COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-12243

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

V.

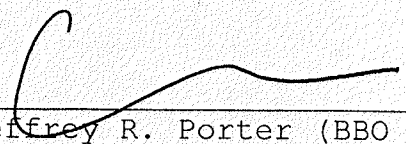
CITY OF WESTFIELD, CITY COUNCIL FOR THE CITY OF WESTFIELD, CHRISTOPHER KEEFE, JAMES BROWN, PETER J. MILLER, MARY O'CONNELL, RICHARD ONOFREY, JR., CHRISTOPHER CREAN, JAMES R. ADAMS, PATTI A. ANDRAS, BRENT B. BEAN, II, JOHN J. BELTRANDI, III, DAVID A. FLAHERTY, BRIAN SULLIVAN, AGMA MARIA SWEENEY NAMED HEREIN SOLELY IN THEIR OFFICIAL CAPACITY; AND DANIEL M. KNAPIK, MAYOR, NAMED HEREIN SOLELY IN HIS OFFICIAL CAPACITY,
APPELLEES

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT IN HAMPDEN COUNTY

BRIEF OF THE TRUSTEES OF RESERVATIONS, MASSACHUSETTS AUDUBON SOCIETY, AND MASSACHUSETTS LAND TRUST COALITION AS *AMICI CURIAE*

THE TRUSTEES OF RESERVATIONS, MASSACHUSETTS AUDUBON SOCIETY, AND MASSACHUSETTS LAND TRUST COALITION

By their attorneys,



Jeffrey R. Porter (BBO 552520)
Colin G. Van Dyke (BBO 665021)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000
jrporter@mintz.com
cgvandyke@mintz.com

March 27, 2017

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE ISSUE.....1

INTEREST OF AMICI CURIAE.....2

SUMMARY OF THE ARGUMENT.....6

ARGUMENT.....8

I. Article 97 Provides Critical Protection for Municipal Open Space in Every Corner of the Commonwealth.....8

A. Article 97 Protects Against Conversion and Disposition of Municipal Open Space.....9

B. The Negative Consequences of the Appeals Court's "Recordation Rule".....9

1. Requiring Recordation Will Encourage Diversion for Non-Open Space Uses.....10

2. Requiring Recordation Will Impose New Burdens on Municipalities.....11

3. Changing the Rules Will Upend Community Expectations.....13

4. Subverting Long-Held Assumptions Will Impair The Value of Privately Held Conservation Land.....14

5. Undermining Article 97 Protections for Municipal Land Will Discourage Future Conservation Efforts.....15

II. If This Court Announces a New Rule It Should Be One That Preserves the Vitality of Article 97 and Credits Communities' Expectations.....16

A. Article 97 Was Adopted in Order Protect the Public's Constitutional Rights.....17

B. The Appeals Court's Analysis Does Not Sufficiently Take Purpose of Article 97 into Account.....18

C. If Community Intent Is Not Manifested By A Deed Or Recording, Then Other Facts and Circumstances Must Be Considered.....19

D. Westfield Clearly Indicated its Intent and that Gave Rise to Reasonable Community Expectations 21

E. Applying Article 97 Protections Broadly Does Not Necessitate Their Application without Limits 23

III. The Appeals Court's Proposed Recordation Rule Is Not Mandated by This Court's Precedent.....25

CONCLUSION.....27

ADDENDUM.....30

TABLE OF AUTHORITIES

Page(s)

Cases

Boston Redevelopment Auth. v. Nat'l Park Serv.,
838 F.3d 42 (1st Cir. 2016) 23

Harris v. Wayland,
392 Mass. 237 (1984) 23

Mahajan v. Dep't of Envtl. Protection,
464 Mass. 604 (2013) .....*passim*

Meikle v. Nurse,
474 Mass. 207 (2015) 17

Nabhan v. Town of Salisbury,
2014 Mass. LCR Lexis 58, **16 .....20, 24

Neff v. Commissioner of the Dep't of Indus. Accs.,
421 Mass. 70 (1995) 17

Selectman of Hanson v. Lindsay,
444 Mass. 502 (2005) 26, 27

Seller's Case,
452 Mass. 804 (2008) 17

Smith v. City of Westfield,
90 Mass. App. Ct. 80 (2016) 10

Toro v. Mayor of Revere,
9 Mass. App. Ct. 871 (1980) 19

Town of Sudbury v. Scott,
439 Mass. 288 (2003) 20

Massachusetts Constitutional Provisions

Article 97.....*passim*

State Statutes

MGL Chapter 45, § 1.....14

Regulations

54 C.F.R. § 2003005(f)(3).....23

STATEMENT OF THE ISSUE

Can land be designated for purposes of Article 97 in a manner sufficient to invoke that article's protection by means other than a deed or other recorded restriction on the land?

INTEREST OF AMICI CURIAE

Amici curiae include the Commonwealth's two leading non-profit land conservation organizations and are among the founders of the conservation movement.

The Trustees of Reservations, founded in 1891, is the world's first regional land trust and whose mission is to preserve, for public use and enjoyment, properties of exceptional scenic, historic, and ecological value in Massachusetts. The Massachusetts Audubon Society, founded in 1896, is nation's oldest Audubon Society and whose mission is to protect the nature of Massachusetts for people and wildlife. Both organizations have worked alongside the Commonwealth and its subdivisions since their inception. The Massachusetts Land Trust Coalition is the non-profit association of land trusts and includes over one hundred and thirty member organizations, including land trusts, watershed associations, open space committees, and advocacy groups. A complete description of each *amici* is contained in the addendum to this brief.

Amici act on behalf of well over 250,000 individual members and supporters and in concert with more than one hundred land trusts. Further, Trustees of Reservations protects over 27,000 acres in fee across

the Commonwealth and protects an additional 20,000 acres through 400+ conservation restrictions. The Massachusetts Audubon Society owns and protects over 36,000 acres statewide. In total, Massachusetts land trusts have contributed to the protection of hundreds of thousands of acres of open space in Massachusetts, through direct conservation and stewardship, and through indirect support and advocacy.

Amici, as a regular course of business, work alongside municipalities and state agencies to protect and defend open spaces, based on a mutual trust that conservation lands will be protected in perpetuity, with very rare exception. Consequently, *amici* are intimately familiar with local interest in protecting open space and local pressures on municipal governments to balance competing demands for open space, schools, and other amenities and services. *Amici* can attest to the demonstrable impact of Article 97 on protection of public open spaces throughout the Commonwealth. Article 97 is an essential tool upon which municipalities, donors, and *amici* and similar organizations rely to preserve open spaces.

Article 97 assures citizens that the public parks, woodlands, stream sides, and other open spaces that

they know and love cannot be converted to other uses without an open and public process and legislative action affording citizens the opportunity to advocate for the land, and with mitigation if a disposition were to happen.

Amici are deeply concerned by the narrow view the Appeals Court has taken of Article 97, one that is both inconsistent with the intent of Article 97 and unwarranted by the cited precedent. Absent clarification by this Court, the Appeals Court's decision will undoubtedly undermine municipal-open-space protections upon which communities and land trusts throughout the Commonwealth have relied for decades.

The Appeals Court's interpretation of Article 97 will cast a shadow of doubt on the status of all manner of conservation lands, and impair the value of already conserved lands proximate to municipally held parcels, and discourage future conveyance of private properties to municipalities or the state for public use.

Further, the rule announced by the Appeals Court will impose administrative burdens on municipalities that wish to ensure that their protected open spaces remain protected. Worse, it could promote the

increased diversion of municipal open spaces long assumed to be held for Article 97 purposes, but newly unburdened of its protections. *Amici* urge the Court to explicitly recognize what its own precedent already recognizes: that there is more than one way to designate land "in a manner sufficient to invoke the protection of Article 97." Mahajan v. Dep't of Envtl. Protection, 464 Mass. 604, 615 (2013). Doing so will ensure the vitality of Article 97 and safeguard public open spaces.

Without robust Article 97 safeguards, large areas of conserved land held by municipalities or conserved through public/private partnerships, including those in which *amici* have participated, will be vulnerable to development despite the clear intentions and longstanding expectations of local governments and their constituents.

STATEMENT OF THE CASE

Amici curiae rely on and incorporate the Statement of the Case contained in the Brief of the Plaintiff-Appellant.

STATEMENT OF THE FACTS

Amici curiae rely on and incorporate the Statement of the Facts contained in the Brief of the Plaintiff-Appellant.

SUMMARY OF THE ARGUMENT

The act of recording a deed or conservation restriction suffices to demonstrate a community's intent to endow publicly-held land with Article 97 protections, but it is not required. A recorded instrument that expressly dedicates land for Article 97 purposes may be per se evidence of such intent, but even where no recorded instrument restricts the use of municipal open space, the community's intent to designate a parcel for Article 97 protections can be gleaned from a fact-specific inquiry into the municipality's official acts and its actual uses of the property.

The indicia of intent will vary from case to case depending on, for example, the nature of the land, the time period during which it was acquired or later designated, and the usual practice of the municipality or similar municipalities. In every instance, however, achieving the objectives of Article 97 requires a substantive evaluation of a municipality's intent, and

the determination should not turn on whether particular formalities have been observed.

The facts and circumstances in this case, including the City of Westfield's ministerial acts relating to the Cross Street Playground and its actual use of the property, sufficiently indicate the City's intent, and have given rise to the community's reasonable reliance, that the property will remain open space subject to Article 97 protection.

The precedent construing Article 97 does not say otherwise. The decisions relied upon by the Appeals Court do not state, necessitate, or even justify a rule that elevates completion of one ministerial act over clear manifestations of a community's intent. Rather, those decisions represent fact-specific outcomes potentially applicable in a set of cases quite dissimilar from this one.

Moreover, the Appeals Court's narrow application of Article 97 contravenes the Article's objectives. If affirmed, its decision will place a cloud over the protections historically provided to parcels for which no restrictive document may have been recorded, but as to which the municipality's intentions have been made clear.

The new rule propounded by the Appeals Court will imperil public open spaces throughout the Commonwealth, upend citizens' expectations that open spaces will remain available, invalidate communities' prior choices to acquire or to set aside land for open space, diminish the conservation value of contiguous privately held properties, and prejudice the future efforts of private and non-profit actors to conserve open spaces in the Commonwealth.

ARGUMENT

I. Article 97 Provides Critical Protection for Municipal Open Space in Every Corner of the Commonwealth

Until now a broad view of the applicability of Article 97 has attached to lands used for Article 97 purposes. By rejecting the Appeals Court's narrow rule requiring recordation of a deed or use restriction specifically placing open space under Article 97's protections, this Court will preserve communities' long-settled expectations that their shared open spaces will be preserved.

A contrary outcome will effectively strip many municipal open spaces of the protections long assumed to apply to them, will lead to diversion of open spaces to other uses, and will critically impair future

efforts by communities and donors to protect open spaces.

A. Article 97 Protects Against Conversion and Disposition of Municipal Open Space

Article 97 was adopted in 1972 to replace Article 49. Like its successor, Article 49 declared the importance of open spaces, but because it lacked mechanisms for protecting them, the interests recognized by Article 49 were continually at risk. Article 97 added a significant procedural limitation; in particular, it provided that lands and easements taken or acquired for its purposes could not be used for other purposes, or otherwise disposed of, without a two-thirds vote of both houses of the Legislature. Since 1972 then the constitutionally-recognized value of public open spaces has been secured for future generations against, among other things, encroachments motivated by the development and revenue needs of municipal governments, which may be driven by shorter-term concerns.

B. The Negative Consequences of the Appeals Court's "Recordation Rule"

This Court has previously recognized that land is protected by Article 97, and subject to its procedural protections, when it was either taken initially for

Article 97 purposes or subsequently "designated for those purposes in a manner sufficient to invoke the protection of Article 97." Mahajan, 464 Mass. at 615.

The Appeals Court held in this case that a designation "sufficient to invoke" the protection of Article 97 could be made only "by deed or other recorded restriction on the land...." Smith v. City of Westfield, 90 Mass. App. Ct. 80, 83 (2016). According to the Appeals Court, the lack of recordation precluded the application of Article 97, and exposed the property to development at the municipality's whim (and without the Legislature's input) even though Westfield had (1) passed an ordinance naming the land in question as a playground (2)endorsed an open space and recreation plan that designated the playground as "open space," and (3) used federal grant money to upgrade the playground on the express condition that the property would be protected under Article 97. Id. Limiting application of Article 97's protections in this manner undid the Legislature's intent in adopting Article 97.

1. Requiring Recordation Will Encourage Diversion for Non-Open Space Uses

Without Article 97 protections, municipal open spaces will be threatened in direct proportion to the

pressures felt by their municipal owners to meet a range of other public needs. At times, municipal officials will consider utilizing open space as a lower-cost solution for municipal buildings or even as a means of raising revenue through disposition. This case presents a perfect example of public open space being misperceived as simply "vacant" and available to meet other municipal needs.

Article 97 was adopted precisely in order to minimize this risk, and to protect open spaces by inducing municipalities to look elsewhere to address their development needs. Loosening those restraints will leave these lands vulnerable to conversion in service of municipal space needs. Indeed, the Appeals Court's interpretation will create an incentive for municipalities to not record a deed or a restriction because doing so will only tie their hands. Thus the Appeals Court's decision will place back into the hands of municipalities exactly those decisions that Article 97 meant to take from them.

2. Requiring Recordation Will Impose New Burdens on Municipalities

On the other hand, municipalities that wish to safeguard their conservation lands will be forced to

inventory every parcel of open space that they own, research all town meeting votes and city council votes for intra-municipal transfers of custody and then record an affidavit for every parcel held for open space, recreation, and water protection.

According to the Massachusetts Office of Geographic Information open space data layer, there are over 281,000 acres and 16,390 parcels of municipal open space considered to have Article 97 protections in the Commonwealth.[1/] It is unknown how many of these have a recording associated with open space designation.

It is unfair and unreasonable to place these unwarranted new procedural requirements on municipalities. We note, for example, that the capacity of many municipalities to review each parcel is limited, especially in many small Massachusetts towns which either have limited staff or are entirely supported by volunteers. Moreover, the costs of these additional efforts, including research, legal advice, and recording fees will be significant.

[1/] The Trust for Public Land Conservation Almanac reports that in Massachusetts, between 1998 and 2011, over $737,000,000 of public dollars were spent on land protection resulting in protection of roughly 170,000 acres. The addition of bond expenditures and tax credits between 2012 and 2016 increases the total of public expenditures to approximately $1,000,000,000.

3. Changing the Rules Will Upend Community Expectations

A municipality's inventory of open spaces impacts its decision-making regarding the acquisition and disposition of municipal lands. If faced with a sudden loss of Article 97 protections for certain municipal lands, a municipality (and its residents) may regret past decisions to not protect other parcels or past decisions about where to locate municipal development projects.

Assumptions about the presence of open spaces also impact the decisions of residents about where to live and the availability of open space can impact the property values of nearby homes.

Absent a compelling reason, then, it is imprudent to adopt a new interpretation of Article 97 that undermines long-held assumptions about open spaces. At some point a community must be able to rely on the preservation of open spaces as open spaces.[2/] Narrowing the "manner sufficient to involve the protection of Article 97" will place in doubt the conservation status of many acres of park lands, water supply protection

---

[2/] Such a principle is reflected in MGL ch. 45, section 1 that defines "park" to include any land "appropriated to such use" for 20 years of more.

lands, town forests, waterways, coastal lands, flood plains, and playgrounds. These areas will be endangered despite decades of use for open space and despite the reasonable assumptions of residents and municipal governments that they will remain open spaces.

4. Subverting Long-Held Assumptions Will Impair The Value of Privately Held Conservation Land

While frequently assessed in the aggregate, conservation land in Massachusetts is in fact a complex tapestry of land owned and managed by public entities and private organizations and individuals, including the *amici*. Casting the permanence of municipal conservation lands into doubt will rend the tapestry.

Many conservation areas held by nonprofit land trusts enhance, and are enhanced by, adjacent public conservation land. Indeed, a key element of the decision-making process that every land trust goes through in determining what land to acquire and protect is a close review of the "landscape context," the geographic relationship of other protected lands to the subject property. More often than not, this landscape context includes public conservation lands and the decisions made by the *amici* and their counterparts are

made in reliance on the expectation that public land used as open space enjoys the protections of Article 97, and will have to be used in that manner unless a super-majority of the Legislature decides otherwise.

The loss of security for municipal conservation lands will threaten the ecological and recreational value of the individual contiguous parcels and of the entire patchwork. Similarly, the scenic and aesthetic values achieved through the aggregation of conservation lands will be reduced if a portion of that whole is no longer protected.

5. Undermining Article 97 Protections for Municipal Land Will Discourage Future Conservation Efforts

Stripping municipal open spaces of Article 97 protections will reduce the public's confidence in the overall conservation effort in Massachusetts. It will cast a shadow of doubt over the status of all conservation lands. Such uncertainty will diminish donors' willingness to convey land in fee or otherwise to municipalities for fear that such lands may be used for purposes other than conservation.

Acquisitions by land trusts will suffer too from such a loss of confidence, because much of the public does not distinguish between private non-profits and

public agencies; the loss of public lands due to the removal of Article 97 protections will reflect negatively on non-profit land trusts as well. Reducing the protections of Article 97 not only removes protection from many public properties thought to be conserved, but will also make it more difficult to acquire new conservation lands.

II. If This Court Announces a New Rule It Should Be One That Preserves the Vitality of Article 97 and Credits Communities' Expectations

While nearly identical in form to its predecessor, Article 49, Article 97 includes an additional paragraph meant to safeguard the public's rights to open space. There was no reason to add the new final paragraph, but for a recognition by the Legislature and ultimately by the Massachusetts voters who adopted Article 97 that public open spaces were too easily disposed of and diverted to other uses.

Consequently, Article 97 must be viewed in part as a remedial statute and should be given a correspondingly broad interpretation. See Meikle v. Nurse, 474 Mass. 207, 210 (2015), citing Seller's Case, 452 Mass. 804, 810 (2008) (quoting Neff v. Commissioner of the Dep't of Indus. Accs., 421 Mass. 70, 73 (1995) (remedial statute to be construed broad "in light of

its purpose and to 'promote the accomplishment of its beneficent design.'"). This Court has itself taken a broad view of how Article 97 should be applied by recognizing that its protections apply not only to property "taken or acquired" for Article 97 purposes but also to property "otherwise designated" for such uses following acquisition. See Mahajan, 464 Mass. at 615.

A. Article 97 Was Adopted in Order Protect the Public's Constitutional Rights

It is imperative that the Court resolves this dispute in a manner that reinforces the will of the Legislature and the voters that public open spaces be conserved rather than subjected to episodic needs of municipal governments, at least without public consideration and approval by the Legislature to ensure that the public's constitutional interests are accounted for.

The relevant interests are those of current citizens, citizens from the past who elected to set aside conservation lands and may have committed funds to their acquisition, and future generations to whom the same constitutional rights will accrue, and whose prospective interests should be taken into account in

deliberations over the potential diversion or disposition of conservation lands. The Court's resolution of the present dispute can affirm the choices of past generations and preserve the rights of current and future generations.

B. The Appeals Court's Analysis Does Not Sufficiently Take Purpose of Article 97 into Account

A community's intent to provide for its citizen's rights and to safeguard those rights against development pressures and revenue demands is the critical factor to be considered in the Article 97 analysis.

The Appeals Court, however, began its analysis with the supposed constraints on Article 97 protections rather than with the thrust of the Article itself. As a consequence, the Court did not sufficiently take into account the Article's remedial purpose and the imperative of a broad construction.

Its approach put too much weight - indeed, dispositive weight - on a single, ministerial act (recordation), and not enough on a holistic, fact-specific analysis of community intent, which is the key to the Article 97.

C. If Community Intent Is Not Manifested By A Deed Or Recording, Then Other Facts and Circumstances Must Be Considered

The factor on which the Appeals Court focused - is sufficient but not necessary. See e.g., Toro v. Mayor of Revere, 9 Mass. App. Ct. 871, 872 (1980) (a conveyance to the town's Conservation Commission for the express purpose of preservation for conservation purposes was sufficient to bring it within Article 97 protections). Recordation may supply per se evidence of the community's intent, but it is not the only measure.

Surely there are and will continue to be instances where a recorded instrument formally manifests a municipality's intent to conserve open space for Article 97 purposes. See e.g. Toro, 9 Mass. App. Ct. at 872. At the other end of the spectrum, there are and will continue to be cases where there is no indication of a community's intent to place land within Article 97's protections other than its use of that property in a manner that "incidentally" promotes Article 97 purposes. Mahajan, 464 Mass. at 613, 615; see also Nabhan v. Town of Salisbury, 2014 Mass. LCR LEXIS 58, **16 (easement incidentally promoting public access to beach does not become Article 97 simply because of

proximity to conservation land). Just as certainly, though, there are cases, like the present one, that will fall between those two poles. In those cases, a more holistic analysis is essential in order to determine whether the property has been designated as open space "in a manner sufficient" to involve the protection of Article 97. The parameters of this analysis cannot be reduced for a single factor, or even to a fixed formula. See Town of Sudbury v. Scott, 439 Mass. 288, 302 (2003) ("intent is a question of fact 'to be determined from [] declarations, conduct and motive, and from all the attending circumstances.'").

In the absence of a recorded instrument expressly designating property for Article 97 purposes, whether a particular set of circumstances adequately reflects a municipality's intent to invoke Article 97 protections must be carefully examined. Indeed, circumstances may be measured differently from town to town, from parcel to parcel, and over time[3/] as practices evolve. For example, if a town always records an instrument clearly indicating that the property is meant to serve Article

[3/] In theory, the application of Article 97 to land designated for conservation purposes after that Article was adopted in 1972 may be evaluated differently from its application to land designated prior to 1972.

97 purposes, then the failure of such town to record an instrument in the case of a certain parcel could be persuasive evidence of its lack of intent to safeguard it.

In every instance though, the essential inquiry is into the community's intent and the public's expectations, and there are myriad and overlapping ways in which a community can designate municipal lands for conservation, including but not limited to: local administrative or legislative action; long-term or conspicuous use, for example as parkland or watershed land or other Article 97-type uses; assignment to the care and control of the Conservation Commission or the Parks Department or the Recreation Department; town meeting votes to place property under Article 97 protections; inclusion in a public planning document, as was the case for Boston City Hall Plaza, see Mahajan, 464 Mass. at fn. 19; and dedication by the State Legislature.

D. Westfield Clearly Indicated its Intent and that Gave Rise to Reasonable Community Expectations

A holistic analysis produces a different outcome in this case. The record reflected the City's clear objectives and its residents' reasonable expectations,

which were expressed and affirmed several times over several decades after the City took title to the property in 1939:

- 1946: Planning Board recommended use as playground;
- 1948: property was transferred to the Playground Commission's "full charge and control";
- 1957: City ordinance recognized the property as a playground and named it accordingly;
- 1979: City applied for and accepted a Federal grant to upgrade the playground[4/];
- 2010: City endorsed an open space and recreation plan that identified the property as "open space."

[4/] Whether the City's acceptance of a Land and Water Conservation Fund ("LWCF") grant combined with the Statewide Comprehensive Outdoor Recreation Plan ("SCORP") that declares lands acquired or developed with LWCF funds SCORP is, in and of itself, sufficient evidence that the property was designated for Article 97 uses need not be determined in this case. It is enough to evaluate the City's acceptance of LWCF funding as one indicator of its intent. Additional related evidence of the City's intent is its presumed awareness of the LWCF regulations that, notwithstanding Massachusetts laws, requires that "property acquired or developed with [LWCF funds may not] be converted to other than public outdoor recreation use." 54 C.F.R. §2003005(f)(3); see also Boston Redevelopment Auth. v. Nat'l Park Serv., 838 F.3d 42, 51 (1st Cir. 2016) (in determining that the National Park Service could require that the land at issue in Mahajan remain public recreation space, the First Circuit also observed that limiting the "area to public outdoor recreational use is exactly what the BRA offered when it applied for, and received, [LWCF] funding.").

Through its actions, Westfield unequivocally manifested its intent to conserve the Cross Street Playground land as open recreation space. A recorded deed or restriction would have done little to amplify the community's intent. Compare Harris v. Wayland, 392 Mass. 237 (1984) (under a different statutory scheme the Town's acquisition and "attendant circumstances" associated with its subsequent management of the property as intended for school purposes meant that such intent was "commonly understood" despite the lack of a recorded deed restriction).

E. Applying Article 97 Protections Broadly Does Not Necessitate Their Application without Limits

A broad application of Article 97 protections is consistent with the Article's purpose and will validate the efforts of municipalities in every corner of the Commonwealth to preserve open space for current and future generations. However, that application need not be limitless. As discussed above, there may well be circumstances in which, after close examination of a municipality's treatment of property and the community's reasonable expectations, there is an insufficient basis for concluding that the municipality intended to designate the property for Article 97 purposes, including that the relationship of the

property to Article 97 purposes was merely incidental. See Mahajan, 464 Mass. at 613, 615; Nabhan, 2014 Mass. LCR LEXIS at **16.

But the alternative to an application of Article 97 to all land that even incidentally promotes "conservation, development and utilization of the . . . forest, water and air", Mahajan, 464 Mass. at 613, is not a construction so narrow so as to reduce Article 97 to a "mere theoretical announcement" of the Commonwealth's aspirations. See June 6, 1973 opinion of Attorney General Robert H. Quinn. Rep. A.G., Pub. Doc. No. 12 (1973), citing Opinion of the Justices, 237 Mass. 598, 608 (1921)(discussing the broad application of Article 49, the precursor to Article 97).

Moreover, there is no discernible downside to a holistic test for the application of Article 97. Preserving open spaces for the benefit of future generations, consistent with the variably expressed preferences of the community, helps to realize the constitutional imperatives of Article 97 itself. Doing so does not preclude the possible conversion or disposition of such property if, in the judgment of at least two-thirds of the Legislature, such action will not impinge on the citizens' rights.

Conversely, a narrow application will result in impacts that could be much more challenging to undo or which, if the municipality wants to commit open space to other uses, could be irrevocable. That outcome will result in decreased open space benefits for citizens, devaluation of adjoining conservation lands, and diminished confidence of potential grantors of conservation and citizens asked to contribute scarce tax dollars to acquisition of new parcels for conservation purposes.

III. The Appeals Court's Proposed Recordation Rule Is Not Mandated by This Court's Precedent

As discussed above, the negative consequences of the Appeals Court's decision cannot be squared with the goals of Article 97. But neither are they mandated by the precedent cited in the majority's opinion.

Both Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005) and Mahajan resolved heavily fact-specific disputes. The decisions in those cases suited their respective circumstances but are inapplicable in their particulars to most conservation lands and open spaces.

For example, Hanson must be read in the context of the bona fide purchaser issues it raised. Recordation was a central issue in that case because of the

potential prejudice to a bona fide purchaser. Hanson, 444 Mass. at 507 (the purpose of recording is notice). Recordation is not a prominent issue in this case because there is no putative bona fide purchaser, no risk of surprise and no need to reconcile the competing values of Article 97 and the recording statutes. Id. at 505 (recording required to prevail over a subsequent bona fide purchaser). Thus, the specific issue and the narrow outcome of Hanson do not apply here.

Likewise, Mahajan is inapposite insofar as this Court had to contend with the question of whether the Article 97 attributes of a portion of a property could subject it to Article 97 protections when the whole parcel was clearly designated for other public uses. In the absence of a clear means of delineating Article 97 land from non-Article 97 land, the Court reasonably concluded that the open space component was incidental to the overall public use. 464 Mass. at 615 (the pavilion area may have "incidentally promote[d]" Article 97 purposes but that does not subject the entire area of the taking to Article 97).

Viewing Hanson and Mahajan as creatures of their particular facts also makes much more common sense than a does a rule that attaches undue importance to a

recording in every case. Moreover, confining Hanson and Mahajan to their particular facts properly accounts for the observation made by this Court in Mahajan that other factors, including the actual use of municipal property, "may provide the best evidence" of the community's intent. Mahajan, 464 Mass. at 620. This Court acknowledged that although the circumstances in Mahajan did not allow for resolution on that basis nothing precluded the possibility that such circumstances could arise in another case.

As discussed above, this is just such a case where the circumstances, including the community's long-standing treatment of the property and its repeated reiteration of its intent, present the best evidence that the property is properly subject to Article 97 protections.

CONCLUSION

In recognition of the important rights protected by Article 97 and in accordance with this Court's precedent, the decision of the Appeals Court should be reversed.

Respectfully submitted,

THE TRUSTEES OF RESERVATIONS, MASSACHUSETTS AUDUBON SOCIETY, AND MASSACHUSETTS LAND TRUST COALITION

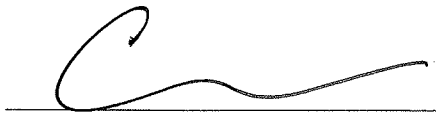
By their attorneys,

Jeffrey R. Porter (BBO 552520)
Colin G. Van Dyke (BBO 665021)
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY and POPEO, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000
jrporter@mintz.com
cgvandyke@mintz.com

March 27, 2017

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure and the Rules of the Supreme Judicial Court.



Colin G. Van Dyke

ADDENDUM

Trustees of Reservations is Massachusetts' largest conservation and preservation organization and the first land preservation organization of its kind in the world. Led by open space visionary Charles Eliot, The Trustees was established by the Massachusetts legislature in 1891 and later incorporated as a nonprofit. Today we remain an active leader in land conservation, frequently working in coordination or direct partnership with towns and state agencies. We steward some of the best of Massachusetts' natural, scenic, and cultural sites across our 116 reservations for the public to use and enjoy. Spanning more than 27,000 acres throughout the Commonwealth these sites include working farms, landscaped and urban gardens, community parks, barrier beaches, forests, campgrounds, inns and historic sites, many of which are National Historic Landmarks. We also permanently protect 20,000 acres statewide through conservation restrictions, more than any other private entity, and have worked with community partners across the Commonwealth to help protect another 25,000 acres. We are funded by more than 125,000 members and supporters and we welcomed more than 1.75 million visitors in 2016.

Massachusetts Audubon Society, Inc. ("Mass Audubon"), founded in 1896, is among the oldest and largest private non-profit conservation organizations in New England. Mass Audubon's mission is to protect the nature of Massachusetts for people and wildlife. With 125,000 members, Mass Audubon stewards nearly 37,000 acres of conservation land, provides educational programs for 225,000 children and adults annually, and advocates for sound environmental policies at the local, state, and federal levels of government. Mass Audubon's statewide network of 100 wildlife sanctuaries welcomes visitors of all ages and serves as the base for its conservation, education, and advocacy work.

Massachusetts Land Trust Coalition ("MLTC") is a not for profit corporation that began as an informal association of land trusts designed to provide a forum for the exchange of ideas and information that would increase the effectiveness of Massachusetts land trusts in their work of preserving and protecting open space. MLTC has over 120 organizations as members and conservation partners. It's yearly conference has become an important networking and training opportunity for land trusts, watershed associations, community preservation committees and open space committees.

While land trusts have always worked in tandem with municipalities in helping to carry out their open space plans, since the adoption of the Community Preservation Act in 2000 ("CPA"), land trusts have often acted as holders of the conservation restrictions required on land purchased with CPA funds.