

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-12243

VIRGINIA B. SMITH, THOMAS SMITH, DANIEL SMITH, ERNIE and
ELIZABETH SIMMONS, BRIAN AND ERIN WINTERS, DEAN and VIRGINIA
WINTERS, PATRICIA BETTINGER, BENJAMIN LARSEN, FRED PUGLIANO, DON
and SHARON WIELGUS, MARCUS and KAREN JAICLIN, FRANK and HELEN
MOCHAK, WILLIAM WIGHAM, GARY WOLFE, WILLIAM SCHNEELOCK, FRED
WROBLESKI, JOSE SANTOS, and FRANCIS and BARBARA SIMMITT,
Appellants

v.

CITY OF WESTFIELD, CITY COUNCIL FOR THE CITY OF WESTFIELD,
Christopher Keefe, James Brown, Peter J. Miller, Mary O'Connell,
Richard Onofrey, Jr., Christopher Crean, James R. Adams, Patti
A. Andras, Brent B. Bean, II, John J. Beltrandi, III, David A.
Flaherty, Brian Sullivan, Agma Maria Sweeney named herein solely
in their official capacity; and DANIEL M. KNAPIK, Mayor, named
herein solely in his official capacity.
Appellees

On Appeal from Judgment of the Superior Court
in Hampden County

BRIEF OF THE ASSOCIATION TO PRESERVE
CAPE COD, INC.

AMICUS CURIAE

The Association to
Preserve Cape Cod
By its attorney,
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MARCH 3, 2017

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Issue Presented

Whether Article 97 is simply an aspirational concept or whether it is a Constitutional protection of the fundamental right to clean air, clean water and protected public trust lands requiring strict scrutiny.

Interest of Amicus

The Association to Preserve Cape Cod (APCC) files this brief pursuant to the Court's January 6, 2017 solicitation for memoranda from *amicus curiae*. APCC is a member supported, nonprofit organization of more than 5,000 members founded in 1968 to protect our environment and natural resources. Our environment and natural resources are essential for protecting human health and quality of life, which are at the core of the Cape Cod economy. APCC is Cape Cod's leading advocate for preserving our water resources, wetlands, open space and way of life.

Article 97 of the Constitution, the public use doctrine and the public trust doctrine, are not separate ships simply passing in the night. They are an integrally entwined comprehensive scheme that protects the Commonwealth's natural resources, common

space, shared air and public waters. State and municipal agencies charged with responsibility under all of these laws and doctrines do not get the option to ignore requirements for legislative review - even if there is a perceived or even articulable public benefit.

Moreover, as the Boston Globe noted in editorial support for adoption of the Constitutional Amendment in 1972, Article 97 "just might be the foundation for legislation and court rulings that will be increasingly important as changing population and land use patterns, both in cities and in suburbs, impose new and unprecedented stresses on the human biosphere." *The referenda-4: A matter of right*, BOSTON GLOBE, Oct. 1, 1972 at A6. This case is one of those opportunities.

APCC has a long history of pragmatic, environmental advocacy that recognizes the implications and consequences of the environment taking a back seat to partially thought-out development, including school projects. As such, APCC believes our legal and practical perspective would be of assistance to the Court.

Statement of Facts

We base our brief on the facts and statement of the case presented in the Smith brief with the one additional fact that a public easement was created in 1957 with the dedication of the park and playground.

Summary of the Argument

Two different legal protections mandate legislative approval before the John A. Sullivan Memorial Playground ("the playground") can be abandoned and transferred for school use and a third protection prohibits such change of use outright. Article 97 of the Amendments to the Massachusetts Constitution, the prior public use doctrine and the public trust doctrine all exist to limit the authority of the Commonwealth and municipalities to alter the use of certain protected lands. There is no question that if any of these legal protections apply to the land, either legislation approval is required or the change is prohibited outright. The question is the applicability of these legal protections to a dedicated playground. Without question, the John A. Sullivan Memorial Playground was "dedicated" as a park and playground. If this Court were to find otherwise,

no real estate can ever be considered dedicated for such purposes.

Moreover, a common sense approach dictates that if we have all of these legal protections for park, open space and recreation land incorporated into our Constitution, should we not err on the side of caution and legislative review? This case, as argued below, is not a case that the use of a playground can never be changed, only that it must first undergo legislative scrutiny and approval. Justice Milkey's concurrence below artfully articulated the issues and concerns with the current status of decisional law. "The overriding point of art. 97 is to insulate dedicated parkland from short-term political pressures. I fear that the effect of Hanson and Mahajan is to rob art. 97 of its intended force with regard to a great deal of dedicated parkland across the Commonwealth." Smith v. City of Westfield, 90 Mass. App. Ct. 80, (2016) (Milkey, J. concurring).

Lastly, this Court's analysis in Hanson was incomplete. The analysis should have extended to the issues whether the land was actually dedicated and the extent, if any, of detrimental reliance on the part of the buyer - what did the buyer know and when did he or

she know it. The Court also should have articulated the nature of any recorded document where a deed or conservation restriction cannot be granted to oneself under Massachusetts recording standards.

Argument

I. The public use doctrine protects parkland.

The John A. Sullivan Memorial Playground is potentially protected under at least three distinct legal protections from conversion to school or any other use without legislative approval, or in some cases outright prohibited from change of use.¹

¹ APCC recognizes that municipalities face enormous pressures to provide quality educational opportunities for its young citizens in a fiscally sound and sustainable way. Utilizing parkland as a way to reduce costs has been recognized as a shortsighted political strategy for a long time. In 1958 Kiplinger's Magazine featured a piece on the false economy of transforming parks into other municipal infrastructure and advocated better planning for future municipal needs by acquiring and dedicating undeveloped land for such dedicated uses. "Usually the campaign to invade the parks flaunts an economy banner: 'Put the city garage on city land and save,' or 'Let's not keep this land off the city tax rolls any longer.' Such pocketbook appeals sound hardheaded. But you can fight back with more than soft talk about the greenery or how the kids need a place to play. Giving up parks to save money may be false economy. For one thing parks usually increase tax values in surrounding property. In Pittsburgh, for example, a 60-acre slum was razed. Half of it was rebuilt, the other half left as park. A few years later, despite taking 30 acres off the tax

In Nickols v. Comm'rs of Middlesex County, 341 Mass. 13 (1960) this Court held that "property conveyed to a government body . . . for a particular public purpose may be subject to an enforceable public obligation or trust to use the property for those purposes." Id. at 19. In other words, land dedicated for a particular purpose is deemed held in trust for that purpose, the public trust doctrine. The Nickols Court relied on Codman v. Crocker, 203 Mass. 146, 150 (1909). "where property is dedicated . . . to a public use for a particular purpose, it cannot . . . without the exercise of . . . eminent domain, be . . . [put] to a use of a different character, in disregard

rolls, the land value of the entire tract has increased \$10,500,000. For another thing replacing lost parks can be insidiously expensive, even prohibitive. Running a freeway through Griffith Park in Los Angeles revealed that any adjoining land bought to compensate for the loss would cost \$35,000 an acre." *Get your community to grab that vacant land*, CHANGING TIMES, THE KIPPLINGER MAGAZINE, Aug. 1958 at 14. In 1958, \$35,000 was an outrageous cost for land. There is more than a century of case law on the very subject in Massachusetts. See e.g., Higginson v. Treasurer and School House Comm'rs of Boston, 212 Mass. 583 (1912) (proposed school on the Fens in Boston not allowed), City of Salem v. Attorney General, 344 Mass. 624 (1962) (proposed school on a park known as Ledge Hill not allowed).

of the trust . . ." Nickols, 341 Mass at 19. The meaning of dedicated in this context is controlling. While the public trust doctrine often involves a gift, the essence of the public trust doctrine is dedication. Indeed, the origins of public trust doctrine are in dedication of tidelands for particular public purposes.

First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties-such as the seashore, highways, and running water-"perpetual use was dedicated to the public."

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. Law Rev. 472, 475 (1969).

The question, then, is whether the public trust concept has some meaning between the two poles; whether there is, in the name of the public trust, any judicially enforceable right which restrains governmental activities dealing with particular interests such as shorelands or parklands, and which is more stringent than are the restraints applicable to governmental dealings generally.

Id. at 477. In the evolution of Massachusetts decisional law, the answer is yes, but perhaps without

the consistency needed to preclude short term political expediency. The case at bar provides an opportunity to steady the ship.

In Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) the Supreme Court not only expanded the reach of the public trust doctrine inland but stated the purpose was the requirement for flexibility in its application.

In Gould v. Greylock Reservation Commission,² the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. Because Gould is such an important case in the development of the public trust doctrine, and because the implications of the case are so far-reaching, it is important to have a clear understanding of both the facts of the case and the court's decision.

Sax, 68 Mich. Law Rev. at 492.

Gould concerned a development scheme for the Mount Greylock reservation, a dedicated park. "The plaintiffs brought the suit as beneficiaries of the public trust under which the reservation was said to be held, and they asked that the court declare invalid both the lease of the 4,000 acres of reservation land

² 350 Mass. 410 (1966)

and the agreement between the Authority and the management corporation." Id. at 493.

The similarities between Gould and Higgonson v. Treasurer and School House Comm'rs of Boston, 212 Mass. 583 (1912) are striking. They both turn on the public interest in parkland. Higginson and Gould are so at odds with Hanson that this alone begs clarification from this Court.

In Higginson this Court related the legal history of land dedicated for park use up to that time:

"The legal title by such purchase became vested in the city, not for its own use in a corporate capacity, but in perpetual trust for the use of all who at any time might enjoy the benefit of a public park." [Holt v. Sommerville, 127 Mass. 408, 411] In Clark v. Waltham, 128 Mass. 567, 569, it was decided that the city held "the park, not for its own profit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit." It was held in Wrentham v. Norfolk, 114 Mass. 555, 562, that the title to an ancient common or training field laid out by the original proprietors was in the town not for its own use in a corporate capacity, but for the benefit not only of inhabitants of the town but of all "who might have occasion to use it." In Oliver v. Worcester, 102 Mass. 489, 495, it was said respecting a similar common: "The whole common is in one sense dedicated to the public use, as a place of public resort and

recreation, over any part of which persons may pass freely, unless restricted for some public and sufficient reason." In Abbott v. Cottage City, 143 Mass. 521, 525, respecting a park, it was asserted by Mr. Justice Holmes apparently as a proposition too plain to require further discussion, that "the use is in the public at large." In Attorney General v. Abbott, 154 Mass. 323, while holding that a park could be established by dedication, it was said that the easement was "not in the town, but it is in the public at large." See also Attorney General v. Vineyard Grove Co. 181 Mass. 507; Wellington, petitioner, 16 Pick. 87. In Commonwealth v. Abrahams, 156 Mass. 57, where rights in Franklin Park, acquired by Boston under the same statute as the Back Bay Fens, were considered, it was said, "The parks of Boston are designed for the use of the public generally." This language was quoted with approval in Commonwealth v. Crowninshield, 187 Mass. 221, 224.

Higginson, 212 Mass at 585-586. Note that this Court used the words "dedicate" and "easement" throughout this early analysis of park cases. Dedicate in terms of creation of parkland and easement in the description of the public rights.

According to Justice Holmes dedication trumps recordation. Attorney General v. Vineyard Grove Co., 183 Mass. 507, 509 (1902). "the line of deeds taken by itself might lead to the conclusion that the land had been held adversely to any public rights, . . . There is nothing to

show that the locus could not be dedicated to the public." Id.

Dedication is an unambiguous act of the owner in fee to use the land for a particular public purpose. As noted in the Smith brief, there is no ambiguity that Westfield (the owner in fee) dedicated the land to park purposes and even benefited from that dedication by receiving park grants. Indeed, the park's very name is a formal dedication - John A. Sullivan Memorial Playground. Memorial and dedicatory are synonyms.

Since the John A. Sullivan Memorial Playground is protected by the public trust doctrine it cannot be converted to school use³, just like the Fens in Boston could not be converted to school use, Mount Greylock could not be commercialized and Ledge Hill in Salem could not be used to build a school.

³ Some "commentators have concluded that it is within the power of the Legislature to grant private rights in public trust properties where the conveyance serves the public interest." Opinion of the Justices to the Senate, 383 Mass. 895, n.3 (1981).

II. The prior public use doctrine requires legislative approval.

Some legal scholars have opined that the prior public use doctrine is nothing more than a transfer of the public trust doctrine to inland properties.

[T]he Supreme Judicial Court has shown a clear recognition of the potential for abuse which exists whenever power over public lands is given to a body which is not directly responsive to the electorate. To counteract the influence which private interest groups may have with administrative agencies and to encourage policy decisions to be made openly at the legislative level, the Massachusetts court has developed a rule that a change in the use of public lands is impermissible without a clear showing of legislative approval.

Sax, 68 MICH. LAW REV. at 491-92.

The court's primary mechanism for the implementation of public trust principles, however, is the doctrine of prior public use. Not only is this doctrine generally applicable to government owned land, but it also shares with public trust two important characteristics. Both focus on the uses to which land is presently put, and both require that changes in those uses be authorized by an act of the Legislature.

Heather Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 866 (1984).

Even if the playground is somehow not protected by the public trust doctrine, there is

no question that prior public use doctrine protects the land and requires legislative approval for any change of use.

However, it cannot be overlooked that the prior public use doctrine developed because of the need to protect inland resources. "The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law." Robbins v. Dept. of Public Works, 355 Mass. 328, 330 (1969) Moreover, this Court singled out parkland as requiring heightened scrutiny. "In furtherance of the policy of the Commonwealth to keep parklands inviolate the rule has been stringently applied to legislation which would result in encroachment on them." Id.

Under the prior public use doctrine there can be no ambiguity in the legislative review that parkland is being lost.

[I]t is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or

recital showing in some way legislative awareness of the existing public use.

Id. at 331.

III. Article 97 protects public easements.

Parks and playgrounds are public easements. The fee in the land is held by the Commonwealth or a municipality with the right of the public to pass, repass and recreate on the land as a matter of right. "[T]he use is in the public at large." Abbott v. Cottage City, 143 Mass. 521, 525. In Attorney General v. Abbott, 154 Mass. 323 while holding that a park could be established by dedication, it was said that the easement was 'not in the town, but it is in the public at large.'" Higginson, 212 Mass at 586. Early decisions made clear "that the use of a public park is not confined to citizens of the municipality in which it is located, but is for all people." Id. at 588. This is an important distinction because the proposed school would benefit only citizens of Westfield and arguably only those citizens with school age children. The public trust doctrine, prior public use doctrine and Article 97 protect the interest of the public at large.

The relevant portion of Article 97 is "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." Easements, which do not always have to be recorded, are clearly protected under Article 97. There is no question that there exists a public easement at the John A. Sullivan Memorial playground. Case law has established that "parks, squares, groves, shore fronts and beaches," properly dedicated, may not have "public use and easement" interfered. Attorney General v. Onset Bay Grove Ass'n, 221 Mass. 342, 351 (1914).

Article 97 added constitutional protection for clean air, clean water "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." Mass. Const. Art. 97. The people of Massachusetts have a fundamental right to the protection and conservation of parks and playgrounds. Any government intrusion imposing a burden on this fundamental right must be strictly scrutinized and held unconstitutional absent

a compelling government interest to interfere with these fundamental rights. Where, as at bar, a “constitutionally protected fundamental right, the infringement upon which triggers strict scrutiny under the compelling State interest and least restrictive means test, this Court must examine far more than the presence or absence of a recorded document.

Commonwealth v. O’Neal, 367 Mass. 440, 449-50 (1975).

In Mahajan v. Dept. of Environmental Protection, 464 Mass. 604 (2013) this Court focused on the specific and narrow purpose for which the land was “taken” and overlooked the totality of circumstances including formal dedication as well as the historic status of the land e.g. public trust protected tidelands. Id. at 612. The Court also included a balancing scheme between conservation and urban renewal. Strict scrutiny does not permit such a balancing. Further, the Court minimized the importance of the Quinn opinion, REP. A.G. PUB. DOC. 12 (1973) which the Commonwealth, including this Court, had used as guide for four decades concerning the retroactive impact of Art. 97. Mahajan, 464 Mass. at 612-13. In Opinion of the Justices to the Senate, 383 Mass. 895 (1981), this Court quoted and fully adopted

the reasoning and logic of the Quinn report. Id. 918. While in Mahajan, the Court was "hesitant to afford it too much weight due to the generalized nature of the inquiry and the hypothetical nature of the response." Id. at 613. The case at bar is not remotely related to conservation, it is the essence of conservation. Id. This Court in both Mahajan and Bd. of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) articulated a requirement for recording a specific restriction by deed or other recorded restriction. Mahajan, 464 Mass. at 615. While being at odds with more than 100 years of precedent, this recording requirement actually can create a Catch 22⁴ for communities.

If not part of the original acquisition, municipalities, as is any party, are prohibited from deeding a property to itself. "One cannot convey [deed, mortgage, or secure] to one's self alone." A.L. Eno & W.V. Hovey, REAL ESTATE LAW § 5.48 (3d ed. 2004).

⁴ Joseph Heller in his novel CATCH 22 popularized this phrase which means a paradoxical situation created by contradictory rules from which there is no escape or relief. In the novel a psychiatrist explains that any pilot requesting mental evaluation for insanity – hoping to be found not sane enough to fly and thereby escape dangerous missions – in fact demonstrates his own sanity in making the request and thus cannot be declared unfit to fly.

Kaufman v. Federal Nat'l Bank of Boston, 287 Mass. 97, 100 (1934). Likewise, "one cannot obtain an easement in one's own land." A.L. Eno & W.V. Hovey, § 8.15. The holder of a conversation restriction cannot be the municipality on municipally owned land. Public easements are not routinely recorded.

Dedication and not recording has been the historic and standard practice to create parks and the attendant public easement in Massachusetts. Attorney General v. Vineyard Grove Co., 181 Mass. 507, 509 (1902) (public rights acquired by dedication), Codman v. Crocker, 203 Mass. 146, (1909) (subway tunnel under the Boston Common was not inconsistent with the original "dedication" of the Common as a park), Attorney General v. Onset Bay Grove Ass'n. 221 Mass. 342, 348 (1915) (It is settled at common law that the dedication need not be in writing), Prentiss v. City of Gloucester, 236 Mass. 36, 54-55 (1920) ("Dedication implies public rights only" such as in public landings, beaches and parks).

G.L. ch. 45 § 1 defines park in terms of dedication: "In this chapter 'park' shall include a city or town common dedicated to the use of the

public, or appropriated to such use without interruption for a period of twenty years."

Memorializing the playground, a park dedicated to children's use, is dedicating it to the public. This is the practice that Westfield followed.

IV. Protecting publicly dedicated land requires more analysis than the existence of recorded documents

Bd. of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) established certain recording requirements to invoke the protection of Article 97. As noted herein, some of those requirements are problematic, e.g. Hanson could not deed the land to itself. The factual analysis implies that there was at least alleged some unclean hands by the buyer or her agent. There is no discussion in the facts of detrimental reliance by the buyer. The treasurer lacked authority to sell the land since the property had been dedicated to conservation for more than 20 years.⁵ Ultimately Hanson is not a case of who got to registry first but

⁵ The significance of the 20 years appears to have been overlooked. Adverse possession is another settled exception to the requirement for recording. As noted G.L. ch. 45 § 1 recognizes appropriation for a period of 20 years.

a complicated case of errors, omissions and possible malfeasance. These are not the facts to make binding precedent upon.


Detrimental reliance is often used in contract law to determine whether performance was required or reasonable. Turnpike Motors, Inc. v. Newbury Group, Inc. 413 Mass. 119 (1992) The reasonableness of reliance should have been part of the analysis in Hanson. If you accept that the treasurer lacked the legal authority to transfer the property, the question posed was whether the buyer reasonably and detrimentally relied upon the treasurer's representation. The decision raises the question of reasonable because of the agent's alleged familiarity with the status of the land having been dedicated to conservation. Recordation is merely an element of reasonable reliance.

Nonetheless the case before the Court need not turn on recordation or detrimental reliance. In Westfield there was no ambiguity concerning the status of the playground. It looks like a park and was used as park. Recordation is superfluous. Westfield knew it was dealing with land dedicated as park.

Conclusion

For the foregoing reasons the judgment of the Superior Court should be reversed and the Court should conclude that Westfield lacks the legal authority under Article 97 of the Constitution and the public trust doctrine to construct a school on the John A. Sullivan Memorial Playground property.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Edward J. DeWitt', written over a horizontal line.

The Association to Preserve
Cape Cod

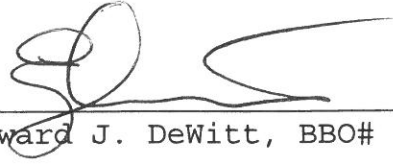
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March 3, 2017

Brief Certification

In accordance with the Mass, R. App. P 16(k) I certify
the brief complies with relevant rules for filing
briefs with the Court.

A handwritten signature in black ink, appearing to be 'EJ DeWitt', written over a horizontal line.

Edward J. DeWitt, BBO# 630955

ADDENDUM

Massachusetts General Laws

CHAPTER 45. PUBLIC PARKS, PLAYGROUNDS AND THE PUBLIC DOMAIN.

Section 1. Definitions.

Section 1. In this chapter "town" shall not include city. In this chapter "park" shall include a city or town common dedicated to the use of the public, or appropriated to such use without interruption for a period of twenty years.

PUBLIC PARKS.

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Article XCVII

Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: - 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.

