COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT – SUPERIOR COURT DEPARTMENT
BERKSHIRE, SS. CIVIL ACTION NO. 2276CV00127

COURTNEY GILARDI, et al, Plaintiff
vs.
LINDA TYER, et al, Defendants

AMICUS CURIAE BRIEF OF JAMES WILUSZ, R.S.

Since the seventeenth century, Massachusetts municipalities have protected the people from a myriad of threats to the public health, ranging from infectious diseases that in the past (and most recently with covid) ravaged entire communities, to wireless communication towers that endanger the health of neighboring residents. *Vandine, Petitioner,* 23 Mass. (6 Pick.) 187, 192 (1828) ("The great object of the city is to preserve the health of the inhabitants.").

Specifically referring to the federal Telecommunications Act, 47 U.S.C. 332(c)(7), the court in *Roberts v. Southwestern Bell Mobile Systems, Inc.,* 429 Mass. 478, 487-488 (1999) rejected a broad view of federal preemption with these words:

> Congress, of course, expressly did not seek to occupy the field, and nothing in the TCA or its legislative history suggests that Congress intended to supersede Massachusetts's statutory provision for de novo review of local authority zoning decisions. To the contrary, the first paragraph of the applicable section of the TCA provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government" over siting decisions of PWS facilities, 47 U.S.C. § 332(c)(7)(A), and "this paragraph" has no such provision.[16] The legislative history **805 is equally clear: "The conference agreement creates a new section 704 which prevents [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. Conf. Rep. No. 104–458 at 207–208 (1996), reprinted in 1996 U.S.C.C.A.N. 222. Particularly where the subject of the Federal provisions at issue, here zoning and local land use regulation, is one traditionally within the purview of State and local government, Federal law will not preempt unless that is the clear and manifest intent of Congress.[17] See *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). See also Arthur D. Little, Inc. v. Commissioner of Health & Hops. of Cambridge, supra at 546, 481 N.E.2d 1441 *488 quoting *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 243–244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) ("this court, and the United States Supreme Court, have been particularly reluctant to overturn State laws which are 'deeply rooted in local feeling and responsibility' ").

Nothing is more "deeply rooted in local … responsibility" G.L. c. 111, § 143, ¶¶ 1 & 2, originally enacted by 1692-1693 Mass. Acts, c. 23, § 1. In its present form, G.L. c. 111, § 143 ¶¶ 1 & 2 states as follows:

> No trade or employment which may result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the public health, or may be attended by noisome and injurious odors shall be established in a city or town except in such a location as may be assigned by the board of health thereof after a public hearing has been held thereon, subject to the provisions of chapter forty A and such board of health may prohibit the exercise thereof within the limits of the city or town or in places not so assigned, in any event. Such assignments shall be entered in the records of the city or town, and may be revoked when the board shall think proper.
>
> The department of environmental protection shall advise, upon request, the board of health of a city or town previous to the assignment of places for the exercise of any trade or employment referred to in this section, and any person, including persons in control of any public land, aggrieved by the action of the board of health in assigning certain places for the exercise of any trade or employment referred to in this section may, within sixty days, appeal from the assignment of the board of health to the department and said department may, after a hearing rescind, modify or amend such assignment.

This statute was broadly construed with these words in *City of Waltham v. Mignosa*, 327 Mass. 250, 251-252 (1951):

> We are of opinion that the regulating in question and its application to the facts here can be rested upon that portion of G.L. (Ter.Ed.) c. 111, § 143, as appearing in St. 1948, c. 480, § 1 which provides in part that 'No trade or employment which *may* result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the ***252** public health, or *may* be attended by noisome and injurious odors shall be established in a city or town except in such a location as may be assigned by the board of health thereof * * * and such board of health may *prohibit* the exercise thereof within the limits of the city or town or in places not so assigned, in any event. * * *' (Emphasis supplied.) It will be noted that the trade or employment need not in fact be a nuisance or attended by noisome and injurious odors before the power of prohibition arises.[1]

Your amicus, speaking as an individual citizen but ever mindful of his sworn obligation as a public official to protect the public health, respectfully submits the following statement:

To the Honorable Court,

I hereby respectfully submit this amicus curiae to offer my personal and professional public health insight with respect to preemption laws and local board of health policy enforcement.

With over 24 years' experience in local public heath, I am a Massachusetts Registered Sanitarian and advise and consult with several boards of health and municipalities on local policy/regulation development and implementation in my professional capacity where preemption topics have come up.

From tobacco control to disease prevention to implementation of emergency COVID-19 restrictions and mandates, we have successfully adopted reasonable rules and regulations to protect public health of the residents in our communities.

The preemption issue has broad importance beyond the Shacktown families before the Court in this case. Boards of Health are increasingly facing claims by various industry actors claiming they are exempt from state regulation due to some federal overlapping role that allegedly displaces longstanding state and local authority. Similar issues are coming up in this region and throughout the state and is not going away.

Given Boards of Health well-established duty, obligation, and charge to protect health and safety and the latest challenges to their authority, the preemption issue is one that the state courts need to get right. Fortunately, the precedent is clear. The Arthur D. Little ruling clearly states that federal preemption must be clear and there must be specific facts demonstrating a direct conflict before a local board's historical and broad power can be eliminated. -Arthur D. Little v. COMMR, HEALTH & HOSP, CAMBRIDGE

It is critical that Boards of Health be able to maintain local authority to perform the duties they are responsible for under local, state, and general law. Large corporations should not be able to dictate the health and wellbeing of our residents. Local board of health policy and its enforcement is necessary to make sure that people are not victimized by those in faraway large executive offices.

Respectfully submitted, Michael Pill, Esq.,
Attorney for Amicus Curiae James Wilusz, R.S.

/s/ Michael Pill Dated February 10, 2023

Michael Pill, Esq., BBO# 399880
Green Miles Lipton, LLP
77 Pleasant Street P.O. Box 210
Northampton, MA 01061-0210
Law Firm Phone (413) 586-8218
FAX (413) 584-6278
Home office phone (413) 259-1221
email mpill@verizon.net

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party via email attachment and via first class mail on February 10, 2023, addressed to:

Brian K. Lee
blee@nutter.com
Nutter McClennen & Fish LLP Seaport West
155 Seaport Boulevard Boston, MA 02210
Telephone: 617-439-2000
Facsimile: 617-310-900

Mark J. Esposito, Esq.
Shatz Schwarts and Fentin
1441 Main Street, Suite 1100
Springfield, MA O I 103
mesposito@ssfpc.com

Paul Revere III, Esq.
Law Offices of Paul Revere, III
226 River View Lane
Centerville, MA 02631
revereiii@aol.com

W. Scott McCollough, Esq.
McCollough Law Firm PC
2290 Gatlin Creek Road
Dripping Springs, TX 78620
wsmc@dotlaw.biz

Buffy D. Lord, Esq. Gregory P. Howard, Esq.
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
ghoward@docatty.com
blord@docatty.com

/s/ Michael Pill
Michael Pill, Esq. MP/csh/L1.1205.Gilardi et al