



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

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

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].

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.

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,

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”

Memo to Robin Crosbie
Bialek Park/Article 97 Issue
June 27, 2016
Page 7

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.

TAB A

1912

36 IPSWICH TOWN REPORT.

RECEIPTS.

Appropriation.....	\$2,257 54
Reimbursed, Commonwealth.....	550 00
Due from	67 60
Reimbursed, Private Work	911 30
Due for	274 37
Balance	97 26
	\$4,158 07

SOLDIERS' BENEFITS.

RELIEF.

Paid to

Josiah A Perkins, cash.....	\$ 60 00
Hannah Hull,	60 00
Martha Clarke,	48 00
Sarah Frost,	48 00
Levi W Mallard,	48 00
Annie M Shirley,	48 00
Martha M Foster,	48 00
Martha Plouff,	48 00
Melinda Conant,	40 00
G G Bailey, M D., medical.....	43 00
L E Willcomb, groceries.....	126 00
W B Richards,	140 00

37 IPSWICH TOWN REPORT.

Paid to

Geo. E MacArthur, medical.....	\$36 00
N Burnham, rent,	84 00
Nellie W Augur, rent.....	48 00
	\$925 00

STATE AID.

Cash	\$2926 00
Balance unexpended.....	331 00
	\$3257 00

RECEIPTS.

Appropriation	\$1200 00
Reimbursed, Commonwealth.....	2982 00
	\$4182 00

MEMORIAL DAY.

(Gen. Jas. Appleton, Post 128, G. A. R.....)

	\$235 00
	\$235 00

RECEIPT.

Appropriation	\$235 00
	\$235 00

PLAYGROUND.

Paid to

D M Smith, Adm., land.....	\$1100 00
Thomas H Lord,	1000 00
John W Nourse, plan.....	10 30
Balance unexpended.....	85 13
	\$2195 43

RECEIPTS.

Appropriation	\$1700 00
Boston & Maine R. R. Co.....	495 43
	\$2195 43

1912

Town, seven days before the time and place of said meeting.

Hereof fail not, and make due return of this warrant with your doings thereon to the Town Clerk, at the time and place aforesaid.

Given under our hands, this eighth day of March in the year of our Lord one thousand nine hundred and twelve.

Geo A Schofield } Selectman
 Chas E Goodhue } of
 John A Brown } Ipswich

* Ipswich March 19, 1912

To the Town Clerk of Ipswich.

I have served the within Warrant by posting up attested copies thereof, one at the Town Hall, one at the Post Office, and one at each of the Public Meeting Houses in said town, seven days before the time for holding said meeting.

Wesley B. Atkinson, Constable of Ipswich.

Special Town Meeting, called to order by the Town Clerk Tuesday March 19th at 8 o'clock in the evening. The Warrant is read by the Clerk. Charles A Hayward Esq is chosen Moderator and he is duly sworn. Action was taken as follows.

Article 2. To see if the Town will vote to sell the Town Farm.

Voted, That a committee of three be appointed by the Moderator, said committee to consult with the town council in regard to the matter, to advertise the farm for sale, and to obtain the best possible price, offered, and report at some future meeting.

Voted that the sum of two hundred dollars be appropriated to be raised and assessed upon the taxable polls and estates in the town for the use of said committee to meet any expense incurred in relation to the sale of the farm.

*

Article 3. Public Play Grounds.

Voted that a committee consisting of the Chairman of the Selectmen, Chairman of the School Committee, Chairman of the Finance Committee and Mr Howard H Doughty, and Mr James S Robinson, be instructed to investigate the matter, examine locations and the probable cost of such grounds and report at some future meeting.

No further business appearing it was voted that this meeting be dissolved. Dissolved attest Charles W Bamford, Town Clerk.

Article 2. The Moderator appoints Geo A. Schofield, Robert S Kimball and Herbert E Mason, committee

Annual Town Meeting held by adjournment - Tuesday March 19, 1912 opened from adjournment at 8:30 o'clock P.M. Charles A Hayward Esq. Moderator.

Voted to take up Article 20 of the Warrant.

Voted that the sum of four thousand nine hundred and thirty dollars be appropriated to be raised and assessed upon the taxable polls and estates in the Town for the payment of interest on Town notes the present year.

Art. 20, indent.
 Town Notes
 \$4930,

Art. 21

Article 21. Voted to indefinitely postpone action on Article twenty one.

Art. 22
 Extend Water
 System

Article 22 Voted that the Water and Light Commissioners be authorized to extend the Water System to such parts of the Town as may be desired, upon payment of five per cent of the cost

Art. 24.
Electric Light
Notes, \$2000
to issue.

authority to increase the same when thought best by the Commissioners to do so.
Voted that the Treasurer be authorized to issue notes to the amount of two thousand dollars, under authority of Section 8, Chapter 34 of the Revised Laws of Massachusetts, and acts in amendment thereof and in addition thereto. The said notes to be signed by the Treasurer, and countersigned by the Selectmen, and to bear interest at the rate of four per cent. per annum, payable semi-annually. The said notes to be paid within thirty years from the date of issue.
The payment of principal and interest thereof, the date and all matters not provided for by vote of the Town relative to said notes to be determined by the said Treasurer and Selectmen.
In favor forty one, negative none.

Art. 25, \$200
Town Records.

Article 25. Voted that the sum of two hundred dollars be appropriated, to be used to meet the expense of repairs of the Ancient Records of the Town.

Art. 26.

Article 26. Voted to indefinitely postpone action on Article twenty six.

Art. 7.

Voted to take Article Seven from the table. Voted that the said Article Seven be laid over to the next adjournment of this meeting.

Voted that this meeting be now adjourned to Friday evening April 5th next. adjourned.

Attest: Charles W. Bamford, Town Clerk.

* Ipswich Friday April 5th 1912

Annual Town Meeting, held by adjournment, opened at 7.30 o'clock P.M. Charles A. Dayward, Esq. Moderator.

Board of Health.

The question of the legality of the election of a member of the Board of Health, being under discussion, it was Voted that the Town Clerk be instructed to present the matter to the Secretary of the Commonwealth and ask for his opinion or decision on the question.

Committee on the
of Town Farm.

In compliance with the action of the Town at the Special Town Meeting held March 19th last the Moderator appointed the following gentlemen a committee to obtain a price for the Town Farm and to report at some future meeting, Committee: George A. Schofield, Robert S. Kimball, and Herbert A. Mason.

and Committee to confer
the Trustees of the
Manning School.

Voted that the School Committee be authorized to confer with the Trustees of the Manning School Fund relative to the conveyance to the Town of a part or the whole of the property of the Manning School Trustees, and to report at some future Town Meeting.

\$350.00 for
Commons

Article 17. Voted that the sum of three hundred and fifty dollars, be appropriated to be raised and assessed upon the ratable polls and estates in the Town to be expended in beautifying

June 21, 1912

1912

Warrants to issue 8
notes for \$1700.00
play ground

Article 4. Voted that the sum of one thousand seven hundred dollars, be appropriated for the purchase of purchasing land for a public play ground. In favor twenty eight; opposed none.
Voted that the Treasurer be and is hereby authorized to issue notes to the amount of seventeen hundred dollars, said notes to be signed by the Treasurer and countersigned by the Selectmen and to bear interest at the rate of four per cent per annum. The notes to be as follows, two notes for six hundred dollars and one note for five hundred dollars, the first two of said notes to become due in one and two years from date of issue and the third note to become due in three years from date of issue, the interest to be paid semi-annually. Payment of the principal, and interest thereof and all other matters relative to said notes not provided for by vote of said Town to be determined by said Treasurer and Selectmen. In favor twenty eight; opposed none.

Article 5. To accept the Act relative to leasing the clam flats, as provided in Chap 710, acts 1912.
Chapter 710, Acts 1912.

Chapter 710 relating
to the taking of clams
in Essex County

Be it enacted, as follows, - Section 1. Any city or town in the County of Essex may take from the Commonwealth a lease of the right to control and regulate the taking of clams from all the flats within its borders.
Section 2. The Commissioners on fisheries and game shall issue a lease as aforesaid to each city or town in said county which makes application therefor, for a term of ten years, at an annual rental of five dollars a year to be paid into the treasury of the Commonwealth.
Section 3. No such lease shall give the right to any city or town to sublet, grant or sublease to any person or corporation any of its rights under the lease.
Section 4. All rights granted to a city or town under a lease as aforesaid shall be held by the city or town for the benefit of its citizens.
Section 5. After acceptance of this act cities through their city governments and towns at any annual or special meeting duly called for the purpose may make rules and regulations in regard to the taking of clams, and may authorize the granting of permits to citizens of such cities and towns to take clams, and may prescribe the time and methods of such taking.
Section 6. Any inhabitant of the commonwealth may, without such permit, take clams for the use of his own family from the waters of his own or any other city or town, and may take from the waters of his own city or town clams for bait, not exceeding three bushels, including shells, in any one day, subject to the general rules and regulations adopted by cities and towns, respectively, in the manner hereinbefore specified in this section as to the time, place and methods of taking clams. Whoever takes any clams without a permit and in violation of the provisions of this section shall forfeit not less than five nor more than fifty dollars for each offence.
Section 7. Nothing contained in this act shall be construed as affecting any of the existing provisions of law relative to the issuing of licenses and grants for the planting, growing or cultivating of oysters or other shellfish.
Section 8. All acts and parts of acts inconsistent herewith are hereby repealed.
Section 9. This act shall take effect in any city upon its acceptance by the city council or corresponding body of such city, and in any town upon its acceptance by a majority of the voters of such town present and voting thereon at any annual town meeting or at any special town meeting duly called for the purpose. {Approved, June 4, 1912}

TAB B

in the presence of } Esther ^{her} ~~X~~ _{mark} Larnar. seal.
 Wm H. Fay to both Commonwealth of Massachusetts, Essex ss. July 1, 1912. Then personally appeared the above named Louis Larnar and acknowledged the foregoing instrument to be his free act and deed, before me.
 Wm H. Fay. Justice of the Peace,
 Essex ss. Rec'd July 1, 1912. 1. m. past 11. A.M. Recorded & examined.

D. M. Smith
 to
 Town of Spewich

Know all men by these presents, that whereas I, Dexter M. Smith, of Spewich in the County of Essex and Commonwealth of Massachusetts, as administrator of the Estate of John H. Cogswell, late of said Spewich, deceased, by virtue of a license granted to me on the sixth day of May A.D. 1912. by the Probate Court for said County of Essex sold the real estate of the said deceased, hereinafter described, at private sale, to the Town of Spewich, a municipal corporation in said County of Essex, for the sum of Eleven hundred dollars. Now therefore, in consideration of the said sum of Eleven hundred dollars to me paid by the said Town of Spewich, the receipt whereof is hereby acknowledged, I do, as administrator as aforesaid, and by virtue of the aforesaid license, hereby grant, bargain, sell and convey unto the said Town of Spewich, a certain parcel of land lying in Spewich in said County of Essex and described as follows: Said parcel being tillage land situate on Boxford Street, and bounded southerly by said Street, northeasterly by land of Thomas H. Lord, northwesterly by land of N. R. Underhill, and westerly by land of Dolan or Patrick Doulon, formerly of Dickinson, To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said Town of Spewich and its assigns, to their own use and behoof forever. In witness whereof I hereto set my hand and seal this twenty third day of May in the year one thousand nine hundred and twelve.
 Dexter M. Smith, seal.

Commonwealth of Massachusetts, Essex ss. May 23, 1912. Then personally appeared the above named Dexter M. Smith and acknowledged the foregoing instrument to be his free act and deed, before me.
 Charles A. Hayward. Justice of the Peace.

Essex ss. Rec'd July 1, 1912. 2. m past 11. A.M. Recorded & examined

Know all men by these presents, that I, William Mc Carthy of Hamilton in the County of Essex and Commonwealth of Massachusetts, in consideration of Five hundred dollars (\$500.00) paid by Thomas J. Broderick of Spaulch, in said County of Essex, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Thomas J. Broderick, a certain lot of land with the buildings thereon situate in said Hamilton, and bounded on the Southwest by Asbury Street about seventy (70) feet; on the northwest by land now or formerly of Harriet E. Pingree about two hundred and ten (210) feet; on the northeast by land now or formerly of William Mc Ginley about seventy (70) feet; and on the southeast by land now or formerly of Emory Lawrence and land now or formerly of Charles H. Thompson about two hundred and ten (210) feet. Being the same premises to me conveyed by David Pingree, trustee, by his deed dated November 12, 1908, and recorded with Essex South District Registry of Deeds, Book 1943, Page 262. But this conveyance is made, however, subject to a mortgage thereon to the Beverly Savings Bank on which the sum of nine hundred dollars (\$900.00) remains unpaid. To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging to the said Thomas J. Broderick, and his heirs and assigns, to their own use and behoof forever. And I hereby for myself and my heirs, executors, and administrators, covenant with the grantee and his heirs and assigns that I am lawfully seized in fee-simple of the granted premises; that they are free from all incumbrances, except as aforesaid, that I have good right to sell and convey the same as aforesaid; and that I will and my heirs, executors, and administrators shall warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons. Provided nevertheless that if I, or my heirs, executors, administrators, or assigns, shall pay unto the grantee, or his executors, administrators, or assigns, the sum of five hundred dol-

Wm Mc Carthy
to
T. J. Broderick

Discharge

B. 2744 P. 102

before me, Wesley K. Bell, Justice of the Peace.

Essex ss. Rec'd July 30, 1912. 10 o'clk. A.M. Recorded and Examined

Know all men by these presents that we, Thomas H. Sord and Lucy A. Sord, singlewoman, both of Ipswich in the County of Essex and Commonwealth of Massachusetts, in consideration of one thousand dollars (\$1000.00) paid by the Inhabitants of Ipswich, a municipal corporation in said County of Essex, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Inhabitants of Ipswich, a certain parcel of land situate on the Northerly side of Bonford Road, sometimes called the Sinebrook Road, in said Ipswich and bounded as follows, to wit: Southerly by said Bonford Road; Easterly by land of the Boston + Maine Railroad; North-erly in part by a Right of Way separating the land herein conveyed from land formerly of Nathan Jewett and in part by land of the First Parish of Ipswich and Westerly in part by land of W. R. Underhill and in part by land formerly of John H. Cogswell, now of the Inhabitants of Ipswich. Being the same premises conveyed to Ara Sord by Abraham Caldwell by his deed dated April 20, 1842, and recorded with Essex So. Dist. Deeds, Book 358, Leaf 158, by George Harris by his deed dated May 11, 1886, and recorded with said Deeds Book 1174, Leaf 37, and by Thomas Staniford, Aaron Cogswell, and Abraham Sord by their deeds dated September 28, 1847, January 6, 1866, and August 19, 1884, re-spectively, and recorded herewith, and to which prem-ises we have title as the heirs-at-law of said Ara Sord. For a more particular description of said prem-ises, see plan of said premises recorded herewith. To have and to hold the granted premises, with all the privileges and appurtenances thereto belong-ing, to the said Inhabitants of Ipswich and its suc-cessors and assigns, to their own use and behoof for-ever. And we hereby for ourselves and our heirs, ex-ecutors, and administrators, covenant with the gran-tee and its successors and assigns that we are lawfully seized in fee-simple of the granted prem-ises; that they are free from all incumbrances; that

S.A. Sord et al.
to
Inhabitants of
Ipswich.
+ Plans.

Handwritten note:
I am in law
room

we have good right to sell and convey the same as aforesaid, and that we will and our heirs, executors and administrators, shall warrant and defend the same to the grantee and its successors and assigns forever against the lawful claims and demands of all persons. And for the consideration aforesaid I, Sueretia S. Sord, wife of said Thomas H. Sord, do hereby release unto the said grantee and its successors and assigns all right of or to both dower and homestead in the granted premises, all rights by statute and all other rights and interests therein. *In witness whereof* we the said Thomas H. Sord, Sueretia S. Sord and Lucy A. Sord, hereunto set our hands and seals this twenty-fifth day of July in the year one thousand nine hundred and twelve.

Signed and sealed
in presence of
George H. W. Hayes
to J. H. L.

Thomas H. Sord seal.
Sueretia S. Sord seal.
Lucy A. Sord seal.

Commonwealth of Massachusetts

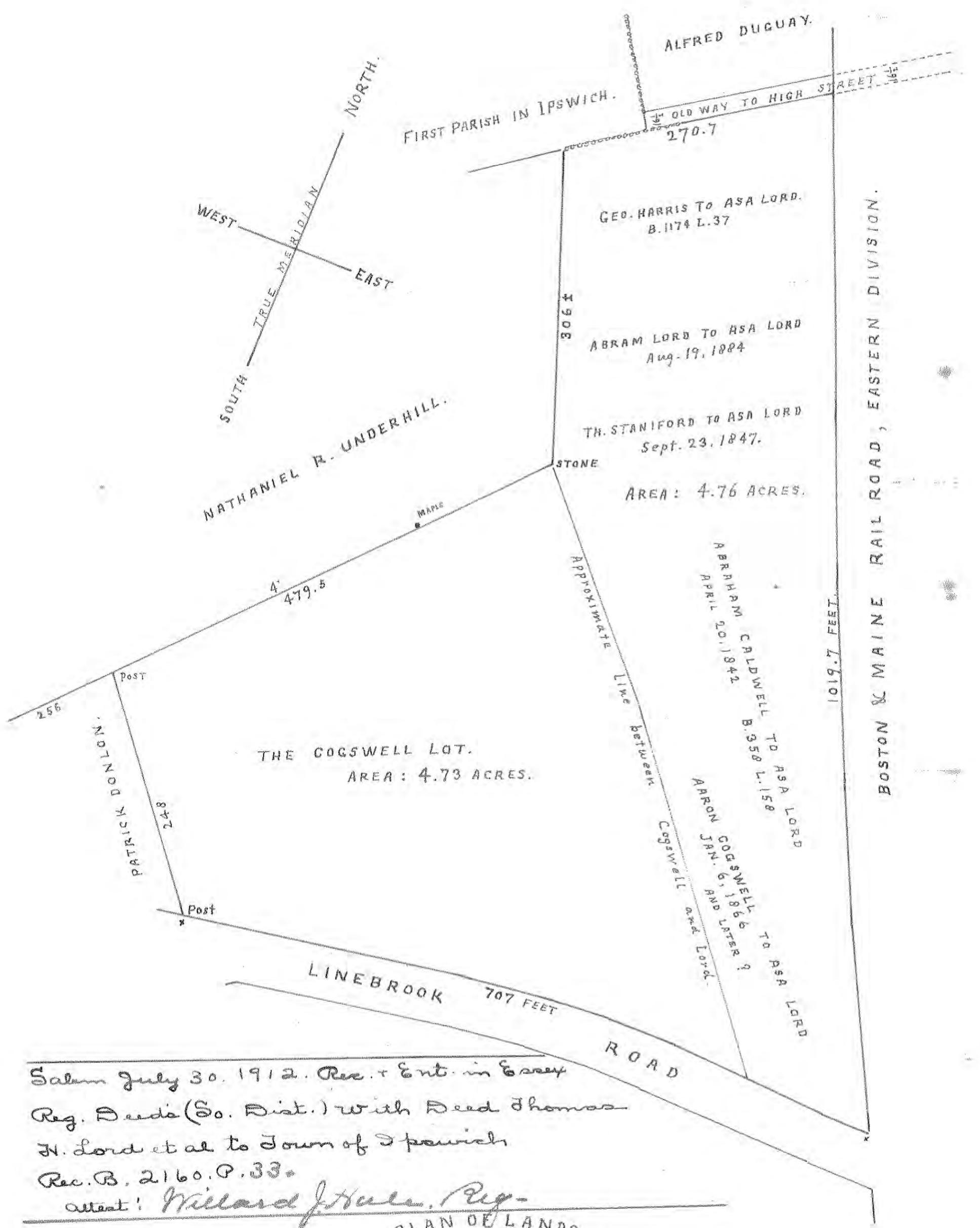
Essex, ss. July 25, 1912. Then personally appeared the above-named Thomas H. Sord and acknowledged the foregoing instrument to be his free act and deed, before me.

George H. W. Hayes, Justice of the Peace.

Essex ss. Recd July 30, 1912. 10 o'clk. A.M. Recorded + Examined

W. Mayer.
to
J. Mroszczyk.

Know all men by these presents that I, William Mayer of Ipswich in the County of Essex and Commonwealth of Massachusetts, in consideration of one dollar and other valuable consideration, paid by Joseph Mroszczyk of said Ipswich, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Joseph Mroszczyk a certain parcel of land with the dwelling house thereon situate on Washington Street in said Ipswich and bounded and described as follows, to wit: Beginning at the Easterly corner of said lot by land of the heirs of Michael Reddy; thence running Northwesterly by said Washington Street thirty-five (35) feet to a stake in the center of a right of way by other land formerly of the grantor, this day conveyed to Joseph Cupryma; thence running



Salem July 30, 1912. Rec. + Ent. in Essex
 Reg. Deeds (So. Dist.) with Deed Thomas
 H. Lord et al to Town of Ipswich
 Rec. B. 2160. P. 33.
 attest: *Willard J. Hall, Reg.*

PLAN OF LANDS

PURCHASED BY THE TOWN OF IPSWICH
 IN THE YEAR 1912
 FOR A PLAY GROUND.

By John W. Nourse, July 1912.
 SCALE: 1" = 100'.

TAB C

& Plan
See Pl. B.
108 Pl. 82

We, Albert J. Horne and Ruth M. Horne, husband and wife, the said Ruth M. Horne also being known as Ruth C. Horne, both

of Ipswich, Essex County, Massachusetts

being ~~married~~, for consideration paid, grant to The Inhabitants of the Town of Ipswich, a Municipal Corporation, in said Essex County, Commonwealth of Massachusetts

with quitclaim covenants

the land in Ipswich between Kimball Avenue and Linebrook Road,

(Description and encumbrances, if any)

Beginning at the Northerly point thereof at land of the Inhabitants of the Town of Ipswich and of Leonella A. Beaulieu; thence running southeasterly along said Ipswich land a distance of 323 feet more or less to a point; thence southwesterly along same land of the Town of Ipswich a distance of 254 feet more or less to a point; thence Northwesterly and Westerly on several courses along land of George N. and Lillian Soffron and other land of Albert J. & Ruth M. Horne a total distance of 779 feet more or less to a point of intersection with Kimball Avenue, so-called; thence northerly along said Kimball Avenue a distance of 30 feet; thence Southeasterly along land of George F. and Richard A. Hammond a distance of 108 feet more or less; thence northerly along land of the aforesaid Hammonds a distance of 230 feet more or less to a point; thence southeasterly a distance of 429 feet more or less, northeasterly a distance of 182 feet more or less, and more easterly a distance of 167 feet more or less, the last three bounds along land of the aforesaid Leonella A. Beaulieu to the point of beginning.

Containing 3.25 acres more or less. The above parcel is shown on a Plan marked "Town of Ipswich, Proposed Addition to Linebrook Playground, dated November 5, 1965, Scale 1" = 100', " to be recorded herewith, and as to description will govern.

For title see deed of Elizabeth E. Adams to Albert J. Horne, et ux, dated May 3, 1950 and recorded with Essex South Registry of Deeds, Book 3739, Page 362, and also see deed of Lucy Ardell Kimball to Albert J. Horne, et ux, dated September 8, 1961 and recorded with Essex South Registry of Deeds. Said land being a portion of premises described in both above deeds.

See certificate of authorization recorded herewith by Clerk of the Grantee Inhabitants of the Town of Ipswich of action taken by Article 50, Annual Town Meeting 1966.



husband
wife of said grantor,

release to said grantee all rights of tenancy by the curtesy and other interests therein.
dower and homestead

Witness our hands and seals this 29th day of April 1966



Albert J. Horne
Ruth M. Horne

The Commonwealth of Massachusetts

Essex ss. 29th April 1966

Then personally appeared the above-named Albert J. Horne and Ruth M. Horne,

and acknowledged the foregoing instrument to be their free act and deed, before me

Terrance F. Perkins
Terrance F. Perkins

My commission expires 7 June 1970

Notary Public



BOOK 5359 PAGE 239

TELEPHONE
356-4161

OFFICE OF TOWN CLERK
IPSWICH, MASS.

May 6, 1966

TO WHOM IT MAY CONCERN:

I, Anthony A. Murawski, Town Clerk of the Town of Ipswich, hereby certify that the following is a true copy of the article and the action as taken at the Annual Town Meeting of Monday, March 7, 1966, which was adjourned to Tuesday, March 15, 1966, to wit:

Article 50.

To see if the Town will vote to appropriate a sum of money for the purchase of a piece of land owned by Albert J. & Ruth Horne of Ipswich, to provide for the payment thereof, and to authorize the Board of Selectmen to pay the money and accept a suitable deed on behalf of the Town from the said Grantors, said land bordering the present Linebrook Playground, so-called, between Kimball Ave. and Linebrook Road in said Ipswich. The parcel of land is bounded and described as follows: Beginning at the northerly point thereof at land of the Inhabitants of the Town of Ipswich and of Leonella A. Beaulieu; thence running southeasterly along said Ipswich land a distance of 323 feet more or less to a point; thence running southwesterly along same land of the Town of Ipswich a distance of 254 feet more or less to a point; thence northwesterly and westerly on several courses along land of George N. and Lillian Soffron and other land of Albert J. & Ruth M. Horne a total distance of 779 feet more or less to a point of intersection with Kimball Avenue, so-called; thence northerly along said Kimball Avenue a distance of 30 feet; thence southeasterly along land of George F. and Richard A. Hammond a distance of 108 feet more or less; thence northerly along land of the aforesaid Hammonds a distance of 230 feet more or less to a point; thence southeasterly a distance of 429 feet more or less, northeasterly a distance of 182 feet more or less, and more easterly a distance of 167 feet more or less, the last three bounds along land of the aforesaid Leonella A. Beaulieu to the point of beginning. Containing 3.25 acres more or less. The above land is shown on a plan marked "Town of Ipswich, Proposed Addition to Linebrook Playground, dated Nov. 5, 1965. Scale 1" = 100'."

ACTION:

Mr. Pechilis moved that the Town raise and appropriate the sum of \$4800 for the purchase of a piece of land owned by Albert J. & Ruth Horne of Ipswich and to authorize the Board of Selectmen to pay the money and accept a suitable deed on behalf of the Town from the said Grantors, said land bordering the present Linebrook Playground, so-called, between Kimball Avenue and Linebrook Road in said Ipswich. The parcel of land is bounded and described as follows: Beginning at the northerly point there-



TELEPHONE
956-4161

BOOK 5359 PAGE 240

OFFICE OF TOWN CLERK
IPSWICH, MASS.

of at land of the Inhabitants of the Town of Ipswich and of Leonella A. Beaulieu; thence running southeasterly along said Ipswich land a distance of 323 feet more or less to a point; thence southwesterly along same land of the Town of Ipswich a distance of 254 feet more or less to a point; thence Northwesterly and Westerly on several courses along land of George N. and Lillian Soffron and other land of Albert J. and Ruth M. Horne a total distance of 779 feet more or less to a point of intersection with Kimball Avenue, so-called; thence northerly along Kimball Avenue a distance of 30 feet; thence southeasterly along land of George F. and Richard A. Hammond a distance of 108 feet more or less; thence northerly along land of the aforesaid Hammonds a distance of 230 feet more or less to a point; thence southeasterly a distance of 429 feet more or less, northeasterly a distance of 182 feet more or less, and more easterly a distance of 167 feet more or less; the last three bounds along land of the aforesaid Leonella A. Beaulieu to the point of beginning. Containint 3.125 acres more or less. The above land is shown on a plan marked "Town of Ipswich, Proposed Addition to Linebrook Playground, dated Nov. 5, 1965, Scale 1" = 100'." Seconded. Finance Committee recommends.

Mr. John Dolan spoke in favor but suggested that in the future the Conservation Commission should look into the possibility of acquiring land such as this to receive 50% reimbursement from the state.

Motion carried by unanimous voice vote.

ATTEST: A true copy;


Anthony A. Murawski
Anthony A. Murawski,
Town Clerk

Essex ss. Recorded May 6, 1966. 34 m. past 3 P.M. #189

TAB D

ALBERT J. HORNE and RUTH M. HORNE, also known as Ruth C. Horne,
husband and wife, both

of Ipswich,

Essex County, Massachusetts

being ~~un~~married, for consideration paid, grant to

The INHABITANTS OF THE TOWN OF IPSWICH,

a municipal corporation in Essex County, Massachusetts
with quitclaim covenants

the land in Ipswich, viz:

(Description and encumbrances, if any)

A certain parcel of land situate on the Easterly side of Kimball Avenue
in said Ipswich, bounded and described as follows, to wit:

Beginning at the Northerly corner thereof on Kimball Avenue by land of
said Inhabitants of the Town of Ipswich,

thence running SOUTHWESTERLY by said Kimball Avenue a distance of 103
feet more or less to land now or formerly of Labadini, formerly of
Edward T. Wells;

thence turning and running SOUTHEASTERLY on a straight line by land of
said Labadini and by other land of the Grantors 338 feet more or less
to land now or formerly of George N. Soffron;

thence turning and running NORTHERLY by said land of Soffron 145 feet
more or less to a concrete bound at said land of Inhabitants of the
Town of Ipswich;

thence turning and running NORTHWESTERLY on two courses by said land
of Inhabitants of the Town of Ipswich 381 feet more or less to said
Kimball Avenue and the point of beginning.

For title see deeds of Lucy Ardell Kimball to the Grantors and Elizabeth
E. Adams to the Grantors as recorded with Essex South District Registry
of Deeds Book 4838 Page 297 and Book 3739 Page 362 respectively.

Also see Plan of land on file with the Engineering Office of the Town of
Ipswich dated April 16, 1968, and containing 36,000 sq. ft., more or less.

Reserving a right to the Grantors, their heirs or assigns, to pass and
repass by foot or vehicle along the southwesterly boundary of land
herein granted by land of Labadini from Kimball Avenue to other land
of the Grantors acquired under deed of Adams to Horne recorded Book 3739
Page 362. The width of the said right shall not exceed fifteen feet.

This conveyance is made under the authority of the Action of the Town
Meeting of 4 March 1968, Article 18, to be recorded herewith.

Notary Public

Witness our hands and seals this 8th day of May 1968

Witness our hands and seals this 8th day of May 1968

Albert J. Horne
Ruth M. Horne

The Commonwealth of Massachusetts

Essex ss. 8th May 1968

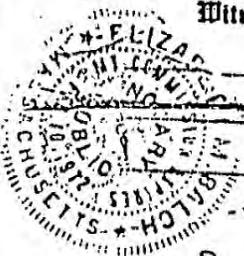
Then personally appeared the above-named Albert J. and Ruth M. Horne

and acknowledged the foregoing instrument to be their free act and deed, before me

My commission expires Feb 10, 1972 19

Elizabeth M. Balch
Notary Public

Mass. Excise Stamps \$ 6.00 affixed
and cancelled on back of this instrument





BK 5530 PG 105

TELEPHONE
358-4181

OFFICE OF TOWN CLERK
IPSWICH, MASS.

May 8, 1968

TO WHOM IT MAY CONCERN:

I, Anthony A. Murawski, Town Clerk of the Town of Ipswich, hereby certify that the following is a true copy of the article and the action as taken at the Annual Town Meeting held on Monday, March 4, 1968, to wit:

Article 18.

To see if the Town will appropriate the sum of \$3,000 to purchase 36,000 square feet of land, more or less, currently owned by Albert and Ruth Horne and located off Kimball Avenue abutting land now owned by the Town, the same to become part and parcel the the new section of Linebrook playground.

ACTION:

Mr. Navarro moved that the town raise and appropriate \$3,000 to purchase a portin of land as shown on plan in the Town Manager's office and presented at a Selectmen's meeting, now owned by Albert and Ruth Horne, located Adjacent to the right of way from Kimball Ave. to the Linebrook Playground for playground and park purposes. Seconded. Motion carried by 531 in favor and 100 opposed. Finance Committee recommends.

ATTEST: A true copy;



Anthony A. Murawski
Anthony A. Murawski,
Town Clerk

Essex ss. Recorded May 22, 1968. 8 m. past 11 A.M. #88



BK 5530 PG 105

TELEPHONE
358-4181

OFFICE OF TOWN CLERK
IPSWICH, MASS.

May 8, 1968

TO WHOM IT MAY CONCERN:

I, Anthony A. Murawski, Town Clerk of the Town of Ipswich, hereby certify that the following is a true copy of the article and the action as taken at the Annual Town Meeting held on Monday, March 4, 1968, to wit:

Article 18.

To see if the Town will appropriate the sum of \$3,000 to purchase 36,000 square feet of land, more or less, currently owned by Albert and Ruth Horne and located off Kimball Avenue abutting land now owned by the Town, the same to become part and parcel the the new section of Linebrook playground.

ACTION:

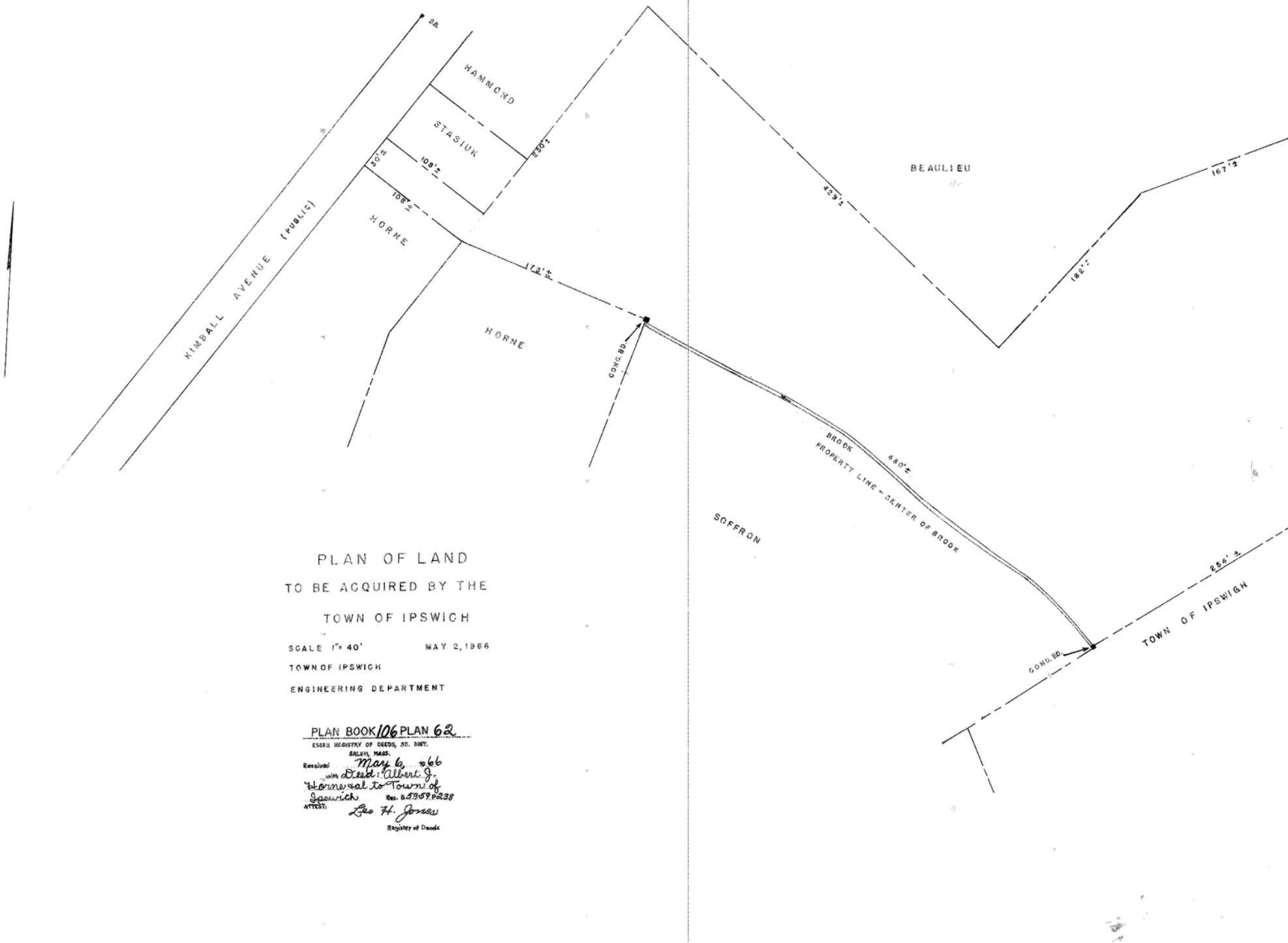
Mr. Navarro moved that the town raise and appropriate \$3,000 to purchase a portin of land as shown on plan in the Town Manager's office and presented at a Selectmen's meeting, now owned by Albert and Ruth Horne, located Adjacent to the right of way from Kimball Ave. to the Linebrook Playground for playground and park purposes. Seconded. Motion carried by 531 in favor and 100 opposed. Finance Committee recommends.

ATTEST: A true copy;



Anthony A. Murawski
Anthony A. Murawski,
Town Clerk

Essex ss. Recorded May 22, 1968. 8 m. past 11 A.M. #88



PLAN OF LAND
TO BE ACQUIRED BY THE
TOWN OF IPSWICH

SCALE 1" = 40' MAY 2, 1966
TOWN OF IPSWICH
ENGINEERING DEPARTMENT

PLAN BOOK 106 PLAN 62

ESSEX REGISTRY OF DEEDS, NO. DIST.
SALISBURY, MASS.
Received *May 6, 1966*
with Deed: *Albert J. Stasiuk*
transferred to Town of
Ipswich Reg. B. 33591238
ATTEST: *Leo H. Jones*
Registry of Deeds

T A B E

may grant approval for the City of Brockton to borrow an amount of money which includes a sum allocated for replacement of equipment and furnishings.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 45

June 6, 1973

Honorable David M. Bartley
*Speaker of the House of
Representatives*
State House
Boston, Massachusetts

Dear Speaker Bartley:

The House of Representatives, by H. 6085, has addressed to me several questions regarding Article 97 of the Articles of Amendment to the Constitution of Massachusetts. Establishing the right to a clean environment for the citizens of Massachusetts, Article 97 was submitted to the voters on the November 1972 ballot and was approved. The questions of the House go to the provision in the Article requiring that acts concerning the disposition of, or certain changes in, the use of certain public lands be approved by a two-thirds roll-call vote of each branch of the General Court.

Specifically, your questions are as follows:

1. Do the provisions of the last paragraph of Article XCVII of the Articles of the Amendments to the Constitution requiring a two thirds vote by each branch of the general court, before a change can be made in the use or disposition of land and easements acquired for a purpose described in said Article, apply to all land and easements held for such a purpose regardless of the date of acquisition, or in the alternative, do they apply only to land and easements acquired for such purposes after the effective date of said Article of Amendments?

2. Does the disposition or change of use of land held for park purposes require a two thirds vote, to be taken by the yeas and nays of each branch of the general court, as provided in Article XCVII of the Articles of the Amendments to the Constitution, or would a majority vote of each branch be sufficient for approval?

3. Do the words "natural resources" as used in the first paragraph of Article XCVII of the Articles of the Amendments to the Constitution include ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds; wild mammals and game; sea and fresh water fish of every

description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits, as formerly set out in the definition of the words "natural resources" in paragraph two of section one of chapter twenty-one of the General Laws?

4. Do the provisions of the fourth paragraph of Article XCVII of the Articles of the Amendments to the Constitution apply to any or all of the following means of disposition or change in use of land held for a public purpose: conveyance of land; long-term lease for inconsistent use; short-term lease, two years or less, for an inconsistent use; the granting or giving of an easement for an inconsistent use; or any agency action with regard to land under its control if an inconsistent use?

The proposed amendment to the Constitution was agreed to by the majority of the members of the Senate and the House of Representatives, in joint session, on August 5, 1969 and again on May 12, 1971, and became part of the Constitution by approval by the voters at the state election next following, on November 7, 1972. The full text of Article 97 is as follows:

ART. 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.

1. The first question of the House of Representatives asks, in effect, whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97, November 7, 1972. For the reasons below, I answer in the affirmative.

The General Court did not propose this Amendment nor was it approved by the voting public without a sense of history nor void of a purpose worthy of a constitutional amendment. Examination of our constitutional history firmly establishes that the two-thirds roll-call vote requirement applies to public lands wherever taken or acquired.

Specifically, Article 97 annuls Article 49, in effect since November 5, 1918. Under that Article the General Court was empowered to provide for the taking or acquisition of lands, easements and interests therein "for the purpose of securing and promoting the proper conservation, development, utilization and control" [of] "agricultural, mineral, forest, water and other natural resources of the commonwealth." Although inclusion of the word "air" in this catalogue as it appears in Article 97 may make this new article slightly broader than the supplanted Article 49 as to purposes for which the General Court may provide for the taking or acquisition of land, it is clear that land taken or acquired under the earlier Article over nearly fifty years is now to be subjected to the two-thirds vote requirement for changes in use or other dispositions. Indeed all land whenever taken or acquired is now subject to the new voting requirement. The original draftsmen of our Constitution prudently included in Article 10 of the Declaration of Rights a broad constitutional basis for the taking of private land to be applied to public uses, without limitation on what are "public uses." By way of acts of the Legislature as well as through generous gifts of many of our citizens, the Commonwealth and our cities and towns have acquired parkland and reservations of which we can be justly proud. To claim that new Article 97 does not give the same care and protection for all these existing public lands as for lands acquired by the foresight of future legislators or the generosity of future citizens would ignore public purposes deemed important in our laws since the beginning of our Commonwealth.

Moreover, if this amendment were only prospective in effect, it would be virtually meaningless. In our Commonwealth, with a life commencing in the early 1600s and already cramped for land, it is most unlikely that the General Court and the voters would choose to protect only those acres hereafter added to the many thousands already held for public purposes. The comment of our Supreme Judicial Court concerning the earlier Article 49 is here applicable: "It must be presumed that the convention proposed and the people approved and ratified the Forty-ninth Amendment with reference to the practical affairs of mankind and not as a mere theoretical announcement." *Opinion of the Justices*, 237 Mass. 598, 608.

2. In its second question the House asks, in effect, whether the two-thirds roll-call vote requirement applies to land held for park purposes, as the term "park" is generally understood. My answer is in the affirmative, for the reasons below.

One major purpose of Article 97 is to secure 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." The fulfillment of these rights is uniquely carried out by parkland acquisition. As the Supreme Judicial Court has declared,

"The healthful and civilizing influence of parks in or near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to the public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment." *Higginson v. Treasurer and School House Commissioners of Boston*, 212 Mass. 583, 590; see also *Higginson v. Inhabitants of Nahant*, 11 Allen 530, 536.

A second major purpose of Article 97 is "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." Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.

This question as to parks raises a further practical matter in regard to implementing Article 97 which warrants further discussion. The reasons the Legislature employs to explain its actions can be of countless levels of specificity or generality and land might conceivably be acquired for general recreation purposes or for very explicit uses such as the playing of baseball, the flying of kites, for evening strolls or for Sunday afternoon concerts. Undoubtedly, to the average man, such land would serve as a park but at even a more legalistic level it clearly can also be observed that such land was acquired, in the language of Article 97, because it was a "resource" which could best be "utilized" and "developed" by being "conserved" within a park. But it is not surprising that most land taken or acquired for public use is acquired under the specific terms of statutes which may not match verbatim the more general terms found in Article 10 of the Declaration of Rights of the Constitution or in Articles 39, 43, 49, 51 and 97 of the Amendments. Land originally acquired for limited or specified public purposes is thus not to be excluded from the operation of the two-thirds roll-call vote requirement for lack of express invocation of the more general purposes of Article 97. Rather the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in "public purpose," changed from "public uses" appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.

Thus, all land, easements and interests therein are covered by Article 97 if taken or acquired for "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" as these terms are

broadly construed. While small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify. Given the spirit of the Amendment and the duty of the General Court, it would seem prudent to classify lands and easements taken or acquired for specific purposes not found verbatim in Article 97 as nevertheless subject to Article 97 if reasonable doubt exists concerning their actual status.

3. The third question of the House asks, in effect, how the words "natural resources," as appearing in Article 97, are to be defined.

Several statutes offer assistance to the General Court, all without limiting what are "natural resources." General Laws c. 21, § 1 defines "natural resources," for the purposes of Department of Natural Resources jurisdiction, as including

"ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds, wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits."

In addition, G. L. c. 12, § 11D, establishing a Division of Environmental Protection in my Department, uses the words "natural resources" in such a way as to include air, water, "rivers, streams, flood plains, lakes, ponds or other surface or subsurface water resources" and "seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks or historic districts or sites." General Laws c. 214, § 10A, the so-called citizen-suit statute, contains a recitation substantially identical. To these lists Article 97 would add only "agricultural" resources.

It is safe to say, as a consequence, that the term "natural resources" should be taken to signify at least these catalogued items, as a minimum. Public lands taken or acquired to conserve, develop or utilize any of these resources are thus subject to Article 97.

It is apparent that the General Court has never sought to apply any limitation to the term "natural resources" but instead has viewed the term as an evolving one which should be expanded according to the needs of the time and the term was originally inserted in our Constitution for just that reason. See *Debate of the Constitutional Convention - 1917-1918*, p. 595. The resources enumerated above should, therefore, be regarded as examples of and not delimiting what are "natural resources."

4. The fourth question of the House requires a determination of the scope of activities which is intended by the words: "shall not be used for other purposes or otherwise disposed of."

The term "disposed" has never developed a precise legal meaning. As the Supreme Court has noted, "The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical significa-

tion." *Phelps v. Harris*, 101 U.S. 370, 381 (1880). The Supreme Court has indicated however, that "disposition" may include a lease. *U.S. v. Gratiot*, 39 U.S. 526 (1840). Other cases on unrelated subjects suggest that in Massachusetts the word "dispose" can include all forms of transfer no matter how complete or incomplete. *Rogers v. Goodwin*, 2 Mass. 475; *Woodbridge v. Jones*, 183 Mass. 549; *Lord v. Smith*, 293 Mass. 555.

In this absence of precise legal meaning, *Webster's Third New International Dictionary* is helpful. "Dispose of" is defined as "to transfer into new hands or to the control of someone else." A change in physical or legal control would thus prove to be controlling.

I therefore conclude that the "dispositions" for which a two-thirds roll-call vote of each branch of the General Court is required include: transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, of lands, easements and interests therein originally taken or acquired for the purposes stated in Article 97, and transfers from public ownership to private. Outright conveyance, takings by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements and all means of transfer or change of legal or physical control are thereby covered, without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.

This interpretation affords a more objective test, and is more easily applied, than "used for other purposes." Under Article 97 that standard must be applied by the Legislature, however, in circumstances which cannot be characterized as a disposition — that is, when a transfer or change in physical or legal control does not occur. A change of use within a governmental agency or within a political subdivision would serve as an apt example. Within any agency or political subdivision any land, easement or interest therein, if originally taken or acquired for the purposes stated in Article 97, may not be "used for other purposes" without the requisite two-thirds roll-call vote of each branch of the General Court.

It may be helpful to note how Article 97 is to be read with the so-called doctrine of "prior public use," application of which also turns on changes in use. That doctrine holds that

"public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." *Robbins v. Department of Public Works*, 355 Mass. 328, 330 and cases there cited.

The doctrine of "prior public use" is derived from many early cases which establish its applicability to transfers between corporations granted limited powers of the Commonwealth, such as eminent domain and authority over water and railroad easements. *E.g.*, *Old Colony Railroad Company v. Framingham Water Company*, 153 Mass. 561; *Boston Water Power Company v. Boston and Worcester Railroad Corporation*,

23 Pick. 360; *Boston and Maine Railroad v. Lowell and Lawrence Railroad Company*, 124 Mass. 368; *Eastern Railroad Company v. Boston and Maine Railroad*, 111 Mass. 125, and *Housatonic Railroad Company v. Lee and Hudson Railroad Company*, 118 Mass. 391. The doctrine was also applied at an early date to transfers between such corporations and municipalities and counties. E.g., *Boston and Albany Railroad Company v. City Council of Cambridge*, 166 Mass. 224 (eminent domain taking of railroad land); *Eldredge v. County Commissioners of Norfolk*, 185 Mass. 186 (eminent domain taking of railroad easement); *West Boston Bridge v. County Commissioners of Middlesex*, 10 Pick. 270 (eminent domain taking of turnpike land), and *Inhabitants of Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63 (eminent domain taking of a public way).

The doctrine of "prior public use" has in more modern times been applied to the following transfers between governmental agencies or political subdivisions: a) a transfer between state agencies, *Robbins v. Department of Public Works*, 355 Mass. 328 (eminent domain taking of Metropolitan District Commission wetlands), b) transfers between a state agency and a special state authority, *Commonwealth v. Massachusetts Turnpike Authority*, 346 Mass. 250 (eminent domain taking of MDC land) and see *Loschi v. Massachusetts Port Authority*, 354 Mass. 53 (eminent domain taking of parkland), c) a transfer between a special state commission and special state authority, *Gould v. Greylock Reservation Commission*, 350 Mass. 410 (lease of portions of Mount Greylock), d) transfers between municipalities, *City of Boston v. Inhabitants of Brookline*, 156 Mass. 172 (eminent domain taking of a water easement) and *Inhabitants of Quincy v. City of Boston*, 148 Mass. 389 (eminent domain taking of a public way), e) transfers between state agencies and municipalities, *Town of Brookline v. Metropolitan District Commission*, 357 Mass. 435 (eminent domain taking of parkland) and *City of Boston v. Massachusetts Port Authority*, 356 Mass. 741 (eminent domain taking of a park), f) a transfer between a special state authority and a municipality, *Appleton v. Massachusetts Parking Authority*, 340 Mass. 303 (1960) (eminent domain, Boston Common), g) a transfer between a state agency and a county, *Abbot v. Commissioners of the County of Dukes County*, 357 Mass. 784 (Department of Natural Resources grant of avigation easement), and h) transfers between counties and municipalities, *Town of Needham v. County Commissioners of Norfolk*, 324 Mass. 293 (eminent domain taking of common and park lands) and *Inhabitants of Easthampton v. County Commissioners of Hampshire*, 154 Mass. 424 (eminent domain taking of school lot).

The doctrine has also been applied to the following changes of use of public lands within governmental agencies or within political subdivisions: a) intra-agency uses, *Sacco v. Department of Public Works*, 352 Mass. 670 (filling a portion of a Great Pond), b) intramunicipality uses, *Higginson v. Treasurer and School House Commissioners of Boston*, 212 Mass. 583 (erecting a building on a public park), and see *Kean v. Stetson*, 5 Pick. 492 (road built adjoining a river), and c) intracounty

uses, *Bauer v. Mitchell*, 247 Mass. 522 (discharging sewage upon school land). The doctrine may also possibly reach *de facto* changes in use, e.g., *Pilgrim Real Estate Inc. v. Superintendent of Police of Boston*, 330 Mass. 250 (parking of cars on park area) and may be available to protect reservation land held by charitable corporations, e.g., *Trustees of Reservations v. Town of Stockbridge*, 348 Mass. 511 (eminent domain).

In addition to these extensions of the doctrine, special statutory protections, codifying the doctrine of "prior public use," are afforded local parkland and commons by G. L. c. 45 and public cemeteries by G. L. c. 114, §§ 17, 41. As to changes in use of public lands held by municipalities or counties, generally, see G. L. c. 40, § 15A and G. L. c. 214, § 3(11).

This is the background against which Article 97 was approved. The doctrine of "prior public use" requires legislative action, by majority vote, to divert land from one public use to another inconsistent public use. As the cases discussed above indicate, the doctrine requires an act of the Legislature regardless whether the land in question is held by the Commonwealth, its agencies, special authorities and commissions, political subdivisions or certain corporations granted powers of the sovereign. And the doctrine applies regardless whether the public use for which the land in question is held is a conservation purpose.

As to all such changes in use previously covered by the doctrine of "prior public use" the new Article 97 will only change the requisite vote of the Legislature from majority to two thirds. Article 97 is designed to supplement, not supplant, the doctrine of "prior public use."

Article 97 will be of special significance, though, where the doctrine of "prior public use" has not yet been applied. For instance, legislation and a two-thirds roll-call vote of the Legislature will now for the first time be required even where a transfer of land or easement between governmental agencies, between political subdivisions, or between levels of government is made with no change in the use of the land, and even where a transfer is from public control to private.

Whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, it is recommended that the legislation meet the high standard of specificity set by the Supreme Judicial Court in a case involving the doctrine of "prior public use":

"We think it is essential to the expression of plain and explicit authority to divert [public lands] 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. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use." (Footnote omitted.) *Robbins v. Department of Public Works*, 355 Mass. 328, 331.

Each piece of legislation which may be subject to Article 97 should, in addition, be drawn so as to identify the parties to any planned disposition of the land.

CONCLUSIONS

Article 97 of the Amendments to the Massachusetts Constitution establishes the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment. 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 declared to be a public purpose. Lands, easements and interests therein taken or acquired for such public purposes are not to be disposed of or used for other purposes except by two-thirds roll-call vote of both the Massachusetts Senate and House of Representatives.

Answering the questions of the House of Representatives I advise that the two-thirds roll-call vote requirement of Article 97 applies to all lands, easements and interests therein *whenever* taken or acquired for Article 97 conservation, development or utilization purposes, even prior to the effective date of Article 97, November 7, 1972. The Amendment applies to land, easements and interests therein held by the Commonwealth, or any of its agencies or political subdivisions, such as cities, towns and counties.

I advise that "natural resources" given protection under Article 97 would include at the very least, without limitation: air, water, wetlands, rivers, streams, lakes, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, sea and fresh water fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites.

I advise that Article 97 requires a two-thirds roll-call vote of the Massachusetts Senate and House of Representatives for all transfers between agencies of government and between political subdivisions of lands, easements or interests therein originally taken or acquired for Article 97 purposes, and transfers of such land, easements or interests therein from one level of government to another, or from public ownership to private. This is so without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes. I so advise because such transfers are "dispositions" under the terms of the new Amendment, and because "disposition" includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting or taking of easements.

I also advise that *intra*-agency changes in uses of land from Article 97 purposes, although they are not "dispositions," are similarly subject to the two-thirds roll-call vote requirement.

Read against the background of the existing doctrine of "prior public use," Article 97 will thus for the first time require legislation and a special vote of the Legislature even where a transfer of land between governmental agencies, between political subdivisions or between levels of government results in no change in the use of land, and even where a transfer is made from public control to private. I suggest that whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, the very highest standard of specificity should be required of the draftsmen to assure that legislation clearly identifies the locus, the present public uses of the land, the new uses contemplated, if any, and the parties to any contemplated "disposition" of the land.

In short, Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development or utilization of natural resources. If land is misused a portion of the public's natural resources may be forever lost, and no less so than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond existing law and much to the benefit of our natural resources and to the credit of our citizens.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46

June 20, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion on two questions relating to continued approval by you of Sunday licenses for certain games known as Skill Right, Fascination, Skill Light, Bing-O-Reno and Light A Line. You have advised me that the game Skill Right has been licensed by the Department of Public Safety since 1949, and the other games to which you refer were given temporary approval as Sunday games by the then Commissioner of Public Safety in 1962. You question whether you may continue to approve such Sunday licenses in view of the enactment of St. 1971, c. 486, entitled "An Act Authorizing the Licensing of a Game Commonly Called Beano."

I proceed first to a consideration of the pertinent statutory provisions. The power of the Commissioner of Public Safety to approve Sunday licenses is derived from G. L. c. 136, § 4, which provides in pertinent part:

"(1) The mayor of a city or the selectmen of a town, upon written application describing the proposed dancing or game,

TAB F

 KeyCite Red Flag - Severe Negative Treatment
Disagreed With by [Nickolas v. City of Marlborough](#), Mass.Super.,
May 9, 2014

2013 WL 4029208

Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court, Middlesex County.

Christopher J. CURLEY and
Carol S. Curley, Plaintiffs,

v.

[TOWN OF BILLERICA](#), Robert M. Correnti, Robert
H. Accomando, Michael S. Rosa, Andrew Deslaurier,
and David A. Gagliardi, as they Comprise The
Board of Selectmen of the Town of Billerica, and
Independent Towers Holdings, LLC, Defendants.

No. 12 Misc. 459001 RBF.

|
Aug. 8, 2013.

DECISION

[ROBERT B. FOSTER](#), Justice.

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

nature of mandamus for enforcement of the requirements set forth in Article 97 of the Amendments to the Massachusetts Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

10. At a second Special Town Meeting held on November 24, 1951, the Town, pursuant to Article 23, "voted unanimously

that the Town accept in consideration of payment therefore of one dollar the conveyance from John A. Akeson to the Town of the [Property] for playground purposes on condition that any playground located thereon shall be called the 'John A. Akeson Playground.' "

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

In the Defendants' Summary Judgment Motion, the Town and the Board set forth five grounds on which, they argue, summary judgment should be entered in their favour and the Amended Complaint dismissed. Two of these grounds were

previously addressed in the Order, and with respect to those grounds, I incorporate the Order by reference. Thus, as set forth in the Order in more detail, I find (a) that the Town complied with the requirements of [G.L. c. 40, § 15A](#), in obtaining the Town Meeting vote authorizing the Lease, and (b) that the Curleys have standing to bring their action in the nature of mandamus as stated in the Amended Complaint.

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

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

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

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their

environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

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

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

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

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

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

The Town's and the Board's fourth ground for their Summary Judgment Motion is that the Property is not dedicated or restricted to playground uses in a way that makes it subject

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

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

***6** In support of their contention that a playground is an art. 97 use, the Curleys rely heavily on the expansive reading of art. 97 set forth in the June 6, 1973 opinion of Attorney General Robert H. Quinn. *Rep. A.G., Pub. Doc. No. 12* (1973) (Quinn Opinion). The Quinn Opinion is a response to “a general inquiry from the Speaker of the House of Representatives” regarding art. 97, “and was rendered without reference to any particular set of facts.” *Mahajan*, 464 Mass. at 613; Quinn Opinion at 139. In the Opinion, Attorney General Quinn discussed the scope of uses of publicly held land that might fall under art. 97. He concluded that the purposes of art. 97—to secure that the people shall have the right to clean air and water and the natural, scenic, historic, and esthetic qualities of the environment, and the protection of the people in their right to the conservation, development and utilization of natural resources—was to be

broadly construed. *Id.* at 141–142. Thus, the Attorney General concluded, lands acquired for use as “parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify” as acquired for the purposes of protecting the interests of the public in the environment and are therefore subject to the requirements of art. 97. *Id.* at 142–143. Under the Quinn Opinion’s interpretation, the Property, acquired for use as a playground and used as athletic fields, is quite plausibly subject to Art. 97.

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

Generally, municipal land acquired for open space or conservation purposes is subject to art. 97. See *Board of Selectmen of Hanson v. Lindsay*, 444 Mass. at 509; *Toro*, 9 Mass.App.Ct. at 872; see also *Mahajan*, 464 Mass. at 619 n. 19 (public open space at Boston City Hall plaza subject to art. 97). A park falls within this category of public open space, as a park is generally accepted to mean “a tract of land, great or small, dedicated and maintained for the purposes of pleasure, exercise, amusement, or ornament.” *Commonwealth v. Davie*, 46 Mass.App.Ct. 25, 28 (1998), quoting *Salem v. Attorney Gen.*, 344 Mass. 626, 630 (1962). Massachusetts law does not explicitly define what constitutes a playground, but it does draw distinctions between parks and playgrounds that indicate that a playground is not a park.

For example, a criminal statute bars the sale of controlled substances “within one hundred feet of a public park *or* playground.” G.L. c. 94C § 32J (emphasis supplied). In chapter 45 of the General Laws, entitled “Public Parks, Playgrounds and the Public Domain,” §§ 2–11 are directed to public parks, while §§ 14–18 are directed to playgrounds. Section 14 of that chapter, addressing the use, acquisition and management of playgrounds, states that its provisions apply to land and buildings acquired for playground purposes, or for park and playground purposes, but not to land and buildings acquired solely for park purposes. G.L. 45 § 14. While lacking explicit definitions, chapter 45 treats parks and playgrounds differently in ways that suggest that a park is open space while a playground is an improved space with structures. Section 7 provides that “[l]and taken for or held as a park ... shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area ... shall be erected ... without leave of the general court.” G.L. c. 45, § 7. On the other hand, a city or town “may construct buildings on land owned or leased by it” as a playground and “may provide equipment” for the playground. G.L. c. 45, § 14. Other statutes concerning playgrounds include references to play equipment that suggest that the presence of such equipment is what defines a playground. See, e.g., G.L. c. 45, § 15 (requiring cities and towns to “maintain at least one public playground conveniently located and of suitable size and *equipment*”) (emphasis supplied); G.L. c. 266, § 98A (making it a crime to destroy, deface, mar, or injure any “playground apparatus or equipment”).

*7 Definitions of “playground” found in other jurisdictions and in dictionaries are consistent with chapter 45’s implication that a playground is a space for active recreation and is improved with equipment or structures, including playing fields. Federal law defines a playground as “any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.” 21 U.S.C. § 860(e)(1); *United States v. Parker*, 30 F.3d 542, 552 (4th Cir.1994). The California Penal Code defines a playground as “any park or recreational area specifically designed to be used by children that has play equipment installed, including public grounds designed for athletic activities ... or any similar facility.” Cal.Penal Code § 626.95(c)(1). Dictionary definitions of “playground” provide that it is “an outdoor area for recreation and play, esp. one having items such as swings,” American Heritage College Dictionary 1068 (4th

ed.2002), or that it is “a piece of land used for and usually equipped with facilities for recreation especially by children.” Free Merriam–Webster Dictionary, at <http://www.merriam-webster.com/dictionary/playground>, visited August 6, 2013.

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

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

Conclusion

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

Judgment accordingly.

Footnotes

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

JUDGMENT

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

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

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

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

All Citations

Not Reported in N.E.2d, 2013 WL 4029208