

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12243

VIRGINIA B. SMITH, ET. AL.

Plaintiffs-Appellants

v.

CITY OF WESTFIELD, ET. AL.

Defendants-Appellees

ON APPEAL FROM A DECISION OF THE
MASSACHUSETTS APPEALS COURT

BRIEF AMICUS CURIAE OF THE MASSACHUSETTS ASSOCIATION OF
CONSERVATION COMMISSIONS, INC. IN SUPPORT OF
PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21,
Massachusetts Association of Conservation
Commissions states that it is a member-based, not-
for-profit Massachusetts corporation. Exempt from
taxation under Section 501(c)(3) of the Internal
Revenue Code, MACC has no parent companies and has
not issued any stock, so there is not any publicly
held corporation that owns any such stock.

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STATEMENT OF THE ISSUES

1. Whether land can be designated for the purposes of Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") in a manner sufficient to invoke that Article's protection by means other than a deed or other recorded restriction on the land.
2. Whether the City of Westfield (the "City") sufficiently designated the John A. Sullivan Memorial Playground for Article 97 purposes without recording any document so stating.

INTEREST OF THE AMICUS

The Massachusetts Association of Conservation Commissions, Inc. ("MACC") is a non-profit corporation organized under the laws of Massachusetts for the purposes of promoting environmental quality, conservation, and protection of wetlands and other natural resources.

MACC supports and provides services to municipal conservation commissions in the Commonwealth of Massachusetts with regard to the administration of the Wetlands Protection Act, G.L. c. 131, § 40, Home-Rule wetlands bylaws, and other matters within the scope of their statutory duties by means of public

education, publications, and advocacy on matters pending before government agencies.

MACC was formed in 1961. More than 330 of the 351 conservation commissions in Massachusetts are currently dues-paying MACC members, and these conservation commissions are MACC's voting members. MACC is supported by the annual dues of these member commissions, by individual and corporate memberships (non-voting), by foundation grants, and by publication sales and conference fees. All municipalities in the Commonwealth have accepted the provisions of the Conservation Commission Act and have established local conservation commissions.

MACC members total approximately 2,300 individuals. MACC is their principal spokesperson on matters of environmental policy, law, and practice within the Commonwealth and, on occasion, their legal resource. MACC previously has filed briefs amici curiae useful to the Supreme Judicial Court.¹

¹ These include briefs in support of the Town of Dennis in Lovequist v. Conservation Commission of the Town of Dennis, 379 Mass. 7 (1979) and the Town of Chatham in Gove v. Zoning Board of Appeals of Chatham, 444 Mass. 754 (2005). More recently, MACC filed a briefs amici curiae in support of the Department of Conservation and Recreation in Blair v. Department of Conservation and Recreation, 457 Mass.

MACC presents research results and testimony to the Legislature, participates in Executive Branch program reviews and promulgation of regulations, sits on government agency advisory committees and task forces, presents professional training courses, pursues appeals in its own right, and conducts semi-annual, statewide educational conferences attended by hundreds of conservation commission members and guests, including scientists, legislators, and agency officials.

MACC helps to structure and implement numerous state and local land and water use regulatory programs: floodplain and wetland zoning, subdivision control, coastal zone management, environmental impact analyses, wildlife and endangered species protection, the Massachusetts Conservation Restriction Act and Agricultural Preservation

634 (2010), in support of a ten-citizens group challenging a Massachusetts Environmental Policy Act decision under G.L. c. 214, §7A, in Ten Persons of the Commonwealth v. Fellsway Development, LLC, 460 Mass. 366 (2011), in support of a ten-citizens group challenging a license granted under G.L. c. 91 in Mahajan v. Dept. of Env'tl. Prot., 464 Mass. 604 (2013), in support of the Division of Fisheries and Wildlife in Pepin v. Division of Fisheries and Wildlife, 467 Mass. 210 (2014), and in support of the New England Forestry Foundation in New England Forestry Foundation, Inc. v. Board of Assessors of Hawley, 468 Mass. 138 (2014).

Restriction Program, the Watershed Protection Act, and of course the Wetlands Protection Act. It encourages and advises on the use of municipal Home-Rule powers under Massachusetts law, supports municipalities doing so, and publishes a model Home-Rule Wetlands Protection Bylaw that has been adopted by many cities and towns and approved by the Massachusetts Attorney General.

MACC conducts two major annual meetings, publishes the highly-regarded Environmental Handbook for Massachusetts Conservation Commissioners and a quarterly magazine for members on policy and technical practice, and writes and/or distributes over 100 other government, legal and environmental publications. The MACC Annual Environmental Conference is the largest annual gathering of local environmental officials in New England and includes about 40 workshops and lectures, and nearly 50 exhibits.

MACC has developed and maintains an educationally-based certificate program for conservation commissioners who have completed an instructional program encompassing a full range of

topics on the legal and technical aspects of conservation commission practice and service.

MACC educational events, publications, and telephone "helpline" make it an invaluable resource in the field of wetlands and open space protection (and related law, science, and policy) for communities across the Commonwealth. MACC has considerable expertise in wetlands, zoning, and regulatory taking law as these matters consistently come before its members. MACC encourages its members to submit comments to state agencies and legislators whenever appropriate.

MACC is familiar with the origin, purpose, nature and implementation of Article 97. MACC has significant interest in this case because of its important implications for the central role of conservation commissions in preservation and management of natural open space for the public benefit. The Conservation Commission Act, G.L. c. 40, §8C, established municipal conservation commissions "for the promotion and development of the natural resources and for the protection of watershed resources," by empowering them to, among other things, "acquire, maintain, improve, protect, limit

the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same."

STATEMENT OF THE CASE

In the interests of brevity and judicial efficiency, MACC adopts the Plaintiffs-Appellants' statement of the case.

SUMMARY OF ARGUMENT

The Appeals Court's ruling is contrary to the purpose, intent, and plain language of Article 97, which establishes a constitutional right for citizens of the Commonwealth to use, conserve and protect natural open space. Article 97 requires a two-thirds vote of the Legislature to transfer, or change the use of, land designated for its purposes. Nothing in the language of Article 97 requires that a property's chain of title include a recorded instrument dedicating the land to its purposes in order to qualify for protection.

In creating a recording requirement for Article 97, the Appeals Court also ignored this Court's ruling that land may attain Article 97 protection after acquisition, based upon subsequent designation

or actual use. Mahajan v. Dept. of Environ. Protection, 464 Mass. 604, 615, 620 (2013). The Appeals Court gave undue weight to the ruling in Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005), which should be limited to its facts. The ruling below would render Article 97 less protective of public open space than its predecessor, the prior public use doctrine, by creating a recording requirement that did not previously exist.

The Appeals Court's decision below ignores practical realities of local governance and, if allowed to stand, would present cities and towns across the Commonwealth with a serious dilemma: either undertake a difficult and costly review of the chain of title for all municipal land believed to be designated for Article 97 purposes, or risk a unilateral transfer or change in use of that land in the future. Many municipalities lack the resources to research and fix the chain of title for conservation land.

Clear guidance on the qualification of land for Article 97 protection is needed from this Court. Land under the care, custody and control of agencies or boards charged with overseeing outdoor space for

conservation or recreation purposes, or land developed with grant money conditioned upon continued public outdoor recreation, should qualify for Article 97 protection regardless how it was acquired.

On the facts of the case at bar, the John A. Sullivan Memorial Playground must qualify for Article 97 protection. For more than sixty years the City of Westfield used this land as a public playground. During that time, the City repeatedly took actions to dedicate the land for public outdoor recreation; it even sought and accepted federal grant money to improve the playground, based on its designation of the property as permanently protected open space.

ARGUMENT

I. LAND MAY BE DESIGNATED AND QUALIFY FOR PROTECTION UNDER ARTICLE 97 BY MEANS OTHER THAN A DEED OR RECORDED INSTRUMENT

Article 97 was enacted by the voters in 1972 to explicitly establish the citizenry's right to use and enjoy the natural environment. Article 97 also put in place procedural protection for public lands taken, acquired, or designated for natural resource purposes by requiring a super-majority vote of each chamber of the Legislature to transfer open space or parkland or use it for other purposes.

Article 97 codifies the public interest in conserving natural areas and open space by providing that:

[t]he 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, taken by yeas and nays, of each branch of the general court.

Art. 97 of the Amendments to the Massachusetts Constitution.

Article 97 does not, however, require that dedication of land to its purposes be reflected in the property's chain of title in order to qualify for protection. The Appeals Court ignored the plain language of Article 97, and wrongly conflated this Court's rulings in Mahajan and Hanson, in erroneously affirming the Superior Court's "finding that Westfield did not specifically designate, in a manner sufficient to invoke the protection of art. 97, i.e., by deed or other recorded restriction on the land,

the playground for art. 97 purposes and that the playground was not taken for those purposes." Smith v. Westfield, 90 Mass. App. Ct. 80, 83 (2016).

A. Neither Article 97 Nor Its Predecessor Require Recording

Article 97 is devoid of any requirement that a property's chain of title reflect a deed or restriction explicitly dedicating the land to conservation purposes in order to qualify for protection. This is consistent with the predecessor to Article 97, the prior public use doctrine, which does not require a deed or recorded instrument to qualify for its protection.²

Rather, actions that would qualify land for protection under the prior public use doctrine

² This Court has recognized that because "the spirit of art. 97 is derived from the related doctrine of 'prior public use,' cases applying that doctrine inform our analysis." Mahajan, 464 Mass. at 616. Under the prior public use doctrine, it "is well established that '[l]and appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end.'" Sacco v. Dept. of Public Works, 352 Mass. 670, 672 (1967) (quoting Higginson v. Treasurer & School House Commrs. of Boston, 212 Mass. 583, 591 (1912)). In applying the prior public use doctrine to "park land," this Court has stated that "[t]he policy of the commonwealth has been to add to the common-law inviolability of parks express prohibition against encroachment." Gould v. Greylock Reservation Commission, 350 Mass. 410, 419 (1966) (citations omitted).

"include 'prior legislative authorization of a taking for a particular public purpose,' acceptance of a 'public or private grant restricted to a particular public purpose,' a 'formal dedication' by a city or town of land for a particular public purpose, and the Legislature's identifying a type of area (such as a great pond) with, or restricting it to, a particular use." Newburyport Redevelopment Auth. v. Commonwealth, 9 Mass. App. Ct. 206, 239-240 (1980) (quoting Muir v. City of Leominster, 2 Mass. App. Ct. 587, 591-592 & n.1 (1974)).

Article 97 is significantly broader than the prior public use doctrine, as land designated for multiple Article 97 purposes (as opposed to one specific public use) qualifies for protection. The Appeals Court's ruling below effectively would make Article 97 more restrictive than the prior public use doctrine by introducing a recording requirement.

B. This Court's Mahajan Ruling Explicitly Allows for Article 97 Protection Without Recording

In Mahajan, this Court rejected the Boston Redevelopment Authority's ("BRA") argument that the original wording of an eminent domain taking order would necessarily determine whether Article 97

protects the land, and made highly relevant the history of actual land uses as proving original intent.³ Mahajan, 464 Mass. at 619-620.

Specifically, this Court ruled that, in judging whether a parcel is protected by Article 97, the wording of the original order of taking is not dispositive. Id. at 620. Rather, in "certain circumstances ... the ultimate use to which the land is put may provide the best evidence of the purposes of the taking, notwithstanding the language of the original order of taking" Id. This Court identified as the "critical question ... whether the land was taken for [Article 97] purposes, or subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 97." Id. at 615.

These statements, taken together, establish that taking order wording, a deed restriction, or other recorded instrument *is not the only way for a public land to become Article 97 protected*. Other ways logically include transfer to the care, custody and control of a conservation commission; gift condition;

³ The Court also rejected the wholesale urban renewal exemption from Article 97 that was urged by the BRA. Mahajan, 464 Mass. at 619.

later dedication; acceptance of grant money restricting use; or even property uses over time demonstrating designation for Article 97 use, no matter how acquired.⁴

In other words, Article 97 application to a piece of property is highly fact-specific, attending most closely to the original acquisition, or subsequent designation or use for conservation and outdoor recreational purposes.⁵

Finally, this Court was without a critical fact which may have altered its decision in Mahajan. Specifically, during oral argument, BRA counsel conceded that acceptance of federal Land and Water

⁴ Allowing dedication of land to Article 97 purposes after acquisition is consistent with the language of Article 97 (land "taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of"), because "acquire" is defined to mean either "to come into possession or control of often by unspecified means" or "to come to have as a new or added characteristic, trait, or ability." Webster's Ninth New Collegiate Dictionary (1988).

⁵ Specifically as to Long Wharf, in ruling on the applicability of Article 97, the Court determined that "while it can be argued that the project site displays some of the attributes of a park and serves the purpose of the utilization of natural resources ... this specific use is incidental to the overarching purpose of urban renewal for which the land ... was originally taken." Mahajan, 464 Mass. at 615.

Conservation Fund ("LWCF")⁶ grant money brings land within Article 97 protection. Addendum ("Add.") 4-6.⁷ The National Park Service subsequently determined that BRA had been relying on the wrong map and that the disputed area was, in fact, within the official project boundary map for which LWCF funds had been accepted. Boston Redevelopment Authority v. National Park Service, 838 F.3d 42, 45-46 (1st Cir. 2016). Had the correct map been before this Court, a different result (protection of Long Wharf by Article 97) may have been reached.

⁶ The Land and Water Conservation Fund Act was created in 1965 to establish a source of funding "for state and local governments to plan, purchase, and develop public outdoor recreation spaces." Boston Redevelopment Authority v. National Park Service, 125 F. Supp. 3d 325, 327 (D. Mass. 2015). State and local governments which accept LWCF funds must agree that "[n]o property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the Interior], be converted to other than public outdoor recreation use." Id. (quoting 54 U.S.C. § 200305(f)(3)). To be eligible for a grant, an LWCF applicant must guarantee that land acquired or developed with the funds is permanently devoted to public recreation. 54 U.S.C. § 200305(f)(3).

⁷ Counsel for BRA, believing the disputed land was beyond the boundary of land for which a LWCF grant was accepted, responded affirmatively to Chief Justice Gants' question of whether "land conveyed for urban development can become Article 97 land if, one it's conveyed to the Parks and Recreation, or second, if you accept federal funding with the commitment that it remain parkland?" Add.5-6.

C. Hanson Should Be Limited to Its Facts

Neither of the qualifying circumstances set forth by the Court in Mahajan were present in Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502, 504 (2005): that town did not acquire the property at issue for any specific purpose, and the land was never designated or used for Article 97 purposes.⁸ A Town Meeting vote to transfer the land for conservation purposes, without more, was deemed insufficient to invoke Article 97 protection.⁹ Id. at 506.

Significantly, this Court in Hanson noted that "[n]othing in the specific language of this [Town

⁸ The Town of Hanson acquired that property by tax taking in 1957 and a treasurer's deed dated May 10, 1960, under which "the town did not acquire the locus for a specific purpose but, rather, held it as general corporate property until 1971." Hanson, 444 Mass. at 504. The March 1, 1971 annual Town Meeting "voted unanimously 'to accept for conservation purposes, a deed, or deeds, to' the locus", however, the town took no further action following that vote. Id. The subject parcel was sold at a public auction in 1998. Id.

⁹ Hanson is also of limited precedential value in light of the underlying circumstances of that case. Specifically, the Hanson Board of Selectmen's Executive Secretary at the time of the transfer was subsequently charged and convicted of violating state Conflict of Interest law, G.L. c. 268A, §20, for actions stemming from his 1996 purchase of municipal land acquired by the town in a tax title foreclosure. Commonwealth v. Nugent, 61 Mass. App. Ct. 65 (2004).

Meeting] vote and no related circumstances suggest that the locus was placed under the custody and control of the [conservation] commission." Id. Instead, the property remained under the care, custody and control of the Board of Selectmen, which had (but never exercised) the authority "to execute a deed designating the locus for conservation purposes." Id.

Thus, the crucial facts in Hanson were that the land was never used and enjoyed by the public for Article 97 purposes, and the Town Meeting vote did not actually designate the land for Article 97 purposes - it merely authorized the Board of Selectmen to do so, which they did not.¹⁰ Id. Indeed, this Court stressed that "the fact that the town took no further action after the 1971 vote and that no deed was prepared for and accepted by the town means that the locus never became specifically designated

¹⁰ The Court ruled that following the Town Meeting vote the "locus was under the control of the board of selectmen, which the town authorized to execute a deed designating the locus for conservation purposes, *effectively imposing a conservation restriction on the property.*" Id. at 506 (emphasis added). The Court went on to discuss *the recording requirements for conservation restrictions* set forth at G.L. c. 184, §§ 31-32, as well as the history and importance of recording statutes in general. Id. at 507-508.

for conservation purposes in the first instance." Id.
at 508 (emphasis in original).

**II. THE APPEALS COURT'S RULING WOULD PLACE AN
UNDUE BURDEN ON MUNICIPALITIES**

Cities and towns acquire property in various ways, at different points in time, and commonly transfer municipal land between local boards without executing or recording real estate documents. Town officials and board members change over time, making it difficult to build institutional knowledge.

Justice Milkey seemed to acknowledge this reality in his concurrence by identifying a practical weakness in the Appeals Court's ruling. Namely, municipal officials may not be aware that further action is needed to ensure Article 97 protection for land dedicated as a park or playground, and would not learn of that fact until it is too late. Smith, 90 Mass. App. Ct. at 88. The scope of Article 97 would be artificially (and severely) limited as a result; its "protections would apply only where the public entity had already taken steps to ensure that those protections were not needed." Id. at 87.

A. Municipal Conservation Land Usually Lacks
Article 97 Language in its Chain of Title

Municipal land acquired before the enactment of Article 97 (as in the case at bar), or even after Article 97, is unlikely to have the "magic language" designating it for "Article 97 purposes" in the original deed or order of taking.¹¹ Land not expressly acquired for Article 97 purposes is commonly dedicated to it by other words in these operative documents, or in Town Meeting articles or motions voted, or by action taken at a later date. As the present case illustrates, municipalities typically do not record real estate instruments in the Registry of Deeds or Land Court for transfers between local boards and agencies.

The Appeals Court's ruling below effectively would require municipalities to undertake the arduous and unrealistic task of reviewing the chain of title for each municipal parcel of land believed to be designated for Article 97 purposes, to be sure there

¹¹ For nearly 45 years, municipalities have relied on the June 6, 1973 opinion of Attorney General Robert Quinn, which included retroactive effect for Article 97 protection and makes no mention of a recording requirement. Op. Atty. Gen. 142 (June 6, 1973).

was or is soon an Article 97 deed transfer.¹² Indeed, following Hanson, some municipalities have already begun trying to do this. For example, the Town of Dartmouth launched a project to review the chain of title for each parcel of land purchased, donated, or transferred to the Conservation Commission for conservation and preservation. Of the 174 parcels identified, 61 - more than one-third - required corrective action.¹³ Add.7.

B. Most Municipalities Are Not Equipped to Fix the Chain of Title for Article 97 Land

Municipal boards like conservation commissions and park commissions consist of resident volunteers. In many communities across the Commonwealth, these boards do not have even one full-time staff member to

¹² Locating deeds and Town Meeting votes is just the beginning of the exercise due to uncertainties over the scope of Article 97 with respect to recreational and playground areas. Furthermore, reviewing old deeds may pose interpretive challenges regarding intent at the time of acquisition.

¹³ Those 61 parcels "were tax title parcels, parcels that were recorded at the Registry of Deeds before the existence of the conservation commission and later transferred to the commission without altering the deed language ... and parcels donated to or purchased by the conservation commission without appropriate wording in the deed." O'Reilly, Michael, *Dartmouth Protects its Conservation Land*, MACC Quarterly, Summer 2016. Add.7.

support their efforts.¹⁴ Membership changes regularly, and as illustrated by the case at bar, municipal land may have been acquired and designated for Article 97 purposes decades before current board members or town officials held their positions.

Thus, where land has been dedicated to Article 97 purposes, but the chain of title does not reflect that designation, "the relevant actors may have no idea that the additional steps are necessary for art. 97 to apply," and will likely not become aware of that fact until it is too late to take action. Smith, 90 Mass. App. Ct. at 88.

The Dartmouth Conservation Commission, discussed above, is fortunate to be supported by *four* staff members (a staff of this size is highly unusual - again, many municipalities, particularly in the western Massachusetts, make due with no full-time staff). Add.8, 10. Even with so much manpower, the process required "much time and effort". Staff spent time researching at the Registry of Deeds, "undertook

¹⁴ While all 351 municipalities in the Commonwealth have established conservation commissions, "[o]ver 100 Commissions have permanent full-time employees" while "[m]ore than half of Conservation Commissions have some level of staffing." See MACC website, <http://www.maccweb.org/page/AboutConCommMA>. Add.8.

quite a bit of GIS work to identify and map the parcels", and "had several discussions and meetings with Town Counsel." Town Meeting then passed two warrant articles regarding deed transfers, after which the Board of Selectmen "re-deeded various parcels to the conservation commission with appropriate wording" O'Reilly, Michael, *Dartmouth Protects its Conservation Land*, MACC Quarterly, Summer 2016. Add.7.

Most municipalities across the Commonwealth operate with little or no administrative support for conservation commissions. Add.8. It is unreasonable to expect volunteer board members to complete projects of this magnitude, and unfair to saddle communities (particularly small, rural towns) with the cost of engaging legal counsel to assist in the process.

III. DEDICATION OF LAND FOR ARTICLE 97 PURPOSES, INCLUDING ACCEPTANCE OF GRANTS RESTRICTING FUTURE USE, DESIGNATES LAND FOR PROTECTION

A workable, common sense interpretation of Article 97 is that certain actions do categorically designate land for Article 97 purposes. These would include evidence in the chain of title, such as language in the deed or order of taking, a

contemporaneous or subsequent conservation restriction or similar encumbrance (e.g. for historic preservation or agricultural or horticultural use), or Town Meeting articles passed. Likewise, acceptance of grant money restricting future use of the land (like LWCF grants or the state Parkland Acquisitions and Renovations for Communities Program ("PARC"), formerly the Urban Self-Help Program), later Town Meeting action, or formal dedication of land (including transferring the care, custody and control of the land to a conservation commission, park department, water supply department or forest division) would designate land for Article 97 purposes.¹⁵ Newburyport Redevelopment Auth., 9 Mass. App. Ct. at 239-240; Muir, 2 Mass. App. Ct. at 591-592 & n.1.

¹⁵ In addition, land would qualify for Article 97 protection following acceptance of a gift or other transfer of land for conservation or recreation purposes, followed by use of the land consistent with that purpose, regardless of recording. Similarly, public use of land for conservation and recreation purposes, coupled with municipal support or endorsement of such use as permanent, would designate land for Article 97 purposes. Land uses within the scope of Article 97 protection would include, at a minimum: conservation, passive and active recreational use, and playgrounds (with the possible exception of playgrounds on school grounds).

A. Land Under the Care, Custody and Control of a
Conservation Commission Has Been Designated
for Article 97 Purposes

The Conservation Commission Act, G.L. c. 40, §8C, was enacted in 1957. It established municipal conservation commissions to protect open space for local government. Specifically, G.L. c. 40, §8C created conservation commissions "for the promotion and development of the natural resources and for the protection of watershed resources," by empowering them to, among other things, "acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces in land and water areas within its city or town, and it shall manage and control the same." In 1972, conservation commissions were assigned local permitting authority under the state Wetlands Protection Act, G.L. c. 131, §40.

The original purpose for which conservation commissions were created - protecting, promoting and managing natural resources through conservation and utilization of open space - fits squarely within the purposes of Article 97. It follows that transferring municipal land to the care, custody and control of a conservation commission per se dedicates that land to

conservation and recreation purposes, regardless how or why it was originally acquired. This qualifies as designation of land subsequent to acquisition "in a manner sufficient to invoke the protection of art. 97." Mahajan, 464 Mass. at 615.

B. Acceptance of Funds Restricting Future Use Designates Land for Article 97 Purposes

In 1979, the City applied for and accepted funds to improve the subject property (and other playgrounds), half of which was paid out of the LWCF grant. Smith, 90 Mass. App. Ct. at 81, 86 n.2; I Record Appendix ("RA") 36-39; II RA 59. Specifically, half of the \$211,000 received by the City was reimbursed by the LWCF program; some of that money was used to improve the Sullivan Memorial Playground. I RA 38.

In its grant application, the City identified the entire playground as being within the boundary of land to be protected as a result of the LWCF grant. I RA 39. The City subsequently confirmed that the Sullivan Memorial Playground is designated as permanently protected open space for public recreational use in the June 2009 "Westfield

Reconnaissance Report" and the City of Westfield's 2010 Open Space Plan. I RA 39.

The City's statements and representations to state and federal agencies must be given some import. That the documents discussed above are absent from the Registry of Deeds does not alter the fact that the Sullivan Memorial Playground was and is dedicated to Article 97 purposes.¹⁶

The Appeals Court's ruling in this case places too much weight on protection of prospective purchasers, and too little on Article 97 itself. As Justice Milkey in concurrence recognized, "[r]ecording statutes obviously serve laudable goals, but they cannot trump a constitutional provision." Smith, 90 Mass. App. Ct. at 87.

The City of Westfield was in the best position to know the status of the John A. Sullivan Memorial Playground, and could have avoided litigation by

¹⁶ "By its plain terms art. 97 protects not only undeveloped state forests, unimproved parks, and pristine conservation lands in rural or suburban parts of Massachusetts, but also public open space that has been developed so that residents of urban areas may also use and enjoy the Commonwealth's natural resources." Nickolas v. City of Marlborough, 2014 WL 2465281, *5 (Mass. Super. Ct. May 9, 2014).

simply filing a land transfer bill with the state Legislature.¹⁷

Furthermore, a prospective purchaser's due diligence in investigating property often extends beyond a title search. For example, a reasonable individual would investigate environmental contamination prior to purchasing a gas station, regardless whether the chain of title reflects pollution (which it likely would not). Similarly, before purchasing municipal land that is used as a playground or conservation area, a private purchaser would be well advised to satisfy herself that the land has not been designated for Article 97 purposes, or has been released for transfer or other uses.

¹⁷ It is worth noting that the state Legislature regularly passes legislation to remove municipal land from Article 97 protection. The Joint Committee on Local Affairs and Regional Government alone considered 150 municipal land transfer bills that were passed between 1989 and 1998; from 1999 to 2004, the Legislature passed 110 municipal land transfer bills (during that time, 8 Article 97 bills were stopped by the Committee and did not go up for a vote). Joint Committee on Local Affairs and Regional Government, *New School Construction and the Loss of Article 97 Land* (2000); Joint Committee on Local Affairs and Regional Government, *An Updated Analysis of Article 97 Land Transfers* (2005). Add.11-20.

**IV. THE CITY OF WESTFIELD SUFFICIENTLY
DESIGNATED THE JOHN A. SULLIVAN MEMORIAL
PLAYGROUND FOR ARTICLE 97 PURPOSES**

The Appeals Court's ruling, on the facts of this case, is contrary to the purpose, intent, and express language of Article 97. It is also contrary to this Court's ruling in Mahajan that land not initially taken for Article 97 purposes could later be "designated for those purposes in a manner sufficient to invoke the protection of art. 97," and that "the ultimate use to which the land is put may provide the best evidence" of the municipality's intentions. Mahajan, 464 Mass. at 615, 620.

For more than six decades, according to facts in the record, the City of Westfield designated and used the John A. Sullivan Memorial Playground for Article 97 purposes.¹⁸ Specifically: (a) in 1946, the Westfield Planning Board recommended that the land be converted to a playground, and the City Council voted to refer that recommendation to the mayor; (b) in 1948, "full charge and control" of the property was transferred to the City's Playground Commission; (c) in 1957, the City Council passed an ordinance

¹⁸ The City of Westfield took title to the property to satisfy a tax debt on or about November 13, 1939.

recognizing the property as a playground and naming it the John A. Sullivan Memorial Playground, which the mayor approved in 1958; (d) in 1979, the City applied for and accepted funds to upgrade the property (and other playgrounds), half of which was paid out of the federal LWCF grant; (e) the City designated the John A. Sullivan Memorial Playground (and the entire Cross Street playground generally) as permanently protected open space and "article 97 land", consistent with the Massachusetts Statewide comprehensive outdoor recreation plan ("SCORP") (necessary for Westfield to qualify for the LWCF grant); and (f) in approximately 2010, the mayor endorsed the City's open space and recreation plan, which identifies the property as permanently protected open space. Smith, 90 Mass. App. Ct. at 81, 86 n.2; I RA 36, 38, 39; II RA 10, 269, 270.

The Appeals Court apparently ignored most of these factual, proved actions in ruling that the City's failure to record a deed or conservation restriction in the chain of title was fatal to Plaintiffs' claims, and that "Westfield's subsequent actions of passing an ordinance naming the playground and endorsing the open space and recreation plan in

2010 are insufficient to subject the playground to art. 97 protection." Smith, 90 Mass. App. Ct. at 83.

If allowed to stand, the ruling would undermine Article 97 and this Court's prior rulings by establishing a recording requirement where none previously existed.¹⁹

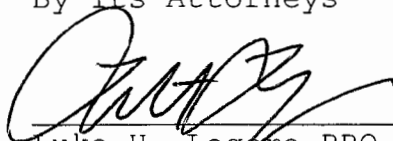
CONCLUSION

For the reasons stated herein, the decision of the Massachusetts Appeals Court should be reversed.

Respectfully Submitted,

Massachusetts Association of
Conservation Commissions, Inc.

By Its Attorneys



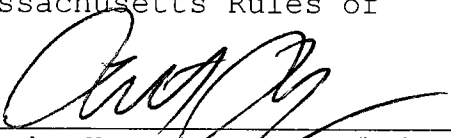
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March 20, 2017

¹⁹ The purpose and intent of Article 97, following threats to public land at Mt. Greylock, Spy Pond, and Fowl Meadows, was to erect a procedural barrier to the loss of public open space, not to create a barrier to establish that protection.

RULE 16(k) CERTIFICATION

I, Luke H. Legere, counsel for Massachusetts Association of Conservation Commissions, Inc. hereby certify that this Brief complies with the Rules of Court that relate to the filing of briefs, including, but not limited to, Rules 16, 17, 19, and 20 of the Massachusetts Rules of Appellate Procedure.



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March 20, 2017

CERTIFICATE OF SERVICE

I, Luke H. Legere, certify that on March 20, 2017, a copy of the foregoing document was served upon counsel for all parties, listed below, by first-class mail, postage prepaid.



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ADDENDUM

Excerpt of Transcript of Oral Arguments from
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Volume: I
Pages: 1-36

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
Docket No. SJC-11134

* * * * *

SANJOY MAHAJAN & others,
Plaintiffs/Appellees

vs.

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION & another,
Defendants/Appellants

* * * * *

TAPE TRANSCRIPTION

BEFORE: The Honorable Francis X. Spina
The Honorable Robert J. Cordy
The Honorable Margot Botsford
The Honorable Ralph D. Gants

DATE: November 5, 2012

LOCATION: John Adams Courthouse
One Pemberton Square
Boston, Massachusetts 02108

SHEA COURT REPORTING SERVICES
15 Court Square, Suite 920, Boston, Massachusetts 02108
(617) 227-3097

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24 Environmental Protection

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1 structure that is about 2,900 square feet, and the
2 proposed winterization and restaurant use will add
3 only an additional 1,200 square feet, leaving over
4 29,000 square feet as open space.

5 The Harbor Walk, which is a recognized
6 park on Long Wharf, and the Compass Rose area,
7 which is adjacent to this project site, both will
8 be entirely unaffected by this proposed reuse.
9 Therefore, within the BRA's discretion, that is
10 determined not a substantial modification.

11 The goals of the BRA are not in
12 conflict with land conservation as outlined by
13 Article 97 of the Mass. Constitution, but just
14 because an urban renewal plan states a proposed
15 use to be open space or a pedestrian walkway or a
16 plaza does not then transform that land to being
17 covered by Article 97. The initial taking is
18 under the urban renewal statute, and the urban
19 renewal statute defines the BRA's powers, and the
20 power of eminent domain is predicated solely on
21 the BRA's finding that land is blighted,
22 substandard or decadent.

23 JUDGE GANTS: Okay, but what I thought
24 you had conceded in your answer to Justice

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1 Botsford, that if you had taken -- if you take
2 land for the purpose of redevelopment and then
3 convey it to a conservation commission or parks
4 and recreation, then that land becomes protected
5 under Article 97. Do you agree with that?

6 MS. CHICOINE: Yes, Your Honor,
7 absolutely.

8 JUDGE GANTS: Okay. So if there were
9 to be -- now here, of course, there was a -- it's
10 declared to be a park. You put a plaque on it.
11 Should that be viewed as the equivalent of a
12 conveyance in terms of the intention of the BRA to
13 have that land be parkland?

14 MS. CHICOINE: It is not a conveyance,
15 and it is, though, a park. So a portion of Long
16 Wharf is protected by Article 97, and that is the
17 Compass Rose area that is adjacent to this project
18 site.

19 JUDGE BOTSFORD: Is that --

20 JUDGE GANTS: And it's protected
21 because --

22 JUDGE BOTSFORD: Yeah.

23 MS. CHICOINE: And the Compass Rose
24 area is protected specifically in that scenario

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1 because of the acceptance of federal funds, under
2 the Land and Water Conservation Fund, to create
3 the Compass Rose. So that area is impressed with
4 a special status, as is the Harbor Walk. And that
5 is what the plaque, Long Wharf Park, refers to
6 is --

7 JUDGE GANTS: So it's become -- is it
8 within Article 97 or simply that you risk federal
9 funding if you were to depart from what was a
10 commitment to the federal government?

11 MS. CHICOINE: Well, there has not
12 previously been really any statement of when urban
13 renewal land and what uses become subject to
14 Article 97, but it is classified that way by the
15 Parks and Recreation Commission of the City of
16 Boston that one protection, which does apply to
17 one portion of Long Wharf, is Article 97.

18 JUDGE GANTS: Okay. So, now, BRA --
19 so, land conveyed for urban development can become
20 Article 97 land if, one, it's conveyed to the
21 Parks and Recreation, or second, if you accept
22 federal funding with the commitment that it remain
23 parkland? Is that sort of another addendum to
24 when it can become Article 97 land?

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1 MS. CHICOINE: I would say that it is,
2 yes, a condition that would then alter its status
3 as urban renewal land that can be modified.

4 JUDGE GANTS: Okay. Now, they will, I
5 assume, come up and say there's a third addendum,
6 which is when you put a plaque on it and say it is
7 part of a park and you've declared it to be such.
8 Why should there not be this third addendum?

9 MS. CHICOINE: Because the plaque does
10 not define the boundaries of the area that is a
11 park. And Long Wharf, you must recall, was built
12 over three hundred years ago and has been the site
13 of an array of commercial uses. There were
14 deteriorating warehouses and fish-processing
15 plants on Long Wharf until the BRA took
16 stewardship of it.

17 And it was through the BRA's vision
18 that it became a gem of the Boston waterfront,
19 with pedestrian access and a bustling marina. And
20 the ability to modify urban renewal land is what
21 the BRA is charged with, under the urban renewal
22 statute, to meet the city's evolving needs.

23 And I would say, just in closing, also
24 that the Superior Court erred in this circumstance

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Dartmouth Protects its Conservation Land

By Michael O'Reilly

After the Massachusetts Supreme Judicial Court (SJC) decision in *Board of Selectmen of Hanson v. Lindsay*, 444 Mass. 502 (2005), concerns arose in Dartmouth that some town conservation lands might not be protected by Article 97 of the Massachusetts Constitution if they were not acquired for conservation purposes or the property deed did not reflect a conservation purpose. Article 97 mandates that state and municipal lands acquired for conservation purposes not be used for other purposes or disposed of except by a law enacted by a two-thirds roll call vote of each house of the state legislature. In the *Hanson* case, the SJC determined that property taken at tax title was not protected by Article 97 even though Town Meeting voted the property be acquired for conservation purposes.

A project was begun in Dartmouth to identify the deed of each conservation commission parcel and take corrective action when needed. A total of 174 individual parcels, totaling 2,167 acres, were known to be in control of the conservation commission. The parcels had been purchased by the commission, donated to the commission, or transferred to the commission for open space protection by vote of the Select Board.

When entering into the project, a concern was that properties thought to be in control of the conservation commission might not have the required deed language to assure Article 97 protection. To ascertain the status of the parcels, the deed of each parcel was examined at the Bristol County Registry of Deeds. Of the 174 conservation commission parcels, 113 had deeds with appropriate conservation language and were adequately protected. The remaining parcels were tax title parcels generally known to be conservation commission parcels, parcels that were recorded at the Registry of Deeds before the existence of the conservation commission and later transferred to the commission without altering the deed language (see Figure 1 - Town Forest & Figure 2 - Destruction Brook Woods), and parcels donated to or purchased by the conservation commission without appropriate wording in the deed. In addition, there were several other town parcels surrounded by conservation commission properties and predominantly wetlands that might logically be transferred to the conservation commission (see example - Dike Creek Salt Marsh Parcels, Figure 3).

After the research, and assistance of counsel, two warrant articles were passed by Town Meeting addressing deed transfers to be sure various parcels would have Article 97 protection. The Select Board then re-deeded various parcels to the conserva-

tion commission with appropriate wording included to assure the parcels were within the protections of Article 97. The types of deeds that needed correcting were: 1) old tax title parcels that had always been assumed to be in conservation commission control but only had wording related to general town ownership (e.g., control of the Select Board); 2) parcels assumed to be in conservation commission control, but with poor deed language; and 3) parcels that had been transferred to the conservation commission but without wording the town thought appropriate to confirm Article 97 protection. In total, sixty-one deeds went through the process.

After Town Meeting concluded, Town Counsel Anthony Savastano recorded three deeds at the Registry of Deeds reflecting the two Town Meeting votes on the warrant articles. Town Counsel Savastano also drafted standard wording for deeds of conservation land, which the town has used for all subsequent deed transfers to the conservation commission: "under the care, custody and control of its conservation commission for conservation purposes, for the promotion and development of natural resources, and for the protection of the watershed resources of the Town of Dartmouth, under the provisions of M.G.L. c. 40, §8C, as it may hereafter be amended and of Amended Article 97 of the Massachusetts Constitution..."

It took a few weeks of work to complete the project. Staff researched deeds at the Registry, which took a day or so, and undertook quite a bit of GIS work to identify and map the parcels for the Select Board, Conservation Commission, and Town Meeting. Staff also had several discussions and meetings with Town Counsel. There was much time and effort to complete the project, but definitely worth it.

Michael O'Reilly is Environmental Affairs Coordinator for the Town of Dartmouth and recipient of MACC's 2016 Environmental Service Award as Conservation Administrator of the Year. He can be reached at moreilly@town.dartmouth.ma.us

(See figures on next three pages)



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Conservation Commissions in Massachusetts

History

Massachusetts invented the municipal Conservation Commission. By the 1950s the need for protection of natural resources at the local government level was well known. This need led to the formation of town forest committees, park commissions, playground commissions, and recreation commissions.



Sportsmen's clubs, garden clubs, nature associations and charitable foundations had done much to conserve our vanishing natural resources. But a specific municipal conservation agency and authorization of conservation as a valid municipal purpose were needed before communities could acquire areas for passive use, rather than active recreational development. In 1957 Representative John Dolan of Ipswich filed a bill in the Legislature which became the Conservation Commission Act (G. L. Chapter 40 §8C). The new law enabled municipalities to establish Conservation Commissions through a vote of the local legislative body (town meeting or city council). During 1958, 12 towns formed Conservation Commissions. Every city and town in the Commonwealth now has a Commission.

The duties and responsibilities of a Conservation Commission are spelled out in the Conservation Commission Act. The Conservation Commission is the official agency specifically charged with the protection of a community's natural resources. The Commission also advises other municipal officials and boards on conservation issues that relate to their areas of responsibility.

Commissions' Legislative Authority

In Massachusetts, Conservation Commissions' authority comes from several sources: the Conservation Commission Act (MGL Chapter 40 section 8C) for open space protection; the Wetlands Protection Act (MGL Chapter 131 section 40) for protecting wetlands and waterways (Commissions have real power - they issue the permits); and the home rule provisions of the state constitution for non-zoning wetlands bylaws.

All state statutes can be found in the Massachusetts General Laws on the state web site at www.mass.gov/legis/laws/mgl/

Practical Information and How to Join

Conservation Commissions are the local environmental agencies in Massachusetts - responsible for protecting the land, water and biological resources of their communities.

Conservation Commissions are a group of volunteers who work long hours to achieve community conservation goals. Commissioners are appointed by their select boards or mayors. Through a special act of the Legislature one community has an elected Commission. The Commission often plays a supporting role in the choice of candidates.

Conservation Commissions have between three and seven members. The town meeting or city council sets the number. Terms are three years in length.

There is no state age, citizenship, residency, knowledge or experience requirements, though there may be local requirements. The tasks of a Commission require a great deal of study, learning and thought by its members, who become expert only by patience and work. Appointments should not be made or taken lightly.



The overriding factors governing appointments should be a candidate's interest in doing the conservation job needed by the town: open space and water resource protection. Since this goal requires a continual, firm commitment to conservation, persons who have no conflict of interest and who relate well to others should be selected. The Commission should represent a variety of interests, skills and backgrounds.

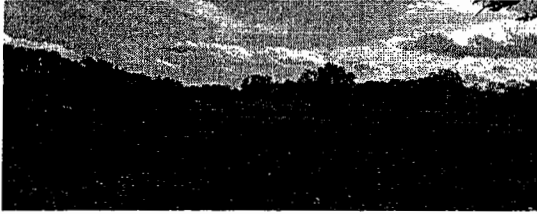
An engineer, a biologist, a naturalist and a lawyer may prove especially helpful. Knowledge of soils is useful. For purposes of coordination of efforts, well-qualified individuals who are members of other boards may be appointed to serve a term.

Over 100 Commissions have permanent full-time employees, many of whom are conservation professionals providing invaluable support to volunteer Commissioners. More than half of Conservation Commissions have some level of staffing.

In addition to voting members, many Commissions also have associate members and committees on which interested citizens serve.

If you have an interest in serving on your local Commission, talk to the Commissioners and staff, attend meetings and hearings, and get a sense of what the job is all about. Volunteer to help. Let the Commission and the selectboard know of your interest.

The Job of Open Space Protection



The first powers given to Commissions in the Conservation Commission Act focused on "promotion and development of natural resources...and protection of watershed resources." Under these powers Commissions undertake planning, acquiring and managing open space, and encouraging and monitoring conservation and agricultural preservation restrictions.

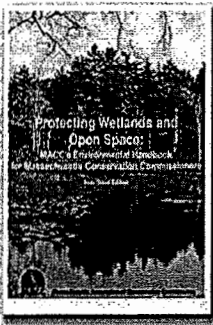
A Commission may accept gifts of money or land with the approval of the city council or selectboard, thus avoiding the delays associated with obtaining town meeting approval.

The Act authorizes Conservation Commissions to inventory the municipality's natural resources and to prepare relevant maps and plans. Open Space and Recreation Plans are therefore coordinated by Commissions. These important documents are a prerequisite for securing Self-Help moneys for open space acquisition.

The Conservation Commission also has the authority to adopt rules and regulations for the use of conservation land. These regulations have the full force of law; they are not merely "guidelines."

Today many Conservation Commissions spend the bulk of their time hearing and conditioning wetlands cases. While this responsibility is vital, it often leaves inadequate time for open space protection and other matters. To allow Commandate, many Commissions have set up open space, land management and other committees involving those members (and associate members) most interested in the Commission's original mandate.

The Job of Wetlands Protection



As the municipal focal point for environmental protection, Conservation Commissions were given responsibility in 1972 for administering the Wetlands Protection Act (G.L. Ch. 131 §40). Thus the Commission serves the community in a regulatory as well as a conservation capacity.

Under this law, Commissions across the state process over ten thousand applications every year for permits to do work in and near wetlands, flood plains, banks, riverfront areas, beaches and surface waters. The Wetlands Protection Act is described in detail in MACC's Environmental Handbook for Massachusetts Conservation Commissioners. Over half of Massachusetts' communities have adopted local non-zoning bylaws or ordinances giving Commissions further power to protect wetlands. The state's highest court has approved the use of such municipal laws. These are administered by Conservation Commissions. If the bylaw/ordinance gives it the power, the Commission may also adopt regulations for its implementation.

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Massachusetts Association of Conservation Commissions (MACC)
10 Juniper Road, Belmont, MA 02478

The Dartmouth Conservation Commission was one of the earliest Commissions in Massachusetts holding its first meeting in 1961. From 1961 through 1972 the Commission's time was spent analyzing open space, prioritizing open space acquisition, coordinating open space activities with other governmental and non-governmental agencies and performing other tasks related to the protection and enjoyment of open space. In 1972 Conservation Commissions in Massachusetts were assigned the task of administering the Massachusetts Wetlands Protection Act (MGL Chapter 131 §40). The Dartmouth Wetlands Protection Bylaw, adopted by the Town in 1980, strengthens aspects of the Wetlands Protection Act for the protection of the Town's natural resources.

While open space protection remains a top priority for the Conservation Commission and staff, it is the regulatory function that Conservation Commissions are most identified with by both the general public and other municipal agencies. The provisions of the Wetlands Act and the Wetlands Bylaw combined affords the Conservation Commission the supportive authority to control activities which border upon or are within wetland resource areas to protect the public interests associated with wetlands.

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Members - Appointed by Select Board

Name	Title	Term
Michael A. Kehoe	Chairperson	2016
Kyle Ross	Vice-Chairperson	2018
Joseph F. Burke Jr.	Commissioner	2018
Richard Golen	Commissioner	2017
Richard Mallen	Commissioner	2017
Patricia Sweriduk	Commissioner	2017
Kelly J. Wilbur	Commissioner	2019





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SENATOR
STEVEN A. TOLMAN

New School Construction and the Loss of
Article 97 Land

Representative Ruth B. Balsler
Chair, Open Space Subcommittee

March, 2000

JOINT COMMITTEE ON LOCAL AFFAIRS OPEN SPACE SUBCOMMITTEE

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Representative SUSAN POPE

Representative JOHN STASIK

STAFF

Charles H.P. Vance, Legislative Aide
Jeffrey Hahn, Intern

EXECUTIVE SUMMARY

The issue of using parkland for schools surfaced at a hearing of the Joint Committee on Local Affairs in April 1999, when representatives from Historic Massachusetts and the Environmental League of Massachusetts testified against Senate Bill 965. This bill authorized the Town of Winthrop to use 5 acres of parkland as the site of a new school. These groups accused the School Building Assistance Bureau (SBAB) of directing municipalities towards new construction rather than encouraging the renovation and reuse of existing, and sometimes historically valuable, structures. Ultimately the bill was given a favorable recommendation by the Joint Committee on Local Affairs and was signed into law by the Governor, but the Committee, under the leadership of its Chairs, Representative Marie Parente and Senator Steven Tolman, decided to form an Open Space Subcommittee to further investigate the issue.

Representative Ruth Balser was appointed Chairwoman, with Representatives John Stasik and Susan Pope joining her as members of the Subcommittee. To support the work of the Subcommittee, Representative Balser assigned her intern, Jeffrey Hahn, to research ten years of Article 97 land transfer legislation. The scope of this inquiry was limited to legislation that was referred to the Committee on Local Affairs and subsequently passed.

Article 97 of the State Constitution grants the people of Massachusetts basic environmental rights, including land conservation rights. However, it allows the transfer of conservation land by a two-thirds vote of the Legislature. If a municipality would use conservation land for other purposes, such as school construction, it must file legislation that is then considered by the Joint Committee on Local Affairs.

A review of Article 97 land transfer bills from the 1989-1998 period revealed the following: 30 transfers (20%) for private and residential purposes; 18 transfers (12%) for water supply and sewage purposes; 16 transfers (11%) for commercial and industrial purposes; 14 transfers (9%) for school construction; 14 transfers (9%) for public buildings (police and fire stations, etc.); 13 transfers (9%) for roads and highways; 13 transfers (9%) for recreational and "other municipal" use; 5 transfers (3%) for public housing; 2 transfers (1%) for cemeteries; 17 transfers (11%) for unknown uses; and 8

transfers (5%) for miscellaneous use.

It should be noted that for the purposes of this report, only the transfer of municipal owned land was reviewed. Transfers of state or county owned land are referred to the Committee on State Administration and the Committee on Counties, respectively.

Of these 150 bills, 32 contained provisions for replacement land. The data indicates that the volume of Article 97 land transfer legislation is not decreasing, and that the average number of bills filed in each of the past ten years has been relatively constant. Furthermore, the data indicates that while only a fraction of these bills involved school use, the acreage involved in these transfers was sizeable. Many of the other land transfer bills involved relatively small easements.

It was concluded that while the loss of a handful of parkland parcels to public schools may not at first glance seem significant, the further diminution of already scarce parkland in our smaller, more densely developed communities can be detrimental to the quality of life of these communities. The Subcommittee therefore decided to identify ways to safeguard the preservation of Article 97 land.

The Subcommittee convened a meeting in July 1999 with representatives from the Department of Education (DOE), the Executive Office of Environmental Affairs (EOEA), the Executive Office of Administration and Finance (A&F), the Department of Food and Agriculture, and environmental and historic preservation groups to discuss the problem and search for solutions (see meeting minutes – Appendix A). Legislators who attended the meeting included Representative Balser, Representative Pope, Representative Stasik, Representative Ellen Story, and Senator Tolman. EOEA representatives included Commissioner of Agriculture Jay Healy, Massachusetts Environmental Policy Act (MEPA) Director Jay Wickersham, EOEA Assistant Secretary Sharon McGregor and EOEA Legislative Liaison Kathy Bell. DOE representatives included Chief Financial Officer Jeff Wulfson, James Anderson of SBAB and DOE Legislative Liaison Joseph Giannino. A&F representatives included Undersecretary Kristen Keel and Jill Reynolds, Deputy Policy Advisor to the Governor on Education. Other participants included Marsha Westropp from the Massachusetts Audubon Society, Margaret Dyson from Historic Massachusetts, Sally Zielinski of the Massachusetts Association of Conservation Commissions, Jay McCaffrey of the Sierra Club and Nam

Kapur of the Environmental League of Massachusetts.

Each of the groups involved in the approval process (DOE, MEPA, the Department of Food and Agriculture, the Conservation Commissions and the legislators) discussed the pressures on them to approve a project once a municipality has invested time, effort, and funds in the proposed school. All agreed that coordination and communication earlier in the process would help to identify alternatives. All expressed the preference for rehabilitation but identified the chief obstacle as cost. The 50% guideline was discussed, and it was suggested that as long as DOE makes clear that all cost overruns would be the responsibility of the individual municipality, the 50% rule could be eliminated (see page 9 for a detailed description of the 50% guideline). The possibility of the Legislature allocating more funds for School Building Assistance was also suggested. Responding to the issue of pressure on legislators and administrators to approve projects, Representative Balser reminded the group that pending legislation (see House Bill 2046 – Appendix B) would require replacement land and would mandate the identification of such land as a first step in the process.

After the meeting, several participants forwarded recommendations to the Subcommittee. Chairwoman Parente suggested that SBAB provide an economic incentive to discourage municipalities from using parkland. The Massachusetts Association of Conservation Commissions submitted an extensive analysis and recommended a “No Net Loss” policy (see MACC Report – Appendix C).

In January of 2000, the Governor announced a new School Building Assistance policy that would give preference to the rehabilitation of existing structures. Along with the Governor’s announcement proposing radical alterations to the School Building Assistance program, A&F released a report entitled Reconstructing the School Building Assistance Program (see policy report excerpts – Appendix D). Ms. Keel and Ms. Reynolds of A&F, both of whom participated in the July 1999 meeting convened by the Subcommittee, performed much of the work for this policy report. Many of the proposals supported by the Subcommittee were adopted in the A&F report, including the elimination of the 50% guideline, financing creative solutions such as modulars, favoring renovation over new construction, and requiring “No Net Loss” of open space.

The Subcommittee was delighted to learn of the Governor’s recommendations,

and recognized that if these recommendations are given the force of regulation or statute, many of the Subcommittee's concerns in relation to school building might be resolved. Passage of House Bill 2046 will continue to be a priority, however, as it would extend the "No Net Loss" policy beyond school construction to include all construction.



JOINT COMMITTEE ON
LOCAL AFFAIRS AND REGIONAL GOVERNMENT

2003-2004 ARTICLE 97 SUB-COMMITTEE REPORT
An Updated Analysis of Article 97 Land Transfers

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COMMITTEE CHAIRS

REPRESENTATIVE
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FINDINGS

This report analyzes all land transfer bills that were heard by the Joint Committee on Local Affairs, now the Joint Committee on Local Affairs and Regional Government and the same Committee on the part of the House for three legislative sessions: 1999-2000, 2001-2002, and 2003-2004. It excludes Article 97 land transfers that were transfers of state-owned land which are heard by the Committee on State Administration and the Article 97 bills that were heard and enacted by other committees in the few months prior to the establishment of the present Joint Committee.

During the time examined by this report, there were 110 Article 97 municipal land transfer bills passed into law (note: this does not include two bills passed into law that changed the language in bills passed prior to 1999). Forty-seven became law during the 1999-2000 session, forty became law during the 2001-2002 session, and thirteen became law during the 2003-2004 session. The total of the 2003-2004 session excludes one repetitive bill transferring the same parcel of land.

A number of Article 97 bills in each of the three legislative sessions were stopped by the Committee in its hearings and therefore did not proceed for further consideration. Three bills were placed into study orders in the 1999-2000 session and remained there as did two bills in the 2001-2002 session and, three in the 2003-2004 session.

Land Transfers:

- Leasing land does not involve an exchange of title, a transfer, because the municipality maintains ownership of the land. Therefore, this report does not address any of the 12 bills that authorized the lease of Article 97 land that became law between 1999-2004.
- Easements are legally-binding agreements that allow temporary or permanent rights of access to individuals or parties other than the landowners. Of the 110 land transfer bills passed into law, thirty-five were transfers involving mostly small pieces of land for the purpose of granting easements, usually for the placement of utilities.
- Thirty-three of the thirty-five easements granted were permanent easements. The size of the easements ranged from less than 100 square feet to 27 acres. Only five easements were greater than 10 acres, and the two largest (11.5 and 27 acres) involved easements for conservation purposes. Twenty-seven of the easements were granted to allow the placement of utilities, such as natural gas pipelines and sewage pipes. Whenever possible, the land is allowed to return to its natural state.
- Approximately one-third of the land transfers involved easements and leases. Most were small in size with the majority for the placement of utilities; an obvious public service. Typically, the land is returned to its natural state. This

report supports the legislative consensus that these easements and leases do not represent an environmental threat. Hence, the subsequent findings will involve only bills where the title of the land was transferred.

- Seventy-five of the 110 transfers involved municipalities conveying the title, ownership, of the land to other parties.
- The total amount of land transferred was approximately 592 acres noting that the amount transferred for three bills could not be determined.
- In 62 of the 75 transfers, the type of transferred land was: forest (20); parks (13); forest plus wetland and/or field (6); park plus forest, trees, and/or playground (3); lawn (2); wellfield (2); field and buildings (1); recreational (1); abandoned factory (1); bogs/field (1); brushland (1); cement block (1); conservation land (1); detention basin (1); forest and lawn (1); parking lot (1); quarry (1); reservoirs (1); residential dwelling (1); road edge (1); sidewalk and road shoulder (1); wetland (1); and wetland and open space (1). For the remaining 13 transfers, the type of land could not be determined.
- Transfers occurred in 64 different municipalities. Multiple transfers occurred in each of the following municipalities: Barnstable (4 transfers), Braintree (2), Mashpee (2), Sharon (2), Sherborn (2), Springfield (2), Sudbury (2), Wayland (2), Winthrop (2), and Yarmouth (2).
- Transfers occurred in 11 of the State's 14 counties: Barnstable (9 transfers), Bristol (4), Duke (1), Essex (9), Hampden (4), Hampshire (4), Middlesex (20), Norfolk (8), Plymouth (8), Suffolk (3), and Worcester (5). No transfers occurred in Berkshire, Franklin, or Nantucket counties.
- The intended uses for the transferred land were: private development (10); public schools (10); water supply/tower/treatment facility/wells (6); cemeteries (3); conservation (3); highways (3); roads and/or bridges (3); private driveways (3); public recreation (3); fire stations (2); senior/recreation centers (2); a private residence (1); affordable housing/general municipal purposes (1); athletic building (1); athletic fields (1); historic preservation (1); library (1); park (1); parking lot (1); playground (1); private driveway and utilities (1); private golf course (1); private swimming pool (1); public beach (1); public safety radio tower (1); public way (1); residential purposes (1); roads and walkways (1); and a telecommunications tower (1). In 8 instances, the intended use of the replacement land could not be determined.

Voting Record:

Sixty-four of the Article 97 transfers that became law were unanimously approved by both the House of Representatives and the Senate. Lone dissenting votes were cast once in the House of Representatives and ten times in the Senate.