacted as sub-regulatory rules as the agency's "authoritative, official position", and citing other examples: official agency statements, agency opinion letters, and amicus briefs); Zoning Bd. of Appeals of Milton, 490 Mass. at 265-66 (upholding substantive policies enacted through adjudicative hearings); see also Mass. Gen. Hosp., 371 Mass. at 707, n. 8 (upholding agency's policy with no direct effect on outside parties even though "an applicant's compliance or noncompliance with it would presumably affect the [agency]'s initial response to the particular application.").[11]

Not only is this conclusion unsupported by case

[11] The Town of Milton's argument here misinterprets Carey v. Comm'r of Correction, 479 Mass. 367 (2018) and DeCosmo, supra at 690 as standing for the proposition that any agency policy having an effect akin to that of a regulation is null and void if it has not been formally promulgated as a regulation. Neither of these cases hold that. Indeed, in DeCosmo, despite differentiating the legal effect of sub-regulatory rules from that of regulations, the Court in effect gave the rule in question the same legal effect as if it were a regulation. In Carey, while the Court did determine that an agency policy was subject to the requirements of G.L. c. 30A, it stayed the effect of its judgment for the agency to re-promulgate the policy through the procedures of G.L. c. 30A and allowed enforcement of the policy pending such re-promulgation. This option is available to the Court here if it determines that the MCA Guidelines should have been promulgated as regulations.

law, if this position were to be endorsed by the Court, this would invite the upending of the entire Massachusetts administrative state by opening the door to future litigation targeted against almost any executive agency guideline having a "significant" effect, whether substantive or procedural. Here, despite nobly characterizing the Town of Milton's position as seeking to uphold "separation of powers and the rule of law", Town Br., p. 9, the Town gleefully speculates that "maybe" countless other guidelines promulgated by state executive branch agencies in accordance with specific statutory authorization to do so on all manner of topics "should have been" promulgated as regulations. Town. Br., p. 35. The Court should decline the Town of Milton's invitation to lay waste to decades of Massachusetts administrative law precedent.

Turning briefly to the content of the MCA Guidelines, the MCA legislates in clear, succinct terms, requiring: (1) that zoning districts created pursuant thereto be of reasonable size, (2) that such districts allow multifamily housing as-of-right, and (3) that such housing not be required to be age restricted and instead be suitable for families with

children. See G.L. c. 40A, § 3A. The MCA further charges EOHLC with the responsibility to interpret and determine compliance with the MCA – in other words, to fill in any gaps in the statutory regime, as it is "entitled" to do. HD/MW Randolph Ave., LLC, 490 Mass. at 266. EOHLC has done so.

There is no present claim by the Town of Milton that the MCA Guidelines conflict with any of the MCA's requirements. Rather, the Town of Milton simply disagrees with the manner in which EOHLC has determined it will interpret the MCA to determine municipalities' compliance. This disagreement, of course, is an abstract one, since the Town of Milton has not actually enacted a zoning bylaw in an effort to comply with the MCA. Rather, the Town of Milton has opted to flout the MCA in its entirety. See Town Br., p. 17 (characterizing the Town of Milton's actions as having "Decline[d] to Create a MCA-Compliant Zoning District"). Having done so, the application of the MCA Guidelines to the Town of Milton is not a live controversy in this case; thus, the substance of any specific requirement of the MCA Guidelines need not be decided by the Court in this case – and should not be decided in the absence of an actual controversy. See,

e.g., Gay & Lesbian Advocs. & Defs. v. Att'y Gen., 436 Mass. 132, 134 (2002).

Even if the Court were to weigh in on the substantive policies of the MCA with which the Town of Milton takes issue, the Court must grant "substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement." Genworth Life Ins. Co. v. Comm'r of Ins., 95 Mass. App. Ct. 392, 396 (2019), quoting Commerce Ins. Co. v. Comm'r of Ins., 447 Mass. 478, 481 (2006). Thus, "[w]here an agency's interpretation of a statute is reasonable, the court should not supplant it with its own judgment." Boston Retirement Bd. v. Contributory Retirement Appeal Bd. 441 Mass. 78, 82 (2004), quoting Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375 (2000); see also Genworth, 95 Mass. App. Ct. at 396 ("The procedure did not conflict in any way with the relevant statutes but, rather, provided a method to implement them"); HD/MW Randolph Ave., 490 Mass. at 264 (agency's "right" to interpret and administer statutes through adjudicatory rule making is "entitled to substantial deference, so long as it is not inconsistent with the statutory language or

purpose.").

"Such deference is particularly appropriate where the statute itself confers broad authority to the agency, which often has special expertise in the area, and where the legislature has not spoken with certainty on the topic in question." Genworth, 95 Mass. App. Ct. at 396 (internal quotation omitted). Moreover, "'where the focus of a statutory enactment is reform,' . . . 'the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform'" HD/MW Randolph Ave., 490 Mass. at 264, quoting Town of Middleborough v. Housing Appeals Comm., 449 Mass. 514, 524 (2007).

In conclusion here, it bears noting that regardless of the Court's determination as to whether the MCA Guidelines were properly promulgated and/or whether the substantive content of the MCA Guidelines is consistent with the MCA, it remains undeniable that the MCA imposed mandatory requirements, with full notice to and participation by the Town of Milton, and with which the Town was duty-bound to comply. And, because the course of conduct charted by the Town of Milton has been to refuse to enact any bylaw

whatsoever, it is likewise indisputable that the Town of Milton is noncompliant with the MCA, warranting (and indeed necessitating) the present action to compel compliance.

CONCLUSION

As the principal bar association in the Commonwealth in the field of real estate law, REBA's membership represents a broad range of interests – including municipalities, developers, abutters, landowners (both public and private), business interests, and private citizens, among others. The present housing crisis facing the Commonwealth adversely affects each of these groups uniquely – from towns facing the prospect of having to lay off firefighters and schoolteachers due to financing shortages stemming from a sparse tax base of single-family homes with sprawling acreage, to young people and families unable to find affordable housing accommodations in locations that do not require single-occupant vehicles to meet each of life's needs, to businesses unable to compete for talent due to the lack of housing options.

Given these stakes, it is difficult to overstate the importance of this case – and the importance for

this Court to take decisive action not only to correct the improper actions of the Town of Milton, but also to signal to the numerous other municipalities which have themselves either signaled their intent to flout the MCA, or have indicated that they intend to take a "wait and see" approach based on the outcome of this very case. See, e.g., Lowell Sun, "Billerica Select Board Wants to Wait for Milton Case Outcome Before Deciding on MBTA Communities" (June 8, 2024) (available at https://www.lowellsun.com/2024/06/08/billerica-select-board-wants-to-wait-for-milton-case-outcome-before-deciding-on-mbta-communities/) ("Right now, I think we do nothing."); Lynnfield Villager, "MBTA Zoning Locations Narrowed" (Aug. 14, 2024) (available at https://localheadlinenews.com/mbta-zoning-locations-narrowed/) ("We should wait until we see what the Supreme Judicial Court says.").

For the reasons discussed above, REBA respectfully requests that the Court find that G. L. c. 40A, § 3A is mandatory, that the Attorney General has the authority to compel enforcement thereof through injunctive relief or otherwise, and that the EOHLC properly promulgated the MCA Guidelines.

Respectfully submitted

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CERTIFICATE 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 briefs, including but not limited to, Mass. R. App. P. 16 and 20. This brief is composed of Courier New font, 12-point type, is proportionally spaced, and contains no more than 7,500 words.

/s/ Robert K. Hopkins
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CERTIFICATE OF SERVICE

I, Robert K. Hopkins, counsel for the Real Estate Bar Association of Massachusetts, Inc., hereby certify that I have made service of this Motion upon attorney of record for each party either by the Electronic Filing System/email as follows:

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