COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
No. 2018-P-1661

TOWN OF SUDBURY,

PLAINTIFF-APPELLANT

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY AND NSTAR ELECTRIC COMPANY D/B/A EVERSOURCE ENERGY,

DEFENDANTS-APPELLEES

ON APPEAL FROM JUDGMENT OF THE LAND COURT

BRIEF OF PLAINTIFF-APPELLANT, TOWN OF SUDBURY

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Whether the Land Court erred in dismissing the Town of Sudbury's Complaint for failure to state a claim under the Massachusetts common law prior public use doctrine.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW

On September 27, 2017, the plaintiff-appellant, Town of Sudbury ("Town"), filed a complaint against the defendant, Massachusetts Bay Transportation Authority ("MBTA"), seeking declaratory and injunctive relief to preclude the MBTA from violating the Massachusetts prior public use doctrine, which precludes land taken for a particular public use to be diverted to an inconsistent public use without plain and explicit authorizing legislation. Appendix (hereafter "A., "), 0001. In the 1970's, the MBTA acquired a railroad right of way ("ROW") in Sudbury "for the purpose of providing mass transportation facilities for public use" and now seeks to grant an easement to a publicly regulated electric utility, NSTAR Electric Company d/b/a Eversource Energy ("Eversource") for the inconsistent public use of the

ROW for a combined electric transmission utility line and paved public "rail trail." A. 0006-7. In its complaint, the Town alleged that the MBTA was precluded from the intended diverted public use under the Massachusetts common law prior public use doctrine, unless and until it obtained the requisite statutory authority. Id.

Following a case management conference in the Land Court on November 1, 2017, the Town amended the complaint to include Eversource as a direct party defendant and to provide further clarification on the issue of standing, pursuant to discussions with the Court at the case management conference. A., 0002. The MBTA then filed a motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted, and Eversource joined in the motion. Id. Following a hearing on the motion which was held on March 7, 2018, the Court (Piper, J.) entered an order allowing the defendants' motion to dismiss on September 28, 2018. A., 0004. The Court issued a 10-page memorandum titled "Order Allowing Defendants' Motion to Dismiss," along with a 2-page Judgment which are included as an addendum to this brief. Addendum (hereafter "Add.). The Town timely

appealed the Judgment and the Town's appeal is now before this Court.

B. STATEMENT OF FACTS

PRIOR PUBLIC USE OF THE ROW

The MBTA ROW in Sudbury has been inactive as a rail line since the 1970's. A. 0007. Areas along the ROW are now either heavily wooded, overtaken by vegetation, or are surrounded by protected public lands, wetlands and related environmental resource areas. A. 0008. The ROW is currently used by the public for walking, hiking, and other passive recreation. Id.

The MBTA acquired the ROW by a combination of a 1976 "Indenture" agreement with the Trustees of the Property of Boston and Maine Corporation ("B&M Trustees"), Debtor, In the Matter of Boston and Maine Corporation, Debtor, United States District Court, Docket No. 70-250-M, and a 1977 taking by eminent domain. Id. The "Indenture" between the B&M Trustees and the MBTA is dated December 24, 1976, and provides in relevant part as follows:

> *in consideration of $36,549,000 Trustees grant all right, title and interest* ***(sufficient to permit the Authority to operate a passenger and freight rail service over the rail line rights of way*** *and the*

> *Boston Engine Terminal Area, as hereinafter described), in and to the Trustees Railroad rights of way and other lands thereon and including all track, signals, bridges, buildings, shops, towers and other improvements affixed thereto, and all rights and easements appurtenant thereto, …*

A. 0008. (emphasis supplied).

The MBTA's Order of Taking dated February 16, 1977, provides in relevant part as follows:

> *"WHEREAS," the Massachusetts Bay Transportation Authority, a body politic and corporate, and a political subdivision of the Commonwealth of Massachusetts, established by and acting pursuant to the provisions of Chapter 161A of the General Laws, as amended,* ***for the purpose of providing and extending mass transportation facilities for public use under the power granted to it by Section 3(o) thereof,*** *hereby adjudges that public necessity and convenience require that the Authority lay out and construct Rapid Transit Extension, and in order to carry out the mandate of Chapter 161A as amended, and to insure this availability of lands for that purpose, the lands located in … Sudbury … hereinafter referred to are hereby taken in fee simple.*
>
> * * *
>
> *WHEREFORE, the Board of Directors of the* [MBTA] … *after examination of the within taking, layout, and plan for the Middlesex County Extension has hereby:*
> *VOTED:*
> *That the mass transportation extension and facilities for the Middlesex County Extension, … be taken in fee simple on behalf of the Authority, under the authority of General Laws, Chapter 79 and Section 3(o) of chapter 161A …*

A. 0008-9. (emphasis supplied).

Thus, the Indenture by which the B&M Trustees conveyed Boston and Maine property interests to the MBTA expressly states that the conveyance was "to permit the [MBTA] to operate a passenger and freight rail service over the rail line rights of way," and the instrument of taking by eminent domain expressly states that the taking was for the specific and limited purpose of "providing and extending mass transportation facilities for public use …" Id.

EVERSOURCE'S PUBLIC PROJECT PROPOSAL

Eversource has entered into an option agreement with the MBTA for an easement for the underground installation of a 115-kilovolt electric transmission line within the ROW, along with an above-ground paved access roadway which is intended to double as a publicly accessible "rail trail." A. 0010. The intended easement for the project is for the full width of the ROW, which is approximately 82.5 feet. Id.

Although Eversource's easement for the project would be with the MBTA, the easement from the MBTA will be conditioned upon review by the Massachusetts Department of Conservation and Recreation ("DCR"). Id. The DCR currently has a lease agreement with the

MBTA for construction of the Massachusetts Central Rail Trail ("MCRT") that coincides with Eversource's proposed project alignment along the ROW. Id. Eversource has indicated that it is entering into a memorandum of understanding with DCR in an effort to memorialize agreements related to design, permitting, construction, operation, and maintenance of both the underground electric transmission line and the above-ground publicly accessible, paved rail trail within the MBTA ROW. Id. Eversource and DCR plan for DCR to be responsible for maintenance of the ROW following construction of the project. Id.

Eversource has filed petitions with the Commonwealth of Massachusetts Energy Facilities Siting Board ("EFSB") and Department of Public Utilities ("DPU"), which have been consolidated in one action, Matter No. EFSB 17-02/D.P.U. 17-82/17-83, seeking approval to construct an underground electric transmission line along the ROW as its "preferred route" ("Preferred Route"), versus alternatives, one of which does not involve construction within the ROW. A. 0010-11. The statutory authority for Eversource's petition is, among other provisions, G.L. c.164, §72, which requires that the proposed electric transmission

line will "serve the public convenience and is consistent with the public interest." A. 0011.

In support of its EFSB/DPU petition, Eversource specifically seeks approval of the project as serving a "compelling public use and purpose." Id. Eversource contends that the project is the result of a state and federally mandated study to identify and address reliability needs of the regional transmission system that serves northern Massachusetts and southern New Hampshire and will address the determination of a need for additional transmission capacity within the Marlborough subarea which encompasses the municipalities of Berlin, Framingham, Grafton, Hudson, Marlborough, Northborough, Shrewsbury, Stow, Southborough and Westborough. Id. Eversource also contends that the coupling of its underground transmission line with the above-ground paved MCRT rail trail confers a further "public benefit" which compels the EFSB and DPU to grant its petitions. Id.[1]

[1] Eversource filed its petition with the EFSB on April 21, 2017. The EFSB conducted sixteen (16) evidentiary hearing sessions from October, 2017 to January, 2018. The petition remains under advisement with the EFSB as of the time of filing this brief.

Eversource has also made requisite filings for the project proposal with the Secretary of the Commonwealth of Massachusetts Office of Energy and Environmental Affairs under the Massachusetts Environmental Policy Act ("MEPA"). A. 0011-12. In its MEPA filings, Eversource contends that it is entitled to the "limited project" exemption under the applicable provisions of the Massachusetts Wetlands Protection Act and regulations because it is proposing underground "public utilities." Id.

INCONSISTENT PUBLIC USE

The Preferred Route along the ROW is approximately 9 miles. A. 0012. It begins at Eversource's Sudbury Substation and travels northwest along the ROW passing through Sudbury, Marlborough, Hudson, Stow and then into Hudson again, where it travels underground in public roadways to Eversource's Hudson Substation. Id. The Preferred Project would travel for a little over four miles through Sudbury. Id.

The high voltage transmission lines for the Preferred Project are intended to be installed in conduits and contained within a "duct bank" to be constructed underground along the ROW. A. 0013. A

thermal concrete envelope which is then filled with a fluidized thermal backfill encases the conduits to form the duct bank. Id. The typical duct bank trench detail will consist of a duct bank that is 4-feet wide and 5 ½ to 8 feet deep. Id. Eversource will also install pre-cast concrete "splice vaults" to facilitate cable installation and splicing and enable access to the underground duct bank and conduits for maintenance and future repairs. Id. Each splice vault will be approximately 10 feet wide by 8 feet high and 30 feet long. Id. The splice vault depth will vary by location, with the base measuring approximately 12 to 15 feet below the proposed final grade of the access road. Id. The splice vaults will be located entirely underground with only manhole covers being visible at ground level at final grade. Id. Pre-cast communication handholes measuring 4 feet by 4 feet by 4 feet will be installed parallel to each splice vault. Id. The splice vaults for the project will be spaced approximately every 1,500 to 1,800 feet along the ROW. Id.

The intended construction platform within the ROW is 22 feet wide generally, with a 30-foot wide limit of disturbance along the duct bank alignment. A.

0014. At select locations, where it is necessary to meet existing grade to satisfy DCR design criteria and to accommodate stormwater management features, the limit of disturbance will be wider than 30 feet. Id. The construction platform will increase to a width of 40 feet at the proposed splice vault locations, with a 45-foot limit of disturbance. Id.

The Preferred Project also involves work on three existing abandoned railroad bridges over navigable portions of two rivers and streams, including two bridges over Hop Brook in Sudbury, which is a particularly sensitive and valuable environmental resource area, further described below. Id. Eversource intends to rehabilitate existing railroad bridges generally within their existing footprints and install new electric transmission lines within the footprint of the existing bridge structures. Id. Eversource has also proposed adaptive reuse of the existing rehabilitated bridge structures to accommodate the shared-use publicly accessible paved roadway for the aforementioned MCRT in accordance with the DCR's proposed design plans. Id.

Eversource's Preferred Project requires an approximate 30-foot wide corridor to be clear cut of

trees and woody shrubs to facilitate the installation of the access road and duct bank/splice vault system. Id. At proposed splice vault locations, the limits of clearing will be expanded to a width of 40-50 feet, for a length of 50 feet, to accommodate the installation of the vaults. Id. In total, the project will result in approximately 27.96 acres of tree removal within the ROW. Id.

Within the aforementioned 30-foot clear-cut corridor, Eversource intends to install a 22-foot wide construction platform consisting of: 1) a 14-foot wide access road (10-foot road surface with 2-foot shoulders); 2) a 4-foot wide duct bank (offset from the access road by 1 foot); 3) splice vaults (requiring additional work space); and 4) 4 feet of additional construction area to facilitate installation of the duct bank. A. 0015. Once construction is completed, Eversource has indicated that the majority of the 82.5-foot wide ROW is to be vegetated, that a 22-foot-wide cleared corridor will be maintained, and the area above the duct bank will consist of herbaceous vegetation. Id. The 14-foot-wide access road (10-foot-wide, plus 2-foot-wide shoulders on each side) will be left unvegetated, and

will be maintained to provide for both the MCRT rail trail and the operation and maintenance of the electric transmission lines. Id.

Eversource expects to install its facilities and construct the gravel base that will be used for DCR's MCRT, and that DCR intends to add a top coat to the gravel base and add loamed and seeded shoulders. Id. Once DCR constructs the MCRT, the gravel base and the MCRT will be under the care and control of DCR and DCR will be responsible for the MCRT and the maintenance of the MCRT and all of the DCR's trail related improvements. Id.

As proposed under Eversource's Preferred Project route, the footprint of the Eversource project would preclude the use of the ROW for active passenger and freight rail service. A. 0022. The two uses cannot physically co-exist within either the project footprint or outside the project footprint but otherwise within the boundary of the 82.5-foot total width of the ROW. Id.

First, with respect to the project footprint itself, in many locations, because of environmental constraints, the 3-foot to 4-foot wide duct bank runs in the center of the access path under the 10-foot

wide MCRT rail trail and the splice vaults partially extend under the 10-foot rail trail. Id. These solid concrete structures with fluidized thermal backfill running up to the ground surface would create an insufficient foundation for railroad track placement and would provide inadequate ballast for track performance and deflection. Id. Any effort to locate tracks on top of the access road would also necessarily result in discontinuance of the MCRT rail trail, which Eversource has claimed to be an integral part of the compelling public purpose served by its Preferred Project proposal. Id. The underground electric transmission line and above-ground MCRT rail trail could also obviously not co-exist with an active passenger and freight rail line in the two areas in Sudbury involving narrow bridge crossings of the Preferred Route over navigable waterways. Id.

With respect to restoration of active rail service outside the bounds of the total 50-foot wide Eversource Preferred Project footprint, but within the approximate 15 feet of width which might hypothetically be left outside both sides of the project footprint but still within the alleged 82.5 foot total width of the ROW, topography, soil, and

waterway conditions would preclude construction of tracks which could support an active rail line. A. 0023.

ADVERSE EFFECTS

Construction along the MBTA ROW presents numerous environmental challenges and concerns. A. 0015. In Sudbury, the ROW directly abuts 6,145 linear feet of protected Town-owned open space with public access. A. 0015-16. The ROW also contains or directly abuts 4,670 linear feet within state priority and estimated wildlife habitat. Id. There are at least eight perennial stream crossings and ten vernal pools located within 100 feet of the ROW centerline. Id. Two national wildlife refuges, the Great Meadows National Wildlife Refuge and the Assabet River National Wildlife Refuge, have a total of 4,185 linear feet directly abutting the ROW. Id. The ROW also directly abuts 2,155 linear feet of parcels that are permanently protected under a recorded conservation restriction in favor of the Town under G.L. c.184, §§31-33. Id. An additional 1,035 linear feet of the ROW abut Stone Tavern Farm, purchased with both local and state funds for permanent agricultural use under the Massachusetts Agricultural Preservation Program.

Id. The ROW also directly abuts 1,995 linear feet of land which the Town acquired for wetland and water supply protection. Id. Active Town public water supply wells are located immediately southward and downgradient of the inactive ROW. Id. The associated Zone II for these wells (defined in MassDEP Regulations as the area of an aquifer that contributes to the wells) covers 2,468 acres. Id. The section of the ROW that crosses the Town's Zone II water supply area is approximately 8800 linear feet and covers 16.6 acres. Id.

Construction activities and clear cutting through the ROW in Sudbury will degrade the experience of the Town's abutting passive recreation trails and will permanently destroy wildlife corridors and wildlife habitat. A. 0017. Sudbury alone has invested more than $25 million in the purchase of open space for conservation purposes since 2001 under the Massachusetts Community Preservation Act ("CPA"), and was one of the first communities to adopt the CPA at the full maximum contribution of 3% added to resident taxpayer dollars. Id. Town-owned conservation land directly abutting the ROW includes: the Town of Sudbury Landham Brook Conservation Land, which

directly abuts the ROW for 500 linear feet, and consists of 100% wetland; another Town-owned conservation parcel consisting of 40 acres to the west of the Landham Brook Conservation Land Parcel; and a 30 acre parcel of land subject to a Town-owned conservation restriction which directly abuts 600 linear feet along the ROW. A. 0017-18. Located to the west of these parcels along the ROW is the Town-owned Hop Brook Marsh Conservation Land, which directly abuts approximately 3,800 linear feet along the north side of the ROW. A. 0019. This is a 93-acre parcel of wetland, floodplain, meadow and forest and was the first parcel of conservation lands purchased by the Town. Id. It is the most active of the Town's conservation lands and is heavily used by the public for passive recreational use and enjoyment. Id. In this area, there are four state certified vernal pools with state-listed species directly abutting the ROW, one on the south side of the ROW and three on the north side. Id. There is also a large pond contained within the Hop Brook Marsh Conservation Land. Id. Further, Hop Brook itself is a state-designated cold water fishery, particularly dependent upon heavy tree canopy. A. 0020.

In total, along the proposed 4.3 miles of the Preferred Project which runs along the ROW in Sudbury, the ROW contains or directly abuts 6,145 linear feet of Town-owned land with public access. Id. As a direct abutter to the ROW, the Town will sustain unique and substantial adverse effects if construction is allowed to proceed along the ROW as proposed by Eversource, including, but not limited to, adverse effects to wetland resources, loss of wildlife habitat and mortality of wildlife species inhabiting Town-owned property, degradation of the scenic and natural environment, adverse effects upon passive recreational uses, and the loss of a rare cold water fishery and mortality of the fish species contained therein as the result of the tree clearing and loss of tree canopy. A. 0021.

SUMMARY OF ARGUMENT

The Town has stated a valid claim upon which relief can be granted under the common law prior public use doctrine. (pp. 21-29). The Town has standing to pursue the claim and has alleged facts sufficient to establish that the MBTA acquired the ROW for a particular public use and seeks to divert the ROW to an inconsistent public use without the

requisite plain and explicit legislative authorization. Id.

The Land Court erred in dismissing the Town's amended complaint in order to allow a purported "private" inconsistent use (pp. 29-32).

The Court correctly rejected the remaining arguments the defendants made to seek dismissal. (pp. 32-43).

ARGUMENT

I. THE TOWN'S AMENDED COMPLAINT STATES A VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE COMMON LAW PRIOR PUBLIC USE DOCTRINE

Under the Massachusetts common law prior public use doctrine, public land taken or acquired for a particular public use cannot be diverted to an inconsistent public use without plain and explicit legislation authorizing the inconsistent use. See Mahajan v. Dep't of Envtl. Prot., 464 Mass. 604, 616-617 (2013), and cases cited. See also, Board of Selectmen of Braintree v. County Commissioners of Norfolk, 399 Mass. 507 (1987) (employing prior public use doctrine to enjoin defendant county commissioners from using a portion of property previously taken as the site for a tuberculosis hospital for a temporary house of correction).

The decision of the Supreme Judicial Court ("SJC") in the Braintree Board of Selectmen v. County Commissioners of Norfolk case, supra, establishes that the Town has stated a valid claim upon which relief can be granted under the prior public use doctrine. In the Braintree case, the plaintiff Board of Selectmen of Braintree ("Board") brought an action in Superior Court seeking to enjoin the defendant County Commissioners of Norfolk ("County Commissioners") from using a building which was part of the Norfolk County Hospital as a correctional facility. Braintree, at 507. The Commissioners had been defendants in a federal district court action challenging overcrowded conditions at the Norfolk County House of Correction and were ordered to reduce the jail population. Braintree, at 508. The Commissioners retained a consulting firm which conducted a survey noting that the Norfolk County Hospital was a physically suitable site but that the site was not recommended as a correctional facility because its use was governed by special legislation entitled "An Act to Provide for the Construction by Counties of Tuberculosis Hospitals for Cities and Towns Having Less than 50,000 Inhabitants." Braintree, at 509. Nevertheless, the

Commissioners voted to use the "nurses' quarters" at the Norfolk County Hospital as a temporary house of correction and began housing inmates there following the Norfolk County Sheriff's assumption of the custody and control of the nurses' quarters. Id. The "nurses quarters" used as the temporary house of correction was a two-story building which was separated from the main hospital building by a hospital roadway. Braintree, at fn. 3. The building was approximately 100 yards from the main hospital building and approximately 110 yards from Washington Street in Braintree. Id.

The Board alleged that the use of the nurses' quarters as a correctional facility was contrary to the use for which the property was taken and was therefore an improper use without specific legislative approval. Braintree, at 509. Similar to one of the arguments the MBTA made in seeking dismissal of the Town's complaint in this case, the County Commissioners countered that the challenged use did not affect or interfere with the operation of the hospital but was merely incidental to the primary use, and that prior legislative authority was therefore not needed. Braintree, at 509-510.

The SJC noted that special legislation authorized the County Commissioners "to provide adequate hospital care for all those in the county suffering from consumption and who were in need of such care." Braintree, at 510. The legislation also authorized the County Commissioners to take land by eminent domain for the purpose of carrying out the provisions of the special legislation and that land so taken shall vest in Norfolk County to be held for said hospital district. Id. The land at issue on which the Norfolk County Hospital was situated was taken by eminent domain under the authority of this special legislation and the instrument of taking recited that the land was taken "for the benefit of said County of Norfolk for hospital purposes as set forth in said Acts and for the inhabitants of said county and hospital district, in manner prescribed in and by said Acts and for all purposes therein provided." Id.

In ruling that the County Commissioners were prohibited from using the nurses' quarters for correction facility purposes, the SJC relied on the prior public use doctrine as follows: "Land which has been devoted to one public use cannot be diverted to another, inconsistent public use without plain and

explicit legislative authority." Braintree, at 510, citing Robbins v. Department of Public Works, 355 Mass. 328, 330 (1969), Bauer v. Mitchell, 247 Mass. 522, 528 (1924), and Higginson v. Treasurer and Schoolhouse Comm'rs of Boston, 212 Mass. 583, 591 (1912). The SJC ruled that the County Commissioners were attempting to appropriate a portion of the hospital grounds to a different public use which was inconsistent with the hospital use and that the nurses' quarters were within the area of the original taking and were used for hospital purposes prior to July 1985. Braintree, at 511. The SJC found that the use of the nurses' quarters as a correctional facility was not consistent with its prior public purpose. Id. The SJC rejected the County Commissioners' argument (similar to one of the arguments the MBTA made in this case) that use of the nurses' quarters for a temporary house of correction involved a use which was allegedly "incidental" to the hospital use, i.e., that use of the nurses' quarters as a temporary house of correction would not interfere with the use of the main hospital building for hospital purposes. Id. The SJC held that this did not render the use "consistent" with the prior public use in a manner

which was sufficient to satisfy the prior public use doctrine. Id., at 511.

The SJC also noted that cases relied on by the County Commissioners on the issue of inconsistent use (the same cases relied on by the MBTA in this case) were distinguishable. The SJC noted that in Peirce v. Boston and Lowell R.R., 141 Mass. 481 (1886), it had held that the use of a railroad building as a lodging house was "consistent with its occupation for the purposes for which it was taken." Id. The SJC noted that the Peirce Court had reasoned that providing food, lodging, and horse-keeping and horse-hiring for the convenience of its passengers and others was "incident" to the business of the railroad because the existence of such services could serve to increase its business as a carrier. Id. The SJC found that despite the fact that the majority of the boarders in the lodging house at issue in the Peirce case were employees of a nearby prison while others were employees of the railroad, the lodging house was also "available to travelers." Braintree, at fn. 6. Therefore, the fact that the lodging house was available to "other than passengers" did not foreclose a finding that the use of the premises was "incidental

to and consistent with the original purpose." Id. The SJC reasoned the Peirce case thus did not involve a "subsequent, inconsistent use, and, therefore, no specific legislative authority was needed to authorize the station master's use of the premises as a lodging house." Braintree, at 511. In contrast, the SJC reasoned that the use of the nurses' quarters in the Braintree case as a correctional facility "has absolutely nothing to do with its 'occupation for the purposes for which it was originally taken.' [quoting Peirce]. Thus, it is clearly an inconsistent use." Id. This is exactly the situation presented in the Town's case against the MBTA and Eversource – the proposed use of the ROW for a public electricity and rail trail project has "absolutely nothing to do with the prior public purpose for which it was taken" (passenger and freight rail service) and is thus "clearly an inconsistent use."

The SJC also noted that while the use of the hospital as a chronic disease hospital "may be consistent" with its original public use as a tuberculosis hospital, "use as a correctional facility is not." Braintree, at 512. The SJC noted that the fact that the hospital would continue to operate was

not controlling. "The use is entirely different and cannot be accomplished without legislative authority." Id. The SJC also reasoned that the County Commissioners could not cite legislative authority justifying their actions. Id. While the enabling legislation granted the County Commissioners general powers of supervision over county property, that was "not enough, however, to validate the commissioners' imposing control for one public use over property which had been devoted to another, inconsistent public use." Id., citing Bauer v. Mitchell, 247 Mass. 522, 528 (1924). The SJC noted that in the Bauer case, the land at issue had been dedicated to use as a school under definite statutory provisions, and that the defendant in the Bauer case could not take part of that land for use of sewer drainage for a hospital, absent specific legislative authority. The SJC reasoned that similarly, in the Braintree case, the County Commissioners could not take part of the land used as a hospital for use as a correctional facility, absent specific legislative authority. Braintree, at 513. The SJC thus reversed a judgment of the Superior Court denying the Board's request for an injunction and remanded the case for the "entry of judgment

enjoining the use of the nurses' quarters as a correctional facility, effective at such reasonable time after rescript as will permit the orderly transfer of the prisoners to other facilities." Id.

There is no meaningful difference between the plaintiff municipality in the Braintree case and the plaintiff municipality in the Town's case against the MBTA and Eversource. In fact, the only real difference is that the Town in this case, and the protected natural environment at issue, stand much more to lose if the Town is precluded from proceeding with its case under the prior public use doctrine. Dismissal of the Town's case for failure to state a claim is directly at odds with the SJC's decision in the Braintree case and must be reversed.[2]

II. THE COURT ERRED IN DISMISSING THE TOWN'S COMPLAINT IN ORDER TO ALLOW A PURPORTED "PRIVATE" INCONSISTENT USE

In its motion to dismiss the Town's amended complaint in the Land Court, the MBTA argued that the

[2] To the extent this Court sees standing as an issue, the Braintree case also compels a ruling that as the municipality where the public land at issue is located, the Town has standing to seek relief under the Massachusetts prior public use doctrine. Moreover, the Town has alleged particularized harm as an abutting landowner, which further establishes its standing to bring a prior public use claim.

Town had failed to state a claim under the prior public use doctrine because Eversource's proposed utility project does not constitute a "public use." A. 0112. The MBTA agued that Eversource is a private corporation, that there is "no allegation that taxpayer funds will be used to fund Eversource's underground transmission line" and that it "knows of no instance in which the actions of a private corporation have been deemed a 'public use' for the purposes of invoking the prior public use doctrine." A. 0138.

The Land Court should have rejected this argument for several reasons. First, it would not make sense for the prior public use doctrine to prohibit the diversion of the prior public use of public land to an inconsistent "public" use while permitting the diversion of the prior public use of public land for an inconsistent "private" use. This would defeat the purpose of the prior public use doctrine, which is to protect public land acquired for a particular public use from being converted to an inconsistent use without the required legislative awareness and specific authorization. Second, while Eversource may be a private corporation, its proposed use of the ROW

is clearly a "public use" based upon the extensive factual allegations on this issue cited on pp. 8-11 above. Eversource's corporate status is irrelevant on the issue of whether the proposed use is an inconsistent "public use" to which the prior public use doctrine applies. It is also worth noting that Eversource will be able to pass along the costs of the project to its public ratepayers in the Commonwealth of Massachusetts, further highlighting the public nature of the project proposal. The public versus private nature of this project is further highlighted by Eversource's representation that the combination of the electric utility line with DCR's MCRT confers a further "public benefit."[3]

[3] On the issue of whether the combined electric utility line with DCR's public "rail trail" project is relevant on the issue of whether the proposed diverted use is a "public use", the Court declined to consider the issue, reasoning that the rail trail plan is "less well-developed than the Eversource power line project, and would come about only after the utility concluded its installation of the high-tension wires underground." Add. 53. The Court ruled that since it could not "hear this case as to the Eversource project," it would not proceed to consider the rail trail component of the project. Id. Declining to consider the public rail trail component of the project was erroneous as it is relevant on the issue of whether the diverted use involves diversion to an inconsistent "public" versus "private" use. The statement that the rail trail project is "less well-developed" than the Eversource project is an

Relying on the MBTA's argument that "Eversource is not a public entity to which the prior public use doctrine lawfully may be applied," the Land Court ruled that it would be inappropriate to "extend" the prior public use doctrine to the specific fact pattern at issue. Add. 54, 55-56. The Court acknowledged that there was substantive validity to the Town's argument that it would be illogical to apply the doctrine to preclude diversion of a prior public use to an inconsistent public use while at the same time allowing diversion of a prior public use to an inconsistent "private" use. Add. 54. Nevertheless, the Court concluded that in the absence of appellate caselaw directly on point, it was not within the trial court's prerogative to "expand" the doctrine to the case before it and that such an expansion would best come from the ap

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impermissible finding of fact which contradicts the factual allegations in the amended complaint which should have been taken as true for the purpose of ruling on the defendants' motion to dismiss. The public rail trail portion of the Eversource project proposal is neither separate from nor "less well-developed" than the project at issue but is one and the same. The Court erred in failing to consider it on the issue of whether the Eversource project constitutes an "inconsistent public use."

pellate courts. Add. 55-56. It is inexplicable how the Land Court could have concluded that this case does not involve a diversion to an inconsistent "public use" in light of Eversource's own argument in the EFSB/DPU proceedings that its project serves a "compelling public use and purpose." The prior public use doctrine speaks only to the "use," not to the corporate status of the user. The Land Court thus erred in applying the doctrine in the manner it did and must be overturned on this issue.[4]

III. THE LAND COURT CORRECTLY REJECTED THE REMAINING ARGUMENTS THE DEFENDANTS MADE TO SEEK DISMISSAL

[4] In footnote 4 of the Order on appeal, the Land Court observes that "many transfers of public land to private ownership" would be subject to challenge if the Court accepted the Town's position in this case. Add. 55. The logical extension of the Land Court's reasoning is that by involving a private entity, a public entity can dramatically convert or erode a public use where it could not have done so itself or in concert with another public entity. This is simply not the case, as such transfers are ordinarily subject to other specific constitutional or statutory procedures and safeguards. For example, land subject to Article 97 of the Massachusetts Constitution cannot be converted without the requisite two-thirds vote of the Massachusetts Legislature. Similarly, municipal land held for a particular public purpose cannot be sold to a private party without a municipality first following the procedures and town meeting approvals required under G.L. c.40, §15A, and if the land is valued in excess of $35,000, also following the public procurement requirements under G.L. c.30B, §16.

The MBTA argued that the prior public use doctrine can only be applied in two instances: 1) in cases where the dispute is between state-chartered public service corporations, municipalities, or other government entities that either claimed authority to use the other's land, or claimed authority to take the other's land by eminent domain; or 2) in cases to "protect the inviolability of the constellation of natural areas specifically acquired, deeded, or dedicated as 'park land.'" A. 0129. The Land Court correctly rejected this argument under the Braintree case which cites and relies upon cases falling under one of the other of these two scenarios and yet falls under neither scenario itself, as is the situation with the Town's case herein.

The MBTA also argued that because the MBTA acquired rights to the ROW subject to the reservation of a freight easement by the "private" B&M Rail Corporation, and because the MBTA's order of taking exempted easements for wires, pipes, poles, etc. as may have then been lawfully located on the premises at the time of the taking, the prior public use doctrine cannot apply because the land was not previously restricted to "one public use." A. 0112. This is an

overly strained and incorrect interpretation of the prior public use doctrine, which the Land Court correctly rejected, as the relevant inquiry is whether the defendant acquired the parcel for a particular public use. The MBTA did so here, where it acquired the ROW "for the purpose of providing and extending mass transportation facilities for public use." This is the "one public use" at issue as it pertains to the MBTA, and the only fact which has relevance on the issue when considering whether the Town has stated a valid claim upon which relief can be granted.

The MBTA also argued that since it is entitled to operate both passenger and freight rail service and to provide "rapid transit" over the ROW, the ROW was not devoted to "only one public use" and that the prior public use doctrine therefore does not apply. This is again an overly strained and incorrect interpretation of the prior public use doctrine which was correctly rejected as a matter of common sense. These purported "multiple" uses – passenger, freight and rapid transit service – all fall within the one prior public use for which the MBTA acquired the ROW, which is "mass transportation facilities for public use."

The MBTA also argued that the Town "appears unaware" of relevant caselaw concerning the issue of what constitutes an "inconsistent" public use, and that the Town failed to allege facts satisfying the requirement that the subsequent use be "inconsistent" with the prior public use for which the property was acquired. A. 0134. This was incorrect, as the Braintree case is directly on point and supports the Town's position that the proposed new use is inconsistent with the prior public use, in that the public electric utility/rail trail project "has absolutely nothing to do with" the prior public use of the land for mass rail transportation purposes. See Braintree, at 511. The Robbins, Higginson, and Peirce cases cited and relied upon by the SJC in the Braintree case also support the Town's position on the "inconsistent" public use issue, as described above.

The MBTA also argued that the fact that it intends to reserve its right to restore rail service to the ROW and that Eversource intends to subordinate its rights to the MBTA's reservation somehow means that Eversource's proposed use cannot qualify as an "inconsistent" use under the prior public use doctrine. A. 0135-36. This is incorrect under the

prior public use doctrine, as it is the proposed new use itself which is at issue, not whether the prior public use may be hypothetically restored at some undefined time in the future. In fact, the SJC in the Braintree case enjoined the inconsistent use, even though the prior public use could continue to operate on the same property. The MBTA's alleged reservation of a right to restore active rail service to the ROW is irrelevant. Strangely, the MBTA also argued that the Town's allegations that the two uses cannot physically coexist in Eversource's proposed Preferred Project route along the ROW are "legal conclusions cast in the form of factual allegations." A. 0135. This was simply untrue, as a plain reading of the allegations shows that they consist of nothing but strictly factual allegations which demonstrate the inconsistency of the two uses.[5]

[5] It is also worth noting that even if the Town prevails in this action, the MBTA is not precluded from seeking to complete its transaction to lease the ROW to Eversource for its proposed electric utility project. Special legislation is passed by the Massachusetts Legislature on a myriad of issues as a routine matter in every legislative session. If the MBTA has concluded it is sound public policy to lease the ROW to Eversource for a public electric utility and rail trail project, it can easily seek the required special legislation to authorize it.

The MBTA also argued that even if the prior public use doctrine applies, the MBTA has received the necessary "plain and explicit legislation" authorizing the diverted inconsistent public use under sections of its enabling statute, G.L. c.161A, §§3, 5, and 11. A. 0142. This argument is incorrect under the caselaw which the SJC relied on in the Braintree case, which holds that general authorizing legislation, such as the MBTA's enabling statute, is not enough to satisfy the prior public use doctrine. Rather, there must be legislation which specifically identifies the parcel in question and demonstrates legislative awareness of the prior and diverted public uses at issue. See Robbins and Higginson, supra.[6]

[6] To support its claim that its enabling legislation was sufficient, the MBTA cited Massachusetts Bay Transportation Authority v. Somerville, 451 Mass. 80 (2008). However, the Somerville case does not involve property acquired by the MBTA for a specifically defined public use and does not involve prior public use issues. Further, the erection of billboards on MBTA property would not be inconsistent with the use of MBTA property for transportation purposes, as the two uses can easily coexist. The Town does not question the MBTA's statutory mandate to maximize non-transportation related revenues as a funding mechanism, or to use unrestricted corporate property in any manner in which it sees fit. Such concerns are not implicated under the unique set of facts involved in this case, where the taking of this particular ROW was for a specifically defined public use.

The Land Court also correctly rejected the MBTA's subject matter jurisdiction claims under the Land Court's jurisdictional statute, G.L. c.185, §1, as follows: 1) that the Town has not pleaded any statutory basis beyond the declaratory judgment statute and equity jurisdiction; 2) that this action does not involve "the Town's Right, Title or Interest in Land"; 3) that the Town's injury and cause of action "sounds in tort"; and 4) that "Claims of Impermissible Derivation of Revenue are Beyond the Scope of G.L. c.185, §1 (Count II)." A. 0120-22.

To support its claim that the Land Court should have dismissed the Town's claim for declaratory judgment, the MBTA argued that the Town "fails to identify, much less establish, any independent statutory or other basis for its standing" and that its declaratory judgment count must therefore be dismissed because the declaratory judgment statute does not provide "an independent statutory basis for standing or subject matter jurisdiction." A. 0119. This was a fundamental misstatement of the law concerning declaratory judgment, which the Court correctly rejected. The rule that the declaratory judgment statute, itself, does not provide an

independent statutory basis for recovery means only that a plaintiff must otherwise state a valid cause of action in order to seek declaratory judgment pursuant to such a valid cause of action. Here, the Town has stated a valid claim for which relief can be granted – the common law claim under the prior public use doctrine. The Town is therefore entitled to seek a declaratory judgment because it is relying on an independent basis for recovery, not only upon the declaratory judgment statute itself.

In seeking dismissal of the Town's count seeking equitable relief, the MBTA argued that "a mere claim under the prior public use doctrine is sufficient to invoke this Court's equity jurisdiction under G.L. c.185, §1(k)." Id. This claim was simply wrong, as the SJC in the Braintree case specifically ordered injunctive relief as a remedy available to the plaintiff municipality under the prior public use doctrine. The Land Court also correctly rejected the MBTA's argument that the case should be dismissed for lack of jurisdiction because it must be the plaintiff's "right, title or interest in land" under G.L. c.185, §1. A. 0120. This was again simply an incorrect statement of the law, as the relevant

section of the Land Court's jurisdictional statute, G.L. c.185, §1(k) provides that the Court has equitable jurisdiction where "any right, title or interest in land is involved …" (emphasis supplied). The argument also ignored the fact that the Town's interest in its own land is directly at issue in this case, as an abutting landowner. The MBTA proclaimed: "Nothing in over a century of precedent indicates a judicial intent to confer standing upon plaintiffs in the Town's posture to commence claims under the prior public use doctrine." A. 0121. The MBTA's proclamation was clearly incorrect under the law stated in the Braintree case discussed above, where the SJC specifically granted the Braintree Board of Selectmen an injunction under the prior public use doctrine even when the Town did not own the land which was the subject of the prior public use claim. Braintree, at 513.

The Land Court also correctly rejected the MBTA's argument that the Town's complaint should be dismissed because "it sounds in tort." The MBTA asserted that since the MBTA "interprets" the Town's claim as one which "indisputably sounds in tort, akin to a nuisance claim," then the Court had to dismiss the claim

because it has jurisdiction over "tort cases 'only when they involve a disputed property line – i.e., a need to adjudicate the property's ownership (a subject within the expertise of this court).'" Id. The problem with this argument is that the Town is not seeking recovery for damages in tort irrespective of the MBTA's attempt to "interpret" or re-label the claim. The Town is seeking declaratory and injunctive relief under the common law prior public use doctrine. The Town included allegations about its particularized harm as an abutter only for the purpose of establishing presumptive standing, in the event the Court were to impose a particularized standing requirement over and above the legal standing which the Braintree case otherwise confers upon the Town. The Town is not seeking recovery for damages in tort and the Land Court correctly rejected the MBTA's misplaced effort to re-label the Town's claim as one in tort for which jurisdiction might otherwise be lacking.

Similarly, the Town does not seek relief based upon an "impermissible derivation of revenue." On this issue, the MBTA argued that the Town's case does not involve the "right, title, or interest in land"

under G.L. c.185, §1(k) because the Town "alleges that the MBTA will be impermissibly deriving 'revenue' from its Option Agreement in excess of its statutory authorization by allowing Eversource to use the ROW." This argument is nonsensical, as the Town's claim is not based upon whether or not the MBTA is deriving revenue from the public land at issue. Rather, the Town's claim is based upon the MBTA's diversion of public land acquired for one public use to an inconsistent public use, without the required authorizing legislation. Whether or not the MBTA seeks to derive revenue from the ROW is immaterial on the issue of whether the Town has stated a valid claim under the prior public use doctrine.

The MBTA also argued that the Town's case should be dismissed on the grounds that its injuries are "speculative and remote" in that they have not yet occurred. A. 0122. This is another argument which is simply nonsensical, as a fundamental purpose of declaratory and injunctive relief is to prevent irreparable harm before it occurs. The argument also missed the point entirely in the context of a common law prior public use claim, which is specifically

designed to prevent the diverted inconsistent use before it occurs.

VI. CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Land Court's Order Allowing the Defendants' Motion to Dismiss, and Judgment, be reversed.

PLAINTIFF-APPELLANT,

TOWN OF SUDBURY,

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CERTIFICATE OF COMPLIANCE

I, George X. Pucci, certify that the foregoing Appellant's brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

___/s/ George X. Pucci _____
George X. Pucci (BBO# 555346)

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify, under the penalties of perjury, that on February 11, 2019, I electronically filed the foregoing document with the Massachusetts Appeals Court. I certify that the following counsel of record are registered as Filers and that they will be served by the Electronic Filing Service:

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ADDENDUM

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(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
NO. 17 MISC 000562 (GHP)

TOWN OF SUDBURY, by and through its Board of Selectmen,

Plaintiff,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY and NSTAR ELECTRIC COMPANY d/b/a EVERSOURCE ENERGY,

Defendants.

ORDER ALLOWING DEFENDANTS' MOTION TO DISMISS

This case concerns an option agreement ("Option Agreement") between Massachusetts Transportation Bay Authority ("MBTA") and NSTAR Electric Company d/b/a/ Eversource Energy ("Eversource") (collectively "Defendants") to grant an easement to Eversource over the MBTA's inactive railroad right of way ("ROW") which passes through the Town of Sudbury ("Plaintiff" or "Town"). If fully exercised, the Option Agreement would create in Eversource rights to run power lines beneath the surface of the ROW. The plaintiff, the Town, in its amended

complaint filed on November 17, 2017,[1] seeks declaratory relief that MBTA's change in use of the ROW requires legislative authorization under the common law prior public use doctrine. The Town also seeks injunctive relief that would restrain MBTA from proceeding with the grant of the easement to Eversource unless MBTA receives legislative authorization to change the use.

On December 22, 2017, MBTA filed a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6). Eversource on February 26, 2018 joined with MBTA's motion to dismiss. Defendants argue that under Mass. R. Civ. P. 12(b)(1) this court lacks subject matter jurisdiction to hear the Town's claims, that the Town does not have standing to bring this action, and that under Mass. R. Civ. P. 12(b)(6) the Town fails to plead sufficiently facts showing the elements to invoke the prior public use doctrine. A hearing on the motion to dismiss was held on March 7, 2018. After the hearing, the court granted the parties the opportunity to submit post-trial briefs.

On consideration of the pleadings, including the papers attached to and supporting the complaint and available as matter of public record, and the arguments of the parties made by their counsel at the hearing and in the briefs filed before and after the hearing, the court concludes that the Town's complaint survives the Defendants' Mass. R. Civ. P. 12(b)(1) challenge. The court, however, has no choice but to grant the Defendants' motion to dismiss, and to dismiss this action for "failure to state a claim upon which relief can be granted." Mass. R. Civ. P. 12(b)(6).

Defendants first urge the court to dismiss this case under Mass. R. Civ. P. 12(b)(1) because the Town in its counts for declaratory and injunctive relief does not cite an independent statutory basis for the Land Court's jurisdiction (and because G.L. c. 231A does not grant an

[1] Plaintiff originally filed its complaint on September 27, 2017. Defendant MBTA filed a motion to dismiss on October 23, 2017. At the case management conference on November 1, 2017, Plaintiff reported its intention by November 17, 2017 to file an amended complaint to join Eversource as a proper party and to address Plaintiff's standing.

independent statutory basis for standing). The defendants argue that there is no precedent establishing, where the prior public use doctrine is implicated, an independent basis for standing for a municipality to bring an action of this kind before the Land Court. Defendants urge this court to rule that it lacks subject matter jurisdiction over this case.

I recognize that it is "settled that G.L. c. 231A does not provide an independent statutory basis for standing." Pratt v. Boston, 396 Mass. 37, 42-3 (1985). "The limitation does not mean," however, "that another statute must expressly provide jurisdiction before a declaratory judgment action may be brought." Villages Dev. Co. v. Secretary of Exec. Office of Envtl. Affairs, 410 Mass. 100, 110 (1991). To assert a claim under the declaratory judgment statute, G.L. c. 231A, a plaintiff needs to "specifically set forth" an actual controversy—in other words, a plaintiff must have standing. G.L. c. 231A, § 1; see also Bonan v. Boston, 398 Mass. 315, 320 (1986).

Indeed, the Town's standing appears at the precipice of adequacy; however, at this early stage I am not prepared to dismiss the case for lack of standing. I conclude that Board of Selectmen of Braintree v. County Commissioners of Norfolk, 399 Mass. 507 (1987) ("Braintree") implicitly confers standing on a town, in otherwise appropriate cases, to bring a claim under the prior public use doctrine. In Braintree, a federal district court had ordered the County Commissioners ("Commissioners") in Norfolk County to redress overcrowded conditions in the county house of correction. The Board of Selectmen of Braintree ("Board") sued, seeking to enjoin the Commissioners from acting in response to this directive by changing the use of a portion of a county hospital to correctional facility use. The Commissioners decided to use part of a county medical facility, which had been established by special legislation in the early twentieth century as a tuberculosis hospital, to a new use–to provide additional jail space. Ruling that

legislative approval was required to make such an inconsistent use, the Supreme Judicial Court ("SJC"), reviewing the actions of the Superior Court where the litigation had been filed, relied squarely on the prior public use doctrine.

Acknowledging that the court in Braintree did not explicitly discuss whether a town has standing to bring a prior public use claim, and by what procedural mechanism the municipality properly may seek judicial relief, I find it significant that the SJC did not question or raise in any manner the town's standing to bring its case. Although it would appear that the question of Braintree's standing to seek remedies in the trial court was not directly raised by the parties, the question of standing is, generally speaking, a threshold one, which may (and, indeed, should) be raised by courts, both trial and appellate, at any stage and on the court's own initiative. Because I decide that the SJC in Braintree ought have addressed any municipal lack of standing to sue based on claims of violation of the prior public use doctrine, and yet the SJC did not embark on any discussion of the issue, I treat the SJC as having no jurisdictional concern about the ability of a city or town to bring forward these claims in court. Given the similarity in the posture of the Braintree case and the one before me, I find no reason to order dismissal of the pending case based on any lack of standing on the part of the Town.[2]

Nonetheless, turning to another of the Defendants' requested grounds for dismissal, I conclude that the Town has not alleged in its complaint any plausible basis for relief of the sort this court legally may provide. The standard under Mass. R. Civ. P. 12(b)(6) is indulgent in favor of the plaintiff, as it ought to be when dismissal on the merits is sought at the early stage of

[2] In reaching this conclusion, I need not take up the alternative grounds advanced by the Plaintiff in support of its standing to bring this litigation–including that land owned or controlled by the Town in the vicinity of the ROW may suffer adverse consequences as a result of the plan to allow Eversource to lay its high voltage lines under the route of the former railroad.

litigation. But not every complaint is entitled to survive even given this forgiving standard of review. When filing a complaint "a plaintiff's obligation to provide the 'grounds' of [its] 'entitle[ment] to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, (2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). A motion to dismiss will be granted only where it appears with certainty that the nonmoving party is not entitled to relief under any combination of facts that it could prove in support of its claims. See Spinner v. Nutt, 417 Mass. 549, 550 (1994); Flattery v. Gregory, 397 Mass. 143, 145–6 (1986).

The fundamental inquiry begins with the legal elements of the cause of action the plaintiff has advanced. The common law doctrine of prior public use, "firmly established in our law," requires plain and explicit legislation authorizing the diversion of public lands devoted to one public use to another inconsistent public use. Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969) ("public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion"); Higginson v. Treasurer & Sch. House Commissioners. of Boston, 212 Mass. 583, 591 (1912) ("land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end."). Recently, the SJC stated that the doctrine of prior public use, while applied more "stringently" to parkland, is not exclusive to parks. Smith v. Westfield, 478 Mass. 49, 61 (2017).

Here, the Town contends that the diversion of MBTA's ROW from its explicitly-authorized use, long inactive, for rail transportion--to an underground utility line, installed, operated, controlled, and maintained by Eversource[3]--violates the prior public use doctrine, because such a diversion of public use from its original sanctioned purpose requires explicit legislative approval. The Town contends that the acquisition of rights in the ROW held by the MBTA was for a confined purpose–the operation of a railroad up and down the ROW line. The Town argues that laying high tension electrical service under the dormant railroad ROW is fundamentally inconsistent with the ROW's use for the only public purpose ever approved.

The Defendants' chief contention is that, even if all that were so, the complaint still requires dismissal, because the challenged use (for power lines buried under the ROW) is a use that will be undertaken and maintained by Eversource. The Defendants argue that because Eversource is not a public entity to which the prior public use doctrine lawfully may be applied by the courts, the Town's complaint is fatally deficient.

The Town acknowledged at oral argument that there is no reported decision of our appellate courts which applies the prior public use doctrine to redress a subsequent use carried out by a private entity. Even so, the Town maintains that this court should apply the doctrine here, because a failure to apply the prior public use doctrine in this case would be illogical and would defeat the fundamental purpose of the doctrine.

I am left to consider whether, despite the absence of any prior instance in which the courts have stepped in and applied this common law doctrine to the diversion of a publically authorized

[3] I need not and do not dwell on the additional use contemplated for the ROW, a proposal later to put in place on the ROW's surface a bicycle path to run over the inactive rail line. This plan is less well-developed than the Eversource power line project, and would come about only after the utility concluded its installation of the high-tension wires underground. Because I conclude that the court cannot hear this case as to the Eversource project, the activity challenged directly in this suit, I do not proceed any further.

use of land to an inconsistent use carried out by a non-public entity, this court ought to employ the prior public use doctrine to Eversource's utility line project. I am being asked to extend the doctrine, as it has been defined and applied by our appellate courts for generations, to a fact pattern in which the doctrine never before has been invoked successfully, and in circumstances that fall outside the doctrine as it has been laid out in the teaching of many opinions of the SJC and our Appeals Court.

I conclude that it is inappropriate for this court to take such a large leap forward. I do so recognizing that there is some reason to doubt whether there are valid reasons for drawing a judicial line that prevents redress when a prior approved public use becomes converted to a different and unauthorized use, but the second user is not a public entity. I agree that, in a broad sense, the courts might feel some need to play a role when there is a change in use altering a public use to another inconsistent use without legislative authorization, even when the succeeding and inconsistent use is a private one. There is some appeal to the argument that such a fact pattern ought to be treated as within the "spirit" of the prior public use doctrine as it now exists. I am not, however, willing to alter or expand in a momentous way such a long-standing doctrine, the legal elements of which have been laid out firmly and repeatedly in many authoritative decisions of our higher courts. Those many cases consistently require as an element of any challenge based on the prior public use doctrine that the later use, alleged to be inconsistent with the prior authorized use, be undertaken as a public use.

The doctrine of prior public use first was articulated over a hundred years ago, and the essential language of the cases—including that insisting upon a subsequent public use—has been carried forward each time an appellate court is confronted with such a challenge. See, e.g.,

Boston v. Inhabitants of Brookline, 156 Mass. 172, 175 (1892) ("There is no doubt that land devoted to one public use may be taken by authority of the legislature for another *public* use"); Higginson v. Slattery, 212 Mass. 583, 591 (1912) ("Land appropriated to one public use cannot be diverted to another inconsistent *public* use without plain and explicit legislation to that end"); Needham v. Norfolk County Commissioners, 324 Mass. 293, 296 (1940) (same, citing Higginson, 212 Mass. at 591); Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969) ("The rule that public lands devoted to one public use cannot be diverted to another inconsistent *public* use without plain and explicit legislation authorizing the diversion is now firmly established in our law"); Smith v. City of Westfield, 478 Mass. 49, 60 (2017) (same) (quoting Robbins, 355 Mass. at 330) (emphases added). As I have said, over the many years the prior public use doctrine has flourished in our common law, there is not any example uncovered by counsel or the court of the rule being applied where the ensuing challenged use is a private one undertaken by a non-public actor.

While trial courts in our common law tradition have an important role to play is expanding incrementally the reaches of doctrines arising under that common law, I conclude that it is not within this trial court's prerogative to expand this long-established doctrine in this case. The change sought by the Town is broad enough, and so likely to widen the reach of the doctrine to a host of circumstances and defendants[4], that such a modification of the law best would come from

[4] The court with little effort can observe that at both the local and state level, transfers of government-owned property to private ownership happen with frequency, and at least at times in cases where the land's title was acquired by the public owner for an express public purpose which may be at odds with the private grantee's ensuing use. If this court were to follow the approach advocated for by the Town, those many transfers of public land to private ownership and use would fall within the prior public use doctrine, and give rise to a significant number of lawsuits challenging the public disposition of the real estate. It is notable that this not uncommon scenario has not worked its way into any of the reported decided prior public use cases that counsel have found.

our appellate courts. The Town can ask those appellate courts to consider whether this might be an appropriate occasion for such a momentous expansion.

A court can dismiss a complaint under Mass. R. Civ. P. 12(b)(6) only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "[T]he allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." Nader, 372 Mass. at 98. Even taking all allegations in the Town's complaint as true and drawing all inferences in the Town's favor, the court cannot get by the fact that Eversource is a private corporation, and cannot reconcile that with the doctrinal requirement that the challenged subsequent use be a public one. The Town puts forth great effort to paint the Project as one of public use. The Town does so by pointing out that regulatory agencies such as the Energy Facilities Siting Board and the Department of Public Utilities must find that these kinds of projects serve a "compelling public use and purpose." The Town observes that, in those fora and elsewhere, Eversource has painted this as a project that will afford public benefits, both with respect to the power grid enhancements and, later, a bicycle recreational trail in concert with DCR. Eversource's legal status as a private corporation, and the inherent differences between Eversource and a governmental agency, cannot be ignored. That a utility, owned by its shareholders, is subject to considerable public oversight does not make it a public entity for purposes of the legal doctrine on which Plaintiff relies. Nor does the fact that a utility such as Eversource only can proceed to build and operate power lines with the approval of public regulatory agencies, and has its rates reviewed in a public manner. And whether the focus of the prior public use doctrine is on the public nature of the challenged

use or of the actor undertaking that use, the doctrine as it now is defined in our common law does not extend as far as the facts alleged in the Town's complaint.

Mindful that dismissal at this early stage of a proceeding is disfavored and rarely appropriate, I am obliged to decide that the case at bar is one in which "plaintiff can prove no set of facts in support of [its] claim. . . ." I must rule that the Town has not stated a claim upon which relief can be granted and that dismissal under Mass. R. Civ. P. 12(b)(6) is required.

Defendants' motion to dismiss is ALLOWED.

Judgment accordingly.

So Ordered.

By the Court. (Piper, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: September 28, 2018

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
NO. 17 MISC 000562 (GHP)

TOWN OF SUDBURY, by and through its Board of Selectmen,

Plaintiff,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY and NSTAR ELECTRIC COMPANY d/b/a EVERSOURCE ENERGY,

Defendants.

JUDGMENT

On September 27, 2017, plaintiff, the Town of Sudbury ("Plaintiff" or "Town"), acting by and through its Board of Selectmen, filed a complaint in this court. The Plaintiff filed an amended complaint November 17, 2018. The Town seeks declaratory judgment (and related injunctive relief) that the prior public use doctrine compels the defendant Massachusetts Bay Transportation Authority ("MBTA") to obtain explicit legislative authority before the use of an inactive railroad right of way may be changed to a use by defendant NSTAR d/b/a Eversource Company (collectively with MBTA, "Defendants") to run power lines beneath the surface of the right of way.

This case came on to be heard on the motion to dismiss filed by the Defendants. In an order issued this day, the court (Piper, J.) has allowed that motion to dismiss.

In accordance with the court's order, it is

ORDERED AND ADJUDGED that this case, in its entirety, as to all parties and claims, is DISMISSED. This dismissal is on the merits and is with prejudice. It is further

ORDERED AND ADJUDGED that this Judgment disposes of the entire case. No costs,

fees, damages, awards or other sums, and no other relief, are awarded to any party.

By the Court. (Piper, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: September 28, 2018

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Part I ADMINISTRATION OF THE GOVERNMENT

Title III LAWS RELATING TO STATE OFFICERS

Chapter 30B UNIFORM PROCUREMENT ACT

Section 16 REAL PROPERTY; DISPOSITION OR ACQUISITION

Section 16. (a) If a governmental body duly authorized by general or special law to engage in such transaction determines that it shall rent, convey, or otherwise dispose of real property, the governmental body shall declare the property available for disposition and shall specify the restrictions, if any, that it will place on the subsequent use of the property.

(b) The governmental body shall determine the value of the property through procedures customarily accepted by the appraising profession as valid.

(c) A governmental body shall solicit proposals prior to:

(1) acquiring by purchase or rental real property or an interest therein from any person at a cost exceeding $35,000; or

(2) disposing of, by sale or rental to any person, real property or any interest therein, determined in accordance with paragraph (b) to exceed $35,000 dollars in value.

(d) The governmental body shall place an advertisement inviting the submission of proposals in a newspaper with a circulation in the locality sufficient to inform the people of the affected locality. The governmental body shall publish the advertisement at least once a week for two consecutive weeks. The last publication shall occur at least eight days preceding the day for opening proposals. The advertisement shall specify the geographical area, terms and requirements of the proposed transaction, and the time and place for the submission of proposals. In the case of the acquisition or disposition of more than twenty-five hundred square feet of real property, the governmental body shall also cause such advertisement to be published, at least thirty days before the opening of proposals, in the central register published by the state secretary pursuant to section twenty A of chapter nine.

(e) The governmental body may shorten or waive the advertising requirement if:

(1) the governmental body determines that an emergency exists and the time required to comply with the requirements would endanger the health or safety of the people or their property; provided, however, that the governmental body shall state the reasons for declaring the emergency in the central register at the earliest opportunity; or

(2) in the case of a proposed acquisition, the governmental body determines in writing that advertising will not benefit the governmental body's interest because of the unique qualities or location of the property needed. The determination shall specify the manner in which the property proposed for acquisition satisfies the unique requirements. The governmental body shall publish the determination and the reasons for the determination, along with the names of the parties having a beneficial interest in the property pursuant to section forty J of chapter seven, the location and size of the property, and the proposed purchase price or rental terms, in the central register not less than thirty days before the governmental body executes a binding agreement to acquire the property.

(f) Proposals shall be opened publicly at the time and place designated in the advertisement. The governmental body shall submit the name of the person selected as party to a real property transaction, and the amount of the transaction, to the state secretary for publication in the central register.

(g) If the governmental body decides to dispose of property at a price less than the value as determined pursuant to paragraph (b), the governmental body shall publish notice of its decision in the central register, explaining the reasons for its decision and disclosing the difference between such value and the price to be received.

(h) This section shall not apply to the rental of residential property to qualified tenants by a housing authority or a community development authority.

(i) Acquisitions or dispositions of real property or any interest therein pursuant to this section between governmental bodies and the federal government, the commonwealth or any of its political subdivisions or another state or political subdivision thereof shall be subject to subsections (a), (b) and (g).

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40A ZONING

Section 15 APPEALS TO PERMIT GRANTING AUTHORITY; NOTICE; TIME; BOARDS OF APPEAL HEARINGS; PROCEDURE

Section 15. Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.

Any appeal to a board of appeals from the order or decision of a zoning administrator, if any, appointed in accordance with section thirteen shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or petition in question shall have been deemed denied in accordance with said section thirteen, as the case may be, by having the petitioner file a notice of appeal, specifying the grounds thereof with the city or town clerk and a copy of said notice including the date and time of filing certified by the city or town clerk shall be filed forthwith in the office of the zoning administrator and in the case of an appeal under section eight with the officer whose decision was the subject of the initial appeal to said zoning administrator. The zoning administrator shall forthwith transmit to the board of appeals all documents and papers constituting the record of the case in which the appeal is taken. An application for a special permit or petition for variance over which the board of appeals or the zoning administrator as the case may be, exercise original jurisdiction shall be filed by the petitioner with the city or town clerk, and a copy of said appeal, application or petition, including the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the board of appeals or to said zoning administrator.

Meetings of the board shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules. The board of appeals shall hold a hearing on any appeal,

application or petition within sixty-five days from the receipt of notice by the board of such appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as provided in section eleven. The chairman, or in his absence the acting chairman, may administer oaths, summon witnesses, and call for the production of papers.

The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits, as provided for in section nine. The required time limits for a public hearing and said action, may be extended by written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office of the city or town clerk. Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition. The petitioner who seeks such approval by reason of the failure of the board to act within the time prescribed shall notify the city or town clerk, in writing, within fourteen days from the expiration of said one hundred days or extended time, if applicable, of such

approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest, by mail and each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the board failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the board failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each notice shall

specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 161A MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Section 3 ADDITIONAL POWERS OF AUTHORITY

[Introductory paragraph effective until July 1, 2015. For text effective July 1, 2015, see below.]

Section 3. In addition to all powers otherwise granted to the authority by law, the authority shall have the following powers, in each case to be exercised by the board unless otherwise specifically provided:

[Introductory paragraph as amended by 2015, 46, Sec. 115 effective July 1, 2015. See 2015, 46, Sec. 216. For text effective until July 1, 2015, see above.]

The authority shall be governed and its corporate powers exercised by the board of directors of the Massachusetts Department of Transportation established in chapter 6C. In addition to the powers granted to the authority by law, the authority shall have the following powers:

(a) To adopt and use a corporate seal and designate the custodian thereof.

(b) To establish within the area constituting the authority a principal office and such other offices as may be deemed necessary.

(c) To hold, operate and manage the mass transportation facilities and equipment acquired by the authority.

[Paragraph (d) effective until July 1, 2015. For text effective July 1, 2015, see below.]

(d) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The authority shall annually, on or before January first, submit to the secretary of administration and finance and the house and senate committees on ways and means a schedule of salaries of all its employees and any proposed increases therein. Said secretary may

make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

[Paragraph (d) as amended by 2015, 46, Sec. 116 effective July 1, 2015. See 2015, 46, Sec. 216. For text effective until July 1, 2015, see above.]

(d) To employ, retain and supervise the managerial, professional and clerical staff as necessary to carry out the work of the authority; provided, however, that the chief executive officer of the authority shall be a general manager who shall be hired by, report to and serve at the pleasure of the secretary of transportation and who shall fix the compensation and conditions of employment for all other authority employees consistent with budgets that are subject to the approval of the board. The authority shall annually, on or before January first, submit to the secretary of administration and finance and the house and senate committees on ways and means a schedule of salaries of all its employees and any proposed increases therein. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

(e) To make, and from time to time revise and repeal, by-laws, rules, regulations and resolutions.

(f) To enter into agreements with other parties, including, without limiting the generality of the foregoing, government agencies, municipalities, authorities, private transportation companies, railroads, and other concerns, providing (i) for construction, operation and use of any mass transportation facility and equipment held or later acquired by the authority; provided, that any agreement entered into by the authority for the construction or acquisition of mass transportation facilities or equipment of more than $1,000,000, which is financed in whole or in part from the proceeds of bonds the debt service payments on which are assisted by the commonwealth or made from the dedicated revenue source, shall not become effective until approved by the secretary of transportation; and provided further, that said secretary shall notify the secretary of administration and finance of any such approval; (ii) for joint or cooperative operation of any mass transportation facility and equipment with another party; (iii) for operation and use of any mass transportation facility and equipment for the account of the authority, for the account of another party or for their joint account; or (iv) for the acquisition of any mass transportation facility and equipment of another party where the whole or any part of the operations of such other party takes place within the area constituting the authority. Any such other party is hereby given power and authority to enter into any such agreements, subject to such provisions of law as may be applicable. Any agreement with a private company under this chapter which is to

be financed from the proceeds of bonds or bond anticipation notes and which provides for the rendering of transportation service by such company and for financial assistance to such company by subsidy, lease or otherwise shall include such service quality standards for such service as the authority may deem appropriate and shall not bind the authority for a period of longer than one year from its effective date, but this shall not prohibit agreements for longer than one year if the authority's obligations thereunder are subject to annual renewal or annual cancellation by the board's authority. Such agreements may provide for cash payments for services rendered, but not more than will permit any private company a reasonable return.

(g) To establish transit facilities and related infrastructure, including terminals, stations, access roads, and parking, pedestrian access facilities and bicycle parking and access facilities as may be deemed necessary and desirable. The authority may charge reasonable fees for the use of such facilities as it may deem desirable, or it may allow the use of such facilities free of charge.

(h) To accept gifts, grants and loans from agencies of local, state and federal governments, or from private agencies or persons, and to accede to such conditions and obligations as may be imposed as a prerequisite to any such gift, grant or loan.

(i) To provide mass transportation service, whether directly, jointly or under contract, on an exclusive basis, in the area constituting the authority and without being subject to the

jurisdiction and control of the department of telecommunications and energy in any manner except as to safety of equipment and operations and, with respect only to operations of the authority with equipment owned and operated by the authority, without, except as otherwise provided in this chapter, being subject to the jurisdiction and control of any city or town or other licensing authority; provided, that schedules and routes shall not be considered matters of safety subject to the jurisdiction and control of said department. Except as otherwise provided in this chapter, the board shall determine the character and extent of the services and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any state, municipal or other department, board or commission except the advisory board as provided in this chapter. Nothing contained in this paragraph shall be construed as exempting any privately owned or controlled carrier, whether operating independently, jointly or under contract with the authority, from obtaining any license required under section 1 of chapter 59A.

(j) To operate mass transportation facilities and equipment, directly or under contract in areas outside the area constituting the authority; but only pursuant to (i) an agreement with or purchase of a private mass transportation company, part of whose operations were, at the time the authority was established, within the area constituting the authority or (ii) an agreement with a transportation area or a municipality for service between the area

of the authority and that of such transportation area or municipality, where no private company is otherwise providing such service.

(k) To provide for construction, extension, modification or improvement of the mass transportation facilities in the territory of the authority; provided, that any such construction, extension, modification or improvement shall be consistent with the program and plans for mass transportation, as developed by the authority under subsection (g) of section 5, unless specifically authorized by legislation.

(*l*) Consistent with the program and plans for public mass transportation as provided in paragraph (g) of section 5, to conduct research, surveys, experimentation, evaluation, design and development, in cooperation with the department, and other governmental agencies and private organizations when appropriate, with regard to mass transportation facilities, equipment and services.

(m) To grant such easements over any real property held by the authority as will not in the judgment of the authority unduly interfere with the operation of any of its mass transportation facilities.

(n) To sell, lease or otherwise contract for advertising in or on the facilities of the authority.

(*o*) To take real property by eminent domain in accordance with the provisions of chapter 79 or chapter 80A; provided, that land devoted to any public use other than mass transportation may be taken by the authority only (i) if any substantial interference with such public use is temporary or any permanent interference therewith is not substantial, or both, or (ii) in the case of takings not authorized by clause (i), upon providing equivalent land for such public use. Interference with the public use of a street or public utility line shall not be considered to be substantial unless the interference with the traffic or utility system of which it is a part is substantial.

(p) To issue bonds, notes and other evidences of indebtedness as hereinafter provided.

(q) Consistent with the constitution and laws of the commonwealth, the authority shall have such other powers, including the power to buy, sell, lease, pledge and otherwise deal with real and personal property, as may be necessary for or incident to carrying out the foregoing powers and the accomplishment of the purposes of this chapter.

(r) The authority may enter into contracts or agreements with the department or with any agency, authority or political subdivision of the commonwealth for the provision, at cost, of specified services either by the authority or by the department or such agency, authority, or political subdivision of the commonwealth. Such services may include, but are not limited to the following:

feasibility and needs studies, transportation and construction planning, family and business relocation, and the conduct or supervision of design, construction, maintenance, management or land acquisition. Any such contract shall specify the manner of, and procedure for, payment or reimbursement for services provided or to be provided. All such agencies, authorities or political subdivisions are authorized to enter into such contracts with the authority.

(s) To issue to every full-time police officer employed by the authority an identification card bearing the officer's photograph and identifying information. The secretary of public safety and security may adopt regulations relative to the form, content and issuance of such identification cards and to the carrying thereof by such police officers.

[Paragraph (t) added by 2015, 46, Sec. 117 effective July 1, 2015. See 2015, 47, Sec. 216.]

(t) To delegate any of the powers in clauses (a) to (s), inclusive, to the general manager or a designee of the general manager; provided, however, that the board shall not delegate the powers set forth in clause (e) or the power to enter into agreements valued at more than $15,000,000.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 161A MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Section 5 LIMITATIONS, CONDITIONS, OBLIGATIONS AND DUTIES OF AUTHORITY

Section 5. The authority shall be subject to the following limitations, conditions, obligations and duties:

(a) The authority shall have the duty to develop, finance and operate the mass transportation facilities and equipment in the public interest, consistent with the purposes and provisions of this chapter, to provide a high standard of service to its riders, and to achieve maximum effectiveness in complementing other forms of transportation in order to promote the general economic and social well-being of the area constituting the authority and of the commonwealth. Said duty shall provide that no person shall, on the grounds of age, race, sex, religion, creed, color, sexual orientation, national origin, or handicap, be denied participation

in, or the benefits of, or be otherwise subjected to discrimination under any program or activity administered or operated by or for the authority.

(b) No real estate shall be sold unless the sale shall have been advertised at least once a week for three successive weeks prior to the date of sale in a newspaper of general circulation in the city or town in which the real property to be sold is located; provided, that no such advertising shall be required if a sale or conveyance of such real estate is made to the commonwealth or any political subdivision thereof or to any agency or instrumentality of either of them. Such real property shall, unless sold to the commonwealth or any political subdivision thereof or to any agency or instrumentality of either of them, be sold to the highest bidder subject to any restrictions, covenants, or conditions the authority shall find that sound reasons in the public interest require.

(c)(i) Any concession or lease of property for a term of more than one year or development agreement shall be awarded to the highest responsible and eligible bidder therefor unless the authority shall find that sound reasons in the public interest require otherwise. (ii) Any property which is the subject of a lease or development agreement pursuant to clause (i) shall not be subject to paragraph (o).

(d) No proposal for a systemwide change in fares or decrease in systemwide service of 10 per cent or more shall be effective until said proposal shall first have been the subject of one or more

public hearings and shall have been reviewed by the advisory board and, for a systemwide increase in fares of 10% or more, the MBTA board has made findings on the environmental impact of such increase in fares and, for a systemwide decrease in service of 10% or more, the decrease shall be the subject of an environmental notification form initiating review pursuant to sections 61 and 62H, inclusive, of chapter 30. Any systemwide increase in fares of 10 per cent or more shall conform to the fare policy established pursuant to paragraph (r). The authority shall increase fares only to provide needed revenue and shall not increase fares soley for the purpose of funding the stabilization fund established pursuant to section 19.

(e) The board shall not establish a fare in excess of one-half the regular adult cash fare for pupils of public day or evening schools, pupils of private day schools or private evening schools or industrial day or evening schools giving substantially the same character and grade of instruction as the schools conducted at public expense and of a not higher grade than a high school for transportation between such schools and their homes, or for children between the ages of five and 11 years, inclusive, or for persons 65 and older who reside within the commonwealth, or for persons with disabilities who reside within the commonwealth. Any such fare so established shall provide for free transfer privileges.

(f) If the authority seeks to contract for local and express bus services theretofore performed by authority employees, it shall conduct a public hearing in each of the affected areas. The authority shall cooperate with the chief executive officers of each of the cities and towns in the affected areas to determine the appropriate, geographically convenient locations at which such hearings shall he held. Said hearings shall be held within 30 days after the authority's requests for proposals and before the awarding of a contract for said services. The authority shall provide written notice 10 days before the hearing to elected officials from affected areas. The authority shall be represented at the meeting by the general manager or his designee and a representative of the authority who is familiar with the proposed contract. The public hearing shall be conducted in the evening hours in a location in the area to be affected by said proposed contract. The authority shall present reasons for the proposed contract. Persons in attendance at the public hearing shall have a reasonable opportunity to ask questions and present reasons why such proposed contract shall not be executed. Within 30 days after said hearing and before the execution of any contract, the authority shall give written notice of its decision and the reasons there for to persons who received written notice of the hearing. The authority shall continue to conduct public hearings pursuant to this subsection each year the contract is in effect. Nothing in this paragraph shall be construed as affecting the applicability of sections 52 to 55, inclusive, of chapter 7 to any such contract.

(g) The authority shall establish a program for mass transportation consistent with this chapter. The program for mass transportation and any revisions thereto shall be submitted for comment and recommendation to the advisory board not less than 60 days prior to the adoption thereof. The authority shall prepare a written response to reports submitted to it by the advisory board which response shall state the basis for any substantial divergence between the actions of the authority and the recommendations contained in such reports of the advisory board. The program shall be reviewed not less than every 5 years to evaluate the achievement of its aims and to re-evaluate its conformity with this chapter.

Said program for mass transportation and any plans specified therein shall be implemented by the capital investment program, including a rolling five-year plan. The capital investment program and plans of the authority shall be based on an evaluation of the impact of each proposed capital investment on the effectiveness of the commonwealth's transportation system, service quality standards, the environment, health and safety, operating costs, the prevention or avoidance of deferred maintenance, and debt service costs. Capital investments that result in the greatest benefits with the least cost, transit commitments made in connection with the central artery project, so-called, capital improvements required under the Americans with disabilities act, and capital expenditures

for an ongoing schedule of maintaining the equipment and mass transportation facilities of the authority, shall receive the highest priority under said capital investment program and plans.

Said ongoing schedule of maintenance shall be designed to prevent the deferral of routine and scheduled maintenance, and shall be undertaken prior to investing in new facilities or service expansion, unless the latter required by law or can be demonstrated to be cost-effective, environmentally beneficial or produce quantifiable savings.

The capital investment program shall be prepared on an annual basis, under the direction, control and supervision of the authority. The program adopted by the board, including plans for each project funded therein, shall be available for public inspection and submitted to the department, the joint committee on transportation and the senate and house committees on ways and means not later than 60 days prior to the start of the fiscal year.

Said program for mass transportation, the capital investment program and the plans for each such project funded therein shall be developed in conjunction with other transportation programs and plans proposed by the department, including any plans of regional transit authorities established pursuant to chapter 161B. Said programs shall be further developed in consultation and cooperation with the department, and in consultation with the department of housing and community development, the metropolitan area planning council, the executive office of

environmental affairs, and such other agencies of the commonwealth or of the federal government as may be concerned with said program and plans.

The plans for each project included in the capital investment program shall identify the purpose and intended benefits of each project, the total budget and timeline necessary to complete each project, the amount of said total which is budgeted for each project in the next fiscal year, the operating costs and savings, if any, anticipated to be incorporated in the operating budget of the authority upon completion of each project, the proposed operating costs and costs of routine and scheduled maintenance associated with each project upon its completion, and the expected useful life of each project.

The capital investment program shall be based on a rolling five-year plan, updated annually, that establishes the priorities and cashflow needs of the capital borrowing program of the authority. The five year plan shall be accompanied by a timeline for the implementation of the projects and priorities established therein and comprehensive financial estimates of the capital and operating costs and revenues associated with each project established by the plan.

The authority shall conduct a series of public meetings within 30 days of issuance of an initial draft of the capital investment program and shall submit a final capital investment program to the advisory board, for its review, no later than January 15 of each year.

The authority shall be responsible for the architectural, engineering design, and the construction of mass transportation facilities and for the operation thereof.

(h) The authority shall on or before April 1 of each year, render to the department, the governor, the advisory board, and the general court, a report of its operations for the preceding calendar year, including therein a description of the organization of the authority, its service quality standards, trends in revenue and ridership, service improvements and recommendations for legislation, if any, and the program for mass transportation as most recently revised.

(i) Any agreement entered into by the authority with a municipality outside of the territory of the authority for service to such municipality directly by the authority, or through agreement with a private company, shall provide for reimbursement by such municipality to the authority only for the net additional expense of such service as determined by the authority. Such agreements may be for such terms, not exceeding five years, as the parties may determine, except as provided in paragraph (f) of section 3. They shall not be subject to the provisions of section 4 of chapter 40 or

section 31 of chapter 44. Municipalities may appropriate from taxes or from any available funds to meet their obligations under any such contracts.

(j) Any private company lawfully providing mass transportation service in the area constituting the authority at the time the authority is established may continue to operate the same route or routes and levels of service as theretofore, and may conduct such further operations as the authority may permit in the future with or without a contract; provided, that the authority shall in all respects have the same powers and duties in respect to such private carriers as are provided by law for the department of telecommunications and energy except as to safety of equipment and operations, schedules and routes not being, however, considered safety of equipment and operations for the purposes of this paragraph; and provided further, that whenever the authority desires to add new routes for service in any area, it shall give preference in the operation of such routes to the private carrier then serving such area unless the authority concludes that such carrier has not demonstrated an ability to render such service according to the standards of the authority, that such service can be operated directly by the authority at substantially lesser expense to the authority and the public than if operated by such private carrier, or that for substantial and compelling reasons in the public interest operation by such private carrier is not feasible.

(k) The board of directors is hereby authorized and directed to promulgate such rules, regulations and procedures, including public hearings, as are necessary and appropriate to provide the following parties the timely opportunity to participate in the development of major transportation projects designed by the authority, as defined by the directors, and to review and comment thereon: (i) state, regional and local agencies and authorities affected by said projects; (ii) elected officials and riders or potential riders from cities and towns affected by said projects; (iii) other public and private organizations, groups and persons who are affected by, and who have provided the board with reasonable notice of their desire to participate in the development of the design of said projects. In this section, the words "timely opportunity" shall mean sufficiently early in the design process so as to permit comments to be considered prior to the final development of or commitment to any specific design for such project.

(l) The authority, during construction projects, may require the relocation or removal of public utility facilities; provided, that if such project is in whole or in part funded by a federal grant, the authority may reimburse said utility for such costs of relocation and removal as may be agreed upon by said utility and the authority.

(m) The authority shall provide gate attendants daily from seven o'clock ante meridian until two o'clock ante meridian on the following day, on High street in the city of Medford at the railroad crossing.

(n) No alcoholic beverages shall be sold on any of the properties under the supervision and control of the authority, its tenants or lessees; provided, however, that this subsection shall not apply to properties used for railroad purposes, as defined in chapter 160, including all properties used for railroad-related purposes, including, but not limited to, railroad stations and terminals.

(o) No person shall have in his possession on a facility or conveyance under the supervision or control of the authority, alcoholic beverages with the intent to consume same on said facility or conveyance except as provided in paragraph (n). A violation of this subsection shall be punishable as provided in section 40A of chapter 272 and said alcoholic beverages shall be forfeited to said authority.

(p) To create, after public hearing and in consultation with the advisory board, mechanisms for ensuring reliable, high-quality and cost-effective operations by establishing and implementing service quality standards.

(q) To promote, in consultation with the advisory board, maximization of fare revenue and nontransportation revenue, described herein, through reasonable and equitable fares, ridership growth, and transit-oriented development of land and air rights controlled by the authority.

(r) To adopt, and revise as appropriate, a fare policy which addresses fare levels, including discounts, fare equity and a fare structure, including, but limited to, fare media and passes. Said fare policy shall include a system for free or substantially price-reduced transfer privileges.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 161A MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

Section 11 BOARD POLICIES TO INCREASE REVENUES AND TO IMPROVE OPERATING EFFICIENCY; NET OPERATING INVESTMENT PER PASSENGER MILE RATIO

Section 11. The board shall establish and implement policies that provide for the maximization of nontransportation revenues from all sources. The board shall report to the general court 30 days prior to the board's approval of the preliminary annual budget on efforts of the authority to maximize nontransportation revenues. The board shall establish and implement policies, consistent with the provisions of paragraphs (q) and (r) of section 5, that maximize and increase total fare revenue and ridership by improving service quality, expanding transit service where appropriate, establishing fare policies that promote ridership growth, marketing its transit services and fare media and providing desirable services and benefits to transit riders.

The board shall establish and implement policies that increase the proportion of the authority's expenses covered by system revenues, provided that the authority shall take all necessary steps to increase system revenues and improve operating efficiency before considering any reductions in service levels; provided that the authority takes all necessary steps to maximize nontransportation revenues, increase ridership and improve fare collection practices before implementing fare increases. Nothing in this chapter shall preclude the authority from increasing fares, if necessary, to meet debt service obligations.

For the purposes of measuring the efficiency of authority operations and evaluating the proportion of authority expenses covered by system revenues, the board shall determine, among other accountability measures, the net operating investment per passenger-mile ratio. To calculate said ratio, the authority shall use for the values of the variables in said ratio the data reported each fiscal year to the federal transit agency, so-called, for the purposes of the national transit database.

In conjunction with the preparation of the preliminary operating budget for the subsequent fiscal year, the board shall establish a target net operating investment per passenger mile ratio that is expected to be achieved in the subsequent fiscal year. The authority shall forward a report to the governor, the general court, and the advisory board not later than April 1 detailing the actual net operating investment per passenger mile ratio achieved in the prior two fiscal years, the ratio projected to be achieved in the

current fiscal year and the ratio expected to be achieved in the subsequent two fiscal years. Said report shall be accompanied by an explanation of the reasons for year-to-year change in said ratio.

Beginning in fiscal year 2006, the authority shall seek to achieve and maintain a target ratio of not more than 20 cents for any fiscal year; provided, that the inability to achieve the ratio of 20 cents shall not, by itself, require the authority to reduce service levels, increase fares or take any other specific action; provided, that if the authority is unable to achieve or maintain the target ratio of 20 cents, or less, it shall, for fiscal year 2006 and subsequent fiscal years, include in said report the reasons therefor and the plans of the authority for seeking to achieve the target ratio of 20 cents.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 164 MANUFACTURE AND SALE OF GAS AND ELECTRICITY

Section 72 TAKING LAND FOR TRANSMISSION LINES

Section 72. (a) Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the department for authority to construct and use or to continue to use as constructed or with altered construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does serve the public convenience and is consistent with the public interest. The company shall forward at the time of filing such petition a copy thereof to each city and town within such area. The company shall file with such petition a general description of such transmission line and a map or plan showing the towns through

which the line will or does pass and its general location. The company shall also furnish an estimate showing in reasonable detail the cost of the line and such additional maps and information as the department requires. The department, after notice and a public hearing in one or more of the towns affected, may determine that said line is necessary for the purpose alleged, and will serve the public convenience and is consistent with the public interest. If the electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service shall file with the department a map or plan of the transmission line showing the towns through which it will or does pass, the public ways, railroads, railways, navigable streams and tide waters in the town named in said petition which it will cross, and the extent to which it will be located upon private land or upon, under or along public ways and places, the department, after such notice as it may direct, shall give a public hearing or hearings in 1 or more of the towns through which the line passes or is intended to pass. The department may by order authorize an electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widening thereof; or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the department. The department shall transmit a certified copy of its order to the

company and the clerk of each such town. The company may at any time before such hearing change or modify the whole or a part of the route of said line, either of its own motion or at the instance of the department or otherwise, and, in such case, shall file with the department maps, plans and estimates as aforesaid showing such changes. If the department dismisses the petition at any stage in said proceedings, no further action shall be taken thereon, but the company may file a new petition after the expiration of a year from such dismissal. When a taking under this section is effected, the company may forthwith, except as hereinafter provided, proceed to erect, maintain and operate thereon said line. If the company shall not enter upon and construct such line upon the land so taken within one year thereafter, its right under such taking shall cease and determine. No lands or rights of way or other easements therein shall be taken by eminent domain under the provisions of this section in any public way, public place, park or reservation, or within the location of any railroad, electric railroad or street railway company except with the consent of such company and on such terms and conditions as it may impose or except as otherwise provided in this chapter; and no electricity shall be transmitted over any land, right of way or other easement taken by eminent domain as herein provided until the electric company, distribution company, generation company, or transmission company or any other entity shall have acquired from the board of aldermen or selectmen or from such other authorities as may have jurisdiction all necessary rights in the public ways or

public places in the town or towns, or in any park or reservation, through which the line will or does pass. No entity shall be authorized under this section or section 69R or section 24 of chapter 164A to take by eminent domain any lands or rights of way or other easements therein held by an electric company or transmission company to support an existing or proposed transmission line without the consent of the electric company or transmission company.

[There is no subsection (b).]

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title I TITLE TO REAL PROPERTY

Chapter 184 GENERAL PROVISIONS RELATIVE TO REAL PROPERTY

Section 31 RESTRICTIONS, DEFINED

Section 31. A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all (a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation,

dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

A preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site historically significant for its architecture, archeology or associations, to forbid or limit any or all (a) alterations in exterior or interior features of the structure, (b) changes in appearance or condition of the site, (c) uses not historically appropriate, (d) field investigation, as defined in section twenty-six A of chapter nine, without a permit as provided by section twenty-seven C of said chapter, or (e) other acts or uses detrimental to appropriate preservation of the structure or site.

An agricultural preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of

buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.

A watershed preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land predominantly in such condition to protect the water supply or potential water supply of the commonwealth, to forbid or limit any or all (a) construction or placing of buildings; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance except as needed to maintain the land and (c) other acts or uses detrimental to such watershed. Such watershed preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner, including the right to privacy.

An affordable housing restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, mortgage, will, agreement, or other instrument executed by or on behalf of the owner of the land appropriate to (a) limiting the use of all or part of the land to occupancy by persons, or families of low or moderate income in either rental housing or other housing or (b) restricting the resale price of all or part of the property in order to assure its affordability by future low and moderate income purchasers or (c) in any way limiting or restricting the use or enjoyment of all or any portion of the land for the purpose of encouraging or assuring creation or retention of rental and other housing for occupancy by low and moderate income persons and families. Without in any way limiting the scope of the foregoing definition, any restriction, easement, covenant or condition placed in any deed, mortgage, will, agreement or other instrument pursuant to the requirements of the Rental Housing Development Action Loan program or the Housing Innovations Fund program established pursuant to section three of chapter two hundred and twenty-six of the acts of nineteen hundred and eighty-seven or pursuant to the requirements of any program established by the Massachusetts housing partnership fund board established pursuant to chapter four hundred and five of the acts of nineteen hundred and eighty-five, including without limitation the Homeownership Opportunity Program, or pursuant to the requirements of sections twenty-five

to twenty-seven, inclusive, of chapter twenty-three B, or pursuant to the requirements of any regulations or guidelines promulgated pursuant to any of the foregoing, shall be deemed to be an affordable housing restriction within the meaning of this paragraph.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title I TITLE TO REAL PROPERTY

Chapter 184 GENERAL PROVISIONS RELATIVE TO REAL PROPERTY

Section 32 EFFECT, ENFORCEMENT, ACQUISITION, AND RELEASE OF RESTRICTIONS

Section 32. No conservation restriction, agricultural preservation or watershed preservation restriction as defined in section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area, and no preservation restriction, as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance or of a particular such building or site, and no affordable housing restriction as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include creating or retaining or assisting in the creation or retention of affordable rental or other housing for occupancy by

persons or families of low or moderate income shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, or on account of the governmental body the charitable corporation or trust having received the right to enforce the restriction by assignment, provided (a) in case of a restriction held by a city or town or a commission, authority or other instrumentality thereof it is approved by the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction, and (b) in case of a restriction held by a charitable corporation or trust it is approved by the mayor, or in cities having a city manager the city manager, and the city council of the city, or selectmen or town meeting of the town, in which the land is situated, and the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the

Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction.

Such conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in the land, in the same manner as it may acquire other interests in land. The restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding, or the decision maker in any arbitration or other alternative dispute resolution enforcement proceeding, finds there has been a violation of the restriction or of any other restriction described in clause (c) of section 26 then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action proceeding. The restriction may be released, in whole or in part, by the holder for consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose

approval shall be required, and in case of a restriction requiring approval by the secretary of environmental affairs, the Massachusetts historical commission, the director of the division of water supply protection of the department of conservation and recreation, the commissioner of food and agriculture, or the director of housing and community development, only with like approval of the release.

No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value. Funds so received shall revert to the fund sources from which the original purchase, loan, or grant was made, or, lacking such source, shall be made available to acquire similar interests in other land. Agricultural preservation restrictions shall be released by the holder only if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good. Watershed preservation restrictions shall be released by the holder only if the land is deemed by the commissioner of the metropolitan district commission and the secretary of environmental affairs to no longer be of any importance to the water supply or potential water supply of the commonwealth or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good.

Approvals of restrictions and releases shall be evidenced by certificates of the secretary of environmental affairs or the chairman, clerk or secretary of the Massachusetts historical commission, or the commissioner of food and agriculture, or the director of housing and community development or the city council, or selectmen of the town, as applicable duly recorded or registered.

In determining whether the restriction or its continuance is in the public interest, the governmental body acquiring, releasing or approving shall take into consideration the public interest in such conservation, preservation, watershed preservation, agricultural preservation or affordable housing and any national, state, regional and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land.

This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable. Nothing in this section or section thirty-one and section thirty-three shall diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain or otherwise to use land for public purposes.

Nothing in this section shall prohibit the department of public utilities or the department of telecommunications and cable from authorizing the taking of easements for the purpose of utility services provided that (a) said department shall require the minimum practicable interference with farming operations with respect to width of easement, pole locations and other pertinent matters, (b) the applicant has received all necessary licenses, permits, approvals and other authorizations from the appropriate state agencies, (c) the applicant shall compensate the owner of the property in the same manner and the same fair market value as if the land were not under restriction.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title I TITLE TO REAL PROPERTY

Chapter 184 GENERAL PROVISIONS RELATIVE TO REAL PROPERTY

Section 33 PUBLIC RESTRICTION TRACT INDEX

Section 33. Any city or town may file with the register of deeds for the county or district in which it is situated a map or set of maps of the city or town, to be known as the public restriction tract index, on which may be indexed conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions and restrictions held by any governmental body. Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record in the public records of the instrument imposing the restriction. Maps used by assessors to identify parcels taxed, and approximate boundaries without distances, shall be sufficient, and, where maps by parcels are not available, addition to other maps of approximate boundaries of restricted land shall be sufficient. If the names of the holders and

the instrument references cannot be conveniently shown directly on the maps, they may be indicated by appropriate reference to accompanying lists. Such maps may also indicate similarly, so far as practicable, (a) any order or license issued by a governmental body entitled to be recorded or registered, (b) the approximate boundaries of any historic or architectural control district established under chapter forty C or any special act, ordinance or by-law where a certificate of appropriateness may be required for exterior changes, (c) any landmark certified by the Massachusetts historical commission pursuant to section twenty-seven of chapter nine, (d) any other land which any governmental body may own in fee, or in which it may hold any other interest, and (e) such additional data as the filing governmental body may deem appropriate.

Whenever any instrument of acquisition of a restriction or order or other appropriate evidence entitled to be indexed in a public restriction tract index is at the option of the holder of the right to enforce it submitted for such indexing, the register shall make, or require the holder of the right to enforce the restriction or order or interest to make, appropriate additions to the tract index.

The maps shall be in such form that they can be readily added to, changed, and reproduced, and shall be a public record, appropriately available for public inspection. If any governmental body, other than a city or town in which the land affected lies, holds a right to enforce a restriction or order or an interest entitled to be indexed in a public restriction tract index for any city or

town which has not filed such an index, or if the secretary of environmental affairs or the Massachusetts historical commission or the commissioner of food and agriculture or the director of housing and community development approves a conservation or preservation restriction or agricultural or watershed preservation restriction or affordable housing restriction held by a charitable corporation or trust so entitled, and the city or town does not within one year after written request to the mayor or selectmen file a sufficient map or set of maps for the purpose, the holding governmental body or approving secretary, director or commission may do so.

The registers of deeds, or a majority of them, may from time to time make and amend rules and regulations for administration of public restriction tract indexes, and the provisions of section thirteen A of chapter thirty-six shall not apply thereto. No such rule, regulation or any amendment thereof shall take effect until after it has been approved by the attorney general. New tract indexes may be filed, from time to time, upon compliance with such rules and regulations as may be necessary to assure against omission of prior additions and references still effective.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title I TITLE TO REAL PROPERTY

Chapter 185 THE LAND COURT AND REGISTRATION OF TITLE TO LAND

Section 1 JURISDICTION; PLACE OF SITTINGS; RULES AND FORMS OF PROCEDURE

Section 1. The land court department established under section one of chapter two hundred and eleven B shall be a court of record, and wherever the words "land court", or wherever in this chapter the word "court" is used in that context, they shall refer to the land court department of the trial court, and the words "judge of the land court" or the word "judge", in context, shall mean an associate justice of the trial court appointed to the land court department. The land court department shall have exclusive original jurisdiction of the following matters:

(a) Complaints for the confirmation and registration and complaints for the confirmation without registration of title to land and easements or rights in land held and possessed in fee simple

within the commonwealth, with power to hear and determine all questions arising upon such complaints, and such other questions as may come before it under this chapter, subject to all rights to jury trial and of appeal provided by law. The proceedings upon such complaints shall be proceedings in rem against the land, and the judgments shall operate directly on the land and vest and establish title thereto. A certified copy of the judgment of confirmation and registration shall be filed and registered in the registry district or districts where the land or any portion thereof lies, as provided in section forty-eight, and a certificate of title in the form prescribed by law shall be issued pursuant thereto. Immediately upon the entry of a judgment of confirmation without registration, the recorder shall cause a certified copy of the same to be recorded in the registry of deeds for the district or districts where the land or any portion thereof lies, and thereafter, the land therein described shall be dealt with as unregistered land.

(a1/2) Complaints affecting title to registered land, with the exception of actions commenced pursuant to chapter two hundred and eight or two hundred and nine.

(b) Proceedings for foreclosure of and for redemption from tax titles under chapter sixty.

(c) Actions to recover freehold estates under chapter two hundred and thirty-seven. In such an action brought in accordance with section forty-seven of chapter two hundred and thirty-six, where the tenant is entitled under clause (2) of section nine of chapter

one hundred and nine A to retain the real estate as security for repayment of the consideration paid therefor by him, said court may determine the amount of such consideration and may order a judgment for possession upon being satisfied that such amount, with lawful interest, has been paid or tendered by the plaintiff to the defendant.

(d) Petitions to require actions to try title to real estate, under sections one to five, inclusive, of chapter two hundred and forty.

(e) Complaints to determine the validity of encumbrances, under sections eleven to fourteen, inclusive, of chapter two hundred and forty.

(f) Complaints to discharge mortgages, under section fifteen of chapter two hundred and forty.

(g) Complaints under section twenty-seven of chapter two hundred and forty to establish power or authority to transfer an interest in real estate.

(h) Complaints to determine the boundaries of flats, under section nineteen of chapter two hundred and forty.

(i) Complaints under sections sixteen to eighteen, inclusive, of chapter two hundred and forty to determine whether or not equitable restrictions are enforceable.

(j) Complaints under section twelve of chapter forty-two to determine county, city, town or district boundaries.

(j1/2) Complaints under section fourteen A of chapter two hundred and forty to determine the validity and extent of municipal zoning ordinances, by-laws and regulations.

It shall also have original jurisdiction concurrent with the supreme judicial court and the superior court of the following:—

(k) All cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, including actions for specific performance of contracts.

(l) Actions under clauses (4) and (10) of section 3 of chapter 214, where any right, title or interest in real estate is involved.

(m) Actions under clause (8) of said section 3 of said chapter 214 or under section 9 of chapter 109A, where the property claimed to have been fraudulently conveyed or encumbered consists of rights, titles or interest in real estate only.

(n) Proceedings transferred to it under the provisions of section 4A of chapter 211.

(o) Civil actions of trespass to real estate involving title to real estate.

(p) Actions brought pursuant to the provisions of sections 7 and 17 of chapter 40A.

(q) Actions brought pursuant to sections 81B, 81V, 81Y, and 81BB of chapter 41.

(r) Actions brought pursuant to section 4 or 5 of chapter 249 where any right, title or interest in land is involved, or which arise under or involve the subdivision control law, the zoning act, or municipal zoning, subdivision, or land-use ordinances, by-laws or regulations.

(s) Actions brought pursuant to section 1 of chapter 245.

The land court department also shall have original jurisdiction concurrent with the probate courts of the following:—

(t) Petitions for partition under chapter 241.

The court shall hold its sittings in the cities of Boston, Fall River, and Worcester, but may adjourn from time to time to such other places as public convenience may require. In Suffolk county, the city council of the city of Boston shall provide suitable rooms for the sittings of said court in the same building with, or convenient to, the probate court or the registry of deeds. In Fall River and Worcester, and other counties, the chief justice of administration and management shall make court rooms, clerk facilities, and other trial facilities available to the land court. On or before February 1, 2007, the chief justice of the land court department shall establish procedures for holding regular sessions of the land court in Fall River and Worcester for the consideration of cases arising from central, western, and southeastern Massachusetts, as the caseload requires but not less than once per quarter.

The court shall have jurisdiction throughout the commonwealth, shall always be open, except on Saturdays, Sundays and legal holidays, and shall have a seal with which all orders, processes and papers made by or proceeding from the court and requiring a seal shall be sealed; provided, that, if the convenience of the public so requires, the court shall be open on such Saturdays, not legal holidays, and during such hours thereof, as the judges thereof may determine. Its notices, orders and processes may run into any county and be returnable as it directs.

The court shall from time to time make general rules and forms for procedure, which, before taking effect, shall be approved by the supreme judicial court or by a justice thereof.