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City of New Bedford, Massachusetts

OFFICE OF THE CITY SOLICITOR

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March 2, 1992

George Rogers
Councillor-at-Large
23 Robeson Street
New Bedford, MA 02740

RE: Sawyer Street Field

Dear Councillor Rogers:

You requested that I review the lease between the City of New Bedford and the Environmental Protection Agency. You asked whether this site could be used for burning PCB's without an express vote of the Park Board and/or City Council

My research of this issue reveals the following factors. On July 22, 1965 the Sawyer Street property was vested in the Board of Park Commissioners by the City Council for recreational purposes. The Park Board has not dedicated this property solely for park purposes. In such a situation the provisions of Massachusetts General Laws Chapter 45, Section 14 apply to this property. This section states:

"Land...so acquired...with the consent of...the board in control of the land...may be used by the municipality,...or by any person...or other organization for such other public purposes as said...board may deem proper." (Emphasis supplied)

The land in question was used as a soccer field and other recreational purposes and is considered by the Park Department as an athletic field. Thus, since it was not used solely for park purposes, section 14 applies and not the other restrictions upon the use of property dedicated for park purposes.

My investigation further revealed the City, State and Federal agencies executed a lease on January 19, 1988. The lease was approved by the Park Commissioners under section 14 and signed by the Chairman of the Park Board.

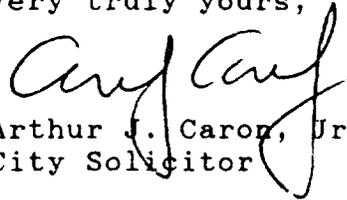
RE: Sawyer Street Field

The 1988 lease contained an attachment B with regard to the incineration of sediment. In 1990 the lease was amended with the same attachment B for "Hot Spot Remedial Action" attached to that lease. Accordingly, the consent approved in 1988 remained in effect, notwithstanding the amendment dealing basically with relocating the soccer field.

Under such circumstances, it is the opinion of this office that consent of the Park Commissioners was required and consent was given in 1988. The 1990 amendment contained the same description of remediation that was approved in 1988 and no further action was needed by the Park Board. In addition, under General Laws Chapter 45, Section 14, the City Council was not required to approve the lease since the property was vested in the Park Board.

The above opinion is further reinforced by an opinion rendered on March 3, 1967 by former City Solicitor George Jacobs involving similar property not dedicated for park purposes. He also concluded there is no restriction upon the City's power to alienate property held for playground purposes. (Copy attached).

Very truly yours,


Arthur J. Caron, Jr.
City Solicitor

AJC/lm

cc: Mayor Rosemary S. Tierney
Council President Frederick Kalisz, Jr.
Richard A. Bachand, Esquire
Michael Glinski, Environmental Planner
Julie Belaga, Regional Administrator EPA

March 3, 1967

Honorable Edward F. Harrington
Municipal Building
New Bedford, Massachusetts

Dear Mr. Mayor:

With regard to your query as to whether the City of New Bedford as of August 22, 1962, had the power to alienate property known as the "Joseph F. Francis Playground" and the "Jacinto F. Dinis Memorial Park", please be advised that my opinion is as follows:

"Joseph F. Francis Playground"

The City of New Bedford acquired titled to this property by virtue of a tax taking in 1933 and a decree of the Land Court in 1936. (See Bristol County (S.D.) Registry of Deeds Book 777, Page 331.) Any doubts as to the validity of the City's ownership as a result of the tax taking are resolved by virtue of the provisions of Massachusetts General Laws, Chapter 260, Section 21, (adverse possession for twenty years).

While this area has been supervised and maintained by the New Bedford Park Board since the 1930's and was designated by said Board as the "Joseph F. Francis Playground" at a meeting held on March 1, 1938, there is no record indicating that jurisdiction over this area was ever turned over to the Park Board or that the area was ever dedicated to public park purposes. These facts lead me to the opinion that the area in question constitutes a playground. This conclusion is supported by the fact that the Park Board in its annual reports has listed the area as a playground.

Under Chapter 45, Section 14, of the General Laws there appears to be no restriction upon the City's power to alienate property held for playground purposes. I would, therefore, conclude that when the City of New Bedford, acting

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by and through its Board of Park Commissioners, granted right of entry for construction purposes to the Commonwealth of Massachusetts on August 22, 1962, with regard to part of the "Joseph F. Francis Playground", said action was valid.

"Jacinto F. Dinis Memorial Park"

The City acquired title to a small portion of what was later to be referred to as the "Jacinto F. Dinis Memorial Park" by the same tax title proceedings as the Francis Playground referred to above. The size of this area was substantially increased as a result of the construction of a sea wall and the filling in of shore property behind the sea wall, which work was done by the Commonwealth of Massachusetts under authorization given by the General Court in Chapter 77 of the Resolves of 1950.

On December 13, 1951, the New Bedford City Council ordered that the artificially constructed portion of land be designated as the "Jacinto F. Dinis Memorial Park" and that the care and custody of said land be vested in the Park Board of the City of New Bedford. On January 10, 1952, the then City Solicitor, Harry A. Lider, rendered an opinion to the effect that at the time of the City Council vote the land-filling project had not been completed and that as of that time the land had not been turned over to the City. He stated that until such time as the land was turned over to the City, "the City Council should not assume any authority in respect to the property". He concluded that the action of the City Council therefore appeared to have been premature. A copy of his opinion is attached hereto.

An examination of the City Council records indicates that at no time subsequent to the vote of December 13, 1951, has the City Council made a designation or a dedication of the land in question, nor has it turned over jurisdiction of said land to any city department.

On the basis of these facts, I would conclude that the so-called "Jacinto F. Dinis Memorial Park" has, since its creation by artificial means, been under the jurisdiction of the New Bedford City Council and has never effectively been dedicated to park purposes. It is my conclusion, therefore, that the vote of the Park Board on August 22, 1962, granting to the Commonwealth of Massachusetts a right of entry for construction purposes was a valid exercise of municipal authority.

In addition to the factors listed above, it is my opinion that under the legislative pattern evidenced in Chapter 45 of the Massachusetts General Laws, the restrictions contained in Section 7 preventing alienation of public parks

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except by act of the Legislature should not be invoked in the absence of clear evidence of a dedication of property to park purposes. I believe this argument to be supported by the fact that said Chapter makes ample provision for acquisition, use and management of property for playground purposes in Section 14. Said Section 14 also distinguishes property acquired for playground purposes and property acquired "solely for park purposes". It gives to the municipality full power to use playground property for public purposes.

Since the natural areas of land which were to be designated the Francis Playground and the Dinis Park were originally acquired by the City by tax taking, and since there is no record of the City Council or any other duly authorized municipal body dedicating said land to park purposes, I would conclude that such areas are not parks within the meaning of Section 7 of Chapter 45. This conclusion is based upon the general principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end. (See *Higginson v. Slattery* 90 N.E. 523, 212 Mass. 583.)

Since the land in question was not explicitly dedicated for park purposes, the City was acting within its authority when it granted right of entry easements for construction purposes. (See Chapter 40, Section 3, and Chapter 45, Section 14.)

Yours truly,

George Jacobs
City Solicitor

GJ/d