

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK COUNTY, SS.

SJC. NO. 10431

TOWN OF CANTON,
Plaintiff-Appellant,

vs.

LUISA PAIEWONSKY, Commissioner of the
Massachusetts Highway Department,

and

DOHERTY DEVELOPMENT ASSOCIATES, LLC,
d/b/a CABOT, CABOT & FORBES OF NEW ENGLAND,

Defendants-Appellees.

On Appeal from a Judgment of the Superior Court

**Brief of Amici Curiae New England Legal Foundation and
NAIOP Massachusetts in Support of Defendants-Appellees**

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Corporate Disclosure Statement

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to Mass. Sup. Jud. Ct. R. 1:21, that it is a 26 U.S.C. § 501 (c) (3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF is supported by contributions from more than 130 corporations, law firms, foundations, and individuals. NELF's mission is to promote balanced economic growth in New England, protect the free enterprise system, and defend economic rights.

NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

Amicus curiae NAIOP Massachusetts, the Commercial Real Estate Development Association, ("NAIOP") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(6) nonprofit association of over 1300 professionals and organizations in Massachusetts, large and small, with an interest in the responsible ownership, development, management, and financing of properties throughout the Commonwealth. NAIOP does

not issue stock or any other form of securities and does not have any publicly owned parent, subsidiary, or affiliate companies.

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ISSUE PRESENTED

The Court has solicited amicus briefing on, and Amici will address, the question of whether the trial court correctly dismissed as untimely an action commenced under G. L. c. 30, § 62H where the action was commenced after the first issuance of a permit.

INTEREST OF AMICI CURIAE

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

Amicus curiae NAIOP Massachusetts, the Commercial Real Estate Development Association, ("NAOIP") is an association of over 1300 professionals and organizations involved in the ownership, management,

development, redevelopment and financing of properties throughout the Commonwealth. NAIOP represents the commercial real estate industry through its public affairs advocacy at the legislative and regulatory levels. NAIOP is actively involved in commenting on and addressing issues concerning permitting and land use controls throughout Massachusetts.

NELF and NAIOP (together, "Amici") believe that statutes affecting Massachusetts businesses should be interpreted in a manner that is both reasonable and consistent with legislative intent. The present case raises an issue of significant concern to Amici's members because the trial court's dismissal of the action was soundly based on the plain meaning of the statute and produces a result that is both reasonable and consistent with legislative intent. If the plaintiff's view prevails on appeal and the action is reinstated, it will create uncertainty as to the plain meaning of statutes and impose burdensome costs and delays on projects like the Westwood project at issue in this case.

NELF has appeared regularly as an amicus curiae in cases that raise issues of general concern to the

business community in Massachusetts.¹ NAIOP has also appeared as an amicus curiae in cases raising issues of general concern to the business community in Massachusetts.² This is such a case, and Amici believe that this brief provides an additional perspective that will be of assistance to the Court. For these reasons, Amici have responded to the Court's call for amicus briefing and have sought leave to file this brief in support of Defendants-Appellees Luisa Paiewonsky, Commissioner of the Massachusetts Highway

¹ See, e.g., *DiFiore v. American Airlines, Inc.*, 454 Mass. 486 (2009); *Saab v. Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564 (2008); *Bd. of Appeals v. Hous. Appeals Comm. of Dep't of Hous. and Cmty. Dev.*, 451 Mass. 581 (2008); *Jepson v. Zoning Bd. of Appeals*, 450 Mass. 81 (2007); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609 (2007); *Allen v. Boston Redev. Auth.*, 450 Mass. 242 (2007); *Devine v. Town of Nantucket*, 449 Mass. 499 (2007); *Centr. Steel Supply Co. v. Planning Bd.*, 447 Mass. 333 (2006); *Humphrey v. Byron*, 447 Mass. 322 (2006); *Mscisz v. Kashner Davidson Sec. Corp.*, 446 Mass. 1008 (2006); *Silvestris v. Tantasqua Reg'l Sch. Dist.*, 446 Mass. 756 (2006); *Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 446 Mass. 330 (2006).

² See, e.g., *Allen v. Boston Redev. Auth.*, 450 Mass. 242 (2007); *Humphrey v. Byron*, 447 Mass. 322 (2006); *Standerwick v. Zoning Bd of Appeals of Andover*, 447 Mass. 20 (2006); *Durand v. IDC Bellingham, LLC*, 440 Mass. 45 (2003); *Massachusetts Broken Stone Co. v. Town of Weston*, 430 Mass. 637 (2000).

Department, and Doherty Development Associates, LLC, d/b/a Cabot, Cabot & Forbes of New England.³

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Defendant-Appellee Doherty Development Associates, LLC, d/b/a Cabot, Cabot & Forbes of New England ("CCF").

ARGUMENT

I. The Filing Deadline In Section 62H Is Subject Matter Jurisdictional, Should Be "Policed In The Strongest Way," And May Not Be Tolled.

The Town of Canton ("Canton") commenced this action in order to challenge the adequacy of the Final Environmental Impact Report ("FEIR") that was filed by CCF for its Westwood project and certified as in compliance with the Massachusetts Environmental Policy Act ("MEPA"), G. L. c. 30, §§ 61-62H, by the Secretary of the Executive Office of Energy and Environmental Affairs ("Secretary") pursuant to G. L. c. 30, § 62C. Canton's right to challenge the FEIR in court by bringing suit against CCF as the project proponent and

³ Neither Defendants nor their counsel, nor any individual or entity aside from Amici and their counsel, has authored this brief in whole or in part or has made any monetary contribution to its preparation or submission.

the Massachusetts Highway Department ("MassHighway") as the relevant permitting agency is a right created solely by statute, G. L. c. 214, § 7A, and the procedural requirements specifically applicable to maintaining the action are also statutory, G. L. c. 30, § 62H ("§ 62H"). Section 62H requires that the action must be commenced "no later than thirty days following the first issuance of a permit." On the basis that Canton had filed its action months after a permit was first issued for the project, the trial court dismissed the action.

Specifically, it is undisputed that Canton filed suit on October 24, 2008, over nine months after the Department of Environmental Protection ("DEP") issued a "Sewer Connection Permit" authorizing CCF to discharge water into Westwood's sewer system and over ten months after the DEP issued a "Beneficial Use Determination" ("BUD") that authorized CCF to use crushed concrete and brick on the project.⁴

⁴ See Brief of Defendant/Appellee Doherty Development Associates LLC d/b/a Cabot, Cabot & Forbes of New England ("CCF Brief") at 6-7 & n.2. "Permit" is broadly defined by statute to include "issuance of a[n] . . . approval or other entitlement for use" G. L. c. 30, § 62. See also 301 C. M. R. § 11.02 ("Permit"). Beneficial use determinations are

Under well-settled law, Canton's failure to meet the statutory deadline, i.e., its failure to file its complaint no later than 30 days after the first issuance of a permit, is a jurisdictional defect that requires dismissal. As this Court has stated in a similar situation:

It has long been the law of this Commonwealth that, when a remedy is created by statute, and the time within which it may be availed of is one of the prescribed conditions for relief, failure to meet that time limit deprives a judicial body, court, or administrative appeals board of jurisdiction to hear the case.

Nissan Motor Corp. in U.S.A. v. Commissioner of Revenue, 407 Mass. 153, 157 (1990), citing *Greeley v. Zoning Bd. of Appeals of Framingham*, 350 Mass. 549, 552 (1966). *Accord Cheney v. Assessors of Town of Dover*, 205 Mass. 501, 503 (1910).

While not yet discussed by this Court in the context of § 62H, the principle set forth above, that a statutory filing deadline is jurisdictional, has been recognized in the Commonwealth in a wide variety of statutory contexts. *See, e.g., New England Legal Foundation v. City of Boston*, 423 Mass. 602, 608 (1996) (action in superior court for back taxes under

specifically described as permits in the applicable regulation. *See* 310 C. M. R. § 19.060(5), (7), (9).

G. L. c. 60, § 98), citing *Wheatland v. City of Boston*, 202 Mass. 258, 259 (1909); *Nissan*, 407 Mass. at 157 (application to Commissioner for tax abatement under G. L. c. 62C, § 37); *Cappuccio v. Zoning Bd. of Appeals of Spencer*, 398 Mass. 304, 311-12 (1986) (appeal to superior court of decision of zoning board of appeals under G. L. c. 40A, § 17); *Schulte v. Director of the Div. of Employ. Security*, 369 Mass. 74, 78-79 (1975) (judicial review of denial of employment benefits under G. L. c. 151A, § 42); *Greeley*, 350 Mass. at 552 (appeal to zoning board of appeals under former G. L. c. 40A, §§ 13, 16, present G. L. c. 40A, §§ 8, 15); *Gordon v. State Building Code Appeals Bd.*, 70 Mass. App. Ct. 12, 20 (2007) (appeal to building code appeals board under G. L. c. 143, § 100); *Calnan v. Planning Bd. of Lynn*, 63 Mass. App. Ct. 384, 389 (2005) (appeal to superior court of planning board decision under G. L. c. 41, § 81BB); *Ford v. Commissioner of Correction*, 27 Mass. App. Ct. 1127, 1128 (1989) (certiorari under G. L. c. 249, § 4); *Flynn v. Contributory Retirement Appeal Bd.*, 17 Mass. App. Ct. 668, 669 (1984) (judicial review of agency decision under G. L. c. 30A, § 14).

On the basis of the fundamental jurisdictional principle enunciated in these cases, this action was properly dismissed. Simply put, the trial court lacked subject matter jurisdiction over Canton's challenge to the FEIR because the action was untimely commenced. Under the time standards set out in plain terms in § 62H, Canton should have commenced the action "no later than thirty days following the first issuance of a permit." In fact, Canton commenced suit about ten months after the BUD was issued. Even if the BUD does not count as a permit (and it is likely that it does, *see supra* n.4), the action was commenced about nine months after the sewer permit was issued. The failure to comply with the statutory conditions for maintaining the action is therefore fatal to Canton's case.

In *Schulte*, the Court distinguished between procedural deficiencies that count as "serious missteps" and "other slips" that may be less consequential. *See Schulte*, 369 Mass. at 78-81. The Court pronounced missing filing deadlines such as that found in § 62H a "prime example" of a serious misstep calling for dismissal.

Sloppiness in following a prescribed procedure for appeal is not encouraged or condoned, but at the same time a distinction is taken between serious missteps and relatively innocuous ones. Some errors or omissions are seen on their face to be so repugnant to the procedural scheme, so destructive of its purposes, as to call for dismissal of the appeal. A prime example is attempted institution of an appeal seeking judicial review of an administrative decision after expiration of the period limited by a statute or rule.

Id. at 79. The Court has therefore held that compliance with a time standard for commencement of a proceeding such as Canton's is a "sine qua non" to the exercise of the right and a requirement to be "policed in the strongest way." *Pierce v. Bd. of Appeals of Carver*, 369 Mass. 804, 808, 811 (1976); accord *Cappuccio*, 398 Mass. at 312. As the Court held when it applied this rule in a tax abatement case, "[t]he board lacks subject matter jurisdiction over abatement proceedings where the process was commenced at a later time or prosecuted in any manner different from that dictated by statute." *Nissan*, 407 Mass. at 157. See also 3 Norman J. Singer & J. D. Shambie Singer, *Statutes and Statutory Construction* § 57:23 at 90-1 (7th ed. 2008) ("Where a statute specifies acts to be done by parties to entitle them to maintain an action

or to perfect an appeal, it is generally mandatory").

Canton claims that it was justified in waiting to commence suit because it lacked standing at any earlier time. The briefs of CCF and MassHighway persuasively set out the reasons why Canton is in error on the standing issue, and Amici will not repeat them here. But Canton also argues in the alternative that if it is wrong on the standing issue and could have commenced the action earlier, the time for bringing suit should have been tolled because Canton never received notice of the issuance of either the BUD or the sewer permit. Specifically, Canton claims that no notice of the filing with the Secretary of findings made under G. L. c. 30, § 61 were published in the *Environmental Monitor* for either the BUD or the sewer permit, contrary to regulatory requirements. See 301 C.M.R. 11.12(5)(e). Canton is in error on the tolling issue as well.

In *Nissan*, this Court stated that the tax abatement action before it under G. L. c. 62C, § 37 was one (like the present case) where there were jurisdictional conditions precedent for obtaining statutory-based relief, including a time limit for

commencing suit; based on that fact, the Court rejected Nissan's argument that the discovery rule should be applied to toll the time. *See Nissan*, 407 Mass. at 157-58. The Court held that it is does not lie within its power to "'provide an excuse for those who fail to comply with' the dictates of a clear statute." *Id.* at 158, quoting *William Rodman & Sons v. State Tax Comm'n*, 364 Mass. 557, 560 (1974). *See also Ford*, 27 Mass. App. Ct. at 1128 (refusing to apply general tolling statute to action for certiorari under G. L. c. 249, § 4).

Specifically as to Canton's complaint about lack of notice, it should be observed that while CCF and the DEP may have been under an obligation to make and file findings so that notice of their availability could be published to the public by the Secretary, that fact does not establish that Canton or any member of the public has a vested right to such notice.

More importantly, Canton certainly has no right to any form of notice in the only place where it counts -- in § 62H. Receipt of notice simply plays no part in the conditions set out for a party like Canton to be able to maintain an action challenging a FEIR. *See G.L. c. 30, 62H.* Jurisdictional time limits are

subject to tolling for lack of notice only when the Legislature expressly specifies that the time runs from the sending or receipt of notice. *See Committee for Public Counsel Serv. v. Lookner*, 47 Mass. App. Ct. 833, 836-37 (1999) (refusing to toll time to bring action for certiorari under G. L. c. 214, § 4 where notice is not mentioned in statute in relation to time for bringing suit). The Legislature knows how to make notice a condition for suit when it wants to do so. Compare § 62H (action "shall commence no later than thirty days following the first issuance of a permit") with, e.g., G. L. c. 30A, § 14(1) (action to review agency decision "shall . . . be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing") and G. L. c. 143, § 100 (action to review building code decisions to be commenced "within forty-five days after the service of notice thereof"). Indeed, one need not go outside the bounds of § 62H in order to see the distinction made. As the defendants point out, while in several other places in § 62H the time to take an

action is expressly keyed off of notice, in the case of commencing an action like Canton's, notice is conspicuous only by its absence from the statute.

It is significant also that § 62H contains an express tolling provision, but it is one that is limited to situations where "an agency or person proposing a project has knowingly concealed a material fact or knowingly submitted false information in any form or report required under sections sixty-two to sixty-two H." Under these circumstances, "limits on the manner and *time* in which actions or proceedings may be commenced shall not apply". G. L. c. 30, § 62H (emphasis added). Section 62H's solitary exception is further grounds for affirming the trial court's dismissal of Canton's action. When a statute like § 62H contains a single express exception to the running of time, the exception is understood to exclude others not expressed there. *See Rudenauer v. Zafiropoulos*, 445 Mass. 353, 359 (2005); *Joslyn v. Chang*, 445 Mass. 344, 350 (2005). *See also Flynn*, 17 Mass. App. Ct. at 669-70 (under G. L. c. 30A, § 14, where time to commence action is jurisdictional, no

extension allowed "except in the limited fashion provided for in § 14(1)").⁵

As the courts have noted, enforcement of the mandatory time conditions for suit set out in statutes like § 62H may sometimes result in "hardship," *Del Grosso v. Bd. of Appeals of Revere*, 330 Mass. 29, 32 (1953), and "may create treacherous ground to both the parties and their lawyers," *Calnan*, 63 Mass. App. Ct. at 389. However, "[w]here rights or privileges are denied an individual because of his own failure to comply strictly with statutory directives, he has no cause for complaint." *Singer & Singer, supra*, § 57:23 at 91.⁶

⁵ Besides the fact that § 62H says nothing that implies a right to notice as to when a permit is first issued, Canton's argument must also fail for the obvious reason that the regulation on which it relies does not even deal with publishing notice of issuance of permits as such, but only with notice of findings related to permits. See 301 C.M.R. 11.12(5)(e). There is an *ex post facto* quality to Canton's arguments concerning its supposed right to notice of permit issuance and about which permit's issuance should trigger the statutory time limit since Canton sued seeking an injunction to *prevent the issuance* of traffic-related permits it objects to. See Amended Complaint at 14. Despite its professions of "good faith" in deciding when to file, see Reply Brief of Appellant Town of Canton at 13, 14, Canton plainly was never concerned with commencing suit based on the actual issuance of any permit.

⁶ The Court has observed that the statutes of repose may impose great hardship on plaintiffs. See *Joslyn*,

II. The Trial Court's Reliance On the Plain Meaning Of The Statute Is Reasonable And Consistent With Legislative Intent.

As the trial court judge recognized, "[w]here statutory language is plain and unambiguous on its face, the Court's obligation is to apply it according to its own terms." *Town of Canton v. Paiewonsky*, No. 08-4748, 2008 WL 981374 at *3 (Mass. Super. Ct. Dec. 8, 2008), citing *Pyle v. Sch. Comm. of S. Hadley*, 423 Mass. 283, 285 (1996). In the present case, the trial court's decision should be upheld on appeal for the

445 Mass. at 351. Despite the Court's characterization of the § 62H time limit as "essentially a statute of limitations," *Cummings v. Sec'y of Executive Office of Env'tl. Affairs*, 402 Mass. 611, 613 (1988), the analysis the Court gives in *Nissan* of the distinction between a statute of limitation and a statute of repose strongly suggests that the § 62H time limit could be regarded as more in the nature of a statute of repose. See *Nissan*, 407 Mass. at 157-58. See also *Joslyn*, 445 Mass. at 346-47, 350; *Rudenauer*, 445 Mass. at 357-58. *Nissan* was a tax abatement action under G. L. c. 62C, § 37, and hence an action (like the present one) controlled by the principles set out in cases like *Greeley* for statutes that grant a right of action accompanied by express conditions precedent for maintaining the action. There would therefore seem to be no reason that the Court's analysis in *Nissan* should not apply equally to § 62H. Considered as a statute of repose, section 62H's time limit cannot be tolled, see *Joslyn*, 445 at 350, is not subject to judicial construction, see *Nissan*, 407 Mass. at 158, and may even expire before a prospective plaintiff like Canton ever gains standing to sue, see *Rudenauer*, 445 Mass. at 358.

additional reason that it produces a reasonable result that is consistent with Legislative intent.

The Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62H, was adopted by St. 1977, c. 947. The legislative preamble declares it an emergency law, whose "deferred operation . . . would tend to defeat its purpose, which is to immediately expedite environmental approvals and rules and regulations thereof" The Legislature therefore made it effective 45 days after passage, rather than the usual 90 days. See St. 1977, c. 947, § 5. The MEPA process instituted by the enactment is thorough and elaborate, especially so in cases where the Secretary finds that a project proponent must prepare an environmental impact report. See *Enos v. Sec'y of Env'tl Affairs*, 432 Mass. 132, 138 (2000) ("It is through this somewhat democratic process that full disclosure of the environmental impact of a project may be made, to ensure a thorough environmental review of a project during its early planning stages.") A great deal of time and money must be invested by proponents like CCF before they can move the first shovelful of dirt. In addition to these costs, the Court has recognized that there also exist "the potential unfairness and social

and economic loss that may result from the delay inherent in litigation." *Cummings*, 402 Mass. at 617.

The trial court correctly held that the "short time limit, and the early trigger" found in the plain meaning of § 62H are consistent with the Legislature's policy goals of expediting environmental approvals and the Court's concerns with costs imposed by litigation. This conclusion is reinforced by two other features of § 62H. Section 62H requires that any party intending to challenge a FEIR in court must file a notice of intent within 60 days of the Secretary's certification of the FEIR. Furthermore, the party's complaint is confined to the issues identified in the notice. These statutory constraints on the right to sue strongly bespeak a legislative purpose aimed at containing litigation costs and delay by limiting both the parties who may sue and the scope of any potential suit. The trial court's decision concerning the time to commence suit is consistent with this overall purpose.

By contrast, allowing Canton to bring suit nine to ten months after the issuance of the first permit for CCF's Westwood project would have exactly the opposite effect from that intended by the clear

language of the statute. If a party can wait months to sue, on Canton's theory that it must wait until the permit it cares about is issued, it would greatly disrupt the orderly progress of the project by subjecting it to the possibility of numerous costly lawsuits strung out over the course of the project's entire duration. As this Court has acknowledged, the costs are not solely the economic costs borne by the developer, but also include the "social . . . loss" borne by society as a result of delays induced by litigation. See *Cummings*, 402 Mass. at 617.

For all of these reasons, the Court should be guided in this case by its words in *Joslyn* and should affirm the dismissal of the action:

"[T]he duty of the court [is] to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text. No exceptions ought to be made, unless they are found therein; and if there are any inconveniences or hardships growing out of such a construction, it is for the legislature, which is fully competent for that purpose, and not for the court, to apply the proper remedy."

Joslyn, 445 Mass. at 352, quoting *Spring v. Gray*, 22 F. Cas. 978, 985 (C.C.D. Me. 1830).

CONCLUSION

For all of these reasons, this Court should affirm the trial court's dismissal of Canton's action.

Respectfully submitted,

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Dated: August 28, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. App. P. 16, 17, and 20.

Dated: August 28, 2009 /s/ John Pagliaro
John Pagliaro

CERTIFICATE OF SERVICE

I, John Pagliaro, hereby certify that on August 28, 2009, I served the within brief by causing two copies thereof to be delivered by first-class mail, post paid, to counsel of record for the following parties:

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Signed under the pains and penalties of perjury
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