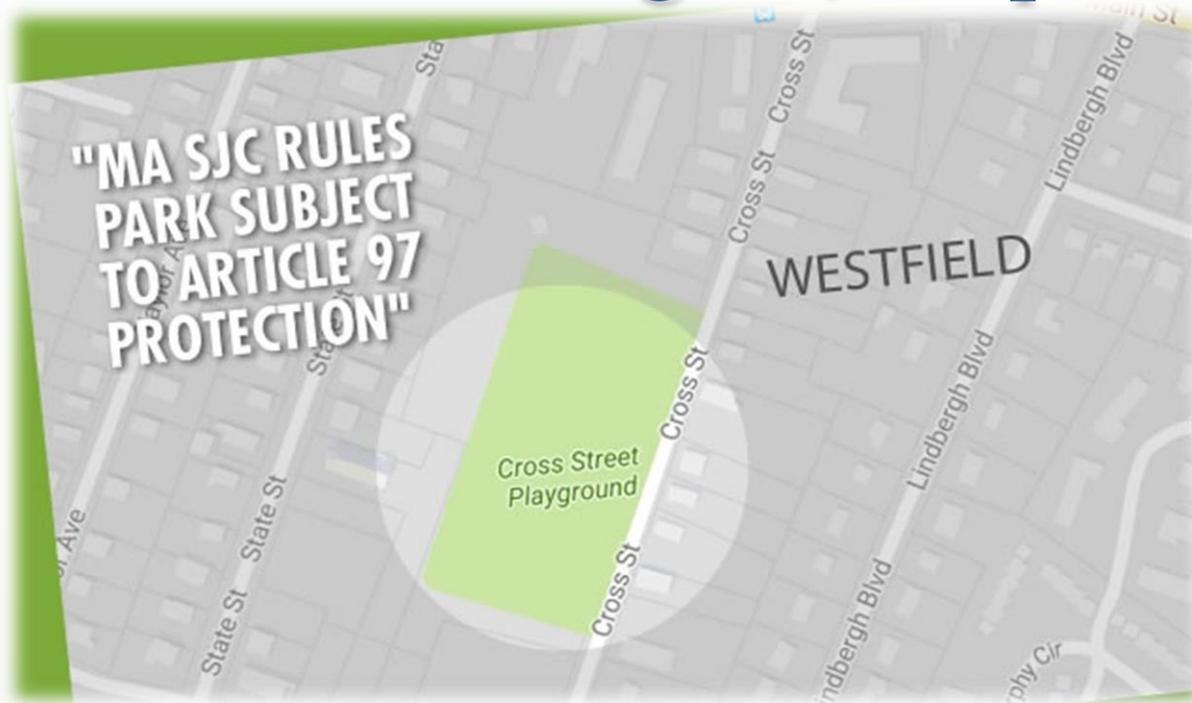


# Article 97 Protection After *Smith v. City of Westfield* Luke H. Legere, Esq.



December 1, 2018

Essex County Open Space Conference

Haverhill, MA

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# Article 97 of the Amendments to the Massachusetts Constitution (“Art. 97”)

## Common Law Doctrine:

The firmly settled and frequently declared policy of the Legislature heretofore has been to preserve public parks free from intrusion of every kind which would interfere in any degree with their complete use for this public end. It cannot be assumed that this policy is to be lightly thrown aside. *Higginson v. Slattery*, 212 Mass. 583 (1912).

## Art. 97, enacted November 7, 1972:

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.

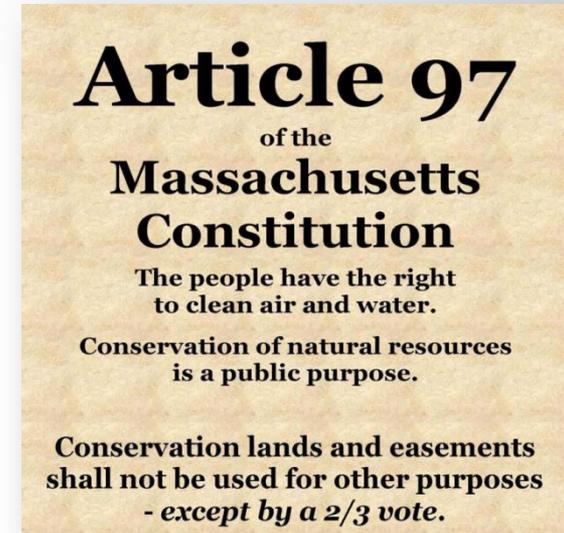
# ***Article 97 Background***

## Purpose:

- Codifies public trust doctrine
- Creates public duty to conserve, develop, and utilize natural resources

## Key Provisions:

- Grants Commonwealth “the power to provide for the taking, upon payment of just compensation therefor ... of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.”
- Strengthened predecessor, Art. 49.
- Mandates two-thirds vote of both houses of state Legislature prior to change in use, transfer, or disposition of land taken for public purposes.



## ***Article 97 Case Law***

### ***Selectmen of Hanson v. Lindsay,*** **444 Mass. 502 (2005)**

***Facts:*** Town acquired title to locus by a tax taking and a treasurer's deed, both instruments were recorded in registry of deeds. Town Meeting voted "to accept for conservation purposes, a deed, or deeds to" the locus. No further action was taken by Town in connection with vote. Later, Town treasurer and tax custodian sold locus to Defendant at auction.

***Issue:*** Whether sale of the locus was invalid and void because it did not comply with Art. 97 by not getting approved by a two-thirds vote of each branch of the Legislature?

***Holding:*** No, sale was valid. Town Meeting vote on its own was not sufficient to transform property into conservation land protected by Art. 97.

***Discussion:*** The vote evidenced an intent by Town Meeting to impose a conservation restriction on the locus, but an instrument creating such a property restriction has to be executed and filed with the registry of deeds in order for Town's interest to prevail over any subsequent bona fide purchaser for value. Here, the vote was never recorded in the registry of deeds and there was no deed of conveyance to the commission.

## ***Article 97 Case Law***

### ***Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013)***

***Facts:*** Locus was portion of land taken by eminent domain by BRA as a part of urban renewal plan. An objective under the plan was “[t]o provide public ways, parks and plazas which encourage the pedestrian to enjoy the harbor and its activities.” Legislature’s goals in statute which gives BRA urban renewal powers and duties are to “eliminat[e] decadent, substandard, or blighted open” areas.

BRA proposed to redevelop Locus by enclosing and expanding an open-air pavilion to accommodate a restaurant. DEP granted ch. 91 license. Plaintiffs’ appealed, contending that DEP must enforce Art. 97 requirements by seeking two-thirds vote of the Legislature prior to issuing the license. Trial Judge agreed with Plaintiffs that the plan’s aims served Art. 97 purposes, and that the issuance of the ch. 91 license constituted a transfer of legal control effecting a disposition and change in use of the land, triggering the two-thirds vote requirement.

## ***Article 97 Case Law***

### ***Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013)***

***Issue:*** Whether Locus was taken for Art. 97 purposes?

***Holding:*** No. Locus was not specifically designated for Art. 97 purposes.

***Discussion:***

- The overarching purpose of the plan is to eliminate urban blight through comprehensive redevelopment and revitalization through development of mixed uses and amenities.
- The retention of certain open spaces pursuant to such plan is not sufficiently indicative of an Art. 97 purpose, it is only incidental.
- Land is not dedicated to Art. 97 purposes because it “incidentally” promotes conservation or “simply displays some attributes of Art. 97 land generally,” or because “a comprehensive urban renewal plan may identify, among other objectives, some objectives that are consistent with Art. 97 purposes.”

# ***Smith v. City of Westfield: FACTS***

- 1939:** City of Westfield took title to the property, commonly known as the Cross Street Playground
- 1946:** Westfield Planning Board and City Council recommended land be converted to a playground
- 1948:** City's Playground Commission was transferred "full charge & control" of the property
- 1957:** Ordinance passed recognizing the property as a playground
- 1979:** City applied and accepted federal LWCF grant money to improve Playground
- Met LWCF funding eligibility requirements: Designated Playground as "permanently protected open space" + "Article 97 land," consistent with Statewide Comprehensive Outdoor Recreation Plan (SCORP); and
  - Forfeited City's ability to convert any part of Playground to a use other than public outdoor recreation, without approval of the U.S. SoI



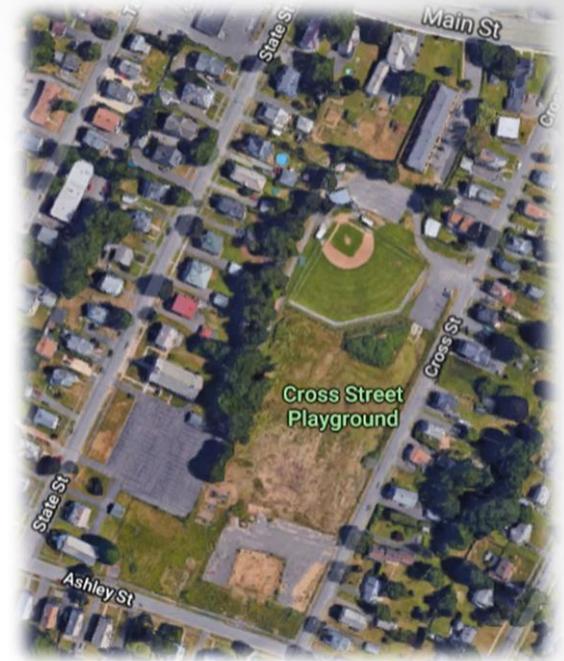
# *Smith v. City of Westfield: FACTS*

**2009:** Map in a report by Dept. of Conservation & Recreation, Pioneer Valley Planning Commission, and Franklin Regional Council identified Playground as “permanently protected open space”

**2010:** City’s mayor endorsed open space plan stating that Playground was public land with a “full” degree of protection and “active” recreation potential

**2011:** City Council voted to transfer property (5.3 acres w/ 2 little league baseball fields and a playground) from the Parks & Recreations Dept. to the School Dept., so an elementary school could be built on it

**2012:** Demolition began



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24 Residents of  
Westfield and  
Holyoke



### *Procedural History:*

- Residents sought restraining order to halt construction and require City to comply with Art. 97 before continuing with the project
- Sup. Ct. judge issued temporary restraining order halting construction and granted residents' motion for a preliminary injunction (PI) ordering City to comply with Art. 97 before proceeding with the project
- Both parties asked the court to decide whether the PI should be made permanent or vacated, which depended on whether Playground was protected by Art. 97
- Sup. Ct. vacated the PI, citing the Supreme Judicial Court's holding in *Mahajan* for the principle: "[T]hat a parcel of land acquires Art[.] 97 protection only when the land is 'specifically designated' for Art[.] 97 purposes by a recorded instrument."
- Residents appealed

# ***Smith v. City of Westfield*: APPEALS COURT**

*Smith v. Westfield*,  
90 Mass. App. Ct. 80 (Aug. 25, 2016)

**Issue 1:** Was Playground properly dedicated to trigger Art. 97 protection?

**Holding:** **No.** Because Playground was not “specifically designated” for an Art. 97 purpose.

**Issue 2:** Does the SCORP contradict *Mahajan*?

**Holding:** **No.** *Mahajan* is only applicable to land that is devoted to public use.



*Smith v. Westfield,*  
90 Mass. App. Ct. 80 (Aug. 25, 2016)

*Discussion:*

The prior public use doctrine, adopted in the Art. 97 context by *Mahajan*, “does not subject the playground to Art. 97 protection because that land had been conveyed to the city with no limitation on its use, and there was neither a taking for an Art. 97 purpose nor a prior public or private grant restricting the land to an Art. 97 purpose.”



*Smith v. Westfield,*  
90 Mass. App. Ct. 80 (Aug. 25, 2016)

*Milkey, J., concurrence:*

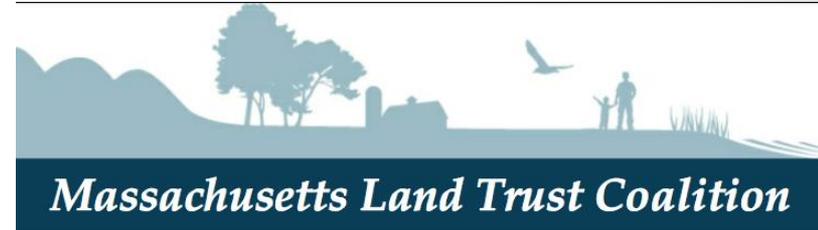
- The *Hanson* and *Mahajan* decisions hold that land originally acquired for non-Art. 97 purposes can be subject to Art. 97's protections only when the restricted use has been recorded on the deed.
- “Nothing in the language or purpose of [A]rt. 97 suggests that its application should turn on whether the underlying deed provides record notice that the land has been committed to an [A]rt. 97 use. Recording statutes . . . Serve laudable goals, but they cannot trump a constitutional provision.”
- “[F]or the large subset of dedicated parkland that originally was acquired for Art. 97 purposes, the rule established by *Hanson* and *Mahajan* threatens to reduce Art. 97 to near irrelevancy: its protections would apply only where the public entity had already taken steps to ensure that those protections were not needed.”

*Smith v. Westfield,*  
90 Mass. App. Ct. 80 (Aug. 25, 2016)

*Milkey, J., concurrence cont.,:*

- Rule is problematic because of practical realities: Public actors that have the power to initiate the additional recording steps necessary to make land subject to Art. 97 “*face little galvanizing pressure to go through the effort and expense of taking the additional steps.*”
- Moreover, “[o]nce the need to take such steps surfaces — that is, after the perceived need to use the land for a pressing competing use has arisen — it likely has become too late to implement such measures.”
- “I fear that the effect of *Hanson and Mahajan* is to rob [A]rt. 97 of its intended force with regard to a great deal of dedicated parkland across the Commonwealth.”

# ***Smith v. City of Westfield: Amici***



**Sanjoy Mahajan**

(lead plaintiff in the Long Wharf litigation)

# ***Smith v. City of Westfield*: MACC AMICUS**



- I. Land may be designated and qualify for protection under Art. 97 by means other than a deed or recorded instrument
  - A. No language in Art. 97 requires dedication of land to Art. 97 purposes to be reflected in an Art. 97 protected properties' chain of title.
  - B. Art. 97's predecessor, the prior public use doctrine, does not require a deed or recorded instrument to qualify for its protection, following actions are enough:
    1. Acceptance of a public/private grant restricted to a particular public purpose;
    2. Formal dedication by a municipality for a particular public purpose; or
    3. Legislature identifying a type of area with, or restricting it to, a particular use.
  - C. Art. 97 is broader than the prior public use doctrine, a recording requirement would make it more restrictive.
  - D. This Court's *Mahajan* ruling:
    1. Allows for Art. 97 protection without recording, as it held that taking order wording, deed restriction, or other recorded instrument are *not the only ways for public land to become Art. 97 protected*.
    2. Decided under different factual circumstances—i.e., disputed land was not within the boundary of land for which the LWCF grant was accepted
  - E. *Hanson* should be limited to its facts, which did not meet *Mahajan's* qualifying circumstances: The land was never designated or used for Art. 97 purposes



## **II. Recording requirement places an undue burden on municipalities**

- A. Municipal conservation land usually lacks Art.97 language in its chain of title
- B. The Appeals Court's ruling would require municipalities to either:
  - 1. Review the chain of title for each municipal parcel of land, and fix the chain of title where the designation is not recorded, which is *costly, difficult, and requires significant manpower*; or
  - 2. Risk unilateral transfer or change in use of that land

## **III. Dedication of land for Art. 97 purposes, including accepting grants that restrict future use, designates land for protection**

- A. Transferring municipal land to the care, custody and control of a Conservation Commission is sufficient to invoke the protection of Art. 97 because the purpose for which the Conservation Commissions were created fits within the purposes of Art. 97, thus that land is dictated to conservation and recreation purposes
- B. City applied for and accepted LWCF grant funds to upgrade the property, resulting Project Agreement restricted future use of land



#### **IV. The City sufficiently designated the Playground for Art. 97 purposes**

- A. For more than 6 decades City designated and used Playground for Art. 97 purposes;
- B. “Full charge and control” of the property was transferred to City’s Playground Commission;
- C. City passed an ordinance recognizing the property as a playground;
- D. City applied and accepted LWCF grant funds to upgrade the property;
- E. City designated Playground as permanently protected open space and “Art. 97 land,” consistent with Massachusetts’ SCORP; AND
- F. Mayor endorsed City’s open space and recreation plan which identifies the property as permanently protected open space

# *Smith v. City of Westfield: SJC*

## *Smith v. Westfield,* 478 Mass. 49 (2017)

**Issue 1:** Whether the only way to designate land for Art. 97 purposes is through a deed or recorded conservation restriction?

**Holding:** No. Municipal land may be designated for Art. 97 purposes without formally recording a deed, conservation restriction, or other instrument at the Registry of Deeds.



*Smith v. Westfield,*  
478 Mass. 49 (2017)

***Discussion:***

The meaning of the provision in Art. 97 at issue—*“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, . . . of each branch of the general court”*—is understood under the dedication of land for public use and prior public use common-law doctrines.

Parkland dedicated by municipalities as public parks, under the prior public use doctrine, cannot be sold or devoted to another public use without plain and explicit legislative authority is protected under Art. 97.

To interpret Art. 97 otherwise would mean that the Legislature or voters intended to diminish the scope of parkland that had been protected under these common-law doctrines.

## *The Dedication for Public Use and Prior Public Use Common-Law Doctrines:*

- Municipalities that own land in their proprietary capacity may dedicate it to a particular public purpose, provided that there is nothing in the terms and conditions by which it was acquired or the purposes for which it is held prevent it from doing so.
- “[L]and is ‘dedicated’ to the public as a public park when the landowner’s intent to do so is *clear and unequivocal*.”
- *Clear and unequivocal* intent may be manifested by the recording of a deed or a conservation restriction, *or* when the dedication grants the general public for whose benefit a use in the land was established an interest in the land in the nature of an easement, and upon completion of the dedication it becomes irrevocable.
- The “general public” that has obtained an ‘interest in the land in the nature of an easement,’ is the residents of the State, thus “the ultimate authority over a public park rests with the Legislature.”
- “[P]ublic parks, dedicated as parkland cannot be sold or devoted to another public use without the approval of the Legislature.”

*Smith v. Westfield,*  
478 Mass. 49 (2017)

**Issue 2:** Whether Playground was designated so as to be subject to Art. 97 protection, and thus may be used for another purpose only after City obtains the approval by a two-thirds vote of each branch of the Legislature?

**Holding:** Yes. Playground is subject to Art. 97 protection. Vacated and remanded.

**Discussion:**

- In considering the “totality of the circumstances,” meaning all relevant facts, the Court found that the playground was dedicated as a public park by the City under the *clear and unequivocal* standard.
- The determinative factor was the City’s acceptance of the LWCF funds to rehabilitate the Playground with the statutory proviso that, by doing so, the City surrendered all ability to convert the Playground to a use other than public outdoor recreation without the approval by the Secretary of the Interior and a two-thirds vote of each branch of the Legislature.

# ***Smith v. City of Westfield: Application by Courts***

## **Mirkovic, et. al. v. Guercio, et. al.,**

2017 WL 4681972 (Mass. Land Ct. October 18, 2017)

**Facts:** Town of Shirley acquired land in a land swap. The deed conveyed property “for purposes of protection of water resource and other compatible purposes including conservation and recreation[.]”

**Issue:** Whether the land was taken for Art. 97 purposes or so designated thereafter in a manner sufficient to invoke Art. 97 protection?

**Holding:** **No.** In interpreting the deed language and applying other factors cited by the SJC in *Smith*, the Land Court held that the language in the deed, “other compatible purposes,” read within the context of the property’s zoning district, was insufficient to invoke the protections of Art. 97 because it permitted uses that were not consistent with Art. 97— e.g., commercial, industrial, and institutional uses.

**Lesson:** This outcome suggests that *Smith* will have a bigger impact on disputes involving public lands. Courts will continue to look to external factors – the totality of the circumstances – in determining whether Art. 97 protections apply.

# ***Smith v. City of Westfield: Application by Courts***

## **Town of Sudbury v. MBTA, et. al., 2018 WL 4700410 (Mass. Land Ct. September 28, 2018)**

***Facts:*** Town of Sudbury challenges agreement for MBTA to grant easement over an inactive railroad right of way to allow NSTAR Electric Co. to run power lines underground and then construct a rail trail on the ROW.

***Issue:*** Whether the MBTA's change in use requires legislative approval under the prior public use doctrine?

***Holding:*** **No.** Although Town had standing to bring its claim under the prior public use doctrine, it failed to state a claim upon which relief could be granted. Eversource is a private corporation, and the prior public use doctrine requires that the challenged use be public.

***Appeal:*** The Town has appealed the Land Court's ruling.

## ***Article 97: Practical Tips***

When contemplating the sale, change in use, or disposal of open space or land dedicated to public outdoor recreational use:

- 1) **Look to the chain of title for actions that categorically designate land for Art. 97 purposes:**
  - ❑ Language in the deed or order of taking
  - ❑ A contemporaneous/subsequent conservation restriction, or a similar encumbrance for historic preservation or agricultural use
- 2) **Look to see if your municipality has accepted federal or state grant money or funds restricting future use of the land.**
  - E.g., LWCF grants, state Parkland Acquisitions and Renovations for Communities Program (PARC) (formerly the Urban Self-Help Program)
- 3) **Look to Town Hall records of Town Meeting actions or other formal dedication of land following acquisition**
  - Was “care, custody, and control” of the land transferred to a conservation commission, park department, water supply department or forest division?
- 4) **Look to common sense:**
  - When looking at the “totality of the circumstances” has the municipality clearly and unequivocally dedicated open space to the public as a park?

*“[T]he ultimate use to which the land is put may provide the best evidence of the purpose of the taking” or intent for land otherwise acquired by a city or town.*

*- SJC in Mahajan*