

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12867

ROBERT MURCHISON, ET AL.,
Plaintiffs–Appellants

v.

ZONING BOARD OF APPEALS OF SHERBORN, ET AL.,
Defendants–Appellees

**ON APPEAL FROM A JUDGMENT OF THE
MASSACHUSETTS APPEALS COURT**

BRIEF OF AMICUS CURIAE
**HOME BUILDERS AND REMODELERS ASSOCIATION OF
MASSACHUSETTS, INC.**
IN SUPPORT OF DEFENDANTS-APPELLEES

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Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, the amicus curiae state that it 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 the Home Builders and Remodelers Association of Massachusetts, Inc.

Declaration Regarding Preparation of Amicus Brief

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

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Statement of Interest

The Home Builders and Remodelers Association of Massachusetts, Inc. ("HBRAMA") which was incorporated in 1959, is a statewide trade association affiliated with both local associations and the National Association of Home Builders. The HBRAMA, whose principal place of business is 465 Waverley Avenue, Suite 421, Waltham, Massachusetts, has more than 1,400 member companies in the commonwealth. Its primary purpose is to be actively involved in relevant legal and public policy issues, with a focus on meeting the housing needs of both current and future residents of Massachusetts. The HBRAMA's members all do business in the commonwealth and are involved in the permitting and development of land for residential uses, as well as the construction of single-family homes, townhomes and apartments. Increasingly, its members are in the business of remodeling and improving existing single-family homes.

The outcome of this matter is of great interest to the HBRAMA because an abutter appeal of a building permit issued for a single-family home, as is the case here, or of other permits such as a special permit for a 20 lot cluster development of townhomes, or a comprehensive permit for a 200 unit apartment building can, merely by its very filing, successfully thwart the production of desperately needed housing. That is because the

undue delay and considerable expense of a trial on the merits poses too great a risk for a builder when weighed against fluctuating market conditions, economic uncertainty and the high cost of financing. To find, as the Appeals Court did, that the mere fact that one's home is directly across the street from an alleged zoning violation is a sufficient basis to confer standing, without having to prove any particularized harm, is to throw the doors wide open to abutter appeals that will not only clog the dockets of the Superior and Land Court, but will also become an effective weapon for those in a community who seek to delay and obstruct housing.

Questions Presented

The amicus curiae will address the following questions:

1. Is the Commonwealth of Massachusetts experiencing a housing shortage?
2. Will the Appeals Court decision, if affirmed by this Court, result in more abutter appeals from the issuance of a building permits for residential dwellings, thereby exacerbating said housing shortage?

Statement of the Case

The amicus curiae adopts the Statement of the Case provided by the Defendant-Appellees in their brief.

Statement of the Facts

The amicus curiae adopts the Statement of Facts provided by the Defendant-Appellees in their brief.

Summary of the Argument

The Commonwealth of Massachusetts is experiencing a severe and prolonged housing shortage. The single greatest barrier to the production of new housing of all types is local zoning - in particular the lack of zoning for multi-family housing and the large lot requirements for single-family dwellings.

The presumption of standing afforded for abutters to challenge local land use decisions afforded by the Zoning Act (G.L. c. 40A, §17) makes it relatively easy for those opposed to

new housing to stop a development in its tracks. The Appeals Court's holding that the mere fact that an abutter's home is directly across the street from an alleged zoning violation is a sufficient basis to confer standing, without having to prove any particularized harm, is to arm the forces of NIMBYism with an effective weapon to thwart housing.

Density matters in housing in two ways. It bears a direct relation to housing affordability and to the quiet enjoyment of one's property. The larger the minimum lot requirements, the more expensive the home. The closer the homes are to each other, the more impactful the issues of light, air, noise and traffic become. That is why an abutter alleging a zoning violation based upon density should be required to offer some evidence that they are harmed by a home being built 180 feet from their property rather than 250 feet.

Cities and towns establish maximum density regulations for many reasons. They can serve to ensure residents access to light, air, open space, etc., or to protect public health or even preserve the character of a community. They can, and do, often serve to keep out those individuals and families deemed undesirable. Enabling an abutter to appeal a building permit solely on the basis of density without showing a particularized harm will have the effect of furthering the discriminatory practices of many communities.

Argument

I. The Commonwealth of Massachusetts is experiencing a prolonged and severe housing shortage.

It is widely recognized that Massachusetts has one of the most severe housing supply shortages of any state in the country.¹ In the last decade, the commonwealth had the fourth lowest rate of housing production in the nation, and construction activity since 2010 has remained low.²

The reason for the housing crisis in Massachusetts is that too many people are chasing too few units. No matter how many current homeowners put their houses on the market, there simply is not enough housing to meet demand, moderate prices, or close the affordability gap. Massachusetts needs new home construction of all types that individuals and families of all incomes can afford.

Given the many luxury condo and apartment towers rising up in the City of Boston, the Court may be surprised to learn that new home construction in the commonwealth is near an all-time low, especially for single-family homes. But even in boom times, Massachusetts has historically lagged behind the rest of the country in meeting housing demand. This perpetual housing shortage is the result of the exclusionary housing policies

¹ "Paths to prosperity" 2012 Annual Report of the Massachusetts Housing Partnership.

² U.S. Census 2000, 2010.

practiced by many communities, and a municipal permitting process that lends itself to abutter appeals.

It has been clearly demonstrated that the need for housing is significant. The Metropolitan Area Planning Council, which serves the 101 cities and towns of Metropolitan Boston, estimates that more than 400,000 new housing units will be needed by the year 2040 if the region is to keep growing its economic base.³

And the lack of housing options is not just a problem for Greater Boston. A study by the Cape Cod Commission found that housing supply continues to be in high demand on the Cape, with both year-round rental properties and affordable houses needing a big boost in inventory. According to the Commission's study, there is a need for approximately 22,000 housing units, and 7,000 year-round rental units. This means that approximately 29,000 units need to be created on Cape Cod to properly meet the needs of permanent residents, as well as those who visit for vacation or work in the summer months.

This critical need for housing has been given much attention in recent years. Governor Baker, in announcing his

³ Metropolitan Area Planning Council, *To Keep Economy on Track, Metro Boston will need up to 435,000 new housing units by 2040*. See http://www.mapc.org/sites/default/files/PR_HousingForecast_011614.pdf.

Housing Choices Initiative nearly two years ago, established a new statewide goal of producing 135,000 new housing units by 2025, to ensure that new housing production keeps pace with projected increases in housing demand.⁴

Despite the recognized need, housing construction has remained extremely low since the 1980s, creating tight markets that drive up costs.⁵ An examination of recent building permit activity as compiled by the U.S. Census Bureau vividly illustrates the extent that new home construction has fallen in the commonwealth. In 2005, 25,549 residential building permits were issued in Massachusetts, of which 14,585 were for new single-family homes. In contrast, in 2018, 17,044 residential building permits were issued, of which a mere 7,169 were for single-family homes.⁶

An adequate supply of new homes to meet demand is essential to ensure that housing is available and affordable to persons of average means. This axiom was acknowledged in a report released

⁴ Press Release: Baker-Polito Administration Announces New Housing Choices Initiative (Dec. 11, 2017). See <https://www.mass.gov/news/baker-polito-administration-announces-new-housing-choice-initiative>

⁵ Testimony of Keith A. Mahoney, Director of Public Affairs for the Boston Foundation to the Massachusetts Legislature's Joint Committee on Municipalities and Regional Government, May 15, 2013.

⁶ <https://www.census.gov/construction/bps/txt/tb2u2018.txt>

by the Dukakis Center for Urban and Regional Policy at Northeastern University that considered the issue of housing affordability.

Trends in home prices and rents on one hand, and in housing affordability on the other, are not necessarily the same, for affordability is determined by three factors, not one. The first, of course, is the price of housing measured by the mortgage payments homeowners pay or the monthly rents that renters have to cover for their housing. We have long advocated for policies that result in building sufficient housing supply to moderate home prices and rents.⁷ (Emphasis added.)

A study prepared for the HBRAMA by housing economist Elliot Eisenberg, PhD., supports the view of the Dukakis Center. The Eisenberg study analyzed the number of residential building permits issued in several Massachusetts counties and metropolitan areas and the value of those permits between January through April 2012 and the same period in 2013. His analysis revealed that when new home construction grows at a greater rate than the national average, housing prices stabilize or go down.⁸

The lack of sufficient housing production to meet the need for housing in the Commonwealth has directly led to skyrocketing

⁷ "The Greater Boston Housing Report Card 2013 Understanding Boston," produced by the Dukakis Center for Urban and Regional Policy at Northeastern University, p.75.

⁸ Press Release: "Study shows Mass housing construction must exceed national average to reduce shortages and prices," Home Builders and Remodelers Association of Massachusetts, July 12, 2013.

home values that has put homeownership beyond the reach of average citizens. With a robust economy and historically low mortgage rates, young couples seeking to buy their first home, growing families looking to trade up, and downsizing baby boomers wanting to stay near their children are entering the housing market. But these eager buyers are quickly confronting the stark reality that housing in Massachusetts is extremely expensive and becoming more so. How expensive?

Massachusetts' median home value is more than double that of the national median, according to the National Association of Realtors. The Warren Group recently reported that the median Massachusetts home sale price over the first nine months of 2019 was \$400,000, bolstered by a record-setting month of September. The median condo sale price in September 2019 of \$375,000 shot up more than 14 percent over the previous September and also established an all-time high for the month.

In the last decade, the percentage of households in Massachusetts spending more than 35% of their income on housing costs has risen more than 66%.⁹ This housing shortage has important implications for the state's economy and competitiveness.

The high cost of housing "makes it needlessly difficult for young people—who represent our state's economic future—to move

⁹ U.S. Census 2000, 2010.

here from other parts of the country, to stay here when they graduate from college, or to settle and start a family."¹⁰ Young families and individuals (25 to 34 years of age) have been leaving the state in large numbers.¹¹

The Executive Office of Housing and Economic Development has warned that "[i]n our talent-based economy, economic competitiveness has been negatively affected. New England has the greatest rate of outflow of recent college graduates of any U. S. region."¹²

II. To find "particularized harm" to an abutter for the purposes of standing merely because their property is across the street from a development regardless of density, is unfair and will further insulate exclusive communities from new housing.

In his January 21, 2020 State of the Commonwealth Address, Governor Charlie Baker urged the Legislature to enact legislation to make it easier to build more housing, saying "Our current zoning laws aren't working. They're a wall between the well off and the up and coming. They punish families and young people who are not already 'in the market.'" In this regard, the town of Sherborn's zoning is part of the problem.

By any measure Sherborn is an exclusive community. Nearly

¹⁰ "Paths to prosperity," 2012 Annual Report of the Massachusetts Housing Partnership, p. 10.

¹¹ U.S. Census 2000, 2010.

¹² "Planning Ahead for Growth," Executive Office of Housing and Economic Development July 2012.

98% of the town is zoned residential. Its three residential districts require a minimum lot of 1, 2 or 3 acres for a single-family dwelling. There is virtually no affordable housing. The most recent data complied by the Massachusetts Department of Housing and Community Development identified a mere 2.3% of Sherborn's year-round housing stock as affordable.¹³ Even so, the Sherborn Select Board is currently opposing two proposals to develop affordable housing through the state's Comprehensive Permit Law (G.L. c. 40B).¹⁴

The nature of the zoning and density in the town of Sherborn matters because the Appeals Court, in assessing the alleged harm to the Plaintiffs, suggests that the density of a zoning district is irrelevant to the issue of standing. See Murchison v. Board of Appeals of Sherborn, 96 Mass. App. Ct. 158, 164 (2019):

There is no platonic ideal of overcrowding against which the plaintiffs' claim is to be measured. Although the distance between the houses might not amount to overcrowding in an urban area . . . cities and towns are free to make legislative judgments about what level of density constitutes harm in various zoning districts and to codify those judgments in bylaws. It does not matter whether we, or a trial judge, or the defendants, or their counsel would consider the district 'overcrowded.'

¹³ https://www.mass.gov/files/documents/2017/10/10/shiinventory_0.pdf

¹⁴ https://www.sherbornma.org/sites/sherbornma/files/uploads/sherborn_masshousing_1-17-2020.pdf

The actual density does matter, however, in assessing whether a plaintiff will suffer some particularized harm (e.g., loss of privacy, noise, traffic, light pollution, loss of water views) from an alleged zoning violation. In the instant case, the Plaintiffs' property is in the RRC Zoning District. The minimum lot area for a single-family home in that district is 3 acres. The minimum frontage is 250 feet, the minimum lot width is 250 feet, the minimum front setback is 60 feet, the minimum side setback is 40 feet and the minimum rear setback is 30 feet.¹⁵

The Defendants' proposed dwelling would be directly across the street from Plaintiffs' property and might be closer to their house than otherwise allowed. A conclusion that those facts alone are sufficient to prove harm without more, however, seems an absurd result given the low density in this district.

In their brief, the Plaintiffs cite the testimony at trial of Robert Murchison that "this house is going to be approximately 180 feet from our house and that is much closer than existing houses in the neighborhood, and I think it's going to significantly change the look and feel and the density and the overall feeling of privacy on our property." (Emphasis added) See Plaintiffs' brief at 16. Plaintiffs should be

¹⁵ https://www.sherbornma.org/sites/sherbornma/files/uploads/2019_zoning_by-law.pdf

required to offer some evidence of how the construction of a single-family home on a three-acre lot with large setbacks would negatively impact their light, air, open space, or would increase noise and traffic, or negatively affect their property value.

Further, how does the Defendant rebut the Plaintiffs' proffer that he "thinks" its going to "significantly change the look and feel and the density and the overall feeling of privacy"? That's particularly difficult in a case such as here, where it is not a matter as to whether the Defendants can build a house on their lot, but rather the location of the house.

The reality this Court must understand is that the Appeals Court formulation will enable those who live in wealthy, residential, low-density communities to have standing to block new housing simply because they live across the street from the proposed development. That's a low bar to bring an abutter appeal.

III. The decision of the Appeals Court relative to standing to bring an abutter appeal will exacerbate the Commonwealth's housing shortage.

The cost and delay of abutter appeals directly and materially impacts the production of housing. The ease with which an appeal can force the downsizing or abandonment of a housing development had been noted in the Report of the

Governor's Special Commission on Barriers to Housing Production of January 2002.

"Currently, the appeals process provides a powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little to no basis, cost or risk." In seeking to reduce the number of unwarranted appeals, the report recommended amending G.L. c. 40A, 17 to mandate that the court impose upon non-municipal plaintiffs the requirement to post a security or cash bond in a sum between \$2,000 and \$15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines that the appellant acted in bad faith or with malice in making the appeal to the court.¹⁶

State lawmakers are considering similar legislation. There are currently six bills pending before the Massachusetts Legislature to address this issue. These bills would amend the Zoning Act (G.L. c. 40A, §17) to permit the court, in its discretion, to require non-municipal plaintiffs to post a surety or cash bond in an amount not to exceed \$15,000 to secure the payment of costs in appeals of decisions approving special permits, variances and site plans, where the court finds that

¹⁶ Report of the Governor's Special Commission on Barriers to Housing Production (January 2002), p. 22. See <https://www.mhp.net/resources/report-of-the-governors-special-commission-on-barriers-to-housing-development>

the harm to the defendants or to the public interest resulting from the delays of appeal outweighs the burden of the surety or cash bond on plaintiffs.¹⁷

While the executive and legislative branches are considering ways to rein in frivolous appeals, the Appeals Court decision in the instant case facilitates them. If the decision is allowed to stand, it will exacerbate the housing shortage.

Giving abutters a right to appeal zoning decisions without demonstrating any actual harm will cause the number of zoning appeals to skyrocket. Without needing to prove evidence of harm, it would be relatively easy and inexpensive for neighbors to appeal. The “not in my backyard” contingent would be armed with a powerful tool to stop development in their neighborhood.

The result would be fewer homes getting built, as delays in court would cause many builders to throw up their hands. Time is money, and many builders can’t afford long delays and legal expenses. The decision of the Appeals Court, if left to stand, will undoubtedly further exacerbate the current housing shortage that is harming the Commonwealth.

¹⁷ S. 775, An Act relative to housing reform; S. 903, An Act to streamline housing production; S. 1024, An Act to streamline zoning appeals; H. 1288, An Act relative to housing reform; H. 3299, An Act relative to streamline the judicial review of local land use decisions; H. 3397, An Act to streamline housing production through abutter appeals reform

Conclusion

For the foregoing reasons, the amicus curiae respectfully requests that the Court find that for a statutory abutter to have standing to claim a violation of local density regulations the abutter must show how the density of the proposed development would adversely affect their property directly and with specificity, and that being located across the street from said development, by itself, is not enough. Accordingly, the decision of the Appeals Court should be reversed.

Respectfully submitted,

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January 28, 2020

Certificate of Compliance

In accordance with the Mass. R.A.P. 16 (k), I hereby certify that to the best of my knowledge, this brief, which is composed in New Courier font and 12 point type, complies with the Mass. R.A.P. 17 pertaining to the filing of amicus briefs with the Court.

/s/ Benjamin Fierro III
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Certificate of Service

I, Benjamin Fierro III, counsel for the Home Builders and Remodelers Association of Massachusetts, Inc., hereby certify that I have made service of this Motion upon attorney of record for each party either by first-class mail, postage prepaid, or by the Electronic Filing System/email as follows:

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