THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

September 30, 2016

BY E-FILING SYSTEM
Francis V. Kenneally, Esq.
Clerk of the Supreme Judicial Court
for the Commonwealth
John Adams Courthouse, Suite 1400
One Pemberton Square
Boston, MA 02108-1724

Subj: *Smith, et al. v. City of Westfield, et al.*, FAR No. 24692 / Appeals Court No. 2014-P-0607—Support for FAR Application

Dear Clerk Kenneally:

We have reviewed the Citizen-Plaintiffs' application for further appellate review of the Appeals Court's decision in the above-referenced matter. We now urge the Court to grant the application because there is a substantial public interest both in reversing the Appeals Court's decision and clarifying an ambiguity in this Court's decision in *Mahajan v. Department of Environmental Protection*, 464 Mass. 604 (2013) that has created uncertainty about what public lands are protected by Article 97 of the Amendments to the Massachusetts Constitution. Mass. R. App. P. 27.1(a); *see also Smith v. Westfield*, 90 Mass. App. Ct. __, Slip Op. at 1 (Aug. 25, 2016) (Milkey, J., concurring) (expressing the hope that this Court will revisit *Mahajan*).

Article 97 protects "the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources." Art. 97. It accomplishes that purpose by prohibiting the government (including municipalities) from selling or changing the use of public parkland without legislative approval in the form of a two-thirds roll call vote from both the Senate and the House of Representatives. *Id.* This case raises an important recurring question about the precise post-taking or post-acquisition measures necessary to trigger the application of Article 97 to parkland that was not taken or acquired initially for Article 97 purposes but has since been continuously used for one or more of those purposes. The Attorney General, as the Commonwealth's chief law officer, is charged with the enforcement of laws, including Article 97, that protect and preserve the public's interest in open spaces and parks and thus has a

substantial interest in this issue. G.L. c. 12, § 11D; *see also Pratt v. Boston*, 396 Mass. 37, 45 n.11 (1985).

The Appeals Court misread *Mahajan*. *Mahajan* clarified that "[t]he critical question [in Article 97 cases] 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." 464 Mass. at 615 (second emphasis added). Relying on the citation to *Hanson v. Lindsay*, 444 Mass. 502 (2005) that followed this quoted text, the Appeals Court held that the *only* "manner sufficient" to designate non-Article 97 land for a protected Article 97 purpose is "by deed or other recorded restriction on the land." *Smith*, Slip Op. at 5-6 (Trainor, J.) & 1, 4 (Milkey, J., concurring).[1] While *Mahajan* did cite *Hanson*'s deed recordation holding as an example of the types of post-acquisition measures that would be sufficient to designate land for an Article 97 purpose, the Court did not state that recording a deed or other restriction is the *only* "manner sufficient" to do so.[2] In fact, the Court also said that conveying the land to a municipality's conservation commission or devoting the land to an Article 97 purpose in an urban renewal plan would also be sufficient to invoke Article 97. *Mahajan*, 464 Mass. at 615, 619 & n.19.[3]

The government (including municipalities) and the public would greatly benefit from more clarity on what measures are "sufficient" to designate land not originally acquired for Article 97 purposes as Article 97 land, thus triggering the Article's important constitutional protection. And the facts of this case represent an ideal vehicle to do so, because the record includes so many different types of evidence that reflect a clear intent on the part of the City of Westfield to designate the disputed land as protected parkland subject to Article 97. For example, the City transferred "full charge and control" over the disputed land to Westfield's

[1] In a parenthetical following the *Mahajan* Court's citation to *Hanson*, the Court characterized *Hanson* as having held, on its unique set of facts that implicated the land recoding system, that "art. 97 protections may arise where subsequent to taking for purposes other than art. 97, land is 'specifically designated' for art. 97 purposes by deed or other recorded restriction."). *Mahajan*, 464 Mass. at 615.

[2] *See Smith*, Slip Op. at 4 (Milkey, J., concurring) (expressing doubt about proper way to read *Mahajan*).

[3] The Appeals Court's reading of *Mahajan* is also irreconcilable with *Mahajan*'s statement that, as to the category of lands alleged to have been originally taken or acquired for an Article 97 purpose, "the ultimate use to which the land is put may provide the best evidence of the purposes of the taking," i.e., no recorded restriction is required. 464 Mass. at 620; *see also Smith*, Slip Op. at 2 (Milkey, J., concurring) (accepting this reading of *Mahajan*).

playground commission in 1948, *Smith*, Slip. Op. at 3 n.2 (Milkey, J., concurring), and enacted an ordinance in 1957 recognizing that the land had been "designated as a public playground" and dedicating it as the John A. Sullivan Memorial Playground. II Record App. (RA) at 43. Later, in 1979, the City applied for and received money from the federal Land and Water Conservation Fund (LWCF) and the LWCF's authorizing Act mandates that a grant recipient must maintain the benefited land in perpetuity for public outdoor recreational use. *See Smith*, Slip. Op. at 3 n.2 (Milkey, J., concurring).[4] And, in 2010, the City confirmed that the park was permanently protected recreation land. *See* II RA at 145, 148. These facts, taken individually or together, should have been sufficient, even under *Mahajan*, to bring the disputed parkland within the protection of Article 97. There is thus certainly a substantial public interest in this Court's clarification of this important public issue.

* * *

For these reasons, "substantial reasons affecting the public interest or the interests of justice" exist in this case, *see* Mass. R. App. P. 27.1(a), and we thus urge the Court to grant the Citizen-Plaintiffs' application for further appellate review.

Sincerely,

/s/ Seth Schofield

SETH SCHOFIELD (BBO NO. 661210)
Assistant Attorney General
Environmental Protection Division
Senior Appellate Counsel
Energy and Environment Bureau
(617) 963-2436
seth.schofield@state.ma.us

Cc: Joseph Stanton, Clerk, Appeals Court (by E-filing System)
Thomas A. Kenefick, III (by e-mail and First Class Mail)
John Garber, Assistant City Solicitor (by e-mail and First Class Mail)
Luke H. Legere (by e-mail and First Class Mail)

16-09.30 [2] - AG Ltr. in Supp. of Citizen FAR App. (Smith v. Westfield) [fnl].doc

---

[4] 16 U.S.C. § 460*l*-8(f)(3) (1976), *re-codified* at 50 U.S.C. § 200305(f)(3); *see also* 36 C.F.R. § 59.3 (2015) (Conversion Requirements); *Brooklyn Heights Ass'n, Inc. v. Nat'l Park Serv.*, 777 F. Supp. 2d 424, 427 (E.D.N.Y. 2011) (stating that this "Section . . . ensures that once a property is assisted by an LWCF grant, it shall be preserved in perpetuity for public outdoor recreational use – or replaced by a substitute property of equal value, usefulness, and location.").