

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11612

EASTHAMPTON SAVINGS BANK; CHICOPEE SAVINGS BANK;
HAMPDEN BANK; UNITED BANK; MONSON SAVINGS BANK;
COUNTRY BANK FOR SAVINGS

Plaintiffs-Appellants,

v.

CITY OF SPRINGFIELD,
Defendant-Appellee.

ON CERTIFICATION OF QUESTIONS BY THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIA MASSACHUSETTS MUNICIPAL LAWYERS
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ISSUE PRESENTED

Are the City of Springfield's ("Springfield") municipal ordinances Chapter 285, Article II, "Vacant or Foreclosing Residential Property" (the "Foreclosure Ordinance") or Chapter 182, Article I, "Mediation of Foreclosures of Owner-Occupied Residential Properties" (the "Mediation Ordinance") preempted in whole or in part by those state laws and regulations identified by the Plaintiffs-Appellants, Easthampton Savings Bank *et al.* (collectively, the "Lenders")?

STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Municipal Lawyers Association, Inc., formerly known as the City Solicitors and Town Counsel Association ("Association"), is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. The members of the Association are attorneys who represent municipal governments as city solicitor, town counsel, town attorney, or corporate counsel. Members of the Association also include attorneys who represent or advise cities, towns and other governmental agencies in other capacities. The Association's mission is to

promote better local government through the advancement of municipal law.

The Association is a nonprofit, nonpartisan statewide association of three hundred forty-seven (347) member cities and towns. Many of the Association's members are responsible for advising their municipal clients on code enforcement matters, where the town or city seeks to act under the authority to act under its police powers, including the preservation of the public health, safety and welfare. Additionally, many of the Association's members are responsible for drafting by-laws and ordinances involving the exercise of local police powers, and for opining on whether proposed by-laws or ordinances fall within the authority of the town or city to enact under the Home Rule Amendment.

The Association files this brief to protect the rights of cities and towns to respond to the negative impact on public safety, property values, and the tax bases due to the deterioration of the housing stock as a result of an underperforming economy. Although it is also a nationwide dilemma, municipalities are on the front lines of foreclosures and vacancies within their borders. These foreclosures and vacancies

create the palpable risk of blight, diminishing neighborhood integrity, risks to public safety, and increasing costs for code enforcement monitoring and response. Those risks often materialize into fires, water and natural damages to the abandoned properties, and crime and other hazards to which cities and towns must respond. On the other side of this issue are lenders, which in many instances are far removed from the impact of their actions and oftentimes are located outside of the community and potentially out of state.

Many cities and towns have enacted or are considering enacting by-laws and ordinances similar to the Foreclosure Ordinance and the Mediation Ordinance enacted by Springfield in order to protect, enhance and preserve the quality of life of residents. A sampling of similar ordinances and bylaws appears in the Addendum, including by-laws and ordinances adopted in the Towns of Barnstable, Medway and Plainville, and the Cities of Gardner, North Adams, Everett, Attleboro, Lynn, Methuen, Revere, and Taunton. A number of these communities have been left to face a myriad of socio-economic challenges, and need all available tools to address economic impacts within their borders. These municipalities have acted in

accordance with their traditional home rule authority, and in the absence of action by the Legislature to address these issues.

The Association submits this amicus curiae brief to urge the Court to uphold the home rule authority of municipalities to exercise their police power to address the negative impacts of foreclosures and abandoned properties within their borders through measures such as the challenged Foreclosure and Mediation Ordinances. A contrary ruling would impede the exercise of this home rule authority by restricting the ability of cities and towns to proactively address public health, safety and welfare vis-à-vis the problems resulting from foreclosures and abandoned properties, and instead be left to sustain the negative consequences without an effective remedy.

STATEMENT OF THE CASE

The Association adopts the Statement of the Case as set forth by the Appellee, Springfield, including its Statement of Facts, as set forth on pages 1 to 5 of Springfield's Principal Brief.

SUMMARY OF ARGUMENT

Article 89 of the Articles of Amendment to the Constitution of the Commonwealth (the "Home Rule Amendment"), reaffirms the right of self-government in local matters. The Home Rule Amendment gives cities and towns the right to exercise any power or function which the General Court has the power to confer, not inconsistent with powers reserved to the Commonwealth or with the municipality's charter. (Pp. 9-10).

The Home Rule Amendment was adopted by the voters at the 1966 general election by a vote of 1,186,608 to 270,087. The subject of home rule had been studied since 1960, when the General Court was tasked the Legislative Research Council to consider ways in which the Massachusetts Constitution could be amended to provide for home rule for cities and towns. Legislative Research Council considered numerous iterations of home rule and issued a report in 1961. The report studied the types of home rule in effect in various states at the time: "self-executing" home rule, which grants powers of self-government to cities and towns and limits the authority of the legislature to act on local questions; "permissive" home rule, which authorizes, but does not require, the

legislature to enact home rule laws on charter-making and other purely local matters; and "legislative" home rule, in which home rule is granted by legislative action without amending the state constitution. In 1963, the *strongest* type of home rule, "self-executing", was introduced in the General Court, and subsequently was enacted by the voters in 1966. (Pp. 10-16).

Springfield's Foreclosure Ordinance and Mediation Ordinance fall squarely within the municipal powers granted by the Home Rule Amendment. Local by-laws and ordinances are deemed to be presumptively valid unless they conflict with either the Home Rule Amendment or the enabling statute. In order for an attack on a local by-law or ordinance to be sustained, there must be either a clear legislative intent at the state level to preclude local action or the plaintiff must demonstrate that the purpose of a statute cannot be achieved in the face of the local ordinance or by-law. The Foreclosure and Mediation Ordinances present no "sharp conflict" with state law, and therefore are a valid exercise of the Springfield's police power. The Ordinances are Springfield's approach to address the need to preserve its housing stock following the

economic downturn of 2007-2010. The inclusion of mortgagees of residential properties as "owners" of the property obligates the mortgagees to maintain the mortgaged property and to mediate with the mortgagor prior to foreclosure. The obligations under the Foreclosure Ordinance go to public safety and public health. The Mediation Ordinance does not impede the ability of the mortgagee to foreclose, but merely requires good faith negotiations prior to foreclosure. In accordance with the Home Rule Amendment, local government is able to deal with a local problem in an expeditious manner specific to the municipality. (Pp. 16-23).

The Ordinances do not present a "sharp conflict" with state law. Municipalities may enact by-laws or ordinances to address public health, public safety and the general welfare. The Foreclosure Statute (M.G.L. c. 244), the State Sanitary Code (M.G.L. c. 111, § 127A and 105 CMR 410.000), the Oil and Hazardous Material Release Prevention Act (M.G.L. c. 21E), and the Trespass Law (M.G.L. c. 266, § 120) do not prohibit the enactment of the Ordinances, nor are the purposes of these laws frustrated in any way by the Ordinances. Under Massachusetts law, mortgagees hold

title to the property. The imposition of minor duties on the mortgagee as outlined in the Foreclosure Ordinance ensures that properties in foreclosure are well-maintained, not open to the elements, and free of hazardous materials. This preserves the value not only of the property in foreclosure, but also of neighboring properties, and enhances public safety and welfare. Considering that the Legislature chose very carefully to place on the ballot a home rule amendment which gave maximum authority to cities and towns, the Court should adopt a very restrictive view of the purported conflict between the Springfield Ordinances and state law. (Pp. 23-33).

Gas and electric utilities are regulated much more comprehensively than is the mortgage industry. No provision in the statute governing mortgages, or the State Sanitary Code, or Chapter 21E has been cited to show that municipalities are prohibited from enacting such ordinances as those adopted by Springfield here. Springfield's Ordinances help to preserve property values and prevent the spread of blight. This should be seen as consistent with the Home Rule Amendment's purpose of allowing

municipalities to address a local problem in a local manner. (Pp. 34-37).

ARGUMENT

I. THE HOME RULE AMENDMENT WAS ADOPTED TO ALLOW COMMUNITIES TO RESPOND TO LOCAL MATTERS.

A. Overview of the Home Rule Amendment

Article 89 of the Articles of Amendment to the Massachusetts Constitution, amending Article 2 of the Articles of Amendment (*i.e.*, Home Rule Amendment) was overwhelmingly adopted by the voters of the Commonwealth at the 1966 general election, with 1,186,608 voting in favor and 270,087 voting against (*i.e.*, over 81% in favor). See Addendum __. Massachusetts Secretary of the Commonwealth.

Section 1 of the Home Rule Amendment states:

It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town **the right of self-government in local matters**, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article.

(Emphasis supplied).

In addition, Section 6 of the Home Rule Amendment states:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. . . .

A similar preempt provision exists in Section 13 of the Home Rule Procedures Act, M.G.L. c. 43B. That section provides that a city or town may adopt local ordinances or by-laws "not inconsistent with the constitution or laws enacted by the general court."

B. Legislative history of the Home Rule Amendment.

The passage of home rule amendments by the General Court, followed by strong voter support, indicated a robust empowerment of cities and towns to control their own fates in a wide variety of areas. The legislative history of the Home Rule Amendment strongly supports, and is consistent with, Springfield's use of its home rule powers to combat the adverse consequences of residential foreclosures and vacancies within its housing stock.

Prior to the adoption of the Home Rule Amendment in 1966, the cities and towns of the Commonwealth were

subject to explicit grants of authority of the General Court in order to enact any meaningful by-laws or ordinances. Municipalities were "creatures of the State." *Bd. of Appeals of Hanover v. Hous. Appeals Comm.*, 363 Mass. 339, 356 (1973). The rights and powers of municipalities originated from the State, their creator, and there were no intrinsic or autonomous rights. *See id.*

The Home Rule Amendment had its origin in an order passed by the General Court in 1960, directing the Legislative Research Council to study the "advisability of establishing genuine home rule for Massachusetts municipalities." Senate No. 568 of 1960. On March 22, 1961, the Legislative Research Council issued its findings in *A Report Submitted by the Legislative Research Council Relative to Municipal Home Rule*, Senate No. 580 of 1961 ("Senate No. 580," or "Report"). The state of the law was summed up by this Court a century earlier in the case of *Hood v. City of Lynn*, 83 Mass. 103, 104 (1861):

The general principal is well-settled that municipal corporations, like other corporations aggregate, can exercise no powers other than those which are conferred on them by the act by which they were created, or such as are necessarily incident to the exercise of their corporate rights,

the perfection of their corporate duties,
and the accomplishment of the purposes for
which they are constituted.

At the time the Council was given its mandate the General Court was considering three distinct proposed amendments to the Constitution. The thrust of each amendment was to restrict the authority of the General Court to pass legislation affecting a particular municipality unless the municipality approved such legislation either before or after passage, or unless the Governor requested such legislation in the state interest and it was passed by a two-thirds (2/3) vote of each house. The Report defined home rule as "autonomy of local government in the sovereign state over all purely local matters, whether established by constitutional or statutory provisions." Senate No. 580 of 1961 at 37. The Report then went on to define various types of home rule: "self-executing," or "mandatory" constitutional home rule; "non-self-executing", or "permissive" constitutional home rule; and "legislatively granted" home rule. *Id.* at 46.

"Self-executing" constitutional home rule is when the state constitution grants powers of self-government to municipalities and limits the power of states to act on local questions. *Id.* at 46. There

are four approaches to "self-executing" constitutional home rule. First, the constitution may provide for detailed procedures where municipalities may adopt, amend or revise their charters without the necessity of state legislation. Second, the constitution may provide for some charter-making or procedural provisions, while requiring the legislature to provide by general law for other aspects. Third, the constitution may require the legislature to enact laws granting home rule powers to cities or towns and/or provide for a charter-making process. Fourth, the constitution may be silent about charter-making but may grant home rule to municipalities with respect to their local affairs and government. *Id.* at 46-47.

The second type of home rule, "permissive" constitutional home rule, authorizes but does not mandate the legislature to enact home rule laws on charter-making and other matters of purely local concern. *Id.* at 47. Finally "legislatively granted" home rule is where the legislature grants home rule authority to local governments without explicit constitutional authority to do so. *Id.* at 47-48. This type of home rule leaves municipalities in the most vulnerable position, in that each grant of

authority by the legislature is subject to a challenge under the state constitution.

The Report paid special attention to two draft constitutional provisions of the strongest form of home rule, "self-executing", put forward by the National Municipal League (now the National Civic League) and the American Municipal Association (now the National League of Cities). *Id.* at 88 (Chapter VI). In a nutshell, the National Municipal League model provision would confer power on municipalities in nine enumerated areas, subject, however, to the authority of the legislature to enact laws within those areas applicable uniformly throughout the state. *Id.* at 91. The American Municipal Association model provision, on the other hand, would confer general substantive authority on the local body to exercise any power which the legislature could grant to a municipality without the need for enabling legislation. *Id.* at 97.

In 1963, the Home Rule Amendment in its present form was introduced in the General Court. It is a "self-executing" amendment, based in part on the model state constitutional provision drafted by the American Municipal Association, and in part on the local

government article in the Rhode Island Constitution. See *Legislative Research Counsel Report Relative to Municipal Home Rule Proposed Constitutional Amendment*, Senate No. 950 of 1965 ("Senate Document 950" or "Second Report"). Second Report at 113. As noted above, the Amendment was overwhelmingly adopted by the voters at the 1966 general election. In 1965, the General Court appointed a Special Commission on the Implementation of the Municipal Home Rule Amendment to the State Constitution ("Special Commission"). The mandate of the Special Commission was to prepare for the statutory implementation of the Home Rule Amendment in the event that it was passed by the voters at the 1966 general election.

In March 1966, the Special Commission issued its own report ("Senate No. 846 of 1966" or "Report of the Commission"). The Special Commission's Report relied heavily on the first Report of the Legislative Research Council. However, it noted the presence on the next state ballot of another amendment, allowing for industrial development authority to be given to cities and towns. The Special Commission noted that the effect of passage of both amendments would be to enable cities and towns to "do pretty much as they

please" in many aspects of industrial development if the General Court did not enact general laws designating industrial development as a state function or impose general standards for municipalities to follow. Special Commission Report at 22. Like the Home Rule Amendment, the Municipal Industrial Development Amendment passed with a strong mandate, 1,104,862 to 380,222. Massachusetts Secretary of the Commonwealth, www.sec.state.ma.us/ele/elebalm/balmresults.html.

II. SPRINGFIELD HAS PROPERLY EXERCISED ITS HOME RULE AUTHORITY BY ENACTING THE CHALLENGED ORDINANCES.

The Home Rule Amendment allows cities and towns, such as Springfield, to adopt an ordinance or by-law in order to address the public health, safety, and general welfare. See *Bd. of Appeals of Hanover v. Housing Appeals Comm. in Dep't of Cmty. Affairs*, 363 Mass. 339, 359 (1973). The exercise of such an "independent municipal power" is permissible even if it ultimately affects private rights. See *id.* The Springfield Ordinances are consistent with local police powers and do not pose a "sharp conflict" with state law, and therefore are permissible under the Home Rule Amendment.

A. The challenged Ordinances are consistent with the exercise of local police powers.

Section 6 of the Home Rule Amendment is regarded as "a broad general grant of home rule powers to cities and towns." *Bd. of Appeals of Hanover*, 363 Mass. at 357-58; see also *Andrews v. Town of Amherst*, 68 Mass. App. Ct. 365, 368 (2007). Combined with Section 7 of the Home Rule Amendment¹, "these two sections repudiate the conception that all powers lie in the State except those expressly delegated to cities and towns." *Bd. of Appeals of Hanover*, 363 Mass. at 358.

Consequently, cities and towns have expansive powers that they did not possess prior to the enactment of the Home Rule Amendment. See *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 223 (2001); *Bd. of Appeals of Hanover*, 363 Mass. at 358 ("The Home Rule Amendment grants cities and towns independent municipal powers which they did not previously inherently possess.").

Cities and towns have "[c]onsiderable latitude" for adopting local ordinances and by-laws, *Mad Maxine's Watersports, Inc. v. Harbormaster of*

¹ Section 7 of the Home Rule Amendment reserves certain powers and functions to the Commonwealth.

Provincetown, 67 Mass. App. Ct. 804, 807 (2006), subject to the proviso that the exercise of this authority "is not inconsistent with the constitution or laws enacted by the general court," Home Rule Amendment § 6. Stated otherwise, a city or town may exercise its broad municipal powers provided that it does not violate State law or a constitutional provision. See *Andrews*, 68 Mass. App. Ct. at 368.

Accordingly, local bylaws and ordinances are deemed presumptively valid, unless a conflict with the Home Rule Amendment or enabling statute arises.

Springfield Preservation Trust, Inc. v. Springfield Library and Museums Ass'n, Inc., 447 Mass. 408, 418 (2006). In light of this broad authority, a high standard of review attaches to determining whether an ordinance or by-law exceeds the authority of a city or town. See *Tri-Nel*, 433 Mass. at 223. A plaintiff has a "heavy burden" to challenge the validity of municipal action. See *Springfield Preservation Trust*, 447 Mass. at 418.

A plaintiff must demonstrate "a sharp conflict between the local and State provisions before the local regulation has been held invalid." *Bloom v. City of Worcester*, 363 Mass. 136, 154 (1973). Two

circumstances arise where a city or town is preempted from exercising its independent municipal powers under the Home Rule Amendment. First, where there is clear legislative intent at the state level to preempt local action. *Take Five Vending, Ltd. v. Town of Provincetown*, 415 Mass. 741, 744 (1993) (citing *Grace v. Town of Brookline*, 379 Mass. 43, 54 (1979)). Alternatively, "absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *Id.* (quoting *Grace*, 379 Mass. at 54).

Springfield's Foreclosure and Mediation Ordinances present no such "sharp conflict" with State law and therefore fall within the ambit of permissible local legislation. The Foreclosure and Mediation Ordinances are an exercise of Springfield's police power, directly addressing the potential adverse impacts upon Springfield, its public officials, and its residents from foreclosures and vacant properties.

The Association urges the Court to find that preservation of the housing stock in cities and towns is a preeminent example of local concern and action and that cities and towns have the authority under the Home Rule Amendment to enact local laws to address

that concern. When the local housing stock produces negative impacts, such as building code, fire code, public health, and/or crime, it is oftentimes that a city or town, rather than the Commonwealth, is required to immediately respond. In so responding, local resources are expended to address these negative impacts on a reactive, rather than a proactive basis, involving the consumption and expenditure of public resources, such as personnel and public monies.

Many cities and towns throughout the Commonwealth have tried to address problems stemming from the local housing stock, most recently occurring from the economic downturn of 2007 to 2010. Yet, these problems have continued in many municipalities.

The challenged Ordinances at issue here are Springfield's approach, under the authority conferred by the Home Rule Amendment, to address these problems. The central question in this case is whether the statutory scheme regulating mortgage foreclosures precludes cities and towns generally, and Springfield specifically, from acting to address disinvestment in the community. Springfield has done so by including mortgagees of residential property who have commenced foreclosure actions within the definition of "owner"

of the property, thereby making them subject to the requirements imposed on owners to maintain the property and by requiring such mortgagees to engage in mediation with the mortgagor prior to foreclosure.

Maintaining the property in the context of the Foreclosure Ordinance specifically means that within 30 days of the property becoming vacant or 15 days of commencement of the foreclosure process, the owner must:

- Give the Building Commissioner and the Fire Commissioner notice concerning the contact information of the person in control of the property, information concerning the period that the property has been vacant and is likely to remain so, and the nature of the contents of the building;
- File with the Fire Commissioner, as he or she requires, a floor plan of any buildings on the premises, with twice-yearly certifications of accuracy by the owner;
- Remove hazardous material as defined in M.G.L. c. 25K from the building as directed by the Fire Commissioner;

- Secure the building for the purposes of arson prevention as directed by the Building Commissioner;
- Post "no trespassing" signs on the property;
- Keep the property free of trash, overgrown vegetation, stagnant water and ensure that buildings on the property are structurally sound; drain the water from pipes of vacant buildings during cold weather months;
- Keep the property up to the State Sanitary Code, the State Building Code, ordinances concerning the maintenance of property, and keep the property in conformity with the Springfield zoning code;
- Provide an emergency contact to the Fire Commissioner;
- Maintain appropriate liability insurance;
- Provide a cash bond in the amount of \$10,000 throughout the period of vacancy to secure maintenance of the property; and
- Notify the Building Commissioner when ownership of the property is transferred.

Foreclosure Ordinance § 285 - 10. "Owners" who are exempt from these actions by the Massachusetts General Laws are not required to comply with this ordinance. *Id.*

Each of the requirements under the Foreclosure Ordinance goes to public safety and public health. Specifically, these provisions address abating or preventing a public nuisance of unsecured and unmaintained vacant and foreclosing properties. Foreclosure Ordinance § 285 - 8.

The Mediation Ordinance applies only to owner-occupied residential properties and requires a mortgagee to engage in good faith negotiations with the mortgagor before proceeding to foreclosure. The mediation "shall in no way constitute an extension of the foreclosure process, nor an extension of the right to cure period." Mediation Ordinance § 182 - 7.

The Foreclosure and the Mediation Ordinances are the epitome of the purpose behind the Home Rule powers. Mayors and city councils, boards of selectmen and town meetings, know firsthand the problems faced by their cities and towns, and they are the people who are best able to act in an expeditious fashion to address those problems. The legislative history of

the Home Rule Amendment demonstrates that its purpose was to enable local officials, who know the challenges faced by their respective municipalities, to act legislatively to meet those challenges.

B. The challenged Ordinances do not present a "sharp conflict" with State law.

A city or town may exercise its expansive police powers "to promote the public good and safety." See *Andrews*, 68 Mass. App. Ct. at 368. A municipality may enact an ordinance or bylaw "[f]or . . . preserving peace and good order." M.G.L. c. 40, § 21(1); see, e.g. *Commonwealth v. Fossa*, 31 Mass. App. Ct. 916, 917 (1991) (rescript) (upholding ordinance proscribing junked or inoperative motor vehicles stores in the open, as an exercise of authority under M.G.L. c. 40, § 21(1)).

There is simply no "sharp conflict" between the Foreclosure and Mediation Ordinances and State law. See, e.g. *Max Maxine's*, 67 Mass. App. Ct. at 810-11. Because the requisite "sharp conflict" does not exist, the Foreclosure and Mediation Ordinances are a permissible exercise of Springfield's home rule authority.

When considering the foregoing provisions and objectives of M.G.L. c. 244 (the "Foreclosure Statute"), the State Sanitary Code (M.G.L. c. 111, § 127A) and its regulations (105 CMR 410.000), M.G.L. c. 21E (the "Oil and Hazardous Material Release Prevention Act"), and M.G.L. c. 266, § 120 (the "Trespass Law"), it is axiomatic that there is no "sharp conflict" between these state laws and Springfield's Ordinances. There is no clear legislative intent to prohibit the type of municipal action exercised by Springfield via the Foreclosure and Mediation Ordinances.

The Foreclosure Statute defines the requirements for a mortgagee to act, and terminate the rights of the mortgagor when the mortgagor has defaulted in performing his or her obligations under a mortgage instrument. See M.G.L. c. 244, § 1 et seq.; *Levin v. Century Indem. Co.*, 279 Mass. 256, 259 (1932). The Foreclosure and Mediation Ordinances do not prohibit a mortgagee from terminating the mortgagor's rights in the mortgaged premises or the elimination of the mortgagor's right of redemption.

The State Sanitary Code establishes minimum health and safety standards for residential dwellings

(i.e., "standards of fitness for human habitation"). See M.G.L. c. 111, § 127A; 105 CMR 410.001; *Negron v. Gordon*, 373 Mass. 199, 202 (1977). However, the Foreclosure and Mediation Ordinances do not sharply conflict with compliance or enforcement under the State Sanitary Code.

Moreover, the Oil and Hazardous Material Release Prevention Act is concerned with the cleaning up hazardous waste sites. See *Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 223 (2002). The Foreclosure and Mediation Ordinances do not impose duties in conflict with those contained in Oil and Hazardous Material Release Prevention Act, or M.G.L. c. 21K for that matter.

The Trespass Law applies to a person entering or remaining in or upon private premises "without right . . . after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon, or in violation of a court order pursuant to [M.G.L. c. 208, § 34B or M.G.L. c. 209A, §§ 3 or 4]." See M.G.L. c. 266, § 120. The Foreclosure and Mediation Ordinances do not direct a mortgagee to violate the Trespass Law,

particularly given the circumstances a "trespass" is deemed to have occurred under that statute.

The Lenders have not cited any provision in the Foreclosure Statute, the State Sanitary Code and its regulations, the Oil and Hazardous Material Release Prevention Act, or the Trespass Law that expressly prohibits Springfield from enacting the Foreclosure and Mediation Ordinances. *Cf. St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 126 (2012) (recognizing various provisions in M.G.L. 143 expressly prohibiting local action by cities and towns).

The Lenders also have not demonstrated that the purposes of the Foreclosure Statute, the State Sanitary Code and its regulations, the Oil and Hazardous Material Release Prevention Act, or the Trespass Law cannot be achieved in the face of the Foreclosure and Mediation Ordinances, as would be required to demonstrate the requisite "sharp conflict." See *Bloom*, 363 Mass. at 156.

Significantly, the Foreclosure and Mediation Ordinances bear similarities to two early and seminal Home Rule Amendment cases, both of which upheld the exercise of local authority: *Bloom* and *Grace*.

To that end, in *Bloom*, this Court considered whether a City of Worcester human rights ordinance was preempted by M.G.L. c. 151B and M.G.L. c. 151C. *Bloom* is notable because, as with Section 7.50.030 of the Foreclosure Ordinance, it contained a preemption clause: "(n)othing in this ordinance shall be interpreted to contravene the General Laws of this Commonwealth." 363 Mass. at 142.

In *Bloom*, this Court held that there was no "sharp conflict" between the City of Worcester human rights ordinance and M.G.L. c. 151B or M.G.L. c. 151C. See 363 Mass. at 158-63. This Court recognized that the City of Worcester "ordinance is a '**local**' **ordinance** in the words of s 13 [of the Home Rule Procedures Act] in that it deals with a problem which is local, although the problem is no doubt found in varying degrees throughout the State." See *id.* at 148 (emphasis added).

Although the policy of the challenged ordinance was broad, the Worcester human rights ordinance did not supersede or conflict with the statutory authority of the Massachusetts Commission Against Discrimination. See *id.* at 158. The Worcester human rights ordinance--similar to the Mediation Ordinance--

had the authority to attempt mediation through its commission for any complaint within its purview. See *id.* at 158. Not only was there no express legislative intent to prohibit local legislation relative to M.G.L. c. 151B and M.G.L. c. 151C, but also this Court declined to infer any such prohibition. Just as the City of Worcester humans rights ordinance could operate parallel to M.G.L. c. 151B and M.G.L. c. 151C, the same can be said with respect to the Foreclosure and Mediation Ordinances and the statutes cited by the Lenders.

Similarly, in *Grace*, the plaintiffs argued that stays of eviction under M.G.L. c. 239, §§ 9-11 preempted a Town of Brookline-imposed waiting period on a buyer's occupancy of an individual condominium unit, in a challenge to the validity of town by-law amendments shielding tenants from being evicted from apartments converted into condominium units. 379 Mass. at 53. Recognizing that "[t]he mere existence of statutory provision for some matters within the purview of the by-law will not render it invalid as repugnant to law," this Court held that the town by-laws did not arise to a "sharp conflict." *Id.* (quoting *John Donnelly & Sons v. Outdoor Advertising*

Bd., 369 Mass. 206, 212 (1975)); see also *Bloom*, 363 Mass. at 156 (involving similar holding).

In *Grace*, this Court recognized that "Chapter 239 is silent on whether local action with respect to eviction regulation is precluded," and, combined with a statute authorizing the town to regulation tenant evictions, no field preemption existed under M.G.L. c. 239. 379 Mass. at 54. Significantly, this Court recognized that the by-law amendments "merely postpones the application of c. 239, without compromising its objectives," operating to supplement, but not to replace, M.G.L. c. 239. See *id.*; see also *Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 202-04 (2000) (holding that local pier construction regulations did not supersede authority of Department of Environmental Protection and instead involved additional requirements, along with state requirements, consistent with M.G.L. c. 91).

Here, the Mediation Ordinance does not prohibit a foreclosure and, comparable to the challenged by-law amendments in *Grace*, at most it postpones the application of the Foreclosure Statute. The Mediation Ordinance, requiring the mortgagee of owner-occupied residential properties to engage in good faith

mediation prior to completing the foreclosure process specifically does not extend either the foreclosure period or the right to cure. Actions taken to allow owner-occupants to remain in their homes maintain stability in a neighborhood. The legislative scheme set out in M.G.L. c. 244 governing foreclosure is in no way frustrated.

Moreover, Springfield has included in the definition of "owner" in the Foreclosure Ordinance as a mortgagee who has initiated the foreclosure process. The imposition of repair, maintenance and other duties in the Foreclosure Ordinance does not conflict with the Foreclosure Statute, the State Sanitary Code and its regulations, the Oil and Hazardous Material Release Prevention Act, or the Trespass Law. Massachusetts is one of a minority of states in which the mortgagee has title to the property, "a conveyance in fee defeasible on the performance of the conditions therein states." *Pineo v. White*, 320 Mass. 487, 489 (1946); see also *Perry v. Miller*, 330 Mass. 261, 263 (1953) and cases cited therein.

As the United States District Court noted, the Foreclosure Ordinance does not inhibit the foreclosure process but rather imposes minor duties on the

mortgagee who has initiated the process. *Easthampton Savings Bank v. City of Springfield*, 874 F. Supp. 2d 25, 30 (2013). Ensuring that a residential property which is in the process of being foreclosed upon is kept up to code, properly secured, maintained in a neat manner with vegetation trimmed, standing water removed and trash picked up, and free from hazardous materials, preserves the value of that property and of neighboring properties, and enhances public welfare and safety. The requirement to maintain residential property goes to the heart of the responsibility of local government to protect the health and safety of the community.

The statutes cited by the Lenders and the Ordinances "are not related in concern or substance," as the Ordinances fall within the umbrella of safeguarding the public health, safety and welfare. *See Lomberto v. Town of Franklin*, 27 Mass. App. Ct. 797, 802 (1989) (holding that bylaw limiting the collection of rubbish do not conflict with M.G.L. c. 159B, which regulated common carriers); *see also Town of Milton v. Att'y Gen.*, 372 Mass. 694 (1977) (holding that by-law prohibiting self-service gas stations did not conflict with Board of Fire Prevention Regulations

addressing safety of self-service automatic gasoline dispensing systems).

The Home Rule Amendment instituted a sea change in the relations between the Commonwealth and its municipalities, from a situation where cities and towns were totally dependent on the Legislature in order to act, to a situation where they became empowered to address local issues as they saw fit as governing bodies, subject only to minimal state control. In deliberating on and passing the Home Rule Amendment, the General Court gave careful consideration to the state of the Commonwealth under the existing constitutional regime and the need for change. Report, pp. 51 - 70.

Each model of home rule was carefully weighed and arguments for and against each type of home rule were presented. *Id.* at pp. 88 - 99. The situation of various states that had adopted each type of home rule was examined. *Id.* at pp. 108 - 138. And the model provisions of the National Municipal League and the American Municipal Association were examined in detail. *Id.* at pp. 88 - 100. The General Court chose to place before the voters for ratification a home rule amendment that gave to cities and towns the

maximum authority to act in matters other than the six reserved powers under Section 7. For this reason, this Court should take a very restrictive view of a purported conflict between the Foreclosure and Mediation Ordinances and the Foreclosure Statute, the State Sanitary Code and its regulations, the Oil and Hazardous Material Release Prevention Act, or the Trespass Law.

C. Cases construing public utility statutes are inapplicable here.

The Lenders point to cases where local regulation of public utilities has been held to be in such "sharp conflict." But the state regulation of mortgage foreclosure is very different from the regulation of the manufacture and sale of natural gas and electricity as set out in G. L. c. 164. The regulation of gas and electric utilities is comprehensively regulated in that chapter. Utility regulation does not reflect the same concerns with the exercise of the police power and attendant public purposes those presented in the Foreclosure

The Lenders cite *Boston Gas Company v. City of Newton*, 425 Mass. 697, (1997), where a City of Newton ordinance imposing inspection and maintenance fees on

a gas company for excavations was invalidated because M.G.L. c. 164, § 70 governed such excavations. *Id.* at 704-05. The authority of a city or town to act under M.G.L. c. 164, § 70 is expressly limited by that section. Thus, *Boston Gas Co.* is distinguishable because, as *Bloom* recognized, “[a] conclusion that the Legislature intended to preempt a subject may also be inferred if the Legislature has explicitly limited the manner in which cities and towns may act on that subject,” yet there is no such limitation here. *Bloom*, 363 Mass. at 155; see also *Boston Edison Co. v. Town of Bedford*, 444 Mass. 775, 782 (2005) (“These express grants of authority are instead strong evidence that the Legislature intended to preempt local activity on the subject absent an affirmative grant.”). By comparison, the Lenders cite no provision in the Foreclosure Statute, the State Sanitary Code and its regulations, the Oil and Hazardous Material Release Prevention Act, or the Trespass Law that similarly limits the manner in which a city or town may act.

Additionally, in *Boston Gas Company*, this Court, quoting an earlier case, held “the manufacture and sale of gas and electricity by public utilities is

governed by M.G.L. c. 164. Given [its] comprehensive nature . . . the Legislature intended to preempt local entities from enacting legislation in this area." *Id.* at 702 (quoting *Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 704 (1995)). Utility regulation does not reflect the exercise of the police power by a city or town--a point of distinction given the express legislative purposes for the Foreclosure and Mediation Ordinances. Whereas utility regulation requires "uniform and efficient utility services to the public," a rationale supporting the doctrine of preemption in *Boston Gas Co.*, the same rationale does not apply here, because the Foreclosure and Mediation expressly serve purposes localized to the public health, safety, and welfare of Springfield, its inhabitants, and public employees.

In analyzing the Ordinances and considering the questions certified by the First Circuit, the Association urges the Court to be mindful of the consideration the General Court gave to the question of local home rule when deliberating on the substance of the Home Rule Amendment, and the policy judgment made by the General Court and then the voters in adopting a robust self-executing model of home rule.

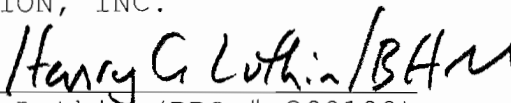
By agreeing to send to the voters a self-executing amendment which restricted the authority of the General Court, the legislature sent a clear signal that cities and towns should be masters of their own fates. The General Court at the same time sent to the voters the article that became Article 88, providing for industrial development in cities and towns, albeit "in such manner as the general court may determine." Here, again, was a second amendment which enlarged the ability of municipalities in the Commonwealth to act in the area of economic development.

Springfield's Ordinances would help to preserve property values of individual pieces of property and prevent the spread of blight to the surrounding neighborhood. These should be seen as fitting in the context of a municipality acting to address a local problem in a local manner, one of the purposes of the Home Rule Amendment.

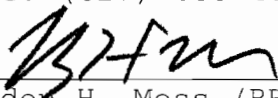
CONCLUSION

For the above reasons, the question presented should be answered in the negative.

Respectfully submitted,
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Dated: May 6, 2014

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CERTIFICATE OF SERVICE

The undersigned counsel for the Massachusetts Municipal Lawyers Association, Inc. hereby certifies that on this 6th day of May, 2014, I served two copies of the foregoing Brief of Amicus Curia Massachusetts Municipal Lawyers Association, Inc., by first class mail, postage prepaid, upon counsel of record for the following:

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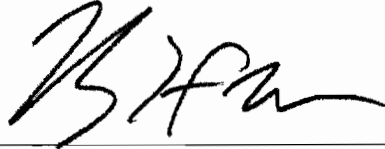
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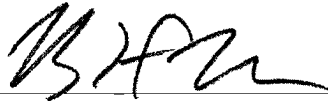
A handwritten signature in black ink, appearing to read 'B. H. Moss', written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Massachusetts Municipal Lawyers Association, Inc., hereby certifies that the Brief of Amicus Curia Massachusetts Municipal Lawyers Association, Inc., submitted herewith complies with the rules of the court that pertain to the filing of brief, including but not limited to: Mass.R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices, and other papers).

DATED at Quincy, Massachusetts, this 6th day of May, 2014.



Brandon H. Moss