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RE: CASE NO. 12-357

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COMMONWEALTH OF MASSACHUSETTS  
HAMPDEN COUNTY  
SUPERIOR COURT THE TRIAL COURT  
FILED

HAMPDEN, ss.

SEP 4 2012

*[Signature]*  
CLERK/MAGISTRATE

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. 12-357

VIRGINIA B. SMITH, THOMAS SMITH, DANIEL SMITH, ERNIE and ELIZABETH SIMMONS, BRIAN AND ERIN WINTERS, DEAN and VIRGINIA WINTERS, PATRICIA BETTINGER, BENJAMINI 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,

PLAINTIFFS

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.

DEFENDANTS

EMERGENCY MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER

The Plaintiffs in the above-referenced matter hereby move, on an ex parte basis, for a temporary restraining order to issue against the Defendants. In support of same, the Plaintiffs submit a *Memorandum of Law In Support Of Emergency Motion For Ex Parte Temporary Restraining Order*, and state the following:

This motion arises out of a Verified Complaint which has been filed previously with the Court. The Complaint alleges that the Defendants are moving forward with plans to construct a new model elementary school upon a location that includes, in part, the Cross Street Playground. The Cross Street Playground is protected open space and recreational space such

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attest Kenneth C. Kirby, Clerk

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COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

Trial Court  
Superior Court Department  
Civil Action No. 12-357

VIRGINIA SMITH & others<sup>1</sup>

vs.

CITY OF WESTFIELD & others<sup>2</sup>

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

SEP 17 2012

*William P. [Signature]*  
CLERK/MAGISTRATE

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR  
A PRELIMINARY INJUNCTION

In this action, ten taxpayers seek a preliminary injunction, pursuant to Mass. R. Civ. P. 65, to enjoin the city of Westfield from expending public funds for the construction of a new school on grounds that encompass the Cross Street Playground without complying with State law, specifically the requirements of article 97 of the Amendments to the Massachusetts Constitution. For the reasons set forth below, the petitioners' motion is allowed, and the defendants are enjoined from destroying or constructing on any land heretofore designated as article 97 land until the defendants are in full compliance with the requirements of the article.

BACKGROUND

In 2011, the city of Westfield received a grant to build a new elementary school to replace the Ashley Street School. The grant, funded by the

<sup>1</sup> Thomas Smith, Daniel Smith, Ernie and Elizabeth Simmons, Brian and Erin Winters, Dean and Virginia Winters, Patricia Hettinger, Benjamin Larsen, Fred Publican, Don and Sharon Wielgus, Marcus and Karen Jaiclin, Frank and Helen Mochak, William Wigham, Gary Wolfe, William Schneelock Fred Wroblewski, Jose Santos, and Francis and Barbara Simmitt

<sup>2</sup> 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 here solely in their official capacity), and Daniel M. Knapik, Mayor

Massachusetts School Building Association, reduces the cost of building schools approved by the program to cities that participate in the Mass School Building Choice Program. The construction of the school would be on a location that includes the Cross Street Playground. The playground is located on land that has been designated as "article 97 land" and, by virtue of a grant from the Land and Water Conservation Fund, is considered a protected open space.<sup>3</sup>

In order to change the use of article 97 land, two-thirds (2/3) approval from both houses of the General Court is required. See MA Const. art. XCVII. Moreover, when a municipality decides to alter the use of article 97 land for which it has received funding under the Land and Water Conservation Fund, it must acquire replacement land to compensate for the loss of the protected open space and approval from the United States Secretary of the Interior. See 16 U.S.C.S. § 4601-8 (f)(3).

On August 27, 2012, in preparation for the school's construction, the city began a demolition process that included taking down century-old trees and removing a portion of the Cross Street Playground. On September 5, 2012, this court issued an emergency temporary order, restraining the city from further construction on the entire site.<sup>4</sup>

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<sup>3</sup> In 1979, Westfield received \$185,000.00 from a federal Land and Water Conservation Fund grant to improve five parks in the town. Cross Street Playground was among the lands improved with this money.

<sup>4</sup> This broad order, issued ex-parte, (1) enjoined the city from taking any further action physically affecting the property at 17 Cross Street, including but not limited to any grading of the property, any further removal of trees or plants, or any demolition or removal of any park structures; (2) ordered the city to cease and desist and to refrain from all demolition or construction activity in connection with the Ashley Street School and/or the new model school at the area of Ashley and Cross Street; and (3) ordered the city to refrain from damaging the property or committing a ty waste affecting 17 Cross Street and/or the Cross Street Playground.

### DISCUSSION

The ten taxpayer plaintiffs seek an injunction, pursuant to G. L. c. 214, § 7A (Actions for Purpose of Protecting Natural Resources and Environment), to enjoin the defendants from building the school on land designated as protected open space. That statute reads in pertinent part:

"The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs . . . determine whether such damage is occurring or is about to occur and may, before final determination of the action, restrain the person causing or about to cause such damage, provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." Id.

Here, the plaintiffs claim that a portion of the land is protected in perpetuity under article 97 of the Amendments to the Massachusetts Constitution and that that amendment has a major purpose of preventing or minimizing damage to the environment. The purpose of the article is clear, as it provides, in part, 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." MA Const. art. XCVII.

This court, however, recognizes that the real issue in this case is the plaintiffs' dissatisfaction with the size, scope, and location of the school. Notwithstanding, and while it is not clear to me whether the plaintiffs are claiming that the city is expending funds in an inappropriate manner, the plaintiffs have

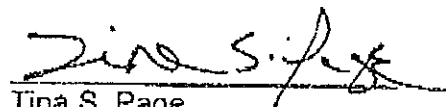
successfully persuaded this court that they have a likelihood of success on the merits in this case. This is underscored both by the defendants' concession that they have not complied with the requirements of article 97, as well as Westfield's admission that it has not yet acquired replacement land to compensate for the loss of the Cross Street Playground, in violation of the Land and Water Conservation Fund Act. See MA Const. art. XCVII; 16 U.S.C.S. §§ 4601, *et seq.* Because the city does not, nor can it plausibly assert that it has complied with these explicit requirements, the petitioners have met their initial burden of showing that they are likely to succeed on the merits of their claim. Accordingly, the court turns to consider how the violation affects the public interest and whether enjoining Westfield from expending any funds for the construction of a new school would promote or adversely affect the public interest.

The city argues that the possibility that the project would be delayed, and that the city may be at risk of losing the 23.1 million dollars in state funding, supports its claim of irreparable harm. However, a claim of irreparable harm must be specific and not what the party might "conceivably suffer." Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). The city has failed to demonstrate that it will be irreparably harmed if it is allowed to ignore compliance with the requisites of article 97. On the other hand, the plaintiffs have demonstrated irreparable harm in that the loss of an open air space without a replacement is a "loss of rights that cannot be vindicated" by a final judgment. See Packaging Indus. Group, Inc., 380 Mass. at 616.

Finally, in determining whether the issuance of this injunction would adversely affect the public interest, I fully agree that the failure to build a new public school would have an adverse impact on the residents of the city, specifically the school children, who are currently learning in outdated and decaying schools. However, this court is not prohibiting the construction of a new school. It is merely ordering the city to comply with the law before it proceeds. I find Westfield's insistence in ignoring its environmental responsibilities to its citizens as well as the laws of the United States and the Commonwealth particularly ironic, where it simultaneously seeks to build an elementary school to educate our future leaders.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion for a preliminary injunction is **ALLOWED**, to the extent that the City of Westfield is enjoined from demolishing or constructing on any article 97 property until it has obtained a locus to substitute for the loss of any portion of the Cross Street Playground and, additionally, obtained a two-thirds (2/3) vote from both houses of the General Court approving the proposed use of this property. This court, in the exercise of its' discretion, will not order the plaintiffs to post security on this action.



Tina S. Page  
Associate Justice of the Superior Court

DATED: 17 September, 2012