COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. 10672

JOHN N. MORRISSEY, TRUSTEE, JNM 2006 TRUST,
PLAINTIFF/APPELLEE
v.
NEW ENGLAND DEACONESS ASSOCIATION - ABUNDANT LIFE COMMUNITIES, INC.,
DEFENDANT

COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF TRANSPORTATION AND PUBLIC WORKS
DEFENDANT/APPELLANT,

DELPHI CONSTRUCTION, INC.
DEFENDANT/THIRD-PARTY PLAINTIFF,
v.
MAROIS BROS., INC.
THIRD-PARTY DEFENDANT

ON APPEAL FROM A DECISION OF THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF AMICUS CURIAE CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION

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ISSUES PRESENTED

Whether the tort of private nuisance is subject to the Massachusetts Tort Claims Act ("MTCA" or "the Tort Claims Act"), and consequently, whether in this case, the private nuisance claim for monetary damages against the Commonwealth is barred by the immunities of G.L. c. 258, §§ 10(b) and (e).

STATEMENT OF INTEREST OF AMICUS CURIAE

The City Solicitors and Town Counsel Association (the "CSTCA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. CSTCA's mission is to promote better local government through the advancement of municipal law.

The CSTCA's primary concern in this case is to ensure that municipalities throughout the Commonwealth are not subject to private nuisance claims outside of the Tort Claims Act, which could result if this Court were to conclude that such claims are not barred by the immunities that municipalities have.

STATEMENT OF FACTS

The CSTCA adopts the statement of facts set forth in the brief of the Massachusetts Executive Office of Transportation and Public Works.

STATEMENT OF PROCEEDINGS

The CSTCA adopts the statement of proceedings set forth in the brief of the Massachusetts Executive Office of Transportation and Public Works.

ARGUMENT

I. THE POLICIES UNDERLYING THE TORT CLAIMS ACT AS IT APPLIES TO CITIES AND TOWNS SUPPORT THE INCLUSION OF PRIVATE NUISANCE CLAIMS.

A. Subjecting Private Nuisance Claims to the Tort Claims Act Would Promote Predictability and Preservation of the Public Fisc.

The Tort Claims Act insulates cities and towns against calamitous losses. Its presentment procedures ensure orderly administration of claims, Yun Ku v. Town of Framingham, 53 Mass. App. Ct. 727, 731 (2002), while its damages cap balances individual recovery with preservation of public funds. Irwin v. Town of Ware, 392 Mass. 745, 772 (1984). Exceptions from these substantive and procedural governors of liability expose municipalities to "potentially

catastrophic financial burden[s]." Morash & Sons v. Commonwealth, 363 Mass. 612, 623 n.6 (1973).

Since the advent of Proposition 2½, cities and towns have had little ability to raise revenue on their own. See G.L. c. 59, § 21C. State finance laws restrict municipal borrowing and generally prohibit deficit spending. See G.L. c. 44, §§ 2, 31. These limitations, coupled with ever-increasing education, pension, and health-care costs, make the protection of the Tort Claims Act for cities and towns more important now than ever before.

Unexpected drains on municipal funds undercut the capacity of a community to provide its inhabitants with important public services, such as police, fire, public health, sanitation, road maintenance, schools, and libraries. The Tort Claims Act waived sovereign immunity of cities and towns but did so with due regard for protection of public funds and operational predictability. These principles apply with no less force to the management and resolution of claims sounding in private nuisance. Public policy concerns support application of the Tort Claims Act to nuisance claims pursued against cities and towns.

B. Subjecting Private Nuisance Claims to the Tort Claims Act Would Balance the Rights of Individual Landowners with the Needs of Effective Local Government.

The essential nature of municipal government warrants treating private nuisance claims brought against communities differently from those brought against non-public defendants. An actionable private nuisance claim arises from the defendant's allowance on its property of a condition that unreasonably and substantially interferes with the use and enjoyment of the property of another. Rattigan v. Wile, 445 Mass. 850, 855 (2006) (citations omitted); see also Ted's Master Service, Inc. v. Farina Bros. Co., 343 Mass. 307, 311 (1961) (liability in nuisance arises from conduct that is intentional and unreasonable or conduct that is negligent, reckless, or ultrahazardous). Measuring wrongfulness of a municipal defendant's use of its land cannot be done without acknowledgement that, unlike private defendants, cities and towns may operate only to further appropriate public interests. See G.L. c. 40, § 5 (cities and towns may use public funds only for proper public purposes).

Whether a municipality's use of its land is sufficiently wrongful to be actionable in nuisance must be judged in light of the municipality's reason for existence: to provide services to its inhabitants. Contrast Rattigan, 445 Mass. at 853 ("no logical explanation" existed for defendant's placement of items at property border other than to harass and annoy plaintiff) with, e.g., DeSanctis v. Lynn Water and Sewer Comm'n, 423 Mass. 112, 113-14 (1996) (allegations of nuisance water seepage and flooding arose from Commission's provision of water to residents). A survey of nuisance cases brought against municipalities demonstrates that -- even if they are not executed without incident -- complained-of activities are uniformly essential or desirable to the public good. Such activities include:

(1) surface water management, see, e.g., Fortier v. Town of Essex, 52 Mass. App. Ct. 263, 264 (2001) (run-off from drainage ditch); Murphy v. Town of Chatham, 41 Mass. App. Ct. 821, 822-23 (1996) (flooding from blocked culvert); Tarzia v. Town of Hingham, 35 Mass. App. Ct. 506, 507 (1993) (overflow from river and holding pond); Schleissner v. Town of Provincetown, 27 Mass. App. Ct. 392, 393 (1989)

(overflow of holding pond used to store surface run-off); Lemasurier v. Town of Pepperell, 10 Mass. App. Ct. 96, 97 (1980) (flooding from culvert replacement);

(2) operation of town dumps, see, e.g., Lenari v. Town of Kingston, 348 Mass. 355 (1965); Turner v. Town of Oxford, 338 Mass. 286, 288 (1959);

(3) construction and maintenance of roads and walls, see, e.g., Miles v. City of Worcester, 154 Mass. 511, 511 (1891) (encroachment of town-owned retaining wall onto plaintiff's property); Asiala v. City of Fitchburg, 24 Mass. App. Ct. 13, 14 (1987) (lateral pressure on plaintiff's property from widening of road);

(4) operation of common sewers, see, e.g., Diamond v. Inhabitants of Town of North Attleborough, 219 Mass. 587, 590 (1914) (water discharge from common sewer); Haskell v. City of New Bedford, 108 Mass. 208, *4 (1871) (same); and

(5) maintenance of a municipal golf course, see Towner v. City of Melrose, 305 Mass. 165, 166-67 (1940) (dirty water flowing into plaintiff's ice-making pond from dam break on golf-course pond). The beneficial nature of these activities should influence

the analysis of whether the municipal defendant's use of its property is unreasonable.

Because municipal use of municipal property for proper municipal purposes is in the public interest, such use should be presumed inherently reasonable. Unlike nuisance claims against private defendants, those against municipalities cannot be disconnected from the public good. Application of the Tort Claims Act to nuisance claims arising out of such use would further the public interest by balancing the good of the general citizenry with the needs of one citizen. See Whitney v. Worcester, 373 Mass. 208, 216 (1977) ("An appropriate balance should be struck between the public interest in fairness to injured persons and in promoting effective government.") Allowing unlimited monetary recovery against a city or town operating for the good of its residents impedes the public interest. Application of the Tort Claims Act would preserve the availability of damages without leaving municipalities fully exposed to catastrophic loss. See Irwin, 392 Mass. at 772 (application of damages cap allows "meaningful recovery . . . while simultaneously limiting a public employer's exposure to excessive liability").

An important consideration other than damages for nuisance is equitable relief, which would remain available if the Tort Claims Act were applied to private nuisance claims against municipalities. See Brief and Addendum of Defendant-Appellant Commonwealth of Massachusetts Executive Office of Transportation and Public Works, at 24-26 and cases cited; G.L. c. 243, § 1 (court may order abatement of nuisance). Courts are well situated to assess the reasonableness of competing uses and balance the needs of adjoining landowners. Allowing potentially unlimited financial recovery for a municipality's use of its property in the public interest could render such use economically infeasible or discourage innovative and potentially beneficial uses. In contrast, judicial weighing of public and private needs will yield an equitable balance between the two, better preserving ability of the municipality to serve the interests of its residents. For these reasons, applying the Tort Claims Act to private nuisance claims against municipalities would further the goals of the Tort Claims Act and the public good.

C. Subjecting Private Nuisance Claims to the Tort Claims Act Would Yield Uniform Treatment of Injured Plaintiffs.

The present exclusion of private nuisance claims from the Tort Claims Act is inconsistent with uniform treatment of injured plaintiffs. A person who is seriously hurt or killed by the negligence of a public employer is limited to a recovery of $100,000, while a landowner who experiences interference with the use and enjoyment of property rights may recover damages far in excess of that amount. This dichotomy between injury claims arising under the Tort Claims Act and injury claims arising from private nuisance has no reasonable basis in public policy. The similarities between two types of claims warrant the same treatment of both. Both types of claims rest on allegations of negligent or otherwise wrongful conduct. Compare G.L. c. 258, § 2 (Tort Claims Act covers claims arising from "negligent or wrongful acts or omissions") with Ted's Master Service, 343 Mass. at 311 (nuisance caused by conduct that is intentional and unreasonable or negligent, reckless, or ultrahazardous). Available relief under both claims may be damages for personal injury or for property damage. Compare Schleissner, 27 Mass. App. Ct. at 396

n.4 (opining that award of monetary damages for personal injury caused by nuisance would be appropriate) and Proulx v. Basbanes, 354 Mass. 559, 562 (1968) (affirming award of monetary damages sufficient to pay for repairs to property caused by nuisance) with G.L. c. 258, § 2 (Torts Claims Act provides damages for "injury or loss of property or personal injury or death").

The Tort Claims Act governs claims for personal injury or property damage caused by the alleged wrongful conduct of public employees. Private nuisance claims against municipalities seek recovery for personal injury or property damage caused by the alleged wrongful conduct of public employees. Given the significant overlap of the two, there is no valid public policy reason for permitting plaintiffs to choose which action to invoke. Plaintiffs seeking similar relief for similar injuries arising from similar conduct by similar defendants should be treated similarly.

Recognizing that private nuisance claims properly fall within the ambit of the Tort Claims Act would promote more even and sensible treatment of all

plaintiffs harmed by the acts or omissions of public employees.

II. SINCE THE CLAIM HERE IS "BASED UPON" THE "ISSUANCE" OF A "PERMIT," THE CLAIM IS BARRED BY G.L. CH. 258 §10(e).

The trial court characterized the claim here such that

> "[t]he allegations … contend that the Commonwealth issued a permit to Deaconess to perform alteration work on Route 2 … and this work interfered with the use and enjoyment of the trust property based [on] the work increasing noise dust and vibration levels…." R.A. 00097-8.

However, the Court did not apply the following from G.L. ch. 258 §10(e):

> The provisions of sections one to eight, inclusive, shall not apply to: -
>
> (e) any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

As stated by the Court in Smith v. Registrar of Motor Vehicles, 66 Mass. App. Ct. 31, 32-33 (2006), review denied 447 Mass. 1103:

> The MTCA waives the Commonwealth's sovereign immunity and permits a plaintiff to recover from a public employer under certain circumstances. The Legislature has, however, for reasons of public policy, chosen to preserve sovereign immunity for certain claims, irrespective of their legal sufficiency or merit, or the gravity of the injuries alleged. See Carleton v. Framingham, 418 Mass. 623, 627 (1994); Brum v.

> Dartmouth, 428 Mass. 684, 695 (1999), Kent v. Commonwealth, 437 Mass. 312, 318 (2002), G.L. c. 258, §10(a)-(j). General Laws c. 258, §10(e), inserted by St. 1993, c. 495, §57, expressly prohibits "any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization." This statutory language is unambiguous, and we attribute to it its plain meaning. Victor V. v. Commonwealth, 423 Mass. 793, 794 (1996). The language of §10(e) cuts a broad swath, exempting from recovery "any claim" in a variety of named circumstances. See Tivnan v. Registrar of Motor Vehicles, 50 Mass. App. Ct. 96, 102 (2000) (RMV was immune from liability for issuing duplicate driver's license to impostor in licensee's name). The phrase "based upon", when accorded its plain and ordinary meaning, refers to any claim that is rooted in or "uses as a basis for" its applicability of any of the covered types of activities or events. See Webster's Third New International Dictionary 180 (1993). If the gravamen of a plaintiff's complaint can be traced back to any one or more of the types of events or activities delineated in §10(e), then the action is barred.

There is no doubt that the claim here is "based upon" the issuance of the permit, and the permit is used "as a basis for" this lawsuit. Accordingly, this claim for private nuisance is barred and should be dismissed.

III. SINCE THE CLAIM HERE IS BASED UPON A DISCRETIONARY FUNCTION, THE CLAIM IS BARRED BY G.L. CH. 258 §10(b)

The Tort Claims Act exempts from liability "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary

function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." G.L. c. 258, §10(b).

As stated by the Court in Greenwood v. Town of Easton, 444 Mass. 467, 470-71 (2005):

> The line of demarcation is between those functions that "rest on the exercise of judgment and discretion and represent planning and policymaking [for which there would be governmental immunity] and those functions which involve the implementation and execution of such governmental policy or planning [for which there would be no governmental immunity]." Harry Soller & Co. v. Lowell, supra at 142, quoting Whitney v. Worcester, 373 Mass. 208, 217 (1977). "If the injury-producing conduct was an integral part of governmental policy making or planning, if the imposition of liability might jeopardize the quality of the governmental process, or if the case could not be decided without usurping the power and responsibility of either the legislative or executive branch of government, governmental immunity would probably attach." Horta v. Sullivan, supra at 620, citing Whitney v. Worcester, supra at 219.

Discretionary function immunity has been recognized by the Courts, as cited in Greenwood, supra 444 Mass. at 472 n. 8 as follows:

> Barnett v. Lynn, 433 Mass. 662, 664 (2001) (immunity conferred where city's decision not to erect fence on city property to prevent sledding was based on allocation of limited resources and, as such, was discretionary function); Pina v. Commonwealth, 400 Mass. 408, 414-415 (1987) (immunity conferred where State employees who evaluated and processed claim for Social Security

disability insurance benefits were performing discretionary function); Patrazza v. Commonwealth, 398 Mass. 464, 469-470 (1986) (immunity conferred where design of highway guardrail and policy implementing its use were encompassed within discretionary function exception of §10[b]); Alter v. Newton, 35 Mass. App. Ct. 142, 146 (1993) (immunity conferred where city's decision not to erect fence around school athletic field constituted integral part of governmental policy making or planning); Wheeler v. Boston Hous. Auth., 34 Mass. App. Ct. 36, 40 (1993) (immunity conferred where decision regarding security measures in public housing complex constituted discretionary function).

The foregoing cases relate to discretionary decisions made by the governmental actor. Here, the decision to issue the permit to alter Route 2 is the basis for the claim. Consistent with the foregoing cases, that decision is a discretionary function which bars the claim pursuant to G.L. ch. 258 §10(b).

CONCLUSION

For the foregoing reasons and upon the authorities cited, this Court should reverse the decision of the Superior Court and rule that the private nuisance claim is barred by G.L. ch. 258 §10(b) and (e).

RESPECTFULLY SUBMITTED,

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