Commonwealth of Massachusetts
The Appeals Court

Suffolk County

No. 2025-P-0953

EMERALD NECKLACE CONSERVANCY, INC., et al.

Plaintiffs-Appellants,

- against -

CITY OF BOSTON, et al.

Defendants-Appellees.

ON APPEAL FROM THE SUFFOLK SUPERIOR COURT,
CIVIL ACTION NO. 2484CV000477

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Rule of Appellate Procedure 16(a)(2) and Supreme Judicial Court Rule 1:21, Plaintiffs-Appellants state that they are individuals, with the exception of Plaintiff-Appellant Emerald Necklace Conservancy, Inc., which states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUES

1) Whether the Trial Court erred, as a matter of law, by ruling that the George Robert White Fund parcel, which was explicitly taken for park purposes in 1883, is not protected under Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"), and that Defendants did not violate Article 97 and/or the Public Lands Preservation Act, M.G.L. c. 3, § 5A, resulting in judgment in Defendants' favor on Counts III, V, VI, VII and VIII of the Third Amended Complaint.

2) Whether the Trial Court erred, as a matter of law, by failing to even address whether the project required legislative approval with respect to sections of Franklin Park beyond the George Robert White Fund Parcel that are protected under Article 97, which resulted in judgment in Defendants' favor on Count IV of the Third Amended Complaint.

3) Whether the Trial Court erred, as a matter of law, in ruling in Defendants' favor on the parties' motions *in limine*, which resulted in: (i) the Trial Court erroneously dismissing Counts I and II of the Second Amended Complaint on grounds that Plaintiffs lacked standing to assert claims for breach of a public, charitable trust; and (ii) Plaintiffs being precluded

from introducing (a) evidence related to their breach of trust claims, and (b) evidence showing a disposition of or change in use to certain areas of Franklin Park.

STATEMENT OF THE CASE

Franklin Park is Boston's oldest and largest public park, having been taken by the City of Boston (the "City") for park purposes via eminent domain in 1883. Nestled in the northern corner of the park is the Playstead, an area designed for outdoor recreation and civic gatherings. Since it opened in 1889, the Playstead has been used by citizens from across the Commonwealth for open space and recreational purposes.

In 1947, the City conveyed a 14-acre parcel of land in the Playstead with no street frontage (the "Stadium Parcel") to the George Robert White Fund Trust (the "White Fund"), to enable the construction of a schoolboy stadium to be called the George Robert White Schoolboy Stadium ("White Stadium"). The White Fund is a public charitable trust established under the will of Mr. White for the benefit of the citizens of Boston. The Mayor and other City officials serve as Trustees. Pursuant to the terms of the charitable trust, the City must pay all maintenance costs of projects funded by the White Fund (while ownership remains in the White Fund).

Having been constructed with funds from the White Fund, White Stadium opened on the Stadium Parcel in 1949 for public recreational purposes consistent with the White Fund (which cannot be altered by legislative action). While ownership of the stadium remained in the White Fund, responsibility for its care, custody, and maintenance was formally placed under the control of the City of Boston's School Department ("BPS").

After its opening in 1949, White Stadium and the Stadium Parcel continued to be used by the public for outdoor recreational use, while BPS hosted public events within and around White Stadium, including youth athletic events and civic and cultural events. During this period, the Stadium Parcel provided easily accessible, open-air recreation space to the surrounding Environmental Justice Neighborhoods in Roxbury, Dorchester, Jamaica Plain, Mattapan, and Roslindale.

In 2023, the City announced plans to demolish White Stadium and construct a new stadium in a venture with Boston Unity Soccer Partners, LLC ("BUSP"), which was awarded the franchise to operate a professional women's soccer team in Boston. The City (through the White Fund) and BUSP signed a Lease Agreement ("Lease") and a Stadium Usage Agreement ("SUA") in 2024, which govern the

construction and future use of a new stadium and a year-round restaurant and bar to be operated on the Stadium Parcel, for up to 30 years. The City also granted BUSP the right to use park roads and to install a new paved accessway, over constitutionally protected land outside the Stadium Parcel, so BUSP and its patrons can access the new stadium and year-round restaurant and bar.

Under the SUA, BUSP is granted exclusive-use rights to a newly constructed White Stadium for significant periods of the year, and year-round exclusive-use rights to portions of the west grandstand and a newly constructed building to operate a restaurant, bar, and retail outlet. BPS would retain rights to host school athletic events and other civic events at the new stadium, but high school football games could not be played in the new stadium earlier than November.

The Plaintiffs-Appellants are Emerald Necklace Conservancy, Inc. and individual plaintiffs, many of whom reside near or around Franklin Park and are City taxpayers. Plaintiffs' civil suit alleged that the City and BUSP failed to obtain the necessary legislative approval required for a change in use to Franklin Park, which is open, protected parkland, as required by Article 97, and that the proposed use of the Stadium

Parcel by the City and BUSP breached the terms of the White Fund. Plaintiffs sought a judgment declaring that Defendants could not proceed with the project without legislative approvals, which had not been obtained.

Prior to trial, the Court dismissed Counts I and II of Plaintiffs' Second Amended Complaint, ruling that Plaintiffs lacked standing to assert claims for breach of a public charitable trust. After a three-day jury-waived trial, the Court issued an 18-page Findings of Fact, Rulings of Law, and Order (the "Order"), ruling for Defendants on all counts of the Third Amended Complaint.[1] The Court ruled that Article 97 did not apply to the Stadium Parcel, but it failed to address whether the proposed project violates Article 97 with respect to areas of Franklin Park beyond the Stadium Parcel, or whether the project would result in a disposition of or change in use to protected parkland. Judgment issued in favor of Defendants, and this appeal timely followed.

STATEMENT OF RELEVANT FACTS

I. The Establishment and Dedication of Franklin Park

Franklin Park was first laid out on an 1880 "Plan of Proposed West Roxbury Park" (the "1880 Plan"). See

[1] Plaintiffs' Third Amended Complaint was filed during trial, to conform to the evidence.

Record Appendix, Vol. XIII, p. 177 ("RA-[Vol.]-[Page]"). In an 1883 Taking Order, the City recorded the taking of the land shown on the 1880 Plan, including the Stadium Parcel. RA-IV-832. The preamble to the 1883 Taking states that the land was taken by the City pursuant to Chapter 185 of the Acts of 1875 (the Parks Act), and that such land was taken "as and for a public park." Id.

The City had previously hired Frederick Law Olmsted, a prominent landscape architect, as an advisor.[2] Olmsted divided Franklin Park into various sections, including the Playstead, a 40-acre section of Franklin Park designed for active recreation and youth sports. RA-VI-398. "Olmsted himself envisioned a formal promenade, a zoo, bandstand, and schoolboy playfields." RA-V-424. In June 1889, the Playstead was the first part of Franklin Park to open to the public. RA-VI-398.

II. The George Robert White Charitable Trust

George Robert White, a prominent Boston businessman, died on January 2, 1922. RA-XIII-225. Through Article Fourteenth of his Will, White created the White Fund Charitable Trust, through which he left

[2] Olmsted designed numerous parks across Boston, such as the Back Bay Fens, Muddy River, Jamaica Park, Arboretum, and Franklin Park. RA-VI-412. Olmsted's city-wide plan is known as the Emerald Necklace.

certain property to the City in trust, with trust income "to be used for creating works of public utility and beauty" for the "use and enjoyment of the inhabitants" of the City. RA-IV-860. With respect to property developed by the White Fund, Article Fourteenth provides that "the current expense of their care and maintenance shall be borne by the City," and that "no part of said income shall be mingled with other funds or applied in joint undertakings." Id. The City accepted the charitable gift in March 1922. RA-IV-873.

III. The City Conveys the Stadium Parcel to the White Fund in 1947

In June 1947, the Legislature approved the Acts of 1947, c. 542, § 1 (the "1947 Act"), which provides in general terms that "any land" owned or acquired by the City could be transferred to the White Fund, if requested by the Fund's Trustees, for fair cash value to be held thereafter "for purposes of said article fourteenth." Addendum ("ADD")-89. The 1947 Act references no specific parcel of land. Id.

On August 16, 1947, the Trustees of the White Fund selected a 14-acre parcel of land in the Playstead for the site of a new stadium to be used by Boston's schoolchildren and the public for recreation purposes.

RA-XIII-227. On October 10, 1947, the Trustees voted to request that the City transfer this property to the White Fund, which the Mayor and City Council subsequently approved on October 20, 1947. Id.; RA-IV-880.

On November 14, 1947, the City deeded the property on which White Stadium was to be constructed to the White Fund. RA-IV-881. The deed defines the parcel conveyed by reference to a recorded plan. RA-IV-879. As can be seen from that plan, the Stadium Parcel is "land locked," with no frontage on any park road, let alone any unrestricted public way outside of Franklin Park. Id.

IV. Construction of White Stadium

White Stadium was constructed on a portion of the 14-acre parcel using money from the White Fund, and construction was completed in May 1949. RA-XIII-227. The Stadium was "emblazoned" with the name, "The George Robert White Schoolboy Stadium," consistent with the requirement of the White Fund that each "work established under this gift shall . . . always bear in a conspicous place a suitable inscription identifying it as erected or established from said George Robert White Fund." RA-IV-860. As further required by the White Fund, the City was responsible for the Stadium's maintenance, and the Mayor (also a Trustee of the Fund) considered

the Parks Department, a Stadium Commission, and the School Committee to be responsible for such maintenance. RA-IV-884. On June 7, 1949, the White Fund Trustees voted that "operation, care and maintenance" of the Stadium would be on the BPS budget. The Mayor approved this vote of the Trustees the same day. RA-XIII-228.

On or about April 10, 1950, the Legislature adopted Chapter 291 of the Acts of 1950 (the "1950 Act"), which provided that White Stadium, so long as it remained under the custody and control of BPS, would be "deemed to be a school building and yard," and therefore maintained "out of funds appropriated under paragraph b of section two of chapter two hundred and twenty-four of the acts of nineteen hundred and thirty-six." ADD-91. This statute allows the School Committee to make appropriations to be raised by taxation for the alteration and repair of school buildings. Id.[3]

V. Historical Use of White Stadium and Stadium Parcel

The general public has made continuous use of all areas of the Stadium Parcel for outdoor park and recreation activities since 1889. RA-XIII-225, 228, 229.

[3] Prior to the issuance of the City's RFP in April 2023, the City Law Department advised BUSP's counsel that the 1950 Act allowed the stadium to receive state funds earmarked for school buildings. RA-VIII-243.

Since 1949, this included events for schoolchildren, and athletic and school-related events within or around White Stadium, such as athletic contests and graduation ceremonies. Id. The public has had access to the inside of White Stadium, and a fenced area to the south, between 7 a.m. and 4 p.m., when it was not being used for school events (prior to the stadium's recent demolition). Id. During those times, members of the public regularly used White Stadium for outdoor recreational activities, including running and walking the stadium stairs and track. Id. The general public also continued to use the portion of the Stadium Parcel outside of the stadium walls (including basketball and tennis courts, pathways, and lawn areas) in the same way it uses the rest of Franklin Park. Id. It is accessible whenever Franklin Park is open.

Beginning in the 1960s, the City began to prepare Open Space Plans ("OSPs") to catalog all open space within the City, and, among other things, reflect whether such open space is protected by private restriction, deed restriction, or other sources of protection. RA-XIII-229. These OSPs have always stated that all of Franklin Park, including White Stadium, was protected by Article 97. See, e.g., RA-VIII-155; ADD-

73. OSPs serve numerous functions, including prioritizing areas for conservation and recreation, improving management of existing open spaces, and accessing state and federal grant programs. RA-IV-712.[4] As reflected in these OSPs, the City received grant funds through the Land and Water Conservation Fund Act, 54 U.S.C. § 200302 ("LWCF"), which funds were used for maintenance and improvements to Franklin Park, excluding the White Stadium and Shattuck Hospital. RA-XIII-230.

VI. The City Proposes to Lease A Newly Constructed White Stadium for Professional Soccer

In late 2022, the City, including its Mayor (also a Trustee of the White Fund), began backing BUSP in its quest to obtain a Boston franchise from the National Womens Soccer League ("NWSL"), and committed to collaborate with BUSP. RA-VIII-211, 240. The City later issued a request for proposals in April 2023 (the "RFP"). RA-XIII-230. BUSP was the only respondent, having already secured a NWSL franchise. RA-XIII-231.

The parties entered a formal Lease and SUA on December 23, 2024, pursuant to which a new, larger

[4] The City's former Parks Commissioner testified that the City received LWCF funds for Franklin Park (outside of the Stadium Parcel, Shattuck Hospital, and the zoo), which is constitutionally protected open space under Article 97. RA-IV-749.

stadium would be erected, as well as an 8,100 square-foot retail building, known as the South Crescent Building. RA-XII-3, 324. This building will host a year-round restaurant and bar as well as other retail uses.

Under the SUA, BUSP will have exclusive use and access to the "Team Exclusive Area" (most of the interior of a newly constructed west grandstand) at all times during the Lease. RA-XII-327-332.[5] BUSP will also have exclusive use of the new, larger stadium for twenty home games during the NWSL season, the South Crescent Building, where BUSP will have the right to operate a restaurant that serves alcohol year-round, and a retail outlet. High school football is not allowed during the NWSL soccer season, which typically ends in the beginning of November. Id. This effectively bars high school football for the season, other than Thanksgiving or championship games.

Under the Lease and SUA, the parties will undertake construction outside of the Stadium Parcel in areas

[5] The City will construct a new East Grandstand, and BUSP will construct a new West Grandstand. The Team Exclusive Use Area consists of administrative offices in the West Grandstand, locker room areas in the West Grandstand, private suites and boxes, private club areas, private lounge areas and related facilities, and all internal storage areas. Id.

protected by Article 97 and LWCF. To enable trucks, buses, and other commercial vehicles to supply the new stadium and year-round restaruant and bar, a new paved accessway is being constructed from Pierpont Road to the Stadium Parcel over land in Franklin Park where there has never been a roadway. RA-XII-84. A new utility line will also be installed through Franklin Park outside of the White Stadium parcel. RA-XI-361; RA-XI-362. Under the SUA, the City grants to BUSP a right of vehicular access over existing paved park roads for ingress and egress to the Stadium, which must be sufficient to accommodate BUSP's use of the Stadium for BUSP events and year-round operation of its facilities. RA-XII-327. Defendants failed to obtain legislative approval under Article 97 prior to entering into the Lease and SUA.

SUMMARY OF ARGUMENT

As explained in Sections II, A (p. 25), B (p. 27), C (p. 34) and D (p. 36), *infra*, the Trial Court failed to properly analyze whether the Legislature extinguished the prior dedication of the Stadium Parcel as protected open space and parkland. When interpreting the legislation under the correct legal standard, this Court should conclude that the Stadium Parcel and Frankin Park have always been, and remain today, protected public

land under Article 97, and that the Defendants must obtain legislative approvals under Article 97 and M.G.L. c. 3, § 5A. Moreover, as explained in Section II, E (p. 38), the Trial Court's ruling that Stadium Parcel uses were legislatively changed by the 1947 and 1950 Acts effectively holds that those Acts altered the terms of a public charitable trust and that the legislature engaged in impermissible *cy pres*. Accordingly, this Court should reverse the Trial Court's Judgment on Counts III, IV, V, VI, VII (see Section II, F at p. 40) and VIII (see Section II, G at p. 41).

The Trial Court also committed reversible error by failing to provide rulings on Plaintiffs' claim that the proposed project will result in a disposition of or change in use to land protected by Article 97 and that legislative approval is required based on the impact to the Stadium Parcel and other areas of Franklin Park. See Sections III, A (p. 43) and B (p. 45).

Finally, Plaintiffs seek remand on Counts I and II, which the Trial Court erroneously "dismissed" on grounds that Plaintiffs lacked standing to assert claims for

breach of a public charitable trust. See Section IV, A (p. 51).[6]

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

On appeal from a jury-waived trial, this Court reviews a trial judge's findings of fact for clear error and reviews *de novo* any rulings on questions of law. Trace Constr., Inc. v. Dana Barros Sports Complex, LLC, 459 Mass. 346, 351 (2011). "It is the duty of an appellate court to apply the correct legal standard to the facts settled by the trial court." Jancey v. Sch. Comm. of Everett, 427 Mass. 603, 606 (1998). Moreover, the allowance of a motion to dismiss is reviewed *de novo*, and the allegations in the complaint are accepted as true, with all reasonable inferences drawn in Plaintiffs' favor. Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). The erroneous exclusion of relevant evidence is also reversible error unless, on the record, the appellate court can say with substantial confidence that the error would not have made a material

[6] The Trial Court also improperly excluded evidence that would support Plaintiffs' claim for breach of a public charitable trust. See Section IV, B (p. 56).

difference. Zabin v. Picciotto, 73 Mass. App. Ct. 141, 152 (2008).

II. THE TRIAL COURT ERRED BY HOLDING THAT THE STADIUM PARCEL IS NOT PROTECTED UNDER ARTICLE 97

This case involves a change in use to land in Boston's Franklin Park, which is constitutionally protected public park and recreation land under Article 97. Adopted in 1972, Article 97 codified the right of the people of Massachusetts to conservation, development, and utilization of agricultural, mineral, forest, water, air, and other natural resources. Article 97's protections cover property interests acquired prior to the effective date of the 1972 amendment. Op. of the Justs. to Senate, 383 Mass. 895, 918 (1981).

The critical question is whether the land was taken for purposes consistent with Article 97. See Mahajan v. Dep't of Env't Prot., 464 Mass. 604, 615 (2013). In determining whether Article 97 protections apply to land held by a municipality for park and recreational purposes, the Court must find a clear and unequivocal intent to dedicate the land as a public park and that those rights have not been extinguished. An intent to dedicate can occur in many forms, including a taking by eminent domain, a deed restriction, under the prior

public use doctrine, or under long-term public use. Smith v. City of Westfield, 478 Mass. 49, 62 (2017). An extinguishment of such a dedication requires plain and explicit legislation that makes it unequivocally clear that the Legislature intends to change the public use of park and recreation land to a different, inconsistent public use. Higginson v. Slattery, 212 Mass. 583, 590 (1912); Sacco v. Dep't of Pub. Works, 352 Mass. 670, 672 (1967). When land and easements are protected under Article 97, the land cannot be used for other purposes or disposed of without the approval by two-thirds roll call votes of each branch of the state Legislature. See M.G.L. c. 3, § 5A.

The Trial Court committed reversible error when it held that the Stadium Parcel, having previously been taken for park purposes under the Parks Act and developed for public recreation, was not protected park and recreation land under Article 97 and that two-thirds legislative approval was therefore not required prior to execution by the City and BUSP of the Lease and SUA. The rationale for the Trial Court's ruling that the public's rights to use the Stadium Parcel as park and recreation land were extinguished in 1947 is not in any way articulated in the Order.

Mass. R. Civ. P. 52(a) requires a court to make findings of fact and conclusions of law. This rule "serves to (1) insure the quality of a judge's decision making process by requiring simultaneous articulation of the judge's underlying reasoning; (2) assure the parties that their claims have been fully and fairly considered; and (3) inform an appellate court of the basis on which a decision has been reached." Cormier v. Carty, 381 Mass. 234, 236 (1980); Petition of New Bedford Child & Family Serv. to Dispense with Consent to Adoption, 385 Mass. 482, 491 (1982). Here, the Trial Court ruled that the Stadium Parcel was dedicated as a public park as a result of the 1883 eminent domain taking, but it failed to analyze (let alone explain) how this dedication was legally extinguished.

A. The City's Taking by Eminent Domain of the Stadium Parcel Sufficiently Evidences an Intent to Dedicate the Land as a Public Park

It is well settled that land taken by a municipality by eminent domain and dedicated as a public park is considered protected open space under Article 97. Smith, 478 Mass. at 62. When a city takes land by eminent domain to be used as a public park, only the Legislature can approve a subsequent change in use. Lowell v. Boston, 322 Mass. 709, 730 (1948); Wright v. Walcott, 238 Mass. 432,

435 (1921). And with the adoption of Article 97 in 1972, any such change in use to protected parkland now requires two-thirds approval from the Legislature. M.G.L. c. 3, § 5A. This comports with settled judicial recognition that public parks are considered sacred land under the law. Higginson, 212 Mass. at 585-90 (once land is taken by a city for public purposes such as park use, it is held strictly for public purposes and "in perpetual trust for the use of all"; the city has no rights of a private owner, and only the legislature can change its use). As such, laws protecting parkland are "stringently applied." Robbins v. Dep't of Pub. Works, 355 Mass. 328, 330 (1969).

In this case, the Trial Court properly found that the City acquired Franklin Park – including the Stadium Parcel – in 1883 "through eminent domain pursuant to the Parks Act." ADD-65-66. The Court also found that: the taking was for the express purpose of opening a public park; the Playstead – including the future Stadium Parcel - subsequently opened to the general public as a park in 1889; from 1889 through 1947, the general public used the Stadium Parcel as a public park; and after the 1947 conveyance to the White Fund, the public continued to use the land for constitutionally protected purposes,

including outdoor recreation and civic activities, through to the present day. Id.; ADD-69-70. These facts sufficiently evidence a dedication of the Stadium Parcel as a public park, dating back to the 1883 taking and 1889 opening of the Playstead. Smith, 478 Mass. at 62.

B. The Public's Right to Use the Stadium Parcel as Open Space for Recreation and Public Park Activities Has Never Been Extinguished

The Trial Court made a reversible error of law when it concluded that the 1947 Act extinguished the prior dedication of the Stadium Parcel as public park and recreation land and that the 1950 Act further entrenched that fact. ADD-78. Absent from the Court's ruling is any statutory construction, analysis, or explanation about how the Stadium Parcel *ceased* being protected public park and recreation land in 1947.

i. Legislation Intended to Extinguish the Public's Right to Use Land as a Public Park Must be Unequivocally Clear

Land that has been dedicated for public use as a park cannot be "diverted to another inconsistent public use without plain and explicit legislation to that end." Sacco, 352 Mass. at 672 (discussing prior public use doctrine); Higginson, 212 Mass. at 591-92.[7] Higginson

[7] Mahajan, 464 Mass. at 616 ("prior public use" cases inform the Court's analysis of Article 97 cases).

restated well-settled law and expressed the applicable legal standard in effect in 1947 and 1950 for purposes of interpreting legislation attempting to change the public use of land. The legislation in Higginson approved the construction of a school building on the Back Bay Fens (a public park taken by the City under the Parks Act, the same statute through which the City took Franklin Park). The project was challenged on grounds that the proposed building would house municipal administrative offices as well as a new school building. The respondents relied upon legislation that allowed the "erection of a building for the High School of Commerce within the limits of the Back Bay Fens." Id. at 592.

Relying on "firmly settled" law, the SJC rejected the argument that using the building for administrative offices was legislatively permitted and held that the Legislature failed to make it *"unequivocally clear"* that it intended to permit any building for purposes beyond "the High School of Commerce." Id. (emphasis added). The SJC held "[l]and appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end." Id. at 591.

Cases following Higginson have clarified the unequivocally clear standard. *First*, the legislation

must expressly identify the precise parcel of property that will be affected by a change in use; *second*, the legislation must include an express recital showing in some way a legislative awareness of the existing public use to be surrendered. Robbins, 355 Mass. at 330.

Here, the Trial Court held that the 1947 Act "extinguished any prior dedication of the Stadium Parcel as parkland," but failed to interpret the 1947 Act under the controlling legal standard laid out in Higginson, failed to analyze the plain words used in the 1947 and 1950 Acts, and incorrectly held in conclusory fashion that the 1947 Act extinguished the dedication of the land as a public park.[8] The Court's analysis started at the wrong time, ignored the fact that the Stadium Parcel had been dedicated parkland for 58 years before conveyance to the White Fund in 1947, and failed to examine how the 1947 or 1950 Acts made it "unequivocally clear" that the Legislature no longer considered the Stadium Parcel to be a public park. Jancey, 427 Mass. at 606 (appellate court must apply correct legal standard).

[8] The Trial Court failed to even mention the Higginson precedent, even though both sides cited to it in their Requests for Rulings and Findings and counsel for Plaintiffs referenced it in closing. RA-IV-220, 264.

ii. The 1947 Act Fails to Identify the Stadium Parcel or Include a Legislative Recognition of an Intended Change in Use

Notably, the 1947 Act makes no specific reference to any specific parcel of land. It simply authorizes the City in general terms to transfer "any land" to the White Fund, for fair consideration, and in any case, for and subject to the terms of the White Fund. ADD-89.

Courts have consistently held in prior public use cases that where legislation fails to specifically identify the impacted land and instead identifies "any land" in general terms, such legislation is not sufficiently plain and explicit to effectuate a change in use. See Commonwealth v. Mass. Tpk. Auth., 346 Mass. 250, 254-55 (1963) (general statutory reference to unspecified public lands for use as public roadways was insufficient to allow a change in public use of land); Town of Brookline v. Metro. Dist. Comm'n, 357 Mass. 435, 439-41 (1970) (statute allowing taking of "any land or easements or interests in land" was not sufficiently plain and explicit to effect a change in public use). This reasoning is sound, as a contrary holding would facilitate endless takings by public entities seeking to use public lands for their own divergent purposes.

The 1947 Act also fails to expressly recite a legislative intention to extinguish the existing public use (public park and recreation land) that would be surrendered by a conveyance of the Stadium Parcel to the White Fund. To terminate the public's park use rights, the Act would need to expressly provide that the public's right to use the Stadium Parcel as open space is to be extinguished, in favor of a new inconsistent public use. Such acknowledgement is entirely lacking in the plain text of the Act. Commonwealth v. Narvaez, 490 Mass. 807, 809 (2022) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent . . . and the courts enforce the statute according to its plain wording."). For these reasons, the 1947 Act is ineffective, as a matter of law, for purposes of "extinguish[ing] any prior dedication of the Stadium Parcel as parkland."[9]

[9] If the legislation in Higginson (which authorized only a school building to be built in the Fens) was deemed not specific enough to authorize construction of a building containing administrative offices in addition to the legislatively authorized school building, the 1947 Act cannot be interpreted to permit construction of a professional soccer stadium (which mostly excludes high school football) and a year-round restaurant and bar. In 1947, the Legislature was aware of Higginson and had passed Chapter 111 of the Acts of 1937. The change in use here is much more extreme than in Higginson.

iii. The 1950 Act Fails to Include a Plain and Express Legislative Recognition of an Intended Change in Public Use

The 1950 Act is also ineffective to extinguish the prior dedication of the Stadium Parcel as a public park. The Trial Court failed to independently analyze the 1950 Act under Higginson, stating instead without explanation that the Act "further entrenches the fact that the land was no longer considered parkland." ADD-78.

Unlike the 1947 Act, the 1950 Act expressly identifies "White Stadium" and the land on which it sits. However, the plain text of the 1950 Act has nothing to do with the general public's use or access to the Stadium Parcel for recreation or a public park. The plain language of the Act was to provide a funding mechanism for maintenance of the property, which is consistent with the terms of the White Fund, pursuant to which "the current expense of [White Fund property] care and maintenance shall be borne by the City." ADD-91.

The 1950 Act also expressly cites 1936 funding legislation which allows the School Committee to make appropriations to be raised by taxation for the alteration and repair of school buildings. ADD-91. The Act qualifies this funding by limiting it only so long as White Stadium remained under BPS's control, further

recognizing that maintenance obligations and control of the land could revert back to other municipal departments in the future.

The 1950 Act resembles the legislation in Robbins.[10] In both cases, reference is made to a new public use for the impacted land (here, a schoolyard and building; there, a proposed highway expansion), while omitting any reference to any current public use to be extinguished. In Robbins, the SJC held that the legislation did not allow a change in public use, because while it "specifies a new public use, it is totally silent as to any existing public use." Robbins, 355 Mass. at 331; see also Sacco, 352 Mass. at 671-73 (SJC found legislation did not expressly recognize a change in public use).

Similarly, here, the 1950 Act makes no reference to the public having or losing its sacred right to access a portion of a public park that had been open for 58 years, simply as a result of BPS being the branch of the City government assigned maintenance responsibility,

[10] In Robbins, the court enjoined the transfer of land located in the Neponset River Reservation from the MDC to DPW in connection with a proposed expansion of Route 128. The SJC ruled the statute relied upon by respondents for the taking (M.G.L. c. 30, § 44A) failed to "state with the requisite degree of explicitness a legislative intention to effect the diversion of use which the DPW seeks to accomplish." 355 Mass. at 328-32.

utilizing appropriations methods available by statute, to comply with the City's obligation to pay for maintenance, as required by the terms of the White Fund. Without that express acknowledgement, the 1950 Act fails to extinguish the prior dedication of the Stadium Parcel as public park and recreation land, as a matter of law, under the standards set forth by Higginson and related cases.

C. After 1947, The City and General Public Continued to Use the Stadium Parcel as Open Space for Park and Recreation Purposes

The Trial Court further erred by ruling that after 1950, there needed to be evidence that the City expressed a deliberate, unequivocal, and decisive intent to permanently place the Stadium Parcel under the protections of Article 97 and that such evidence was lacking. As noted above, the Legislature never extinguished the public's park and recreation use rights to the Stadium Parcel, so no subsequent or formal dedication after 1947 was required.

Putting aside the fact that the Stadium Parcel was taken for park purposes by eminent domain in 1883 and opened as a public park in 1889, the facts found by the Trial Court nonetheless compel the conclusion that the Stadium Parcel is constitutionally protected under

Article 97. Sanguinetti v. Nantucket Const. Co., 5 Mass. App. Ct. 227, 228 (1977) (in reviewing the trial judge's ultimate conclusions, drawn from his or her subsidiary findings of fact, it is duty of appellate court to draw its own inferences and reach its own conclusions).

The Trial Court's Order focuses on many of the types of dedications that are not present in this case (such as a deed restriction or other municipal dedication), while minimizing the impact of "competent, and often important" evidence going directly to the heart of the matter: *actual public use*. Hayden v. Stone, 112 Mass. 346, 350 (1873) (the way land is actually used by the public is "very strong evidence to show an intention to dedicate"). The construction and opening of White Stadium reinforced all of the public uses of the land envisioned by Olmsted, who as the Trial Court found, intended the Playstead to be used for "athletic recreation" and other civic ceremonies. ADD-66.

After the Stadium opened in 1949, the City then allowed use of White Stadium consistent with the prior use of the land since 1889, keeping the space open for active, everyday recreational uses, such as jogging, walking, basketball, and tennis, as well as by hosting youth athletic events and other civic, artistic, and

cultural events in the newly built stadium.[11] This is an open-air public park, plain and simple, and has been for over 135 years. Smith, 478 Mass. at 57 (the ultimate use to which the land is put may provide the best evidence of the purposes of the taking). For all of these reasons, this Court should hold that the Stadium Parcel is protected by Article 97 and reverse the Trial Court's Judgment accordingly.

D. The Lease and SUA Would Result in a Change in Use Inconsistent with How the Stadium Parcel Was Historically Used by the General Public

The evidence presented at trial demonstrates that in 1947 and 1950, neither the Legislature nor the White Fund Trustees considered the erection and use of White Stadium for school sponsored athletic events to represent a new, "inconsistent" public use of the land. And the governing law, evident on the face of the 1947 and 1950 Acts, demonstrates that the Legislature did not view school-sponsored athletic events in White Stadium as the type of changed use that was "inconsistent" with

[11] The fact that White Stadium was closed to the public during overnight hours is not evidence of a change in use after 1949. A municipality may close its public parks during late night hours or at other times when the use of such facilities may pose a threat to public safety and order. That is merely a proper exercise of a local government's police powers.

the public's prior use of the land for park and recreation use, which included youth sports.

By contrast, the proposed use of the land under the recently signed Lease and SUA is in direct conflict not only with the 1883 taking, but also with decades of prior public use of the Stadium Parcel and the terms of the White Fund. It would permit a professional soccer team and for-profit business to use the land as a professional sports and entertainment complex for up to 30 years while severely limiting public access to a large portion of the Playstead, while changing much of the quality and use of the rest of the public park areas and surrounding Environmental Justice Communities. The fact that the City's mismanagement led White Stadium to fall into disrepair, limiting its public use, cannot be the *rationale* for allowing a new private, for-profit, inconsistent use of the land, with limitations on public use going forward, without legislative approval. Ultimately, this change in use is "inconsistent" with prior public use, will deprive the public of the rights it has enjoyed uninterrupted since 1889, and is being pursued for motives that conflict with Article 97. Higginson, 212 Mass. at 590 (public parks are intended

for the "common good of mankind rather than the special gain or private benefit of a particular city or town.").

E. The Trial Court's Order Is Predicated Upon the Assumption That the 1947 and 1950 Acts Impermissibly Rewrote Terms of the White Fund

The Trial Court's ruling that Stadium Parcel uses were legislatively changed by the 1947 and 1950 Acts effectively holds that those statutes altered the terms of the White Fund trust instrument, a public charitable trust, and that the legislature engaged in *cy pres*, which is impermissible under Massachusetts and federal law. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 588-93 (1819); Op. of the Justs. to the U.S. House of Representatives, 374 Mass. 843 (1978) (legislative *cy pres* improper); Franklin Found. v. Att'y Gen., 340 Mass. 197, 205 (1960); Cohen v. City of Lynn, 33 Mass. App. Ct. 271, 279-80 (1992) ("contract obligations arising from a charitable trust . . . cannot be impaired legislatively").

Under these principles, the 1950 Act did not and could not change the recreational use of the Stadium Parcel imposed by the terms of the White Fund and recognized by the 1947 Act. Under the terms of the White Fund, works of the Trust may be used only for "the use and enjoyment of the City of Boston," may not be "mingled

with other funds or applied in joint undertakings," and the "current cost of their care and maintenance shall be borne by the City." RA-IV-860. Under the Lease, the citizens of Boston will be barred from portions of the proposed stadium at all times, the entirety of the Stadium at other times, and will be charged market rate for admission, with profits flowing to a private business. These terms are in direct conflict with the White Fund.

Chapter 111 of the Acts of 1937 provides that upon the construction of any work by the White Fund of any work of public utility and beauty for the enjoyment of the inhabitants of the City, *if permissible under Article 14*, in connection with any athletic contest or other exhibition, the City may charge an admission fee, provided that the aggregate amount of such fees do not exceed the care and maintenance expenses, and that the fees are applied by the City "only toward meeting the care and maintenance expense." RA-XIII-226; ADD-88. In this statute, the Legislature recognized that it could not override the terms of the White Fund Trust.[12]

[12] See also Section IV, B, *infra*, discussing excluded evidence related to probate court proceedings.

Here, fees for entry to proposed professional soccer games, other stadium events such as concerts, and a year-round restaurant and bar, are not limited to maintenance costs, but will presumably be paid as profits to BUSP and its investors in violation of the terms of the White Fund and the 1937 statute, both of which prohibit White Fund property from being used for private profit. The implication of the Trial Court's Order is that the 1947 and 1950 Acts, together, changed the terms of the White Fund in such a manner that today will allow for private, for-profit events on White Fund property (which is public trust land), and where admission charges could be imposed in excess of the City's maintenance costs. This result violates the express terms of the White Fund trust instrument and is improper, as the Legislature does not have the power of *cy pres* to change or modify a public charitable trust.

F. Plaintiffs Are Entitled to a Judgment in Their Favor Under M.G.L. c. 45, § 7

The Trial Court erred by ruling that the project "does not run afoul of G.L. c. 45, § 7." ADD-79. This is based on the Court's erroneous holding that the Stadium Parcel is not protected by Article 97. Id. Like other statutes designed to protect public parks, M.G.L. c. 45,

§ 7 requires legislative approval, here for the erection of a building in a park that exceeds six hundred square feet on the ground. Id.

The Trial Court found that the "Project calls for the construction of an 8,100 square-foot retail building outside the Stadium, but within the Stadium Parcel." ADD-79. For the reasons articulated in Sections II, A-D, *supra*, the Stadium Parcel is protected parkland under Article 97, and thus legislative approval is also required under G.L. c. 45, § 7 to construct an 8,100 square-foot retail building on the land.

G. Plaintiffs Are Entitled to a Judgment in Their Favor Under M.G.L. c. 40, § 53

The trial court further erred by ruling that Plaintiffs' claim under M.G.L. c. 40, § 53 was barred by laches. ADD-79. The Trial Court ruled that Plaintiffs satisfied the jurisdictional requirement that such a claim be brought by 10 individual taxpayer residents of the City, but it concluded that laches barred their claim. Id.

The Trial Court's conclusion was reversible error. The time of filing an amended complaint relates back to the original filing date. NES Rentals v. Me. Drilling & Blasting, Inc., 465 Mass. 856, 864-65 (2013). Here, the

Plaintiffs filed their original Complaint nearly ten months prior to the execution of the Lease. The City had sufficient notice of a potential challenge under the statute prior to executing the Lease and incurring tax obligations related thereto. This Court should reverse the Trial Court's judgment on Count VIII.[13]

III. THE TRIAL COURT ERRED BY FAILING TO EXPRESSLY RULE ON CLAIMS RELATING TO THE APPLICABILITY OF ARTICLE 97 IN CONNECTION WITH THE PROJECT

In Counts III and IV, Plaintiffs sought a declaratory judgment that Defendants were in violation of Article 97 and M.G.L. c. 3, § 5A as a result of the anticipated disposition of or change in use to areas of Franklin Park within and beyond the Stadium Parcel, that would result from the Lease and SUA.

In its Order, the Trial Court addressed only the question of whether the Stadium Parcel was protected by Article 97. It remained entirely silent – and made no rulings - on the equally important issue of whether the Lease and SUA constitute a change in use of or disposition of land with respect to areas of Franklin Park beyond the Stadium Parcel. Based on the facts and

[13] Other reasons set forth by the Court for entering judgment in the City's favor on this count (footnote 9 of the Order), are also based on the erroneous conclusion that the Stadium Parcel is not protected parkland.

evidence at trial, this Court should hold that the Lease and SUA will result in a disposition of and change in use to both the Stadium Parcel and surrounding portions of Franklin Park, requiring two-thirds legislative approval. Rummel v. Peters, 314 Mass. 504, 517 (1943) (Court's failure to render a ruling is equivalent to, and interpreted to be, a ruling that as a matter of law such a finding cannot be made); Sanguinetti, 5 Mass. App. Ct. at 228.

A. The Trial Court Failed to Address Whether the Lease, SUA, and/or Proposed Project Require Approval Under Article 97 With Respect to the Stadium Parcel

As a result of the Trial Court's erroneous conclusion that the Stadium Parcel is not protected by Article 97, the Court did not answer the question of whether the Lease and SUA terms constitute a change in use to or disposition of land requiring Defendants to obtain legislative approval. Based on the Court's findings, this Court should draw its own conclusion on this legal question and hold that legislative approval is required pursuant to Article 97.

A lease conveys an interest in land and transfers possession. Chase v. Aetna Rubber Co., 321 Mass. 721, 724 (1947); Baseball Pub. Co. v. Bruton, 302 Mass. 54,

55 (1938). The Attorney General has formally opined that a lease is a "disposition" for Article 97 purposes. 1979-80 Mass. Op. Att'y Gen. No. 15 (May 16, 1980) ("[A] disposition occurs, for purposes of Article 97, whenever there is any transfer, without limitation, of either the legal interest in the acquired land or physical control over it."); Curley v. Town of Billerica, 2013 WL 4029208, at *5 (Mass. Land Ct. Aug. 8, 2013) (unpublished) (lease was a disposition under Art. 97).

The Trial Court found that "On December 23, 2024, the City and BUSP executed a final Lease Agreement and Stadium Usage Agreement" through which the City and BUSP will share use of White Stadium once the project is completed for a term of up to 30 years. ADD-70. The Lease and SUA concern construction to be performed on, and future use of, the Stadium Parcel. Id. The terms of those documents identify the changed uses, which include, among other things, income-generating events such as professional soccer games, concerts, and the sale of food, alcohol, and merchandise. The Trial Court's Order makes no reference to these changed uses, which constitute a major portion of the contemplated new facilities. If this Court concludes the Stadium Parcel is protected by Article 97, this Court must also conclude

that the Lease and SUA executed by the City and BUSP constitute a "change in use" and "disposition of land," which require the approval of the Legislature under Article 97 and M.G.L. c. 3, § 5A(a).

B. The Trial Court Failed to Address Whether the Lease, SUA, and/or Proposed Project Require Approval Under Article 97 For Areas of Franklin Park Beyond the Stadium Parcel

Even more egregious was the Trial Court's failure to address whether the project's grant of usage rights, construction within, and impacts on areas of Franklin Park beyond the Stadium Parcel require legislative approval under Article 97. On the facts found by the Trial Court, this Court should conclude that Franklin Park is protected by Article 97, as Plaintiffs are entitled to a full and fair disposition of all of their claims, which the Trial Court failed to provide. Cormier, 381 Mass. at 236.

i. The Evidence at Trial Supports Plaintiffs' Argument of a Change in Use to and/or Disposition of Areas of Franklin Park Beyond the Stadium Parcel

The Trial Court made key findings that show a change in use to and effective disposition of areas in Franklin Park resulting from the project. Although the Trial Court did not conclude that Franklin Park is protected under Article 97, the evidence unequivocally leads to

that result. Specifically, the Court found: Franklin Park was taken by the City by eminent domain in 1883 for park purposes; Franklin Park opened to the public as a park in 1889; the City received LWCF grants over the years for maintenance and upkeep throughout Franklin Park, including park roads; and the City's OSPs have identified Franklin Park as open space protected by Article 97. ADD-65-66, 73. The City's former Parks Commissioner also testified that Franklin Park is protected by Article 97. RA-IV-749.

Because Franklin Park is constitutionally protected under Article 97, any disposition of or change in use to land within Franklin Park in connection with this project requires the express approval of the state Legislature and compliance with the Public Lands Preservation Act. M.G.L. c. 3, § 5A. The primary facts relating to the parties' obligations under the Lease and SUA are set forth in the record via the documents themselves. No witness provided direct testimony on the terms of those documents, and this Court should draw its own conclusions based on the documentary evidence. Commonwealth v. Tremblay, 480 Mass. 645, 654-55 (2018).

Specifically, the Lease and SUA show that the parties will undertake construction outside of the

Stadium Parcel in areas that are protected by Article 97 and LWCF, including design, construction, and paving work to parking areas and access roads in Franklin Park. RA-XII-200-214; RA-XII-366. Moreover, under the SUA, the City purports to grant to BUSP a "license" for up to 30 years for vehicular access across any paved roads intended for vehicular use for ingress and egress to the Stadium, running through all portions of Franklin Park abutting the Stadium Parcel. RA-XII-327. The City admits that such ingress and egress must be sufficient to accommodate BUSP's use of the Stadium for BUSP events and the year-round operation of its restaurant. Id.

The ingress and egress rights granted under the SUA constitute an easement, despite the SUA conveniently using the label of a "license." Commonwealth Wharf East Condo. Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 134 (1990) (the label placed upon the interest granted is not controlling); Bruton, 302 Mass. at 56 (instrument identified as lease held not to be a lease); Beal v. E. Air Devices, Inc., 9 Mass. App. Ct. 910, 910 (1980) (court disregarded parties' identification of agreement as "license agreement" where so-called license agreement ran for a term). The critical factor in determining whether an interest is a license or an easement is the

intent of the parties; "the label that the parties give the right, however, does not dictate its legal effect." Jon W. Bruce et al., The Law of Easements and Licenses in Land § 1.5 (Feb. 2025 update).[14]

Here, the access rights granted at § 4.2(a) of the SUA (1) are written, (2) designate a particular portion of Franklin Park over which the access is granted (paved roads), (3) have a set duration at § 3.1 of the SUA and are binding on the parties' successors and assigns per § 18.9 of the SUA, (4) were granted in return for the consideration provided by BUSP in the Lease and the SUA, (5) are not the subject of an express revocation right, and are integral to the entire transaction between the parties. RA-XII-327. Without the right to travel over roads in the portions of Franklin Park abutting the

[14] Leading scholars argue that in determining the intent of the parties when there is a question as to whether the interest granted is a license or easement, the following elements are important: (1) "manner of creation (oral or written)"; (2) "nature of right created" (i.e., the right to use "a particular portion of the servient estate indicates that an easement was intended," as does the "authority in the holder of the right to maintain or improve the burdened property"); (3) "duration of right" (i.e., a "set duration indicates an easement," as does the fact that "the right expressly binds the servient landowner's successors and assigns"); (4) "amount of consideration" (i.e., "[s]ubstantial consideration indicates an easement"); (5) "reservation of power to revoke right" (i.e., express reservation indicates a license). Id.

Stadium Parcel, BUSP would be unable to access the Stadium Parcel where its multimillion-dollar project will be constructed and operated for up to 30 years.

On these facts, this Court should conclude, as a matter of law, that the interest set forth in § 4.2(a) of the SUA is an easement, and not a license, and that other impacts on Frankin Park from the Lease and SUA will result in a disposition of or change in use to portions of Franklin Park surrounding the Stadium Parcel, requiring legislative approval by a two-thirds vote. Mahajan, 464 Mass. at 620.

ii. The Trial Court Erroneously Precluded Plaintiffs from Offering Evidence Related to Other Impacts on Franklin Park

Plaintiffs were prepared to offer additional evidence at trial to support their change-in-use argument, but the Trial Court denied them that opportunity. This was reversible error, as the proffer would have further supported Plaintiffs' argument that the project requires legislative approval under Article 97. Zabin, 73 Mass. App. Ct. at 152.

Specifically, Plaintiffs moved *in limine* seeking to introduce Parks and Recreation Department rules barring possession of alcohol in City parks as well as the City's Traffic Rules and Regulations, which set forth rules for

vehicular access through Franklin Park. There is no more relevant evidence to a change-in-use analysis than "before and after" evidence. Here, the Court denied Plaintiffs the opportunity to introduce relevant "before" evidence; in this instance, City policies and regulations expressly identifying conduct that was historically prohibited, but which would now be permitted under the Lease and SUA (i.e., the sale and use of alcohol in and around Franklin Park and increased commercial vehicle use in Franklin Park). See M.G.L. c. 272, § 40A. In doing so, the Court committed a reversible error, as the Court was thereafter unable to fully assess the true change in use resulting from the project.

IV. THE TRIAL COURT ERRED IN ALLOWING DEFENDANTS' MOTION *IN LIMINE* AND DISMISSING COUNTS I AND II OF THE SECOND AMENDED COMPLAINT

Defendants moved *in limine* on the eve of trial seeking to dismiss Counts I and II of Plaintiffs' Second Amended Complaint and prevent Plaintiffs from introducing evidence related to those breach of trust claims. The Trial Court allowed Defendants' motion and summarily dismissed Counts I and II on the grounds that Plaintiffs lacked standing to bring claims for breach of charitable trust, and it precluded Plaintiffs from introducing supporting evidence at trial. ADD-82-83.

A. Plaintiffs Have Special-Interest Standing to Bring Claims for Breach of Charitable Trust

Under Massachusetts law, the Attorney General, the trustees of a trust, and those with a special interest in the trust distinct from that of the general public have standing to bring claims for breach of a charitable trust. See Degiacomo v. City of Quincy, 476 Mass. 38, 46 (2016); Maffei v. Roman Cath. Archbishop of Bos., 449 Mass. 235, 245 (2007). Plaintiff Emerald Necklace Conservancy, Inc. ("Conservancy") falls within the third category of special-interest standing.

A plaintiff has special-interest standing when its claim arises from an individual right directly affecting the plaintiff. Weaver v. Wood, 425 Mass. 270, 276 (1997). Standing involves a fact-sensitive comparison of the plaintiff's rights and duties with those of the general public. Harvard Climate Just. Coal. v. President & Fellows of Harvard Coll., 90 Mass. App. Ct. 444, 446-47 (2016). Beyond these general principles, Massachusetts has not defined special interests. The Restatement of Charitable Nonprofit Organizations and several other

state supreme courts have done so, however, and have conferred standing to a larger class of plaintiffs.[15]

Some states also follow the "Blasko" definition, named after the leading trust scholar who articulated it. In re Tr. of Mary Baker Eddy, 212 A.3d 414, 422 (N.H. 2019). Under the Blasko definition, courts balance five factors: (1) the extraordinary nature of the acts complained of and the remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to the charity; and (5) the social desirability of conferring standing. Id. at 419, 422. This case represents an important opportunity to clarify Massachusetts law on special-interest standing.

Here, the Conservancy should be conferred with special-interest standing for a number of reasons.

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[15] Under the Restatement, a plaintiff has special-interest standing when:(a) the attorney general is not exercising the office's authority to protect the public's interest in the charitable assets at issue;(b) the charitable assets at issue will not be protected without the grant of standing to the private party;(c) the alleged misconduct is egregious or the circumstances are serious and exigent;(d) the relief sought is appropriate to enforce the purposes of the charity or the purposes to which particular charitable assets are devoted; and (e) the private party has a substantial connection to . . . the charitable assets at issue. Restatement of Charitable Nonprofit Orgs. § 6.05 (Am. L. Inst. 2021).

First, under both the Restatement and the Blasko definition, the Attorney General's willingness (*vel non*) to protect trust property is a key consideration. When trustees of a charitable trust choose not to seek judicial instructions despite "a genuine controversy as to [their] power to enter into a particular transaction" and the Attorney General chooses not to assert a claim for breach, special-interest standing is appropriate. See Kapiolani Park Pres. Soc. v. City & Cnty. of Honolulu, 751 P.2d 1022, 1025 (Haw. 1988).

The case at bar is factually similar to Kapiolani Park, where the Hawaii Supreme Court held that members of the public, as beneficiaries of a public charitable trust, had standing to bring a claim for breach of the trust because the city (as Trustee) and Attorney General had failed to do so.[16] In ruling that the project violated the charitable trust, the court recognized "that the law

[16] At issue in Kapiolani Park was an agreement to lease a portion of a park, operated by the City of Honolulu as trustee of a public charitable trust, to a "concessionaire" for restaurant purposes under a 15-year term, with the proposed construction of a new building to host the restaurant. See generally 751 P.2d 1022. The Plaintiffs had provided detailed notice to the city and Attorney General explaining why the proposed agreement violated the trust, which according to the Court, required the defendants, at the very least, to seek judicial guidance. Id. at 1024–25.

on the matter was, at least, subject to reasonable doubt, and each, therefore, should have brought the matter to the courts." Id. at 1024-25. The court further held that where the "attorney general as *parens patriae*, has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court." Id.

Here, the Attorney General opted not to exercise her "authority to protect the public's interest" in the Stadium Parcel, owned by a public charitable trust, despite having notice of the breach and an opportunity to, at the very least, seek guidance from the Probate Court. RA-XIII-134; RA-XIII-142; RA-XIII-145. Instead, the Attorney General elected to abandon all "availability and effectiveness" in this regard. See In re Tr. of Mary Baker Eddy, 212 A.3d at 419.

Due to the Attorney General's unwillingness to protect the White Fund's property, the Conservancy is the party best positioned to enforce the terms of this public trust that has provided benefits to the citizens of Boston for more than 100 years. Under its Articles of

Organization, the Conservancy's stated purpose "is to preserve, improve, promote, and maintain the system of land and water park areas known as the Emerald Necklace," which includes Franklin Park and the Stadium. RA-XIII-223. Since 1997, this has been the Conservancy's exclusive purpose. The general public does not have as its exclusive purpose the preservation, improvement, promotion, and maintenance of Franklin Park.

The Conservancy has also devoted significant resources to preserving, improving, promoting, and maintaining Franklin Park and the Stadium Parcel. With approvals from the City – including extensive project agreements and annual plans – it funded, planted and cared for new and existing trees in the Stadium Parcel (RA-III-24), funded and installed a drinking fountain in the Stadium Parcel for the public (RA-III-62), and continues to engage in many other conservation efforts within the Stadium Parcel. The general public visits, uses, and enjoys Franklin Park and the Stadium Parcel as a public park, but it does not preserve, improve, promote, or maintain them. This is a distinct and special interest unique to the Conservancy.

Defendants also accorded the Conservancy certain contractual rights in Franklin Park and the Stadium

Parcel by, among other things, entering into public-private partnership agreements with the Conservancy. RA-XIII-180; RA-XIII-190. The general public has none of these contractual rights; they are distinct and special interests unique to the Conservancy, and they, too, would be directly affected by the proposed project.

Because these interests are "distinct from those of the general public," and any breach of charitable trust would directly affect the Conservancy differently than it would affect members of the general public, this Court should hold that the Conservancy has special-interest standing to assert claims for breach of a public charitable trust. See Degiacomo, 476 Mass. at 46.

B. Plaintiffs Were Prejudiced by the Court Preventing Them from Offering Evidence Related to Their Breach of Charitable Trust Claims

Had the Court not erroneously dismissed Counts I and II, Plaintiffs would have introduced evidence in support of their breach of public trust claim. The Court committed reversible error by denying Plaintiffs that opportunity. Zabin, 73 Mass. App. Ct. at 152.

For example, the Trial Court wrongfully excluded evidence that after the passage of Chapter 111 of the Acts of 1937, the White Fund filed a Petition for Instructions with the Probate Court, seeking guidance on

whether charging admission for athletic events limited to maintenance costs as set forth in the 1937 Act was permissible under the Trust, an action in which the Attorney General was a party. See Excluded Exhibits at: RA-XIV-17, 24, 27, 35, 235; RA-XV-2. Admission of these documents would have given the Trial Court a better understanding of the 1947 and 1950 Acts and the meaning of the White Fund terms. Without the benefit of that evidence, the Trial Court endorsed the current project, approved and executed by the Mayor of Boston, as trustee of the White Fund, including the signing of a Lease and SUA completely at odds with the terms of the White Fund trust instrument and the position taken by the White Fund Trustees in the past. The erroneous exclusion of this relevant evidence was reversible error.

CONCLUSION

For these reasons, the Appeals Court should reverse the Trial Court, enter judgment in Plaintiffs' favor on Counts III, IV, V, VI, VII and VIII, and remand to the Trial Court for further proceedings on Counts I and II.

Respectfully submitted,

Plaintiffs-Appellants

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Dated: October 15, 2025

CERTIFICATE OF COMPLIANCE

I, Alan E. Lipkind, attorney for the Plaintiffs-Appellants, hereby certify that this Opening Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). This Opening Brief complies with the applicable length limit of Rule 20 because it uses Courier New, 12 point, a monospaced font not exceeding 10.5 characters per inch, and contains 50 non-excluded pages.

/s/Alan E. Lipkind
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Commonwealth of Massachusetts
The Appeals Court

Suffolk County

No. 2025-P-0953

EMERALD NECKLACE CONSERVANCY, INC., et al.

Plaintiffs-Appellants,

- against -

CITY OF BOSTON, et al.

Defendants-Appellees.

ON APPEAL FROM THE SUFFOLK SUPERIOR COURT,
CIVIL ACTION NO. 2484CV000477

CERTIFICATE OF SERVICE

I, Alan E. Lipkind, attorney for the Plaintiffs-Appellants, hereby certify that on this 15th day of October, 2025, I served true copies of the Opening Brief of Plaintiffs-Appellants and the Appendix of Plaintiffs-Appellants on counsel of record, via eFileMA and email, as follows:

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2484CV0477 A

EMERALD NECKLACE CONSERVANCY, INC. & others[1]

vs.

CITY OF BOSTON & others[2]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOLLOWING BENCH TRIAL

Plaintiffs Emerald Necklace Conservancy, Inc. ("Emerald Necklace") and twenty individuals (collectively, "Plaintiffs") brought this action against the City of Boston ("City"), the Trustees of the George Robert White Fund ("Trustees"), Boston Public Schools ("BPS"), the Boston Parks and Recreation Department ("BPRD") (the foregoing, collectively, "City Defendants"), Boston Unity Soccer Partners, LLC ("BUSP"), and Boston Unity Stadco, LLC ("Stadco") seeking to prevent the City from entering into a public-private partnership with BUSP and its affiliates[3] to renovate and then lease White Stadium and the area immediately surrounding it ("Project Site") in Franklin Park. The Second Amended Complaint sought a declaratory judgment that the City and Trustees violated the terms of the George Robert White Fund ("White Fund") (Counts I

[1] Beth Abelow; Jerrold Abelow; Jon Ball; Carla-Lisa Caliga; Rory Coffey; Jamie Cohen; John R. Cook; Louis Elisa; Derrick Evans; Marjorie Greville; Melissa Hamel; Pamela Jones; Arlene Mattison; Karen Mauney-Brodek; Jean McGuire; Beverly Merz; Daniel K. Moon; Rodney Singleton; Ben Taylor; Renee Welch

[2] Michelle Wu, as Mayor of the City of Boston and Trustee of the George Robert White Fund; Ruthzee Louijeune, as Boston City Council President and Trustee of the George Robert White Fund; Maureen Joyce, as Boston City Auditor and Trustee of the George Robert White Fund; James E. Rooney, as President and CEO of the Boston Chamber of Commerce and Trustee of the George Robert White Fund; Matthew McTygue, President of the Boston Bar Association and Trustee of the George Robert White Fund; Boston Public Schools; Boston Parks and Recreation Department; Boston Unity Soccer Partners, LLC; Boston Unity Stadco, LLC

[3] BUSP is a limited liability company that has been awarded a franchise for a professional women's soccer team in Boston by the National Women's Soccer League ("NWSL").

& II), a declaratory judgment that all Defendants violated Article 97 of the Massachusetts Constitution and the Public Lands Preservation Act (Counts III & IV), equitable relief (Count V), and preliminary and permanent injunctive relief (Count VI).

Upon the filing of the Complaint on February 20, 2024, the Plaintiffs sought a temporary restraining order and preliminary injunction prohibiting the City from entering into any agreement transferring control of any portion of the Project Site to BUSP and its affiliates, failing to comply with the Article 97 process, continuing with the Request for Quotations ("RFQ") process for bids for construction management of the City's portion of the Project, and failing to engage in Article 80 review before the Boston Planning and Development Agency. On March 22, 2024, the court (Ellis, J.) denied the Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Prior to trial, the Defendants moved *in limine* to dismiss Counts I and II of the Second Amended Complaint, arguing that the Plaintiffs lacked standing to assert those claims. This court allowed that motion prior to trial, and Counts I and II were dismissed.[4] The remaining counts proceeded to trial on March 18, 2025. On March 19, 2025, the Plaintiffs filed the Third Amended Complaint, asserting additional claims for

[4] While the Defendants' motion was styled as a motion *in limine*, it constituted a motion to dismiss for lack of standing. "The issue of standing is one of subject matter jurisdiction." *Sullivan* v. *Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 21 (2006). "[A] party has the right to raise subject matter jurisdiction at any time." *ROPT Ltd. P'ship* v. *Katin*, 431 Mass. 601, 607 (2000).

"[T]he Attorney General is the only person apart from a trustee who, on behalf of the general public served by [a public charitable] trust's charitable mission, has standing to bring [an action to correct abuses in the administration of a charitable trust]." *DeGiacomo* v. *Quincy*, 476 Mass. 38, 46 (2016). "[A] private plaintiff also has standing to bring claims against a public charity where the plaintiff 'asserts an individual interest in the charitable organization distinct from that of the general public.'" *Id.*, quoting *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007), cert. denied, 552 U.S. 1099 (2008).

The Plaintiffs are neither the Attorney General nor trustees of the White Fund. The White Fund was established for the benefit of the general public, and the Plaintiffs do not have individual interests in the White Fund distinct from that of the general public. The Plaintiffs, therefore, do not have standing to bring Counts I and II regarding violation of the White Fund.

violations of G.L. c. 45, § 7 (Count VII) and G.L. c. 40, § 53 (Count VIII) against all Defendants.

BACKGROUND

I. Establishment of Franklin Park

In 1869, the Boston City Council created a committee to "consider what action should be taken by the city government to purchase and lay out a public park." In 1875, the Commonwealth passed the Parks Act, Chapter 185 of the Acts of 1875. Pursuant to the Parks Act, the City was authorized to acquire lands within the City for park purposes and to establish a parks commission to govern and regulate the City's parks. In 1883, the City acquired the land that became Franklin Park through eminent domain pursuant to the Parks Act. The land taken includes the property in dispute – the White Stadium parcel and the surrounding park land comprising Franklin Park. The City took 23 parcels of land by eminent domain in 1883. Included in the eminent domain takings was Lot 15,[5] which would later become known as Franklin Park.

Franklin Park was designed by prominent landscape architect Frederick Law Olmstead, who had previously designed New York City's Central Park. He began advising the Boston Parks Commission in 1878 and provided plans for numerous parks

[5] Lot 15 was described as:

> A parcel of land belonging to George D. Lord, Trustee, bounded and described as follows: beginning on the northeasterly line of Walnut St. at land hereinbefore described as taken from Samuel S. Sawyer, and running northerly on said Walnut Street to land hereinbefore described as taken from the Institution for Savings in Newburyport and its Vicinity; thence turning southeasterly on said land described as taken from said Institution for Savings to said land described as taken from Samuel E. Sawyer; thence running southwesterly on said last mentioned land to the point to beginning. Containing 1217763 sq. ft. more or less and being the parcel number 15 on a plan of Proposed West Roxbury Park dated 1880 on file at the office of said Commissioners.

including Jamaica Park, the Arboretum, and Franklin Park. Franklin Park is Boston's largest park and is one in a chain of nine parks known as the Emerald Necklace. It is located near the neighborhoods of Jamaica Plain, Dorchester, Roxbury, and Mattapan.

Franklin Park Playstead, built between 1887 and 1888, is an area of approximately forty acres on the northern side of Franklin Park. Olmstead intended this particular area "to be used for the athletic recreation and education of the city's school boys, for occasional civil ceremonies and exhibition, and for any purpose likely to draw spectators in crowds." The Playstead was the first area of Franklin Park to be completed, and it opened to the public on June 12, 1889.

II. The George Robert White Charitable Trust

George Robert White ("White"), a prominent Boston businessman, died on January 2, 1922. The White Fund was established by Article Fourteenth of the Will of George Robert White ("Will"). The relevant parts of Article Fourteenth read as follows:

> ... I do now carry out by immediate gift my public charitable purpose which in previous wills I have provided for in remainder, and I do now give all the rest and residue of my property of every nature to the City of Boston, the same to be held as a permanent charitable trust fund to be known as the George Robert White Fund, and the net income only to be used for creating works of public utility and beauty, for the use and enjoyment of the inhabitants of the City of Boston. It is my intention that no part of said income, however, shall be used for a religious, political, educational or any purpose which it shall be the duty of the City in the ordinary course of events to provide.
>
> The control and management of said Fund and the disbursement of the income shall be in the hands of a board of five trustees to consist of the Mayor, who shall be its chairman, the President of the City Council, the City Auditor, the President of the Chamber of Commerce and the president of the Bar Association of the city of Boston . . . As this is a public charitable gift to the City of Boston, it is my intention that the City shall at all times be officially represented by a majority of the board of trustees charged with its management.

The Will was filed with the Probate Court on February 2, 1922, and allowed by the court on March 2, 1922.

In March 1922, by order of the City Council, approved by the Mayor, the City accepted the devise and bequest under Article Fourteenth of the Will, in accordance with the imposed terms and conditions.

On August 16, 1947, the Trustees of the White Fund selected a portion of the Playstead to be the site of a new stadium for use by Boston's schoolchildren. On October 10, 1947, the Trustees voted to request that the City transfer to the City of Boston-George Robert White Fund, a 14-acre parcel of land in the Playstead ("Stadium Parcel") for purposes of the establishment of a stadium, pursuant to the Acts of 1947, c. 542, § 1.[6] On October 20, 1947, the Mayor asked the City Council to approve the sale of the parcel for purposes of constructing a schoolboy stadium at the site to be named the "George Robert White Fund Memorial Stadium." On October 27, 1947, the City Council authorized the Mayor to transfer the Stadium Parcel for purposes of constructing the stadium.

On November 14, 1947, the City deeded the Stadium Parcel to the White Fund in consideration of the sum of $20,000. The deed recited that the transfer was "for the purpose with the establishment of the stadium on said land." The land conveyed to the White Fund is shown on the plan dated October 16, 1947, entitled "Plan showing land to

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[6] The Acts of 1947, c. 542, § 1, provide, in relevant part,

> any land heretofore or hereafter acquired by the city of Boston by tax title foreclosure and any land including park land, heretofore or hereafter acquired in fee by [the City of Boston] by eminent domain or by purchase, gift, devise or otherwise may, if the board of trustees of the fund established by article fourteenth of [the Will] and known as the [White Fund] so re-quests and the board or officer having charge of said land so recommends, be transferred for the fair cash value thereof by vote of the city council of said city, subject to the provisions of its charter, to said fund to be held hereafter for the purposes of said article fourteenth . . . .

be transferred by City of Boston Parks Department, to City of Boston-George Robert White Fund which plan was recorded at the Suffolk registry of deeds."

In or around October 1947, the Trustees voted to construct the stadium at an initial cost of $300,000. A 10,000-seat stadium was constructed on the property using money from the White Fund. The stadium has two sets of grandstands (East and West) and is open at both ends insofar as there are no structures at the ends, but the stadium is fenced in so that the public cannot access the stadium when it is closed. The construction of White Stadium was completed in May 1949.

On June 7, 1949, the Trustees unanimously voted that the Stadium "be turned over to the City – according to the terms of the Will – and that the Trustees favor an announcement by His Honor the Mayor to the Public that the School Department would have full charge of the operation, care and maintenance of the new Schoolboy Stadium in Franklin Park." The Mayor approved the vote and authorized White Stadium being turned over to the Boston School Department.

On or about April 10, 1950, the General Court of the Commonwealth of Massachusetts passed and adopted Chapter 291 of the Acts of 1950, entitled "An Act Relative to the George Robert White Fund Schoolboy Stadium in the City of Boston." The 1950 Act states as follows:

> So long as George Robert White Fund[']s Schoolboy Stadium shall remain in the custody and control of the school committee of [Boston] said stadium, together with the estate upon which it stands, shall be deemed to be a school building and yard, and should be repaired, altered, improved and furnished in the same manner as a school building and yard out of funds appropriated under paragraph b of section two of chapter two hundred and twenty-four of the acts of nineteen hundred and thirty-six, and shall be cared for and maintained in like manner out of funds appropriated under paragraph c of said section 2.

III. Use of White Stadium

a. Historically

BPS has controlled White Stadium since 1949. White Stadium has been used for numerous athletic events, including football, soccer, cross country, cheerleading, track and field, and Special Olympics practices and competitions. BPS has continuously used the Stadium Parcel for athletic purposes. Boston Latin Academy, Boston Latin School, Burke High School, and West Roxbury High School have all used White Stadium for athletic games for various lengths of time.

BPS has annually hosted high school graduation ceremonies at White Stadium. Youth camps are held there in the summer. White Stadium is also the home of various music, cultural, community and arts festivals, including the Caribbean kids' festival, the Puerto Rican festival, the Dominican festival, and the Boston Arts & Music Festival. The Boston Fire Department uses the field for a teen academy in the summer.

The public has access to portions of White Stadium when it is not being used for specific events. The track and grandstands are open to members of the public from 7:00 a.m. to 4:00 p.m. Monday through Friday. During that time, the public is permitted to use the track and traverse the bleachers of the West Grandstand. The public is not able to access the field or the areas inside the grandstands. Outside these hours, the Stadium is locked and intended to be inaccessible to the public. Testimony, however, suggests that members of the public often use the Stadium outside the official hours of use.

Members of the public often use portions outside White Stadium, but within the Stadium Parcel, for walking, exercising, or just enjoying the outdoors. This use includes

the fenced area to the south of the Stadium. It further includes basketball and tennis courts, which are located outside the Stadium but within the Stadium Parcel.

The BPS Athletics Department maintains offices on the second floor of the West Grandstand. The public does not have access to that area. The areas inside the East Grandstand are virtually unusable because of damage caused by a long-ago fire. Presently, use of the field is limited by its current condition to approximately 250 hours per year. Although White Stadium has bathroom facilities and water fountains, they are inoperable in the winter when the water must be turned off. The poured concrete foundation of the grandstands has structural deficiencies, such as expansion joint failure, cracking, and deterioration. The lighting, plumbing, and HVAC systems are at the end of their useful life. Water damage is visible from seepage through the stadium floors. Further, White Stadium does not comply with current building codes, fire codes, or the Americans with Disabilities Act.

There is simply no doubt that the City and BPS have failed in their responsibility to maintain White Stadium. It has been seriously dilapidated and in need of significant repairs for decades. Generations of BPS students have been short-changed by the willful neglect that has affected White Stadium.

b. After Project Completion

Once the Project is completed, the City and BUSP will share use of White Stadium. City and community events historically hosted in or around White Stadium will continue to be held there. On December 23, 2024, the City and BUSP executed a final Lease Agreement ("Lease") and Stadium Usage Agreement ("SUA"). The SUA provides that major City events have "absolute priority" over BUSP games. Further,

City and community events and BPS games and practices have scheduling priority over BUSP practices.

The interior of the East Grandstand will be used exclusively by BPS. That space will include a strength and conditioning facility, a sports medicine facility, offices for the BPS Athletics Department, study lounges for students, a community room, and a catering kitchen.[7] The community room, which will be able to hold up to 100 people, and catering kitchen will be available for use by the public. Additionally, the West Grandstand will include a storage facility for BPS, public restrooms available to users of White Stadium and Franklin Park, and a press box that BPS students will be able to utilize.

Pursuant to the SUA, the public will enjoy enhanced use of White Stadium. Aside from BUSP game days and BPS games and practices, the track, public restrooms, stairs and seating of both grandstands, and area to the south of the Stadium will be available for public use every day of the week from 6:00 a.m. to 9:00 p.m. White Stadium will be available for use by BPS students and/or the public 365 days per year.

IV. Open Space and Recreation Plans

The City began preparing and publishing Open Space and Recreation Plans ("OSPs"), which provide a comprehensive overview and analysis of the City's park system, in the 1960s. Initially, OSPs were prepared every five years and, later, every seven years. The overwhelming reason that the City prepares OSPs is to ensure that it is eligible for certain state grants, such as the Land and Water Conservation Fund ("LWCF") and Renovations for Communities Grants. Based upon the evidence

[7] BPS students do not currently have access to any of these types of facilities.

presented, I do not believe OSPs would be prepared by the City but for the opportunity to obtain funding.

OSPs are initially prepared by City personnel. They are then reviewed and approved by the Division of Conservation Services ("DCS"), a unit which reports to the Executive Secretary of Environmental Affairs ("EEA"). Once approved, OSPs are published. OSPs were published beginning in the 1970s with the most recent covering the time period 2023-2029.

Beginning with the 2002 OSP, the City was required by the DCS, as a condition of granting funding, to include a detailed inventory of all property located within Boston considered to be open and recreation space. This is called the Open Space Inventory.

Various OSPs identified White Stadium as protected Article 97 land. Testimony by Liza Meyer, Interim Commissioner of the BPRD, and Exhibit 116, a deposition transcript of Aldo Ghirin, a BPRD employee, are relevant to this issue. Ghirin bore responsibility for preparing, reviewing, and editing OSPs. He prepared, reviewed, and edited OSPs published in 2002, 2008, and 2015. Ghirin identified White Stadium and the remainder of the Stadium Parcel as protected space under Article 97.

Ghirin acknowledged at his deposition that he did not review Chapter 291 of the Acts of 1950 or any of the related history of the Stadium Parcel prior to identifying it as protected under Article 97. Ghirin reviewed those relevant documents for the first time in 2020 and was then unclear as to whether the land should have been identified as protected by Article 97. Each of the OSPs prepared by Ghirin contains a disclaimer that it should not be relied upon without further investigation and inquiry.

Liza Meyer's trial testimony essentially corroborated Ghirin's deposition testimony. I fully credit their testimony on this topic and, as a result, find the OSPs to have limited persuasive value on the issue of whether the land in question is protected land under Article 97.

Meyer testified that Boston received at least two grants through the LWCF. The City obtained a grant through the LWCF covering the period from 1978 through 1983, in or around the amount of $200,000, for work within Franklin Park. Additionally, the City obtained another grant through LWCF for "Phase II" Franklin Park renovations. That grant covered the time period from September 30, 1983, through December 31, 1986 and was in or around the amount of $250,000. Meyer was definitive that the grant funds were used for the betterment of Franklin Park, not the Stadium Parcel. I specifically credit that testimony. An LWCF Boundary Map depicting the portion of Franklin Park protected by the LWCF includes all areas of Franklin Park, except the Stadium Parcel and the areas currently occupied by Shattuck Hospital and Franklin Park Zoo.

V. MassMapper

The Commonwealth's Executive Office of Technology and Security Services, through MassGIS,[8] publishes an interactive mapping tool available to the public called MassMapper. MassMapper has a data layer that shows open space that is protected by Article 97. MassMapper indicates that the Stadium Parcel is not protected under Article 97.

[8] MassGIS is the Commonwealth's Bureau of Geographic Information.

Throughout these proceedings, each side has offered evidence and opined about the benefits and detriments of the Project. I specifically decline to make any factual findings about those issues. They are simply not relevant to the case.

There was evidence presented during the trial that BPRD maintained some portions of the Stadium Parcel outside of the Stadium walls and the fenced area to the south and that BPS maintained the inside of the Stadium. I find this to be a mere convenience and pooling of resources between departments and not dispositive of control over any particular area.

RULINGS OF LAW

I. Article 97

The outcome of this case hinges on whether the Stadium Parcel is protected by Article 97. According to Article 97 of the Amendments to the Massachusetts Constitution, which was ratified by voters in 1972, a two-thirds vote of both houses of the Legislature is required to allow land acquired or designated for a public purpose to be used for other purposes.

Article 97 provides, in pertinent part, that

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and **the protection of the people in their right to the conservation**, development and utilization of the agricultural, mineral, forest, water, air and other natural resources **is hereby declared to be a public purpose**.
>
> . . .
>
> Lands and easements **taken or acquired for such purposes** shall not be used for other purposes or otherwise disposed of except by laws enacted by a two[-]thirds vote . . . of each branch of the [legislature].

(emphasis added).

"[T]he language of Article 97 is 'relatively imprecise' and [ ] its provisions must be interpreted 'in light of the practical consequences that would result from . . . an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of art. 97.'" *Smith* v. *Westfield*, 478 Mass. 49, 56 (2017), quoting *Mahajan* v. *Department of Env't Prot.*, 464 Mass. 604, 614-615 (2013). Although Article 97 became law in 1972, the Supreme Judicial Court has "made clear that art. 97 applie[s] to all property that was taken or acquired for art. 97 purposes, including property taken or acquired before its ratification in 1972." *Id.* at 62. "[L]and may be protected by art. 97 where it was neither taken by eminent domain nor acquired for any purpose set forth in art. 97 provided that, after the taking or acquisition, it 'was designated for those purposes in a manner sufficient to invoke the protection of art. 97.'" *Id.* at 63, quoting *Mahajan*, 464 Mass. at 615. "[L]and is not taken for art. 97 purposes simply because it 'incidentally' promotes conservation, or because it 'simply displays some attributes of art. 97 land generally,' or because 'a comprehensive urban renewal plan may identify, among other objectives, some objectives that are consistent with art. 97 purposes.'" *Id.* at 57, quoting *Mahajan*, 464 Mass. at 613-614, 618.

Article 97 applies to property protected under two common law doctrines: the public dedication doctrine and the doctrine of prior public use. *Id.* at 58, 62. In fact, "the spirit of art. 97 is derived from" those common law doctrines, which should be applied under Article 97 to "inform [the court's] analysis." *Mahajan*, 464 Mass. at 616.

The "public dedication doctrine" applies when privately owned land has areas dedicated to public use, such as roadways subject to the easement of public ways. *Smith*, 478 Mass. at 58-59. Similarly, "[a] city or town that owns land in its proprietary

capacity and uses the land for a park may also dedicate the parkland to the use of the public." *Id.* at 59. In this circumstance, "[t]he general public for whose benefit a use in the land was established by an owner obtains an interest in the land in the nature of an easement." *Id.*, citing *Lowell* v. *Boston*, 322 Mass. 709, 730 (1948).

The related doctrine of "prior public use" dictates that "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." *Id.* at 60, quoting *Robbins* v. *Department of Pub. Works*, 355 Mass. 328, 330 (1969). The doctrine "is applied more 'stringently' where a public agency or municipality seeks to encroach upon a park." *Id.* at 61, quoting *Robbins*, 355 Mass. at 330. "[P]arkland protected by art. 97 includes land dedicated by municipalities as public parks that, under the prior public use doctrine, cannot be sold or devoted to another public use without plain and explicit legislative authority." *Id.* at 62.

The key question in this case is whether the Stadium Parcel was permanently dedicated by the City as a public park or whether the City has evinced an intent to use the Stadium Parcel as school property. "Under our common law, land is dedicated to the public as a public park when the landowner's intent to do so is clear and unequivocal, and when the public accepts such use by actually using the land as a public park." *Id.* at 63. Thus, a claim under the public dedication doctrine has two elements: (1) clear and unequivocal intent of the landowner to dedicate the land for public use; and (2) acceptance by the public to use the land for the purpose so dedicated. *Id.*

"The clear and unequivocal intent to dedicate public land as a public park must be more than simply an intent to use public land as a park temporarily or until a better use has emerged or ripened." *Id.* "[T]he intent must be to use the land permanently as a public park, because the consequence of a dedication is that '[t]he general public for whose benefit a use in the land was established . . . obtains an interest in the land in the nature of an easement' and 'upon completion of the dedication it becomes irrevocable.'" *Id.* (internal citation omitted). Clear and unequivocal intent may be demonstrated in a number of ways. "The recording of a deed or a conservation restriction is one way of manifesting such intent but it is not the only way." *Id.*

Use of the land by the public "is competent, and often important, as bearing on the question of dedication, when that is in dispute, for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate." *Hayden* v. *Stone*, 112 Mass. 346, 350 (1873). Dedication "also may be manifested by the owner's acts from which such an intention can be inferred." *Attorney Gen.* v. *Onset Bay Grove Ass'n*, 221 Mass. 342, 348 (1915).

In *Smith*, for example, where there was no recorded restriction, a dedication was found based on the 1979 "acceptance by the city of Federal conservation funds under the [Land and Water Conservation Fund Act of 1965] to rehabilitate the playground with the statutory proviso that, by doing so, the city surrendered all ability to convert the playground to a use other than public outdoor recreation without the approval of the Secretary [of the Interior]." 478 Mass. at 64.

There is not enough evidence to support the proposition that, at any point in time, the City expressed a deliberate, unequivocal and decisive intent to permanently place

the Stadium Parcel under the protection of Article 97. There is no deed or conservation restriction which manifests a clear and unequivocal intent to dedicate the Stadium Parcel as a public park. There is no evidence that the City accepted federal conservation funds to rehabilitate White Stadium and/or the Stadium Parcel. See *Smith*, 478 Mass. at 64. There is no evidence of a clear and unequivocal intent by the Boston Redevelopment Authority to make White Stadium permanently a public park. See *Mahajan*, 464 Mass. at 618-619. There is no evidence of a City Council vote to dedicate White Stadium permanently as conservation land or to transfer White Stadium to the conservation commission. See *Selectmen of Hanson* v. *Lindsay*, 444 Mass. 502, 506-508 (2005).

Chapter 542 of 1947 extinguished any prior dedication of the Stadium Parcel as parkland. Moreover, it allowed the land to be held for the purposes that it was originally bequeathed to the City in the Will. Chapter 291 of the Acts of 1950 further entrenches the fact that the land was no longer to be considered parkland. The General Court, albeit presumably by a majority and not a two-thirds vote (which is legally sufficient for purposes here given that Article 97 was not enacted until 1972), voted that the land was to be a school building and yard.

Notwithstanding the testimony from nearby residents, there is simply inadequate evidence that the everyday use of the property evinces an unequivocal intent to dedicate the property as public parkland. I conclude, therefore, that the Stadium Parcel is not protected by Article 97.

II. G.L. c. 45, § 7

Pursuant to G.L. c. 45, § 7,

> Land taken for or held as a park . . . shall forever by kept open and maintained as a public park, and no building which exceeds six hundred square feet in area on the ground shall be erected on a common or park dedicated to the use of the public without leave of the general court . . ..

In addition to renovating White Stadium, the Project calls for the construction of an 8,100 square-foot retail building outside the Stadium, but within the Stadium Parcel. As previously discussed, the Stadium Parcel is not parkland "dedicated to the use of the public." Therefore, the Project does not run afoul of G.L. c. 45, § 7.

III. G.L. c. 40, § 53

General Laws c. 40, § 53, provides a mechanism for taxpayers to enforce laws relating to the expenditure of tax money by the local government. *LeClair* v. *Norwell*, 430 Mass. 328, 332 (1999). The Defendants do not dispute that, among the Individual Plaintiffs, are ten taxpaying residents of the City. The statute provides that

> If a town, regional school district, or a district . . . or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town, regional school district, or district for any purpose or object or in any manner other than that for and in which such town, regional school district, or district has the legal and constitutional right and power to raise or expend money or incur obligations, the [ ] superior court may, upon petition of not less than ten taxable inhabitants of the town, or not less than ten taxable inhabitants of any town in the regional school district . . . determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

G.L. c. 40, § 53.

"[A]n action by ten taxpayers under G.L. c. 40, § 53, is subject to laches . . . and must be brought before obligations are incurred by a municipality." *Siedeman* v. *Newton*, 452 Mass. 472, 480 n.13 (2008). For laches to apply, there must be a showing

that the Plaintiffs had knowledge of the alleged issue in dispute. See *G.E.B.* v. *S.R.W.*, 422 Mass. 158, 166 (1996).

The City and BUSP executed the Lease and SUA on December 23, 2024. The terms of a commercial lease to which a tenant has agreed are binding. See *Worcester-Tatnuck Square CVS, Inc.* v. *Kaplan*, 33 Mass. App. Ct. 499, 503-506 (1992). Accordingly, the City has already incurred obligations. The Plaintiffs had sufficient knowledge of the Project, as evidenced by their filing of this action on February 20, 2024, well in advance of the City and BUSP executing the Lease and SUA. Consequently, laches applies to bar the Plaintiffs' claim under G.L. c. 40, § 53.[9]

ORDER

For the foregoing reasons, judgment shall enter for the Defendants on all remaining counts. The Court hereby declares that the Stadium Parcel is not subject to Article 97, and, therefore, the Defendants did not violate Article 97 and/or the Public Lands Preservation Act (Counts III & IV); the Plaintiffs are not entitled to equitable or injunctive relief (Counts V & VI); and the Project does not violate either G.L. c. 45, § 7, or G.L. c. 40, § 53 (Counts VII & VIII).

Matthew J. Nestor
Justice of the Superior Court

Dated: April 2, 2025

[9] Even if the Plaintiffs' claim was not barred by the doctrine of laches, the Plaintiffs contend that the City Defendants do not have the legal or constitutional authority to raise and expend funds and/or incur obligations to complete the Project pursuant to, among other uncited provisions and statutes, Article 97; G.L. c. 3, § 5A; G.L. c. 214, § 7A, and G.L. c. 45, § 7. As discussed, *supra*, the Stadium Parcel is not subject to Article 97. General Laws c. 3, § 5A, concerns land and interests subject to Article 97 and is, therefore, inapplicable. As discussed in Section II, the Project does not run afoul of G.L. c. 45, § 7. Finally, G.L. c. 214, § 7A, requires a plaintiff asserting a claim pursuant to that statute to provide notice to the opposing party by certified mail "at least twenty-one days prior to the commencement of such action." The Third Amended Complaint was not filed until March 19, 2025, after the trial was underway, and, therefore, G.L. c. 214, § 7A, cannot serve as a basis for Count VIII.

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JUDGMENT	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 2484CV00477	John E Powers, III Suffolk County Civil
CASE NAME Emerald Necklace Conservancy Inc et al vs. City of Boston et al	COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

This action came before the Court, Hon. Matthew J Nestor, presiding, and upon consideration thereof,

It is ORDERED and ADJUDGED:

that judgment shall enter for defendants on all remaining counts. SO ORDERED. (Nestor, J.) See docket for judgment and order.

Staff: Melissa Doris
Assistant Clerk Magistrate

4-17-25
JUDGMENT ENTERED ON DOCKET
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

Notice sent 4-17-25

DATE JUDGMENT ENTERED	~~CLERK OF COURTS~~/ ASST. CLERK
04/17/2025	X

Date/Time Printed: 04-17-2025 09:58:25

SCV131: 05/2016

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2024-0477

EMERALD NECKLACE CONSERVATORY & others[1]

vs.

CITY OF BOSTON & others[2]

ORDER ON MOTIONS IN LIMINE

Defendants' Motion *in Limine* Nos. 1 and 2 (Paper No. 61)

The Defendants contend that the Plaintiffs lack standing to assert Counts I and II of the Second Amended Complaint, which seek a declaratory judgment regarding violation of a public charitable trust.[3] "The issue of standing is one of subject matter jurisdiction." *Sullivan* v. *Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 21 (2006). "[A] party has the right to raise subject matter jurisdiction at any time." *ROPT Ltd. P'ship* v. *Katin*, 431 Mass. 601, 607 (2000).

"[T]he Attorney General is the only person apart from a trustee who, on behalf of the general public served by [a public charitable] trust's charitable mission, has standing to bring to bring [an action to correct abuses in the administration of a charitable trust]." *DeGiacomo* v. *Quincy*, 476 Mass. 38, 46 (2016). "[A] private plaintiff also has standing to bring claims against

[1] Beth Abelow; Jerrold Abelow; Jon Ball; Carla-Lisa Caliga; Rory Coffey; Jamie Cohen; John R. Cook; Louis Elisa; Derrick Evans; Marjorie Greville; Melissa Hamel; Pamela Jones; Arlene Mattison; Karen Mauney-Brodek; Jean McGuire; Beverly Merz; Daniel K. Moon; Rodney Singleton; Ben Taylor; and Renee Welch

[2] Michelle Wu, as Mayor of the City of Boston and Chairperson and Trustee of the George Robert White Fund; Ruthzee Louijeune, as Boston City Counil President and Trustee of the George Robert White Fund; Maureen Joyce, as Boston City Auditor and Trustee of the George Robert White Fund; James E. Rooney, President and CEO of the Boston Chamber of Commerce and Trustee of the George Robert White Fund; Matthew V. McTygue, President of the Boston Bar Association and Trustee of the George Robert White Fund; Boston Public Schools; Boston Parks and Recreation Department; Boston Unity Soccer Partners, LLC; and Boston Unity Stadco, LLC

[3] Defendants' Motion *in Limine* No. 1 may be best characterized as a motion to dismiss styled as a motion *in limine*.

a public charity where the plaintiff 'asserts an individual interest in the charitable organization distinct from that of the general public.'" *Id.*, quoting *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007), cert. denied, 552 U.S. 1099 (2008).

There is no dispute that the Plaintiffs are neither the Attorney General nor trustees of the George Robert White Fund ("White Fund"). The White Fund was established for the benefit of the general public, and the Plaintiffs do not have individual interests in the White Fund distinct from that of the general public. The Plaintiffs, therefore, do not have standing to brings Counts I and II regarding violation of the White Fund. Defendants' Motion *In Limine* No. 1 is therefore **ALLOWED**. Defendants' Motion *in Limine* No. 2 – seeking to preclude the admission of evidence concerning a possible PILOT agreement – is **DENIED as moot** in light of the ruling on Motion *in Limine* No. 1.

Defendants' Motion *in Limine* No. 3 (Paper No. 61), Plaintiffs' Motion *in Limine* to Admit Probate Court Filings (Paper No. 63), and Plaintiffs' Motion *in Limine* to Admit Ancient Newspaper Articles (Paper No. 66)

These motions *in limine* concern the proposed admission of certain evidence – specifically, Probate Court filings as to Paper Nos. 61 and 63 and "ancient newspaper articles" as to Paper No. 66 – relevant to the permissible use of White Fund income and property. As previously determined, the Plaintiffs lack standing to assert a claim for violation of the White Fund. Therefore, evidence concerning the use of White Fund income and/or property is not relevant to the case. Accordingly, Defendants' Motion *in Limine* No. 3 is **ALLOWED**, and Plaintiffs' Motions *in Limine* to Admit Probate Court Filings and Ancient Newspaper Articles are **DENIED**.

Defendants' Motion *in Limine* No. 4 (Paper No. 61)

Defendants' seek to preclude Plaintiffs from offering evidence or making any argument regarding early discussions between the City and Boston Unity, the City's Request for Proposals ("RFP") for the Project, and the City's preliminary designation of Boston Unity as the winning bidder. The Second Amended Complaint does not assert any claim relative to the RFP process. Therefore, any evidence or argument concerning the aforementioned topics is not relevant. Accordingly, Defendants' Motion *in Limine* No. 4 is **ALLOWED**.

Defendants' Motion *in Limine* No. 5 (Paper No. 61) and Plaintiffs' Motion *in Limine* to Admit Defendants' Policies (Paper No. 64)

Plaintiffs seek to introduce at evidence at trial that Defendants' plans for White Stadium and the surrounding property differ from current policies, which, they argue, is "probative of a changing and inconsistent use of the subject property." The Second Amended Complaint asserts four remaining claims: Counts III and IV – seeking a declaratory judgment that the Defendants violated Article 97 and the Public Lands Preservation Act as to the Project Site and Franklin Park generally, respectively; Count V – seeking equitable relief restraining Defendants from moving forward with the Project due to a failure to engage in the Article 97 process and failure to "fully and properly" examine the environmental impacts of the Project; and Count VI – seeking permanent injunctive relief enjoining the Defendants from proceeding with the Project because it violates White Fund's requirement that the Project Site be reserved for public use. The policies Plaintiffs seek to introduce concerning plans to sell alcohol at White Stadium, allow alcohol in Franklin Park, and encourage traffic in Franklin Park do not bear on and are not relevant to any of those remaining claims. Accordingly, Defendants' Motion *in Limine* No. 5 is **ALLOWED**, and Plaintiffs' Motion *in Limine* to Admit Defendants' Policies is **DENIED**.

Defendants Boston Unity Soccer Partners LLC and Boston Unity Stadco LLC's Motion *in Limine* to Exclude Irrelevant Evidence Regarding the National Women's Soccer League (Paper No. 62)

Boston Unity seeks to preclude any and all evidence concerning the organizational structures, investments, investors, and financial inter-relationships of Boston Unity and the NWSL; the economic investments in and valuations of each of such entities; and information as to the organization and operations of the NWSL generally and any other teams forming the NWSL. This case concerns the City's proposed Project to renovate White Stadium in conjunction with Boston Unity to allow Boston Unity to lease White Stadium for use by its professional women's soccer team which will be part of the NWSL. This matter concerns the use of White Fund property and the legality of any proposed lease between the City and Boston Unity. Evidence concerning the NWSL is irrelevant to those issues. Consequently, Defendants Boston Unity Soccer Partners LLC and Boston Unity Stadco LLC's Motion *in Limine* to Exclude Irrelevant Evidence Regarding the National Women's Soccer League is **ALLOWED**.

Plaintiffs' Motion *in Limine* to Preclude Undisclosed Witness (Paper No. 65)

Plaintiffs seek to preclude the testimony of Rickie Thompson on the grounds that the witness was not timely identified in response to interrogatories. Discovery sanctions are left to the discretion of the trial judge. See *Linardon* v. *Noke*, 2020 Mass. App. Unpub. LEXIS 297 at *2-*3 (2020) (Rule 1:28 opinion). Plaintiffs contend that permitting Thompson to testify would be unfairly prejudicial to them. Further, they argue that Thompson should not be allowed to testify because Defendants failed to seasonably supplement their responses to interrogatories.

On March 3, 2025, the parties jointly filed a Motion to Establish Pretrial Filing Deadlines (Paper No. 58). That motion called for the parties to submit "[a] final witness list identifying the witnesses that each party intends to call at trial" by March 10, 2025. This court endorsed that motion. Plaintiffs do not contend that Defendants subsequently failed to adhere to that deadline

and/or failed to identify Thompson as a trial witness on or before the March 10 deadline. Consequently, Plaintiffs' Motion *in Limine* to Preclude Undisclosed Witness is **DENIED**.

Matthew J. Nestor
Justice of the Superior Court

Dated: March 17, 2025

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment

M.G.L.A. Const. Amend. Art. 49

Art. XLIX. Right of people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment

Currentness

ART. XLIX. The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Notes of Decisions (51)

M.G.L.A. Const. Amend. Art. 49, MA CONST Amend. Art. 49
Current through amendments approved February 1, 2024.

End of Document

and thirty-six, to convey to Thomas Tertius Noble of the city and state of New York, a summer resident of said town, such portion or portions of Old Garden Beach Landing, so called, in said town as may be determined by the board of selectmen of said town to be included within the description of the property conveyed to said Noble, under the name of T. Tertius Noble, by either or both of two deeds of George W. Harvey, as trustee or otherwise, to said Noble, one deed being dated May twenty-fourth, nineteen hundred and twenty-nine, and recorded with Essex south district registry of deeds in book twenty-eight hundred and six at page two hundred and forty, and the other deed being dated September twenty-seventh, nineteen hundred and twenty-nine, and being recorded with said registry in book twenty-eight hundred and thirty-three at page two hundred and fifteen, the entire property having since been used and occupied by said Noble.

SECTION 2. This act shall take effect upon its passage.

Approved March 19, 1937.

Chap. 111 AN ACT RELATIVE TO THE CHARGING OF ADMISSION FEES BY THE CITY OF BOSTON IN CONNECTION WITH DEMONSTRATIONS, LECTURES, CONTESTS AND EXHIBITIONS AT WORKS CONSTRUCTED UNDER THE WILL OF GEORGE ROBERT WHITE.

Be it enacted, etc., as follows:

SECTION 1. Upon the construction or erection and establishment by the city of Boston, acting by and through the board of trustees of the George Robert White Fund and under and in accordance with the provisions of article fourteenth of the will of said George Robert White, of any work of public utility and beauty for the use and enjoyment of the inhabitants of said city, said city, acting by and through the head of the department in whose charge and control the same shall be placed, if permissible under the provisions of said will, may, in connection with any demonstration, lecture, athletic contest or athletic or other exhibition therein, charge a fee for admission thereto; provided, that the aggregate amount of such fees charged at any such work in any fiscal year shall not exceed the expense of the care and maintenance thereof during such year. Such fees shall be applied by said city only toward meeting the expense of said care and maintenance.

SECTION 2. This act shall take effect upon its passage.

Approved March 19, 1937.

Chap. 112 AN ACT RELATIVE TO CONDITIONAL SALES OF ELEVATOR APPARATUS OR MACHINERY.

Be it enacted, etc., as follows:

G. L. (Ter. Ed.), 184, § 13, amended.

Section thirteen of chapter one hundred and eighty-four of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by inserting after the word

SECTION 17. This act shall not abridge the right of the inhabitants of the town to hold general meetings as secured to them by the constitution of this commonwealth; nor shall this act confer upon any representative town meeting the power finally to commit the town to any measure affecting its municipal existence or substantially changing its form of government without action thereon by the registered voters of the town at large, using the ballot and the check list therefor.

SECTION 18. This act shall be submitted to the registered voters of the town of Norwood for acceptance at its next annual town election. The vote shall be taken by ballot in accordance with the provisions of the General Laws, so far as the same shall be applicable, in answer to the question, which shall be placed upon the official ballot to be used in said town at said election: "Shall an act passed by the general court in the year nineteen hundred and forty-seven, entitled 'An Act to establish representative town government by limited town meetings in the town of Norwood' be accepted by this town?"

SECTION 19. Sections two and three shall take effect upon acceptance of this act by a majority of the voters voting thereon, and the remainder shall take effect upon the effective date of the by-laws provided for by section three.

SECTION 20. If this act is rejected by the registered voters of the town of Norwood when first submitted to said voters under section eighteen, it may be submitted for acceptance in like manner from time to time to such voters at any annual town meeting in said town within three years thereafter. *Approved June 18, 1947.*

AN ACT AUTHORIZING THE TRANSFER OF LANDS OF THE CITY OF BOSTON TO THE GEORGE ROBERT WHITE FUND. *Chap.* 542

Be it enacted, etc., as follows:

SECTION 1. Any land heretofore or hereafter acquired in fee by the city of Boston by tax title foreclosure and any land, including park land, heretofore or hereafter acquired in fee by said city by eminent domain or by purchase, gift, devise or otherwise may, if the board of trustees of the fund established by article fourteenth of the will of George Robert White and known as the George Robert White Fund so requests and the board or officer having charge of said land so recommends, be transferred for the fair cash value thereof by vote of the city council of said city, subject to the provisions of its charter, to said fund to be held thereafter for the purposes of said article fourteenth; provided, that such transfer shall be null, void and of no effect if within thirty days after the approval by the mayor of the vote of the city council the George Robert White Fund does not pay to the city the fair cash value as fixed by said vote; and provided, further, that no such transfer shall be valid if it is in violation of any term or condition of the city's estate in said land.

SECTION 2. This act shall take full effect upon its acceptance, during the current year, by vote of the city council of the city of Boston, subject to the provisions of its charter, and by vote of the trustees of the George Robert White Fund, but not otherwise. *Approved June 18, 1947.*

Chap. 543 AN ACT RELATIVE TO THE FILING FEES TO BE PAID IN CONNECTION WITH THE CONSOLIDATION OF BUSINESS CORPORATIONS.

Be it enacted, etc., as follows:

G. L. (Ter. Ed.), 156, § 46B, etc., amended.

SECTION 1. Section 46B of chapter 156 of the General Laws is hereby amended by striking out the paragraph inserted by section 1 of chapter 405 of the acts of 1943, and inserting in place thereof the following: —

Filing fee.

The fee to be paid to the state secretary for filing the articles of consolidation shall be not less than fifty dollars nor less than the amount, if any, by which the sum of clauses (*a*) and (*b*) of this paragraph exceeds the sum of clauses (*c*) and (*d*) thereof: —

(*a*) One twentieth of one per cent of the total amount of the authorized capital stock with par value of the consolidated corporation.

(*b*) One cent a share for all authorized shares without par value of the consolidated corporation.

(*c*) One twentieth of one per cent of the total amount of the authorized capital stock with par value of all of the constituent corporations.

(*d*) One cent a share for all authorized shares without par value of all of the constituent corporations.

G. L. (Ter. Ed.), 156, § 46D, etc., amended.

SECTION 2. Section 46D of said chapter 156 is hereby amended by striking out the paragraph inserted by section 2 of said chapter 405, and inserting in place thereof the following: —

Filing fee.

If the consolidated corporation is to be a domestic corporation, the fee to be paid to the state secretary for filing the articles of consolidation shall be not less than fifty dollars, nor less than the amount, if any, by which the sum of clauses (*a*) and (*b*) of this paragraph exceeds the sum of clauses (*c*) and (*d*) thereof: —

(*a*) One twentieth of one per cent of the total amount of the authorized capital stock with par value of the consolidated corporation.

(*b*) One cent a share for all authorized shares without par value of the consolidated corporation.

(*c*) One twentieth of one per cent of the total amount of the authorized capital stock with par value of all of the constituent domestic corporations.

(*d*) One cent a share for all authorized shares without par value of all of the constituent domestic corporations.

If the consolidated corporation is to be a foreign corporation the fee for filing the articles of consolidation shall be one hundred dollars. *Approved June 18, 1947.*

to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

G. L. (Ter. Ed.), 31, § 21, etc., amended.

SECTION 1. Section 21 of chapter 31 of the General Laws, as most recently amended by chapter 216 of the acts of 1946, is hereby further amended by inserting after the word "who", in line 3, and in line 19, in each instance, the words: — on or before December thirty-first, nineteen hundred and forty-six.

SECTION 2. Certifications made on or after the effective date of this act shall conform to the provisions of section one of this act. *Approved April 10, 1950.*

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*Chap.*290 AN ACT AUTHORIZING THE TOWN OF SWAMPSCOTT TO PAY A SUM OF MONEY TO EDITH P. BROWN.

Be it enacted, etc., as follows:

SECTION 1. For the purpose of discharging a moral obligation, the town of Swampscott is hereby authorized to appropriate and pay the sum of three hundred and twenty-six dollars and ten cents to Edith P. Brown for damages suffered by her by the taking of land for park purposes located on the Greenway in said town, and for taxes paid from nineteen hundred and forty-two to nineteen hundred and forty-nine, erroneously assessed against said premises and paid by said Edith P. Brown.

SECTION 2. This act shall take effect upon its passage. *Approved April 10, 1950.*

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*Chap.*291 AN ACT RELATIVE TO THE GEORGE ROBERT WHITE FUND SCHOOLBOY STADIUM IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. So long as the stadium in the city of Boston known as the George Robert White Fund Schoolboy Stadium shall remain in the custody and control of the school committee of said city, said stadium, together with the estate upon which it stands, shall be deemed to be a school building and yard, and shall be repaired, altered, improved and furnished in the same manner as a school building and yard out of funds appropriated under paragraph *b* of section two of chapter two hundred and twenty-four of the acts of nineteen hundred and thirty-six, and shall be cared for and maintained in like manner out of funds appropriated under paragraph *c* of said section two.

SECTION 2. This act shall take effect upon its passage. *Approved April 10, 1950.*

M.G.L.A. 3 § 5A

§ 5A. Change in use or disposition of land by public entity; alternatives analysis; replacement land or funding; petition

Currentness

(a) In order to use for another purpose or otherwise dispose of land, an easement or other real property interest subject to Article XCVII of the Amendments to the Constitution of the Commonwealth, a public entity, which for the purposes of this section shall include the commonwealth, any agency, authority, board, bureau, commission, committee, council, county, department, division, institution, municipality, officer, quasi-public agency, public instrumentality or any subdivision thereof shall: (i)(A) notify the public and the secretary of energy and environmental affairs and conduct an alternatives analysis demonstrating that all other options to avoid or minimize said Article XCVII disposition or change in use have been explored and no feasible or substantially equivalent alternative exists; and (B) submit the analysis to the secretary of energy and environmental affairs and make the analysis public; (ii) identify replacement land or an interest in land, which is not already subject to said Article XCVII, in a comparable location and that is of equal or greater natural resource value, as determined by the secretary of energy and environmental affairs, and acreage and monetary value, as determined by an appraisal of the fair market value or value in use, whichever is greater; and (iii) take, acquire or dedicate the replacement land or interest in said land identified pursuant to clause (ii) in perpetuity for said Article XCVII purposes. Upon request of a public entity seeking to use for another purpose or otherwise dispose of land, an easement or another real property interest subject to said Article XCVII, the secretary of energy and environmental affairs may waive or modify the replacement land requirement pursuant to clauses (ii) and (iii) of the first sentence if: (A) the disposition involves only the transfer of legal control between public entities as described in this subsection and does not involve any other change, including, but not limited to, a change allowing the land to be used for another purpose; or (B) the transfer is of a parcel that is of insignificant natural resource and recreation value and is less than 2,500 square feet in area and the transfer serves a significant public interest.

(b)(1) Notwithstanding clause (iii) of subsection (a), a public entity seeking to change the use of or otherwise dispose of land subject to Article XCVII of the Amendments to the Constitution of the Commonwealth may provide funding in lieu of replacement land, or a combination of funding and replacement land or an interest in land, if the secretary of energy and environmental affairs has reported to the legislature an explicit finding that: (i) the proposed change in use or disposition serves a significant public interest; (ii) the proposed change in use or disposition will have no adverse impacts on an environmental justice population, as defined in section 62 of chapter 30 of the General Laws; (iii) the alternatives analysis required by said subsection (a) has been submitted to the secretary of energy and environmental affairs and subjected to public notice and comment and said analysis demonstrates that all other options to avoid or minimize the disposition or change in use have been explored and no feasible or substantially equivalent alternative exists for reasons specifically stated; and (iv) it is not feasible to contemporaneously designate replacement land that satisfies the requirements of said subsection (a).

(2) If a public entity provides funding in lieu of or in combination with replacement land, the following conditions shall be met: (i) the amount of funding provided shall be not less than 110 per cent of the fair market value or value in use of the Article XCVII land, whichever is greater, as determined by the secretary of energy and environmental affairs after an independent appraisal; (ii) the funding provided to change the use of or otherwise dispose of: (A) municipal land shall be held in the municipality's

Community Preservation Fund and dedicated solely for the acquisition of land for Article XCVII purposes or another already established municipal account for land preservation purposes or, if the municipality lacks such a fund, in a segregated account and dedicated solely for the acquisition of land for Article XCVII purposes; and (B) commonwealth land shall be held in a fund for acquiring Article XCVII land; and (iii) the funds shall be used within 3 years to acquire replacement land in a comparable location and dedicated in perpetuity for Article XCVII purposes; provided, however, that replacement lands acquired with in lieu funds shall be of equal or greater natural resource value, as determined by the secretary of energy and environmental affairs, and acreage and monetary value, as determined by an independent appraisal of the fair market value or value in use, whichever is greater.

(3) The secretary of energy and environmental affairs shall annually issue a report of all of the instances in which funding was provided in lieu of replacement land in exchange for a change in the use of or disposition of an interest in land taken, acquired or designated for purposes pursuant to Article XCVII of the Amendments to the Constitution of the Commonwealth including the amount of funds provided, the account into which the funds were deposited, whether the funds were expended to acquire replacement land and, if so, a description of the land that was acquired. Said report shall be submitted annually not later than December 15th to the clerks of the senate and house of representatives and made available on the executive office of energy and environmental affairs' website.

(c) A petition to the general court to authorize the use for another purpose or other disposition of land, an easement or another real property interest subject to Article XCVII of the Amendments to the Constitution of the Commonwealth shall be accompanied by: (i) an alternatives analysis conducted pursuant to subsection (a); (ii) a description of the replacement land or interest in land to be dedicated pursuant to said subsection (a), if not waived pursuant to said subsection (a); (iii) a copy of the appraisal required by said subsection (a); (iv) a copy of any waiver or modification granted pursuant to said subsection (a); and (v) if applicable, a copy of the report of the findings of the secretary of energy and environmental affairs required by paragraph (1) of subsection (b).

Credits

Added by St.2022, c. 274, § 1, eff. Feb. 10, 2023.

M.G.L.A. 3 § 5A, MA ST 3 § 5A

Current through Chapter 13 of the 2025 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 214. Equity Jurisdiction (Refs & Annos)

M.G.L.A. 214 § 7A

§ 7A. Damage to the environment; temporary restraining order as additional remedy; definitions; requisites; procedure

Currentness

As used in this section, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

As used in this section "person" shall mean any individual, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or any political subdivision thereof, any administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representatives, agents or assigns.

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

No such action shall be taken unless the plaintiffs at least twenty-one days prior to the commencement of such action direct a written notice of such violation or imminent violation by certified mail, to the agency responsible for enforcing said statute, ordinance, by-law or regulation, to the attorney general, and to the person violating or about to violate the same; provided, however, that if the plaintiffs can show that irreparable damage will result unless immediate action is taken the court may waive the foregoing requirement of notice and issue a temporary restraining order forthwith.

It shall be a defense to any action taken pursuant to this section that the defendant is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the plaintiffs demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction.

Any action brought pursuant to the authorization contained in this section shall be advanced for speedy trial and shall not be compromised without prior approval of the court.

If there is a finding by the court in favor of the plaintiffs it may assess their costs, including reasonable fees of expert witnesses but not attorney's fees; provided, however, that no such finding shall include damages.

The court may require the plaintiffs to post a surety or cash bond in a sum of not less than five hundred nor more than five thousand dollars to secure the payment of any costs which may be assessed against the plaintiffs in the event that they do not prevail.

Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause of action herein authorized shall be in addition to any such right or remedy.

Credits

Added by St.1973, c. 1114, § 62. Amended by St.1981, c. 643.

Notes of Decisions (28)

M.G.L.A. 214 § 7A, MA ST 214 § 7A

Current through Chapter 13 of the 2025 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VII. Cities, Towns and Districts (Ch. 39-49a)
Chapter 45. Public Parks, Playgrounds and the Public Domain (Refs & Annos)

M.G.L.A. 45 § 7

§ 7. Erection of buildings in parks

Currentness

Land taken for or held as a park under this chapter shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area on the ground shall be erected on a common or park dedicated to the use of the public without leave of the general court; but, except in parks in Boston and in parks comprising less than one hundred acres in extent, structures for shelter, refreshment and other purposes may be erected of such material and in such places as, in the opinion of the fire commissioners, if any, do not endanger buildings beyond the limits of such park. The superior court shall have jurisdiction in equity, upon petition of not less than ten taxable inhabitants of the city or town in which such common or park is located, to restrain the erection of a building on a common or park in violation of this section.

Notes of Decisions (16)

M.G.L.A. 45 § 7, MA ST 45 § 7
Current through Chapter 13 of the 2025 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

M.G.L.A. 40 § 53

§ 53. Restraint of illegal appropriations; ten taxpayer actions

Currentness

If a town, regional school district, or a district as defined in section one A, or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town, regional school district, or district for any purpose or object or in any manner other than that for and in which such town, regional school district, or district has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town, or not less than ten taxable inhabitants of any town in the regional school district, or not less than ten taxable inhabitants of that portion of a town which is in the district, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

Credits
Amended by St.1969, c. 507.

Notes of Decisions (167)

M.G.L.A. 40 § 53, MA ST 40 § 53
Current through Chapter 13 of the 2025 1st Annual Session. Some sections may be more current, see credits for details.

End of Document

1979-80 Mass. Op. Atty. Gen. No. 15 (Mass.A.G.), 1979-80 Mass. Op. Atty. Gen. 129, 1980 WL 119551

Office of the Attorney General

Commonwealth of Massachusetts
Opinion No. 15
May 16, 1980

***1** Richard E. Kendall
Commissioner
Department of Environmental Management
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, MA 02202

Dear Commissioner Kendall:
In September, 1966, the Department of Natural Resources, the predecessor agency to the Department of Environmental Management (the Department), purchased the Otis Reservoir from the Farmington River Water Power Company. The Department made the purchase pursuant to chapter 457 of the Acts of 1966, which authorized the purchase for water conservation and recreational purposes. The Department took title to the reservoir and the immediate shoreline (the perimeter strip), a piece of land ranging in width from five to twenty feet. [1] Since taking title, the Department has issued permits to the abutting property owners for the exclusive use of the perimeter strip abutting their land. The permits allow the abutting property owner to use the perimeter strip in a manner defined by the Department's regulation set forth at 304 C.M.R. 5.03. The permits are issued on an annual basis upon payment of a fee, as set forth in 304 C.M.R. 5.03 (1) and (2); are not transferrable without the prior approval of the Department, 304 C.M.R. 5.03 (3); and are revocable, 304 C.M.R. 5.03 (1), (8).

You have asked my opinion as to the effect of Article 97 of the Amendments to the Massachusetts Constitution on the issuance of these permits. Specifically, you have asked the following four questions:
1. Is the issuance of exclusive land use permits which preclude access by the general public an "other purpose" under Article 97, different from the public purpose for which the land was acquired?

2. Does the issuance of exclusive land use permits violate the public trust duties under which the Department of Environmental Management holds title to the land?

3. Are the exclusive land use permits, under their present conditions of revocability, a disposition within the meaning of Article 97?

4. Do the answers to these questions depend upon whether there were prior easements, or can the Department issue permits, irrespective of whether there were prior easements?

For the reasons set forth in the ensuing pages, I answer your questions as follows: (1) the permits are not an "other purpose" under Article 97, different from the public purpose for which the land was acquired; (2) the permits do not violate the public trust duties under which the Department holds title to the land; (3) the permits are not a disposition within the meaning of Article 97; and (4) the abutters with pre-existing easements need not be required to purchase the permits, in order to use the strip. If they do not purchase the permits, however, they may use the strip only in a manner consistent with the "pre-existing" easement. If they wish the exclusive use of the strip, they must purchase the permits.

Article 97 of the Amendments to the Constitution of Massachusetts provides:

***2** The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court. (Emphasis supplied.)

Chapter 457 of the Acts of 1966 authorized the Department to purchase Otis Reservoir and the perimeter strip "for the protection of water supply, and for conservation and recreation as described in chapter one hundred and thirty-two A of the General Laws ...." The land was therefore acquired for the conservation-related purposes enumerated in Article 97[2] and any further disposition or alteration in its use will require a two-thirds vote of each branch of the Legislature.[3]

You have asked first whether the issuance of the permits constitutes an "other purpose," different from that for which the land was acquired. In order to properly analyze what are "other purposes," the language of Article 97 must be read in conjunction with the judicially developed doctrine of "prior public use," whereby public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that effect. *Brookline* v. *Metropolitan District Commission,* 357 Mass. 435, 440 (1970); *Robbins* v. *Department of Public Works,* 355 Mass. 328, 330 (1969), and cases cited therein; Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144-147 (1973). The relevant inquiry is whether the permits effect a change in the use of the land, which use is inconsistent with conservation and recreation.

You have indicated to me that the Department believes that there is adequate justification for granting exclusive use permits. The Department has determined that public safety requires that access to the reservoir be limited and that conservation would be enhanced if the use of the perimeter strip were exclusive.[4] The Department has also concluded that the small and irregular size of the perimeter strip renders impractical any development of this land for recreational purposes which would be available to the general public. Moreover, the Department's regulation is designed to ensure that the use of this land does not lower the environmental quality of the reservoir and the sourrounding area. *See* 304 C.M.R. 5.03 (1), (5), (8).

***3** For these reasons, I am unable to conclude that the Department, by issuing exclusive permits to abutting property owners, has diverted the perimeter strip to a use inconsistent with that for which it was acquired.

You have next asked whether issuance of the permits violates the Department's public trust obligations. The answer to this question depends in part upon whether their issuance violates the Department's obligations under c. 132A.[5] G.L. 132A, § 2B, provides that all lands acquired by the Department for conservation and recreation purposes "shall in so far as practicable" be preserved in their natural state." Thus, the Department's primary obligation is to preserve such land in its natural state or to effectuate the policy of conservation set forth in c. 132A. When land is acquired for both conservation and recreational purposes, however, the Commissioner must reconcile the conflicts which may arise between these two goals. He is responsible for the planning, maintenance, and development of whatever land he is authorized to acquire. G.L. c. 132A, §§ 2C and 2D. When implementing this mandate the Commissioner may utilize the assistance of private individuals. Op. Atty. Gen., Rep. A.G.,

Pub. Doc. No. 12 at 335, 338 (1966). The Department may, consistent with its obligations under c. 132A, solicit aid from the perimeter strip abutters when implementing its duty to protect the water supply in the Reservoir and to establish a recreational area for the public enjoyment. The issuance of permits is a permissible means of soliciting this assistance. [6] Thus, the issuance of the permits has not violated the public trust obligations of the Department insofar as they are set out in G.L. c. 132A.

It is within the sound discretion of the Department to determine the role which the abutters play and whether or not the permits should be exclusive. The Department may "evaluate the situations presented it on the basis of its own expertise, and . . . make appropriate decisions in conformity to the legislative policy and purpose." Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 335, 337 (1966). Using its experience and knowledge, the Department may deterime which type of permit most effectuates the legislative policy. It "must - in the first instance - make a factual determination whether [an activity] may be carried on consistently with the Commonwealth's policy of conservation and recreation." *Id.* Because the Department has determined that the exclusive use permits effectuate the legislative policy of conservation and recreation at Otis Reservoir, their issuance does not violate the Department's public trust duties.

This conclusion, however, is made subject to two qualifications. If the Department fails to enforce its regulations or take action when the permittees abuse their rights, the Department will violate its statutory duty to hold land in the public trust. G.L. c. 132 A. *See, e.g., Blaney* v. *Commissioner of Corrections,* Mass. Adv. Sh. (1978) 278, 283. Second, restricting the issuance of permits to abutters alone may be necessitated by the inability of the general public to obtain easy access to the strip. I must note my concern, however, about any policy which may discriminate among citizens of the Commonwealth, that is, between abutters and non-abutters, in the issuance of the exclusive permits. *See, e.g., Neptune City* v. *Avon-By-The-Sea,* 61 N.J. 296 (1972).

***4** Your third question turns on the meaning of the word "disposition" as it is used in Article 97. That issue was addressed in a prior opinion of the Attorney General. Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139 (1973). That opinion concluded that a ". . . 'disposition' includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting of taking of easements." *Id.* at 147, Thus, a disposition occurs, for purposes of Article 97, whenever there is any transfer, without limitation, of either the legal interest in the acquired land or physical control over it. The permits under discussion here do not effect such a transfer and hence do not rise to the level of a "disposition."

A permit is a written license or grant of authority to do a thing which otherwise would not be allowed. Black's LAW DICTIONARY 1026 (5th Ed. 1979). A permit to use public land, like a license to use such land, is not an interest in land and grants to the person(s) holding it only conditional use of the land. *Woodbury* v. *Municipal Council of Gloucester,* 318 Mass. 385, 388 (1945). *See City of Boston* v. *A. W. Perry, Inc.* 304 Mass. 18, 21 (1939); *Baseball Publishing Co.* v. *Bruton,* 302 Mass. 54, 56 (1938). Thus, the permits granted by the Department to the abutting landowners surrounding Otis Reservoir do not transfer any interest in the perimeter strip. All legal interest in the land remains in the Department. The permits, are by definition, revocable at any time. *Woodbury* v. *Municipal Council of Gloucester, supra,* 318 Mass. at 388. Since they transfer no legal control or interest to the person(s) holding the permits, their issuance, per se, does not violate Article 97.

A permit, however, may violate the disposition provision of Article 97 if it transfers physical control over the land to the person(s) holding it. *See* Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144 (1973). Any relinquishment of physical control over the land would be a disposition and would require a vote of two-thirds of both Legislative branches. The Department cannot, therefore, through these permits, surrender its duty to police, conserve, preserve, and care for the reservoir and the perimeter strip. Whether or not these exclusive land use permits transfer such control depends upon their scope.

The scope of the permits granted by the Department is found in the Department's regulation, 304 C.M.R. 5.03. The regulation prohibits any activity "which contributes to water or air pollution or to a general lowering of the environmental quality". 304 C.M.R. 5.03 (5). [7] The permits are issued subject to the provision that "should further investigation by the Department of Environmental Management and other appropriate agencies, reveal the presence of a source of water pollution, on or adjacent to the permit area, that the permit may be terminated immediately, if there are not satisfactory corrective measures taken."

304 C.M.R. 5.03 (1). Violations of any Departmental regulation result in the immediate cancellation of the permit. *See* 304 C.M.R. 5.03 (8). Thus, the Department controls the land by regulating its uses and does not, through the issuance of the permits, relinquish control over it. You have brought to my attention[8] the fact that some person(s) holding permits have attempted to expand the permits' scope and use the land as if it were their own. Acquiescence in such use of the land by the Department would constitute a relinquishment of physical control over the land in violation of Article 97. The Department must assure, through its power of revocation and through the enforcement of its regulations, that the abutters limit the scope of their activities.

***5** Finally, you have asked what effect, if any, the prior easements have on the issuance of these exclusive use permits. You have indicated that the Department took title to the perimeter strip subject to a prior easement in gross granted to certain land owners by the Farmington River Water Power Company.[9]

The easement holders have the right to use the perimeter strip in a manner consistent with their easement. They may pass and repass over the land, erect temporary structures, and use the land in a general way. The Department cannot interfere with or impair these rights. *See Metropolitan District Commission* v. *Plotnick,* 354 Mass. 1, 3 (1968); *Lizzo* v. *Drukas,* 333 Mass. 242, 243 (1955). Thus, the Department may not issue permits which extinguish the rights of the easement holders, nor can it require the easement holders to purchase permits to use the land.[10]

In order to assure the exclusive use of the strip, however, the abutter may choose to purchase a permit. The permit would grant the land owner no greater use of the land than that enjoyed under his easement and would not, therefore, violate Article 97. It would only grant to the abutter the exclusive use of the strip for a one year period.[11] In this context, the permit acts as a contract between the easement holder and the Department. In consideration of the fee paid by the owner, the Department promises not to grant a permit to other individuals.[12] In these circumstances, there is no dispostion or other use prohibited by Article 97.

Thus, the existence of these easements has no effect on whether the permits violate the provision of Article 97, and the permits in this context would not be a “disposition” or “other use” prohibited by Article 97.[13]

In sum, it is my opinion that the exclusive land use permits do not violate either the provisions of Article 97 or the public trust duties under which the Department holds title to the perimeter strip. Rather, the permits are a legitimate mechanism for implementing the legislative policy of protecting the recreational and conservation uses of Otis Reservoir.

Very truly yours,

Francis X. Bellotti
Attorney General

Footnotes

1 The Department's title to this perimeter strip was not completely free and clear, but was taken subject to a pre-existing “easement in gross” held by several abutting property owners. The casements were granted by the Farmington River Water Power Company in 1935 and gave the abutting owners the right to “pass and repass over the permeter strip on foot or in vehicles and to erect thereon temporary structures, boathouses, and docks, and to use the land in a general way.”

2 In a prior opinion, the Attorney General has concluded that Article 97 applied to public lands acquired prior to the Amendment's effective date. Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 140 (1973). Thus, the fact that this land was purchased in September, 1966, prior to the Amendment's passage, is irrelevant.

3 The fact that the land was acquired for recreational, as well as conservation purposes, does not affect the applicability of Article 97. Article 97 applies to recreation part land, as well as land acquired for purely conservational purposes. *See* Op. Atty. Gen., No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 142 (1973). Since the land is to be used for both recreational and conservation purposes, however, the Department will be required to mediate the conflicts between what may be inconsistent goals.

4 You have informed me of several reasons for your determination that the general public must be excluded from the land. For example, you have determined that it would be prohibitively expensive to post lifeguards along the entire strip and that exclusive permits relieve the Commonwealth of the bunden of enforcing a ban against public access for safety reasons. It is clear that the Commonwealth may exercise the police power over property held in trust for the public, for the good of the public. *Home for Aged Women* v. *Commonwealth,* 202 Mass. 422, 435 (1909).

5 Because the Department was authorized to buy the Otis Reservoir property "for the purposes of conservation and recreation as described in chapter one hundred and thirty-two A of the General Laws." *see* St. 1966, c. 457, the Department holds title to the land under G.L. c. 132A.

6 The Commissioner may not, without legislative authority, however, retain this aid by transferring any legal interest in the land. *See* Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 45, 46 (1939); Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 335, 338 (1966).

7 Under proposed regulations, the Director of the Department will determine what activities are detrimental to the public interest and, therefore, prohibited.

8 In your request for an opinion, you have indicated that some permittces have built permanent structures on the land, have filled in the reservoir in order to build on the land, and have altered the shoreline to accommodate their needs. Such use may violate 304 C.M.R. 5.03. You have referred to this office for enforcement two related matters. It is appropriate that you continue to refer for enforcement action such instances of misuse of the exclusive use permits.

9 *See* n. 1, *supra*.

10 Of course, if any of the easements have terminated, the Department may require the land owner to purchase a permit as a precondition to use of the perimeter strip. Easements in gross are normally personal in nature and are not incidental to the land, thus they terminate with the death of, or a transfer by, the easement holder. *See* Restatement (First) of Property § 454 (1944). However, the easements may run with the land if the facts demonstrate that the parties intended them so to run. *See* Restatement (First) of Property § 492 (1944).

11 As discussed above, the exclusivity of the permit would not violate Article 97.

12 As a practical matter, of course, the easement holder may already have exclusive use of the land which abuts his property, since the Department has indicated that it would not allow the general public access in any event.

13 The Department may prohibit the easement holders from using the strip in a manner that is inconsistent with the scope of the easements. *See Brassard* v. *Flynn.* 352 Mass. 185, 190 (1967); *Nantucket Conservation Foundtion, Inc.* v. *Russell Management, Inc.,* 2 Mass. App. Ct. 686 (1974). The Department may also seek to enjoin any easement holder who abuses his casement rights by filling in the reservoir or building permanent structures on the perimcter strip. *See, e.g., Doody* v. *Spurr.* 315 Mass. 129, 133 (1944); *Swenson* v. *Marino.* 306 Mass. 582, 585-586 (1940); *Michaelson* v. *Nemetz.* 4 Mass. App. Ct. 806, 807 (1976).

1979-80 Mass. Op. Atty. Gen. No. 15 (Mass.A.G.), 1979-80 Mass. Op. Atty. Gen. 129, 1980 WL 119551

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Massachusetts Land Court.
Department of the Trial Court, Middlesex County.

Christopher J. CURLEY and Carol S. Curley, Plaintiffs,
v.
TOWN OF BILLERICA, Robert M. Correnti, Robert H. Accomando, Michael S. Rosa, Andrew Deslaurier, and David A. Gagliardi, as they Comprise The Board of Selectmen of the Town of Billerica, and Independent Towers Holdings, LLC, Defendants.

No. 12 Misc. 459001 RBF.
|
Aug. 8, 2013.

DECISION

ROBERT B. FOSTER, Justice.

***1** Christopher J. Curley and Carol S. Curley filed their Verified Complaint on February 6, 2012, naming as defendants the Town of Billerica (Town), the members of the Board of Selectman of the Town of Billerica (Board or Selectmen), and Independent Towers Holdings, LLC (Independent). The Town and the Board filed the Defendants Town of Billerica and Town of Billerica Board of Selectmen's Motion to Dismiss and/or for Summary Judgment, with an accompanying memorandum of law, on March 6, 2012; the same day, Independent filed Defendant Independent Holdings, LLC's Motion to Dismiss and/or for Summary Judgment, joining in and relying on the Town's and Board's motion (collectively, the Motion to Dismiss). The Curleys filed the Plaintiff's Opposition to Defendants' Motion to Dismiss and/or for Summary Judgment, with accompanying memorandum of law, on April 6, 2012. The court heard argument on the Motion to Dismiss on April 27, 2012. By an Order Allowing Defendants' Motion to Dismiss and Granting Leave to Amend (Order), issued September 27, 2012, I allowed the Motion to Dismiss and gave the Curleys leave to amend their complaint and allege a cause of action in the nature of mandamus for enforcement of the requirements set forth in Article 97 of the Amendments to the Massachusetts Constitution.

The Curleys filed their Amended Complaint on October 9, 2012. The defendants filed their respective answers to the Amended Complaint on October 15, 2012. A Case Management Conference was held on November 2, 2012. On December 21, 2012, the Town and the Board filed a Motion for Summary Judgment (Defendants' Summary Judgment Motion), accompanied by a memorandum of law, and the parties filed a Joint Statement of Agreed Facts. The Curleys filed the Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, accompanied by a memorandum of law, and Plaintiffs' Cross–Motion for Summary Judgment (Plaintiffs' Summary Judgment Motion), accompanied by a memorandum of law, on January 30, 2013. The parties filed an Amended Joint Statement of Agreed Facts on February 15, 2013. On that same day, the Town and the Board filed their Reply Memorandum to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. The Curleys filed the Plaintiffs' Sur Reply Memorandum in Response to the Defendants' Reply Memorandum on February 22, 2013. I heard argument on the Summary Judgment Motion on March 18, 2013, and took it under advisement. [1] For the reasons set forth in this Decision, the Defendants' Summary Judgment Motion is **ALLOWED,** and the Plaintiffs' Summary Judgment Motion is **DENIED.**

1 At the hearing, counsel for Independent stated that Independent relies on the Defendants' Summary Judgment Motion.

Summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission ... together with affidavits ... show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, I am to draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." ' *Regis Coll. v. Town of Weston*, 462 Mass. 280, 284 (2012) quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). "The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991).

***2** I find that the following material facts are not in dispute:

1. The Curleys are individuals residing at 7 Shanpauly Drive, Billerica, MA 01821.

2. The defendant Town is a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts with a principal place of business at 365 Boston Road, Billerica, MA 01821.

3. At all relevant times, the defendants Robert M. Correnti, Robert B. Accomando, Michael S. Rosa, Andrew Deslaurier and David A. Gagliardi were members of the Billerica Board of Selectmen.

4. The defendant Independent is a Georgia limited liability corporation with a principal place of business at 11 Herbert Drive, Latham, N.Y. 12110.

5. The Town is the owner of an approximately 4.4 acre parcel of land with an address of 774 Boston Road, Billerica, MA 01821, and referenced as Lot 195–0 on the Billerica Assessor's Map 90 (the Property).

6. The Town acquired title to the Property by a deed from John A. Akeson dated February 29, 1952, and recorded in the Middlesex North District Registry of Deeds (registry) at Book 1194, Page 430 (the Akeson Deed).

7. The Akeson Deed contains a description of the Property and refers to a plan. However, the plan referred to in the Akeson Deed is not recorded in the registry.

8. Another plan showing the Property, entitled "Plan of Land in Billerica, Mass., Surveyed for John A. Akeson, Trustees [sic], scale: 1 inch = 150 feet, June 1967, Emmons, Fleming & Bienvenu, Inc ., Engineers & Surveyors, Billerica, Mass.," was recorded in the registry on April 30, 1971, at Plan Book 112, Plan 49.

9. On March 10, 1951, before the Property was conveyed to the Town, the Town voted at a Special Town Meeting to accept a report from its Playground Committee. A motion to recommend that the Selectmen be authorized to purchase or take by eminent domain a suitable site for a playground, preferably the Property, was voted upon and defeated.

10. At a second Special Town Meeting held on November 24, 1951, the Town, pursuant to Article 23, "voted unanimously that the Town accept in consideration of payment therefore of one dollar the conveyance from John A. Akeson to the Town of the [Property] for playground purposes on condition that any playground located thereon shall be called the 'John A. Akeson Playground." '

11. The Curleys' property is located approximately 300 feet from the Property, and is listed, along with the other abutting properties, on the "Abutters List for [the Property] using a distance of 500 feet" as provided by the Town's assessor.

12. Soccer fields were built on the Property and remain in use to this day.

13. On May 11, 2009, the Town of Billerica Recreation Commission, the body authorized by Billerica General Bylaw Article II, § 27.1 to issue use permits for all fields and recreational facilities owned by the Town, voted 10–0–0 to support the construction of a telecommunications tower on the Property.

14. On September 28, 2009, the Board, in its capacity as custodian of the Property, voted unanimously, 5–0, to place Article 19 on the Fall Annual Town Meeting Warrant, seeking Town Meeting's authorization to allow the Board/Town Manager to negotiate a lease for the purpose of constructing telecommunications facilities on three specified parcels of Town owned land, one of which was "Boston Road (Akeson Field), Plate 90, Parcel 195," i.e., the Property.

***3** 15. Upon recommendation by the Board, on October 6, 2009 Town Meeting voted by a 2/3 super-majority vote to approve Article 19, authorizing the lease of the Property for the purposes of constructing a telecommunications facility.

16. The Town entered into a lease with Independent on December 2, 2010 (the Lease). A Memorandum of Lease dated December 2, 2010 is recorded in the registry at Book 24613, Page 63.

17. The Lease allows the Applicant to place a telecommunications tower on a 40′ x 60′ portion of the 4.4 acre Property, and provides for "non-exclusive easements for reasonable access thereto ." The term of the Lease is for ten years commencing on December 2, 2010, with one additional automatic ten-year extension unless otherwise terminated by Independent by prior notice.

18. On January 31, 2011, the Billerica Planning Board denied Independent's application for a special permit to constrict a 130–foot monopole telecommunications tower within a 40′ x 60′ compound on the Property(the Tower).

19. The Town's Zoning Board of Appeals granted Independent's request for all necessary variances from the setback, fall zone, and height restrictions of the Town's Zoning Bylaw on February 16, 2011.

20. The Town's Conservation Commission granted Independent an Order of Conditions on March 11, 2011.

21. Upon appeal by Independent of the Planning Board's denial of the special permit, the United States District Court for the District of Massachusetts issued its Judgment and Order in *Independent Towers Holdings, LLC v. Billerica Planning Board:* civil action no. 1:11–cv–10442–LTS, entering judgment for Independent under the provisions of the Federal Telecommunications Act of 1996, and, inter alia, ordering the issuance of a building permit for the Tower at the Property.

22. The Building Inspector issued Building Permit # 11–0712 for the Tower to Independent on September 13, 2011.

23. The Town did not seek to obtain two-thirds vote of the Legislature authorizing the Lease of the Property.

Discussion

This is an action in the nature of mandamus pursuant to G.L. c. 249, § 5. The Curleys allege that the Property is used for a purpose that makes it subject to Article 97 of the Amendments to the Massachusetts Constitution (art. 97), and, therefore, the Property could not be leased to Independent without the Town's first obtaining a two-thirds vote of the Legislature. It is undisputed that the Town did not obtain such a vote. Because the two-thirds vote requirement is not discretionary, the Curleys seek a judgment in the nature of mandamus invalidating the Lease and enjoining the Town from entering any lease or otherwise disposing of the Property without obtaining the necessary vote.

In the Defendants' Summary Judgment Motion, the Town and the Board set forth five grounds on which, they argue, summary judgment should be entered in their favour and the Amended Complaint dismissed. Two of these grounds were previously addressed in the Order, and with respect to those grounds, I incorporate the Order by reference. Thus, as set forth in the Order in more detail, I find (a) that the Town complied with the requirements of G.L. c. 40, § 15A, in obtaining the Town Meeting vote authorizing the Lease, and (b) that the Curleys have standing to bring their action in the nature of mandamus as stated in the Amended Complaint.

***4** The Town's and the Board's third ground for their Summary Judgment Motion is that the Land Court lacks subject matter jurisdiction over an art. 97 mandamus claim that does not involve "any right, title, or interest in land." G.L. c. 249, § 5. The Land Court has concurrent jurisdiction over any action in the nature of mandamus that involves "any right, title, or interest in land is involved or arises under or involves the subdivision control law, the zoning act, or municipal zoning, or subdivision ordinances, by-laws or regulations." *Id;* see G.L. c. 185, § 1(r). The Curleys contend that this case involves an interest in land because the Town entered into the Lease of the Property. I agree. The Lease is a disposition of municipal real estate that triggers the requirements of G.L. c. 40, § 15A, and could potentially trigger the two-thirds vote requirement of art. 97. See *Wright v. Walcott,* 238 Mass. 432 438 (1921) (conveyance of lesser estate than full sale can be made by municipality). A lease, at least one entered into by a municipality, is an encumbrance on title that involves a right, title or interest in land sufficient to invoke the Land Court's subject matter jurisdiction. *Lepore v. City of Lynn,* 13 LCR 237, 239 (2005)*Lepore v. City of Lynn,* 13 LCR 237, 239 (2005). The question of whether the Town was required to comply with the dictates of art. 97 before it could validly enter into the Lease is one over which this court has subject matter jurisdiction.

The Town's and the Board's final two grounds for their Summary Judgment Motion, as well as the Plaintiffs' Summary Judgment Motion, join the issue raised by the Curleys in the Amended Complaint: whether the Property is subject to the requirements of art. 97, so that the Town was obligated to obtain a two-thirds vote of the legislature before it could enter the Lease.

Article 97 of the Amendments to the Constitution was approved and ratified on November 7, 1972. *Mahajan v. Department of Envtl. Protection,* 464 Mass. 604, 611 (2013). It replaced Article 49 of the Amendments to the Constitution, see *id.* at 605 n. 3 & 611, and provides as follows:

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> The general court shall have the power to enact legislation necessary or expedient to protect such rights.
>
> In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

***5** Art. 97. Under art. 97, the people are deemed to have the right to clean air and water, and the protection of these rights is a public purpose. Land may be taken or purchased by the government to protect this public purpose in the environment, and such land cannot be disposed of except by a two-thirds vote of both branches of the Legislature. *Id.;* see *Opinion of the Justices,* 383 Mass. 895, 917–918 (1981). Article 97 is retroactive, applying "to the disposition of all lands and easements taken or acquired for the stated purposes, regardless of when they were taken or acquired." *Id.* at 918.

There is no dispute that the Property is held by the Town, a political subdivision of the Commonwealth, and that the Town did not obtain a two-thirds vote of the Legislature before entering the Lease. I held in the Order, and the parties do not challenge here, that the Lease was a disposal of the Property as defined in art. 97. The Curleys allege that the acceptance of the Property for playground purposes is a use or purpose that falls within the categories of environmental interests protected in art. 97. If this allegation is correct, then they are entitled to summary judgment and an order of mandamus invalidating the Lease and ordering the Town not to dispose of the Property without approval of the Legislature by a two-thirds vote. If it is not, then summary judgment should enter for the Town and Board dismissing the Amended Complaint.

The Town's and the Board's fourth ground for their Summary Judgment Motion is that the Property is not dedicated or restricted to playground uses in a way that makes it subject to art. 97. Specifically, they argue that art. 97 does not apply to the Property because neither the Akeson Deed nor any other recorded instrument related to the Property contains a restriction on the use of the Property under G.L. c. 184, §§ 26–30. Such a restriction, they argue, is required to subject any parcel to the requirements of art. 97. This is not correct. Whether the Property is subject to a restriction under G.L. c. 184, §§ 26–30, or whether the acquisition of the Property for playground purposes created such a restriction on the property is irrelevant to the question of whether art. 97 applies to the Property. Article 97 applies to any municipal land that was taken or acquired for a purpose articulated within art. 97, or subsequently designated for such a purpose in a manner sufficient to invoke the protections of art. 97. *Mahajan,* 464 Mass. at 615–616; *Board of Selectmen of Hanson v. Lindsay,* 444 Mass. 502, 508–509 (2005); *Toro v. Mayor of Revere,* 9 Mass.App.Ct. 871, 872 (1980). The Town accepted the Property in 1951 for "playground purposes." If "playground purposes" is a purpose articulated within 97, then the vote of Town Meeting accepting the Property for such purposes was sufficient to subject it to the protections of art. 97.

The remaining issue, then, is whether "playground purposes" qualify as an art. 97 use. The Curleys contend a playground is an art. 97 use, and, therefore, the Town was required to obtain a two-thirds vote from the Legislature authorizing a change or disposition in that use before it could enter the Lease The Town and the Board contend that a playground, as opposed to a park, is not a use articulated within art. 97. The Curleys counter that the legal definition of "playground" does not differ from "park" in any meaningful way, and that land acquired for either purpose is subject to art. 97.

***6** In support of their contention that a playground is an art. 97 use, the Curleys rely heavily on the expansive reading of art. 97 set forth in the June 6, 1973 opinion of Attorney General Robert H. Quinn. *Rep. A.G., Pub. Doc. No. 12* (1973) (Quinn Opinion). The Quinn Opinion is a response to "a general inquiry from the Speaker of the House of Representatives" regarding art. 97, "and was rendered without reference to any particular set of facts." *Mahajan,*

464 Mass. at 613; Quinn Opinion at 139. In the Opinion, Attorney General Quinn discussed the scope of uses of publicly held land that might fall under art. 97. He concluded that the purposes of art. 97—to secure that the people shall have the right to clean air and water and the natural, scenic, historic, and esthetic qualities of the environment, and the protection of the people in their right to the conservation, development and utilization of natural resources—was to be broadly construed. *Id.* at 141–142. Thus, the Attorney General concluded, lands acquired for use as "parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify" as acquired for the purposes of protecting the interests of the public in the environment and are therefore subject to the requirements of art. 97. *Id.* at 142–143. Under the Quinn Opinion's interpretation, the Property, acquired for use as a playground and used as athletic fields, is quite plausibly subject to Art. 97.

In a decision issued after the briefing of and hearing on these motions, the Supreme Judicial Court has made clear that the Quinn Opinion's interpretation of art. 97, while possibly persuasive, "is not binding in its particulars," and that courts should be "hesitant to afford it too much weight due to the generalized nature of the inquiry and the hypothetical nature of the response." *Mahajan,* 464 Mass. at 613. The court disagreed with the Quinn Opinion to the extent it suggested that the vast majority of land taken for any public purpose may be subject to art. 97 if the taking or use even incidentally promotes "conservation, development and utilization of the ... forest, water and air." *Id.,* quoting Quinn Opinion at 142. The "relatively imprecise language of art. 97" did not warrant "an interpretation as broad as the Quinn Opinion would afford it, particularly in light of the practical consequences that would result from such an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of art. 97." *Id.* at 614–615. Applying the court's reasoning in *Mahajan,* the issue of whether a playground is an art. 97 use is not resolved by the Quinn Opinion. Rather, the analysis should focus more narrowly on whether the particular use the land was taken or acquired for—here, playground uses—falls directly within an art. 97 purpose. *Id.* at 615.

Generally, municipal land acquired for open space or conservation purposes is subject to art. 97. See *Board of Selectmen of Hanson v. Lindsay,* 444 Mass. at 509; *Toro,* 9 Mass.App.Ct. at 872; see also *Mahajan,* 464 Mass. at 619 n. 19 (public open space at Boston City Hall plaza subject to art. 97). A park falls within this category of public open space, as a park is generally accepted to mean "a tract of land, great or small, dedicated and maintained for the purposes of pleasure, exercise, amusement, or ornament." *Commonwealth v. Davie,* 46 Mass.App.Ct. 25, 28 (1998), quoting *Salem v. Attorney Gen.,* 344 Mass. 626, 630 (1962). Massachusetts law does not explicitly define what constitutes a playground, but it does draw distinctions between parks and playgrounds that indicate that a playground is not a park. For example, a criminal statute bars the sale of controlled substances "within one hundred feet of a public park *or* playground." G.L. c. 94C § 32J (emphasis supplied). In chapter 45 of the General Laws, entitled "Public Parks, Playgrounds and the Public Domain," §§ 2–11 are directed to public parks, while §§ 14–18 are directed to playgrounds. Section 14 of that chapter, addressing the use, acquisition and management of playgrounds, states that its provisions apply to land and buildings acquired for playground purposes, or for park and playground purposes, but not to land and buildings acquired solely for park purposes. G.L. 45 § 14. While lacking explicit definitions, chapter 45 treats parks and playgrounds differently in ways that suggest that a park is open space while a playground is an improved space with structures. Section 7 provides that "[l]and taken for or held as a park ... shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area ... shall be erected ... without leave of the general court." G.L. c. 45, § 7. On the other hand, a city or town "may construct buildings on land owned or leased by it" as a playground and "may provide equipment" for the playground. G.L. c. 45, § 14. Other statutes concerning playgrounds include references to play equipment that suggest that the presence of such equipment is what defines a playground. See, e.g., G.L. c. 45, § 15 (requiring cities and towns to "maintain at least one public playground conveniently located and of suitable size and *equipment*) (emphasis supplied); G.L. c. 266, § 98A (making it a crime to destroy, deface, mar, or injure any "playground apparatus or equipment").

***7** Definitions of "playground" found in other jurisdictions and in dictionaries are consistent with chapter 45's implication that a playground is a space for active recreation and is improved with equipment or structures, including playing fields. Federal law defines a playground as "any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more apparatus intended

for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards." 21 U.S.C. § 860(e)(1); *United States v. Parker,* 30 F.3d 542, 552 (4th Cir.1994). The California Penal Code defines a playground as "any park or recreational area specifically designed to be used by children that has play equipment installed, including public grounds designed for athletic activities ... or any similar facility." Cal.Penal Code § 626.95(c)(1). Dictionary definitions of "playground" provide that it is "an outdoor area for recreation and play, esp. one having items such as swings," American Heritage College Dictionary 1068 (4th ed.2002), or that it is "a piece of land used for and usually equipped with facilities for recreation especially by children." Free Merriam–Webster Dictionary, at http://www.merriam-webster.com/dictionary/playground, visited August 6, 2013.

Based on the foregoing, I conclude that a playground is a public recreational space that is improved with buildings and play structures or apparatus. A park, on the other hand, is a public open space that, for the most part, remains open and unimproved. This distinction between a playground and a park falls along the very fault line of an art. 97 use. Article 97 is intended to protect "the people in their right to the conservation, development and utilization of the ... natural resources" of the environment. Art. 97. Parks protect that interest. Improved property, including playgrounds, does not. Because of the development required to construct a playground, land taken or acquired for playground use does not fall within the scope of art. 97 purposes. [2]

[2] That playing fields were built on the Property does not change this conclusion. The use which determines whether a property is subject to art. 97 is the use for which the property was originally taken or acquired-here, playground purposes. *Mahajan,* 464 Mass. at 615–616. Moreover, playing fields are not open space. They are constructed, maintained and used on property in such a way that the property is no longer open and serving the purposes protected by art. 97. In that way, playing fields are, in effect, large playgrounds.

By virtue of its acceptance for playground purposes, the Property is not subject to art. 97. The Town was not required to follow the requirements of art. 97 and obtain approval of the Legislature by a two-thirds vote before it entered the Lease. No action for mandamus lies to invalidate the Lease and compel the Town to follow art. 97, and the Amended Complaint must be dismissed.

Conclusion

The Plaintiff's Motion for Summary Judgment is hereby **DENIED** and the Defendant Bank's Cross–Motion for Summary Judgment is hereby **ALLOWED.** The Amended Complaint is **DISMISSED WITH PREJUDICE.**

Judgment accordingly.

JUDGMENT

Christopher J. Curley and Carol S. Curley (the Curleys) filed their verified complaint in this action on February 6, 2012. By the court's Order Allowing Defendants' Motion to Dismiss and Granting Leave to Amend, issued September 27, 2012, the verified complaint was dismissed and the Curleys given leave to amend. The Curleys filed their amended complaint on October 9, 2012. The Curleys' amended complaint is an action in the nature of mandamus pursuant to G.L. c. 249, § 5, seeking a judgment invalidating the lease between the defendants Town of Billerica (Town) and Independent Towers Holdings, LLC and enjoining the Town and defendant Board of Selectmen of the Town of Billerica (Board) from disposing of the property at issue without complying with the requirements set forth in Article 97 of the Amendments to the Massachusetts Constitution. The Town and the Board filed their Motion for Summary Judgment on December 21, 2012. The Curleys filed Plaintiffs' Cross–Motion for Summary Judgment on January 30, 2013.

***8** The Motion for Summary Judgment and the Plaintiffs' Cross–Motion for Summary Judgment came on to be heard on March 18, 2013, at which Independent joined the Motion for Summary Judgment. In a decision of even date, the court (Foster, J.) has allowed the Motion for Summary Judgment and has denied the Plaintiffs' Cross–Motion for Summary Judgment.

In accordance with the court's decision issued today, it is

ORDERED AND ADJUDGED that plaintiffs' amended complaint is *DISMISSED* with prejudice.

2013 WL 4029208

All Citations

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End of Document

The Law of Easements & Licenses in Land § 1:5

The Law of Easements and Licenses in Land | July 2025 Update
Jon W. Bruce, James W. Ely, Jr., and Edward T. Brading

Chapter 1. Nature of Easements

§ 1:5. Easements compared to licenses in land—Intent of parties

References

West's Key Number Digest

- West's Key Number Digest, **Easements 12**
- West's Key Number Digest, **Licenses 44(3)**

All of the legal distinctions between easements and licenses mentioned in the preceding section only hint at how one can decide which right was created. The critical factor is the parties' intent.[1] The following elements are important in ascertaining intent:

1. *Manner of creation of right (oral or written).*[2] The mere granting of a right in writing does not automatically render it an easement.[3] As the cases discussed later in the text of in § 1:6 and § 1:7 demonstrate, more is required to create an easement. The existence or absence of words that are "ordinarily used in the conveyances of real estate" is an important factor.[4] The label that the parties give the right, however, does not dictate its legal effect.[5] For example, a right called a lease may in reality be an easement or a license.[6]
2. *Nature of right created.* The creation of a right to be used in a particular portion of the servient estate indicates that an easement was intended.[7] Likewise, the existence of authority in the holder of the right to maintain or improve the burdened property suggests an easement.[8]
3. *Duration of right.* A set duration indicates an easement.[9] A grant in perpetuity also indicates an easement.[10] Further, an express provision that the right benefits its holder's successors and assigns supports the conclusion that an easement was intended.[11] Similarly, an easement is indicated if the right expressly binds the servient landowner's successors and assigns.[12] Conversely, the deletion of words of succession may indicate a license.[13] Finding an easement, however, does not depend upon the existence of "magic words such as 'successors and assigns.' "[14]
4. *Amount of consideration, if any, given for right.* Substantial consideration indicates an easement.[15] In this regard, it is necessary to distinguish consideration given for the right from money expended in reliance upon the right.[16] An "irrevocable license" may result from expenditures made in reliance on an existing license.[17]

5. *Reservation of power to revoke right.* An express reservation of the power to cancel, revoke, or terminate the right may be considered to indicate a license.[18] However, a power to terminate in the landowner does not necessarily mean that a license was created.[19] Specifying a power to terminate for a particular reason or in limited circumstances may be seen as inconsistent with the unabridged right to revoke retained by one who grants a license.[20] Moreover, an easement may be expressly subject to termination by the servient owner upon the occurrence of a specified event.[21]

In order to demonstrate the operation of these elements, four cases have been selected for analysis. In the first two cases, the court found that the parties intended an easement; in the latter two, the court concluded that a license was created. The practical result of these decisions was that in the first set of cases, the landowner could not unilaterally terminate the easement holder's use of the land, whereas in the second set of cases, the landowner could revoke at any time the licensee's privilege to enter the premises.

Footnotes

1 Boyce v. Cassese, 941 So. 2d 932, 941 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 295-296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 490 (Ala. Civ. App. 2007) (quoting this treatise); James v. Brewster, 954 So. 2d 594, 600 (Ala. Civ. App. 2006) (finding license); Paul v. Blakely, 243 Iowa 355, 358, 51 N.W.2d 405, 407 (1952); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 398-399 (Wyo. 2003) (citing this treatise); Baker v. Pike, 2002 WY 34, 41 P.3d 537, 541 (Wyo. 2002) (citing this treatise).

See also Cooper v. Boise Church of Christ of Boise, Idaho, Inc., 96 Idaho 45, 47, 524 P.2d 173, 175 (1974); Gilman v. Blocks, 44 Kan. App.2d 163, 172-175, 235 P.3d 503, 510–513 (2010) (applying elements set forth in this treatise to determine intent); Quality Discount Market Corp. v. Laconia Planning Bd., 132 N.H. 734, 739-740, 571 A.2d 271, 274-276 (1990); Ouellette v. Butler, 125 N.H. 184, 189, 480 A.2d 76, 79 (1984); Cronk v. Tait, 305 A.D.2d 947, 948-949, 762 N.Y.S.2d 119, 121 (3d Dep't 2003); Crain v. Siegel, 151 Or. App. 567, 571-572, 950 P.2d 382, 385 (1997); Pelletier v. Laureanno, 46 A.3d 28, 35-38 (R.I. 2012); Proctor v. Huntington, 146 Wash. App. 836, 852-854, 192 P.3d 958, 967-968 (Div. 2 2008).

2 Boyce v. Cassese, 941 So. 2d 932, 941 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 490 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan. App. 2d 163, 173, 235 P.3d 503, 511 (2010) (quoting this treatise).

See also Bob Daniels and Sons v. Weaver, 106 Idaho 535, 541-542, 681 P.2d 1010, 1017 (Ct. App. 1984) (oral agreement to provide access under certain conditions created license); Petersen v. Corrubia, 21 Ill. 2d 525, 532, 173 N.E.2d 499, 502-503 (1961) (parol grant of right-of-way presumed to be with knowledge of Statute of Frauds and thus intended as license); O'Hara v. Chicago Title and Trust Co., 115 Ill. App. 3d 309, 320, 71 Ill. Dec. 304, 450 N.E.2d 1183, 1190 (1st Dist. 1983) (citing Petersen); Borton v. Forest Hills Country Club, 926 S.W.2d 232, 233-234 (Mo. Ct. App. E.D. 1996) (finding deed provision granting "privilege of retrieving any and all errant golf balls" constituted easement, not license, and stating: "[S]ince the original developer of the property properly recorded … the deed restrictions, those restrictions created property interests that run with the land and are binding on successive landowners."); §§ 3:1, 3:2 (discussing Statute of Frauds).

3 See Willow Tex, Inc. v. Dimacopoulos, 68 N.Y.2d 963, 965, 510 N.Y.S.2d 543, 544, 503 N.E.2d 99, 100 (1986) ("The policy of the law favoring unrestricted use of realty requires that where there is any ambiguity as to the permanence of the restriction to be imposed on the servient estate, the right of use should be deemed a license, revocable at will by the grantor, rather than an easement … ."); Crain v. Siegel, 151 Or. App. 567, 572, 950 P.2d 382, 385 (1997) (letter "agreement is more appropriately characterized as the granting of a license to plaintiff to use the driveway during the period of construction of plaintiff's house, subject to an agreement to convey an easement at a later time").

4 Evans v. Holloway Sand and Gravel, Inc., 106 Mich. App. 70, 79-81, 308 N.W.2d 440, 443-444 (1981) (use of term "conveyance" supported finding that easement in gross or profit was created). See also Boyce v. Cassese, 941 So. 2d 932, 941–942 (Ala. 2006) (quoting this treatise, noting that "agreement as amended contains words typical of a conveyance of an interest in land," and finding easement); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise, observing that "Declaration … indicates that the covenants therein will run with the land" and "references an 'easement for ingress/egress' as recorded on the plat," and finding easement); Middletown Commercial Associates Ltd. Partnership v. City of Middletown, 42 Conn. App. 426, 440-441, 680 A.2d 1350, 1358 (1996) (concluding parking agreement "much more akin to a license than an easement" and noting: "The parking agreement does not use the language of grant, nor is it executed with the formalities normally associated with the grant of an interest in real property."); Entine v. Reilly, 2015 WL 5091271, *7 (Mass. Land Ct. 2015) (citing this treatise); Kampfer v. Jacob DaCorsi, 126 A.D.3d 1067, 1068, 6 N.Y.S.3d 680, 682 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1018, 10 N.Y.S.3d 510, 32 N.E.3d 946 (2015) (observing that "[a]side from the word 'grant' the agreement does not use language typically utilized to convey an interest in land, such as 'convey' and 'forever,'" and finding license based upon "the language of the agreement and the loan context"); Henry v. Malen, 263 A.D.2d 698, 692 N.Y.S.2d 841, 845-846 (3d Dep't 1999) (finding "1867 deed's grant of a right-of-way to the three watering places created an easement appurtenant rather than a license" and stating: "The language contained in the deed included words, such as 'grant,' 'convey,' and 'forever,' and phrases, such as 'his heirs and assigns,' which demonstrate that an easement was intended."); Stratis v. Doyle, 176 A.D.2d 1096, 1097, 575 N.Y.S.2d 400, 401 (3d Dep't 1991) (creation of interest by warranty deed and use of term "grant" indicated easement intended, not license); Evans v. Taraszkiewicz, 125 A.D.2d 884, 885, 510 N.Y.S.2d 243, 244 (3d Dep't 1986) ("The language used, including the words 'grant' and 'convey,' indicates that an easement was intended … ."); Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 2000 PA Super 294, 761 A.2d 139, 144 (2000) ("A license is distinguishable from an easement because it is usually created orally … ."); Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2011 ND 95, 797 N.W.2d 770, 777-778 (N.D. 2011) (finding sewer "permit" created easement, not license and noting: "[T]he 1953 permit … uses the term "granted," which is a word of conveyance."); Pelletier v. Laureanno, 46 A.3d 28, 36-38 (R.I. 2012) (finding license where driveway "Agreement" contained "language … clearly permissive in nature").

5 Blackburn v. Lefebvre, 976 So. 2d 482, 490-492 (Ala. Civ. App. 2007) (quoting this treatise and finding "boat-slip agreement" constituted license even though it employed "the term 'easement' at least four times in referencing the right that was the subject of that agreement"); Gilman v. Blocks, 44 Kan. App.2d 163, 172-173, 175, 235 P.3d 503, 511-512 (2010) (quoting this treatise and determining: "Although the … declaration uses the term 'license' within paragraph 4, a reading of the entire document shows that the parties intended to create an easement …."); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 399 (Wyo. 2003) (quoting this treatise and finding "Fishing License Agreement" created easement).

See also Brevard County v. Blasky, 875 So. 2d 6, 12 (Fla. Dist. Ct. App. 5th Dist. 2004) (determining "that despite its name, the document is a license, not an easement."); Rowan v. Riley, 139 Idaho 49, 56–57, 72 P.3d 889, 896-897, 50 U.C.C. Rep. Serv. 2d 1127 (2003) (stating that "the title of the instrument is not controlling," concluding that license was created, and noting in support of conclusion that "the agreement itself recites that it is a license"); Trust No. 6011, Lake County Trust Co. v. Heil's Haven Condominiums Homeowners Ass'n, 967 N.E.2d 6, 10 n.1 (Ind. Ct. App. 2012), transfer denied, 973 N.E.2d 2 (Ind. 2012)

("Although these agreements use the term 'license,' the interests conveyed are effectively easements, and the parties treat them as such."); Kansas City Area Transp. Authority v. Ashley, 485 S.W.2d 641 (Mo. Ct. App. 1972) ("license" for use of parking lots found to constitute either lease or easement in gross); Ouellette v. Butler, 125 N.H. 184, 189, 480 A.2d 76, 80 (1984) (document found to create easement, even though right was called license); Millbrook Hunt, Inc. v. Smith, 249 A.D.2d 281, 282-283, 670 N.Y.S.2d 907, 908-909 (2d Dep't 1998) (stating that "[t]o determine the true character of an interest, a court must examine the nature of the right rather than the name given to it by the parties" and concluding "Lease and Easement Agreement" authorizing fox hunting on certain land for 75 years created easement, not license); Loren v. Marry, 195 A.D.2d 776, 777, 600 N.Y.S.2d 369 (3d Dep't 1993) ("lease" for duration of relationship between owner of house and occupant or until owner decided to sell property found to constitute license); Joseph Brothers Company, LLC v. Dunn Bros., Ltd., 2019-Ohio-4821, 148 N.E.3d 1260 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal not allowed, 158 Ohio St. 3d 1436, 2020-Ohio-877, 141 N.E.3d 250 (2020) (despite use of term "sign license," right created under document titled "License Agreements" was irrevocable and not terminable at the will of the grantor and therefore was a license coupled with an interest, or an easement); Dalliance Real Estate, Inc. v. Covert, 2013-Ohio-4963, 1 N.E.3d 850, 856-858 (Ohio Ct. App. 11th Dist. Geauga County 2013) (observing that "the mere use of the word 'license' does not render a document a revocable license when language is included to support the conclusion that the parties intended to create a more permanent right to access the property …" and finding easement created); Negus v. Madison Gas and Elec. Co., 112 Wis. 2d 52, 58-61, 331 N.W.2d 658, 662-663 (Ct. App. 1983) ("license agreement" to lay and maintain electric cable found to create easement); Note, Is the Suite Life Truly Sweet? The Property Rights Luxury Box Owners Actually Acquire, 8 Vand. J. Ent. & Tech. L. 453, 454 n.6 (2006) (citing this treatise).

6 Baseball Pub. Co. v. Bruton, 302 Mass. 54, 56, 18 N.E.2d 362, 364, 119 A.L.R. 1518 (1938); Loren v. Marry, 195 A.D.2d 776, 777, 600 N.Y.S.2d 369 (3d Dep't 1993) ("lease" for duration of relationship between owner of house and occupant or until owner decided to sell property found to constitute license).

7 Cunningham, Stoebuck, and Whitman, The Law of Property § 8.1 (2d ed.); Boyce v. Cassese, 941 So. 2d 932, 941 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan. App.2d 163, 173-175, 235 P.3d 503, 511–512 (2010) (quoting this treatise, observing that "[t]he right was created in a particular portion of the land," and finding easement); Comment, Treating Fair Use as an Easement on Intellectual Property, 2018 B.Y.U. L. Rev. 1073, 1100 (2018) (citing this treatise).

8 Cunningham, Stoebuck, and Whitman, The Law of Property § 8.1 (2d ed.); Boyce v. Cassese, 941 So. 2d 932, 941-942 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan. App.2d 163, 173-175, 235 P.3d 503, 511–512 (2010) (quoting this treatise, noting that "the holders of the right had the authority to maintain the tract of land subject to the easement," and finding easement).

9 Cunningham, Stoebuck, and Whitman, The Law of Property § 8.1 (2d ed.). See also Entine v. Reilly, 2015 WL 5091271, *7 (Mass. Land Ct. 2015) (citing this treatise); Millbrook Hunt, Inc. v. Smith, 249 A.D.2d 281, 283, 670 N.Y.S.2d 907, 909 (2d Dep't 1998) (stating that "an essential feature of the type of easement involved herein, which distinguishes it from a license, is that the interest in land is for some definite period" and finding right to engage in fox hunting on certain land for 75 years constituted easement, not license). Cf. Kampfer v. Jacob DaCorsi, 126 A.D.3d 1067, 1068, 6 N.Y.S.3d 680, 682 (3d Dep't 2015), leave to appeal denied, 25 N.Y.3d 1018, 10 N.Y.S.3d 510, 32 N.E.3d 946 (2015) ("Where, as here, there is no express time limitation for the right to use the property, that right should be deemed a license, and not an easement …").

10 See Entine v. Reilly, 2015 WL 5091271, *7 (Mass. Land Ct. 2015) (citing this treatise); Dalliance Real Estate, Inc. v. Covert, 2013-Ohio-4963, 1 N.E.3d 850, 856-858 (Ohio Ct. App. 11th Dist. Geauga County 2013); Negus v. Madison Gas and Elec. Co., 112 Wis. 2d 52, 58-61, 331 N.W.2d 658, 662-663 (Ct. App. 1983).

11 Boyce v. Cassese, 941 So. 2d 932, 941-942 (Ala. 2006) (quoting this treatise, noting that "the agreement indicated that the rights and obligations granted in it were to run with the land and that they were binding upon the parties' successors and assigns," and finding easement); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise, observing that "Declaration … indicates that the covenants therein will run with the land and be binding," and finding easement); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Christensen v. Vail Mountain View Residences Phase II, LLC, 2024 WL 477605, *8 (Colo. Dist. Ct. 2024) (quoting this treatise); Koubenec v. Moore, 399 Ill. 620, 625, 78 N.E.2d 234, 236-237 (1948); Gilman v. Blocks, 44 Kan.App.2d 163, 173-175, 235 P.3d 503, 511–512 (2010) (quoting this treatise, observing that "declaration expressly binds the parties' successors and assigns," and finding easement); Maranatha Settlement Ass'n v. Evans, 385 Pa. 208, 211-212, 122 A.2d 679, 681 (1956); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 399-402 (Wyo. 2003) (citing this treatise).

12 Boyce v. Cassese, 941 So. 2d 932, 941-942 (Ala. 2006) (quoting this treatise, noting that "the agreement indicated that the rights and obligations granted in it were to run with the land and that they were binding upon the parties' successors and assigns," and finding easement); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise, observing that "Declaration … indicates that the covenants therein will run with the land and be binding," and finding easement); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173-175, 235 P.3d 503, 511–512 (2010) (quoting this treatise, observing that "declaration expressly binds the parties' successors and assigns," and finding easement); Weir v. Consolidated Rail Corp., 12 Ohio App. 3d 63, 66, 465 N.E.2d 1341, 1345 (8th Dist. Cuyahoga County 1983).

13 Simmons v. Abbondandolo, 184 A.D.2d 878, 878-879, 585 N.Y.S.2d 535, 536 (3d Dep't 1992) (finding that deed provision reserving right-of-way "to the grantors, personally, for so long as they shall own the premises to the northwest of those conveyed" created a license, not an easement and noting that phrase "their heirs and devisees" had been deleted from provision and replaced by term "personally"). See also Pelletier v. Laureanno, 46 A.3d 28, 37-38 (R.I. 2012) (finding license and concluding: "[T]he trial justice did not err in his consideration of the driveway agreement's paucity of wording denoting permanency—particularly, language binding the parties' 'heirs, successors or assigns.'"); Bunn v. Offutt, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976) (finding license where words of succession not used).

But see Entine v. Reilly, 2015 WL 5091271, *8 (Mass. Land Ct. 2015) (citing this treatise, but concluding: "[T]he better view is that the absence of such words is inconclusive—it neither signifies nor renounces the creation of one interest over the other.").

14 Barton v. Gammell, 143 Ga. App. 291, 294, 238 S.E.2d 445, 447 (1977) (agreements granting lot purchasers "lake privileges," "use of 2 acres of land for gardening," and "use of community pasture" found to create easements appurtenant rather than licenses); Entine v. Reilly, 2015 WL 5091271, *7 (Mass. Land Ct. 2015) (citing this treatise). See also Evans v. Taraszkiewicz, 125 A.D.2d 884, 886, 510 N.Y.S.2d 243, 244 (3d Dep't 1986) (easement found although "specific words of inheritance were not used").

15 Cunningham, Stoebuck, and Whitman, The Law of Property § 8.1 (2d ed.); Boyce v. Cassese, 941 So. 2d 932, 941 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173-175,

235 P.3d 503, 511–512 (2010) (quoting this treatise, concluding consideration substantial, and finding easement); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 401 (Wyo. 2003) (quoting this treatise).

See also Kansas City Area Transp. Authority v. Ashley, 485 S.W.2d 641, 645 (Mo. Ct. App. 1972) (payment of valuable consideration made right more than bare license); Weir v. Consolidated Rail Corp., 12 Ohio App. 3d 63, 65-66, 465 N.E.2d 1341, 1345 (8th Dist. Cuyahoga County 1983) ($59,000 paid for pipeline cited as support for conclusion that right was easement).

16 See § 11:9 (discussing legal effect of expenditures made in reliance upon license).

17 See § 11:9 (discussing legal effect of expenditures made in reliance upon license).

18 Boyce v. Cassese, 941 So. 2d 932, 941-942 (Ala. 2006) (quoting this treatise, observing that "the owner of the servient estate, did not reserve the right to cancel or terminate the Golf Club's rights under the agreement," and finding easement); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173-175, 235 P.3d 503, 511-512 (2010) (quoting this treatise, noting that "the declaration contains no express reservation of the power to cancel, revoke, or terminate the right," and finding easement); Tenampa, Inc. v. Bernard, 616 S.W.3d 327, 335-336 (Mo. Ct. App. W.D. 2020), reh'g and/or transfer denied, (Nov. 19, 2020) and transfer denied, (Mar. 2, 2021) (finding easement and noting that the instrument contained no language suggesting that the reservation was freely terminable but instead contained the specific words "continuing" and "easement"); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 398-399 (Wyo. 2003) (citing this treatise).

See also Rowan v. Riley, 139 Idaho 49, 57, 72 P.3d 889, 897, 50 U.C.C. Rep. Serv. 2d 1127 (2003) (concluding that "[t]his agreement … is appropriately deemed a license, because, under the terms of the agreement, the railroad can revoke the licensee's privileges without consequence"); Babcock v. State, 27 A.D.2d 880, 881, 277 N.Y.S.2d 774, 776 (3d Dep't 1967) (where court in condemnation case concluded that agreements granting right-of-way could not be "read as creating much more than a license, despite the use of the word 'easement' … , since the agreements could be cancelled by the [landowners] at any time between November and April [of each year] on [60 days'] notice."); Joseph Brothers Company, LLC v. Dunn Bros., Ltd., 2019-Ohio-4821, 148 N.E.3d 1260 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal not allowed, 158 Ohio St. 3d 1436, 2020-Ohio-877, 141 N.E.3d 250 (2020) ("sign license" created under document titled "License Agreements" was irrevocable and not terminable at the will of the grantor and therefore was a license coupled with an interest, or an easement); McKenna v. Williams, 1946 OK 100, 196 Okla. 603, 604, 167 P.2d 368, 370 (1946). Cf. Henry v. Malen, 263 A.D.2d 698, 702, 703, 692 N.Y.S.2d 841, 845-846 (3d Dep't 1999) (finding "1867 deed's grant of a right-of-way to the three watering places created an easement appurtenant rather than a license" and noting that deed contained no "rights of revocation").

19 Boyce v. Cassese, 941 So. 2d 932, 942 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296-297 (Ala. Civ. App. 2010) (quoting this treatise, noting potential ambiguity created by termination language in Declaration, but finding easement); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173, 235 P.3d 503, 511 (2010) (quoting this treatise); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 401 (Wyo. 2003) (citing this treatise).

20 Boyce v. Cassese, 941 So. 2d 932, 942 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173, 235 P.3d 503, 511 (2010) (quoting this treatise); Testa's, Inc. v. Coopersmith, 2014

ME 137, 105 A.3d 1037, 1043 (Me. 2014) (quoting this treatise); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 401 (Wyo. 2003) (quoting this treatise).

See also SOP, Inc. v. State, Dept. of Natural Resources, Div. of Parks and Outdoor Recreation, 310 P.3d 962, 968-969 (Alaska 2013), as amended on reh'g, (Oct. 11, 2013) (holding "special park use permits that are revocable only for cause convey easements, not licenses"); Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2011 ND 95, 797 N.W.2d 770, 777 (N.D. 2011) (finding sewer "permit" created easement, not license and observing: "The permit is not revocable at the will of the landowner, but is subject to termination only under limited circumstances.").

The condemnation case of U.S. v. 126.24 Acres of Land, More or Less, Situate in St. Clair County, State of Mo., 572 F. Supp. 832 (W.D. Mo. 1983), illustrates this point. There, a real estate developer granted a "privilege" to certain lot owners to hunt and fish on the developer's land, "except parts that will be closed temporarily or permanently for spawning, breeding or grazing purposes." The court, concluding that this arrangement created an easement, stated:

> The distinguishing feature between an easement and a license … is that a license is revocable at will by the grantor. In the present case, the grantor was not free to revoke the right to use the lake for fishing at any time. Rather, the grantor could only revoke the grant if the lake were closed for spawning, breeding, or grazing purposes. The fact that the grantor did not reserve the right to close off the lake at will at any time demonstrates that the rights conveyed to the lotowners were greater than those of a bare license.

U.S. v. 126.24 Acres of Land, More or Less, Situate in St. Clair County, State of Mo., 572 F. Supp. 832, 834 (W.D. Mo. 1983).

21 Boyce v. Cassese, 941 So. 2d 932, 942 (Ala. 2006) (quoting this treatise); Chancy v. Chancy Lake Homeowners Ass'n, Inc., 55 So. 3d 287, 296 (Ala. Civ. App. 2010) (quoting this treatise); Blackburn v. Lefebvre, 976 So. 2d 482, 491 (Ala. Civ. App. 2007) (quoting this treatise); Gilman v. Blocks, 44 Kan.App.2d 163, 173, 235 P.3d 503, 511 (2010) (quoting this treatise); Testa's, Inc. v. Coopersmith, 2014 ME 137, 105 A.3d 1037, 1043 (Me. 2014) (quoting this treatise and stating: "That the access was structured to end upon the happening of a 'specific event' in the agreement—abuse of the access—does not transform it into a license."); Markstein v. Countryside I, L.L.C., 2003 WY 122, 77 P.3d 389, 401 (Wyo. 2003) (citing this treatise). See also § 10:3 (discussing defeasible easements).

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