

# McGREGOR & LEGERE

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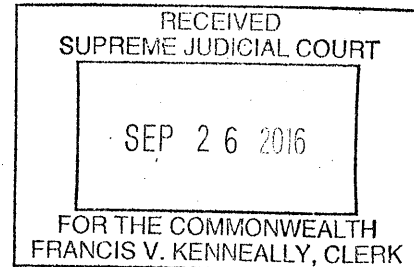
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## VIA HAND DELIVERY

September 26, 2016

Francis V. Kenneally, Esq.  
Clerk for the Commonwealth  
Supreme Judicial Court  
John Adams Courthouse  
One Pemberton Square, Suite 1400  
Boston, MA 02108



**Re: Virginia B. Smith, et. al. v. City of Westfield, et. al.**  
**Docket No. FAR-24692 / Appeals Court No. 2015-P-0773**  
**MACC Support for Further Appellate Review**

Dear Mr. Kenneally:

This Firm represents the Massachusetts Association of Conservation Commissions, Inc. (“MACC”), which hereby expresses its support for the Plaintiffs’ Application for Further Appellate Review in the above-referenced matter, filed on September 14, 2016. Plaintiffs in this matter have challenged the Defendants’ decision to construct a school building on an existing playground, arguing that the playground is protected by Article 97 of the Amendments to the Massachusetts Constitution (“Article 97”) and the prior public use doctrine.

If the Application is allowed, MACC expects to request Leave to file a Brief Amicus Curiae.<sup>1</sup> MACC previously has filed briefs amicus curiae useful to the Supreme Judicial Court in cases addressing Article 97 and related issues.<sup>2</sup>

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<sup>1</sup> MACC is a non-profit corporation formed in 1961 and incorporated in 1978 under the laws of Massachusetts for the purposes of promoting environmental quality, conservation, and protection of wetlands and other natural resources. MACC supports and provides services to municipal conservation commissions in the Commonwealth of Massachusetts with regard to the administration of the Wetlands Protection Act, G.L. c. 131, § 40, Home-Rule wetlands bylaws, and other matters within the scope of their statutory duties by means of public education, publications, and advocacy on matters pending before government agencies. MACC includes as members all conservation commissions duly established under the Conservation Commission Act, G.L. c. 40, § 8C, which must pay dues to be members (335 of 351 did so in fiscal year 2016). MACC members and associate members total approximately 2,300 individuals. MACC is their principal spokesperson on matters of environmental policy, law, and practice within the Commonwealth.

<sup>2</sup> MACC most recently filed a brief amicus curiae in support of the New England Forestry Foundation, Inc. in New England Forestry Foundation, Inc. v. Board of Assessors of Hawley, 468 Mass. 138 (2014).



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MACC is familiar with the origin, purpose, nature and implementation of Article 97. MACC has significant interest in this case because of its important implications for the central role of conservation commissions in preservation and management of natural open space for the public benefit.

MACC believes strongly that Justice Milkey, in his concurrence, correctly identified practical weaknesses and inconsistencies in the application of Article 97 stemming from this Court's prior rulings on the subject. Smith v. City of Westfield, 90 Mass. App. Ct. 80, 2016 WL 4467901 (2016). MACC shares Justice Milkey's "hope that the Supreme Judicial Court someday will revisit such precedent," and supports Plaintiffs' request that this Court do so in this matter. Id. at \*2.

Specifically, MACC agrees that land not expressly acquired for Article 97 purposes is commonly dedicated to such purposes at a later date. In these circumstances, this Court's prior decisions appear to allow for Article 97 protection only where the subsequent restriction on use is formally recorded in the chain of title. Selectmen of Hanson v. Lindsay, 444 Mass. 502, 506 (2005); Mahajan v. Dept. of Env'tl. Prot., 464 Mass. 604, 615-616 (2013).

Article 97 itself does not, however, require that dedication of land to Article 97 purposes be reflected in the property's chain of title in order to qualify for protection.

Justice Milkey astutely recognized that requiring recordation of a formal restriction on the use of land not originally acquired for Article 97 purposes undermines Article 97, as "its protections would apply only where the public entity had already taken steps to ensure that those protections were not needed." Westfield, 2016 WL 4467901 at \*4. Where land has merely been dedicated to Article 97 purposes, "the relevant actors may have no idea that the additional steps are necessary for art. 97 to apply," and will likely not become aware of that fact until it is too late to take the requisite action. Id. Although concerns over record notice may be legitimate, MACC agrees that "[r]ecording statutes ... cannot trump a constitutional provision." Id.

Also, the practical reality that municipalities typically do not record real estate instruments in the Registry of Deeds or Land Court for transfers between local boards and agencies should be reflected in this Court's jurisprudence.

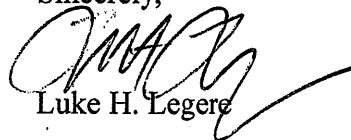
MACC respectfully requests that this Court allow the Plaintiffs' Application for Further Appellate Review in this matter to address this fundamental inconsistency between Article 97 and the cases interpreting it.



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Thank you for your attention to this matter.

Sincerely,



Luke H. Legere

cc: Joseph Stanton, Esq., Clerk, Massachusetts Appeals Court  
Thomas A. Kenefick, III, Esq. (via first-class mail)  
Anthony I. Wilson, Esq. (via first-class mail)  
John Liebel, Esq. (via first-class mail)  
Brian J. Pearly, Esq. (via first-class mail)  
Eugene B. Benson, Executive Director, MACC (via first-class mail)

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