ANDERSON KREIGER

MEMORANDUM

To: Robin Crosbie, Town Manager

From: GEORGE A. HALL, JR.

Date: June 27, 2016

Re: Bialek Park: Whether a vote to transfer the care, custody and control of the Park to the School Department for school use would require approval of the Legislature under Article 97 of the Amendments to the Massachusetts Constitution

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The Question

In 1972, the Commonwealth adopted Article 97 of the Articles of the Amendment to the Massachusetts Constitution, which provides that:

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

[Emphasis supplied.] You have asked whether the conversion of all or a part of Bialek Park for school use would require a two-thirds vote of the Legislature under the second paragraph quoted above. That requires a determination of whether the land was originally acquired for the public purposes listed in the first paragraph: i.e., the "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" of the Town.

This question has both a factual and legal component. The factual question, which we have researched by examining the title to the property and the Ipswich Town Meeting records, is whether Bialek Park acquired for a specific purpose, and if so, what that purpose was specified to be. With that information in hand, the legal question is whether the specified purpose falls within the scope of the "public purposes" identified in Article 97 quoted above.

Summary of Opinion

Ipswich Town Meeting records clearly establish that Bialek Park was acquired for the specific purpose of operating a public playground. The question, therefore, comes down to the legal one: whether "playground purposes" are within the scope of the protection of Article 97. There is one Land Court decision that addresses this question squarely, and which answers the question in the negative (land acquired for playground purposes, as distinct from land held solely for park purposes, is not subject to Article 97 protection). We think that this Land Court decision is well-reasoned, and that if the issue were to be presented to a Massachusetts appellate court, there is a reasonably good likelihood that the appellate court would adopt its reasoning. As trial court decisions are not binding, however, there is always some risk that, if challenged, an appellate court would reach the opposite conclusion.

Bialek Park Acquisition History

Bialek Park was originally acquired for the purpose of a public playground in 1912, and was enlarged by acquisitions in 1966 and 1968.

At a special town meeting in March, 1912, the meeting voted to form a committee consisting of the Chairman of the Board of Selectmen, the Chairman of the School Committee, the Chairman of the Finance Committee, and two citizens at large "to investigate the matter [of a public play ground], examine locations and the probable cost of such grounds and report at some future meeting." Three months later, at another special town meeting held June 21, 1912, the Town voted "that the sum of one thousand seven hundred dollars be appropriated for the purpose of purchasing land for a public play ground." (See Tab A for these votes).

Shortly after the June 21, 1912 special town meeting, on July 1, 1912, the Town accepted and recorded a deed from the Estate of John H. Cogswell (Book 2153, Page 592) acquiring 4.73 acres on Linebrook Road. On July 30, 1912, the Town recorded a deed conveying 4.76 acres abutting the Cogswell parcel to the east from Thomas and Lucy Lord (Book 2160, Page 33). A plan prepared by John Nourse showing both of these parcels was recorded with the latter deed. (See Tab B for the two deeds and the Nourse plan).

The 1912 Ipswich Town Report shows the amounts paid for the deeds executed by Thomas and Lucy Lord ($1,000), and by Dexter M. Smith as Administrator of the Estate of John Cogswell ($1,100), as well as for the Nourse plan ($10.30), under the heading "Playground." (See Tab A, page 1).[1]

More than 50 years later, at the adjourned annual town meeting on March 15, 1966, the Town voted to raise and appropriate the sum of $4800 to acquire a parcel of land from Albert J. and Ruth Horne, and referencing a plan to be entitled "proposed addition to Linebrook Playground." A deed from Albert and Ruth Horne dated April 29, 1966 was recorded at Book 5359, Page 238, and references the plan recorded in Plan Book 106, Page 62. The deed states that the land area is 3.25 acres more or less (no acreage given on plan). (See Tab C for the deed, the town meeting vote, and plan).

On March 4, 1968, under Article 18 of the annual town meeting, the Town voted to appropriate the sum of $3,000 to purchase an additional 36,000 square feet of land from Albert and Ruth Horne "located [a]djacent to the right of way from Kimball Ave. to the Linebrook playground for playground and park purposes." The second deed from the Hornes dated May 8, 1968 was recorded in Book 5530, Page 104. (See Tab D for the deed and town meeting vote). This land widened the portion of the park that fronts on Kimball Avenue, probably to facilitate access from Kimball Avenue.

These four deeds appear to cover all of the land now included in Bialek Park; the courses and distances given for the boundaries of the parcel on the 1912 and 1966 plans correspond to those shown on Assessors Map 30D as the current boundaries of the Town's land.

It is clear from the 1912 votes and Town report that the purpose of the original acquisitions was to establish a public playground. It is also clear that the 1966 and 1968 acquisitions were to enlarge the existing playground. I don't view the use of the word "park" in the statement of purpose in the 1968 vote as intending any change or restriction in the original use, especially given the continuity of the use.[2]

Bialek Park is currently improved with several baseball/softball fields and other outdoor athletic facilities, as well as ancillary structures and parking areas. We have not attempted to trace or summarize the history of the Town's expenditures on these facilities

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[1] The report shows an unexpended balance of $85.13 from what is shown as an appropriation of $2195.12. I don't know how to explain the discrepancy between that number and the $1,700 appropriation under Article 4 of the June 21, 1912 special town meeting, but I don't think it is material to the question addressed in this memo.

[2] Note also that, in G.L. c. 45, § 14, the provisions of that Chapter pertaining to playgrounds "shall apply to land and buildings acquired for playground purposes, or for park and playground purposes, but shall not apply to land and buildings acquired solely for park purposes."

over the Park's more than 100-year history. There does not appear to be any evidence, however, that Bialek Park has been used for anything other than a playground, as defined in G.L. c. 45, § 14 (discussed below), over the course of its existence.

Article 97

Until recently, there has not been a lot of case law to help define the limits of what constitutes land acquired for the purposes listed in Article 97. For many years, the primary authority relied on by lawyers for state and local agencies was a 1973 Opinion of Attorney General Robert Quinn to the Legislature, in which he took a very broad view of the issue; Quinn's opinion suggests that all public parks, whenever acquired, including those improved with athletic fields and facilities, are subject to Article 97. See Rep. A.G., Pub. Doc. No. 12, at 139 (1973) (Quinn Opinion) (see Tab E).

In a recent SJC decision, however, Mahajan v. Department of Environmental Protection, 464 Mass. 604, 613 (2013), a case in which the plaintiffs sought the application of Article 97 to the Long Wharf pavilion in Boston, the Court declined to adopt Quinn's reasoning:

> The Quinn Opinion was issued in response to a general inquiry from the Speaker of the House of Representatives regarding the applicability of art. 97, and was rendered without reference to any particular set of facts. Although the Quinn Opinion is entitled to careful judicial consideration on the question of the scope of art. 97 and the intent of its drafters … its interpretation of art. 97 is not binding in its particulars, and we are hesitant to afford it too much weight due to the generalized nature of the inquiry and the hypothetical nature of the response. [Citation omitted].
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> The Quinn Opinion suggests a more expansive reading of art. 97 than we afford it today, and it may reasonably be read to support the plaintiffs' argument that the project site is subject to art. 97. ***We disagree with the Quinn Opinion to the extent it suggests that the vast majority of land taken for any public purpose may become subject to art. 97 if the taking or use even incidentally promotes the "conservation, development and utilization of the ... forest, water and air" … or that the land simply displays some attributes of art. 97 land generally.*** We also do not agree that the relatively imprecise language of art. 97 warrants an interpretation as broad as the Quinn Opinion would afford it, particularly in light of the practical consequences that would result from such an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of art. 97.
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> ***The critical question to be answered is not whether the use of the land incidentally serves purposes consistent with art. 97, or whether the land displays some attributes of art. 97 land, but whether the land was taken for those***

> ***purposes, or subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 97***. [Citations omitted]. In this case, 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—in that it promotes access to the waterfront and the sea—this specific use is incidental to the overarching purpose of urban renewal for which the land including the project site was originally taken.

[Emphasis supplied]. Three days after Mahajan was decided, Judge Robert Foster of the Land Court heard oral arguments from the parties in Curley v. Town of Billerica, in which the plaintiffs, invoking Article 97, sought to invalidate a lease by the Town of a portion of a parcel of land acquired for playground purposes to a wireless communications company for the construction of a cell tower.

In a decision issued later that year (2013 WL 4029208) (attached at Tab F), Judge Foster found that there was no question that the Town had acquired the property for "playground purposes," and that "[i]f 'playground purposes' is a purpose articulated within 97, then the vote of the Town Meeting accepting the Property for such purposes was sufficient to subject it to the protections of art. 97." Judge Foster concluded that "playground purposes" are not within the scope of Article 97.

Judge Foster's decision relies substantially on the differential treatment of "parks" and "playgrounds" in G.L. c. 45.

> In chapter 45 of the General Laws, entitled "Public Parks, Playgrounds and the Public Domain," §§ 2–11 are directed to public parks, while §§ 14–18 are directed to playgrounds. Section 14 of that chapter, addressing the use, acquisition and management of playgrounds, states that its provisions apply to land and buildings acquired for playground purposes, or for park and playground purposes, but not to land and buildings acquired solely for park purposes. G.L. 45 § 14. While lacking explicit definitions, chapter 45 treats parks and playgrounds differently in ways that suggest that a park is open space while a playground is an improved space with structures. Section 7 provides that "[l]and taken for or held as a park ... shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area ... shall be erected ... without leave of the general court." G.L. c. 45, § 7. On the other hand, a city or town "may construct buildings on land owned or leased by it" as a playground and "may provide equipment" for the playground. G.L. c. 45, § 14. Other statutes concerning playgrounds include references to play equipment that suggest that the presence of such equipment is what defines a playground. See, e.g., G.L. c. 45, § 15 (requiring cities and towns to "maintain at least one public playground

> conveniently located and of suitable size and *equipment*) (emphasis supplied); G.L. c. 266, § 98A (making it a crime to destroy, deface, mar, or injure any "playground apparatus or equipment").

See Tab F, page 5. There is another important statute supporting Judge Foster's conclusion that he overlooked: G.L. c. 40, § 15A. Prior to the adoption of that statute in 1951, under the so-called "prior public use doctrine," the state Legislature had to approve the conversion of any land that had been acquired by state or local government for a particular purpose to different purpose. G.L. c. 40, § 15A delegated this authority, with regard to land held by cities and towns, to their legislative bodies (city councils or town meetings) acting by two-thirds vote. It is notable that this delegation expressly included "land acquired for playground purposes," but expressly excluded "land acquired for park purposes."

The decision of the Legislature not to allow local conversions of park land without its approval when it adopted G.L. c. 40, § 15A may be seen as an important antecedent to Article 97. Article 97, in effect, strengthened the protection of park land by escalating the requirement of state legislative approval, which had been retained in G.L. c. 40, § 15A, to a two-thirds vote requirement. It also expanded the definition of the land protected in this way to reflect the fact that, by the 1960s, not all land acquired for conservation purposes was called "park land."[3] Nothing in Article 97 suggests an intention, however, to revisit the distinction between playgrounds and parks that was incorporated into G.L. c. 40, § 15A.

Judge Foster's decision is also consistent with the SJC's statement in Mahajan that it "is not whether the use of the land incidentally serves purposes consistent with art. 97, or whether the land displays some attributes of art. 97 land, but whether the land was taken for those purposes" that determines the applicability of that constitutional provision. 464 Mass. at 613. There is no question that playgrounds may incidentally promote the public's enjoyment of the "natural, scenic, historic, and esthetic qualities of [the] environment." The principal purpose of a public playground, however, is to allow the town to "conduct and promote recreation, play, sport and physical education" on fields, buildings and equipment constructed for those purposes. See G.L. c. 45, § 14. In contrast to park land, there is no limitation on how much of a playground may be improved with buildings, parking areas, concessions stands, basketball courts, etc. Nothing in G.L. c. 45 requires that any portion of a playground be retained or preserved in its natural condition. This distinction between "parks" and "playgrounds" in G.L. c. 45,

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[3] For example, in 1957, the Legislature enacted the Conservation Commission Act, G.L. c. 40, § 8C, which authorizes conservation commissions established by local governments to acquire interests in land, with the approval of the mayor or selectmen, "as may be necessary to 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 …."

upon which Judge Foster relied, was a feature of the revised statutes in existence when the Town of Ipswich acquired Bialek Park in 1912; see Revised Laws of Massachusetts (1902), Chapter 28 ("Public Parks, Playgrounds and Public Domain"), including §§1-18 ("Public Parks") and §§ 19-22 ("Public Playgrounds"). The 1912 Town Meeting voters should be presumed to have understood the difference when they voted to acquire the property. Subsequent use of the property, which appears to have included fairly intensive recreational use of playing fields, courts and play structures, is consistent with the original vote.

Based on the foregoing, it is my opinion that Bialek Park was acquired for "playground purposes," and as such, may be converted to a different use subject to the provisions of G.L. c. 40, § 15A, and that it is not subject to the requirement of a two-thirds vote of the Legislature under Article 97. G.L. c. 40A, § 15 requires that the board or officer having care, custody and control of Bialek Park must first vote that it is no longer needed for playground purposes, following which the Town Meeting may, by a two-thirds vote, transfer it to the School Department for educational use.

If you have any questions regarding this opinion, please let me know.