COMMONWEALTH OF MASSACHUSETTS

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| SUFFOLK, ss. | SUPERIOR COURT DEPARTMENT<br>OF THE TRIAL COURT |
| EMERALD NECKLACE CONSERVANCY, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE CITY OF BOSTON, et al.,<br><br>Defendants. | CIVIL ACTION NO. 2484CV00477 |

**THE CITY DEFENDANTS' REPLY**
**IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR**
**PRELIMINARY INJUNCTIVE RELIEF AND A LIS PENDENS**

Plaintiffs' supplemental brief underscores five reasons why they are not entitled to the relief they seek in their pending motions.

First, Plaintiffs' arguments are premised on the inaccurate notion that the planned renovation of White Stadium will deprive the public of its use and enjoyment of the Stadium. Nothing could be farther from the truth. In reality, the public will enjoy increased use of a dramatically improved facility. Both Boston Public Schools' students and the public more broadly will be able to use more of the Stadium more of the time. In particular, Plaintiffs' assertion that there will be less football played at White Stadium than there is today is untrue. And the Stadium's use for school soccer, track, and other sports will increase. Nothing is being taken away from the public.

Second, the Will does not (as Plaintiffs would have the Court believe) prohibit the leasing of a portion of the Stadium to BUSP for professional women's soccer use—especially where BUSP will provide necessary economic support without which the Stadium renovation will not happen. Plaintiffs have no right to impose restrictions that White elected not to include in his

Will, and Plaintiffs' positions ignore the clear provisions of the Will authorizing the leasing of Fund real estate (without limitation on who the tenants may be), permitting lessees to rebuild the premises leased to them (as BUSP will do with a portion of the Stadium), and allowing works established by the Fund to be "improved, extended, enlarged or added to from time to time" (which is precisely what is happening here).

Third, Plaintiffs have offered no basis for the Court to ignore the special acts passed in 1947 and 1950, and the various votes and conveyances that happened in between them, which rendered the Stadium Property a "school building and yard." Those acts are definitive on the Stadium's legal status as a school building and yard, and not as an Article 97-protected public park. Plaintiffs have offered no evidence that there has been a dedication of the Stadium Property for Article 97 purposes through City action or public use since then.

Fourth, Plaintiffs do not engage with the City Defendants' arguments that Plaintiffs will not be irreparably harmed by the improvements to the Stadium (to the contrary, they will be benefitted by having enhanced access to an improved facility), or by the signing of agreements that can be rendered unenforceable in the future by this Court if need be. Plaintiffs, therefore, have not established that they will suffer irreparable harm absent an injunction.

Fifth, and finally, the environmental justice concerns Plaintiffs raise (while certainly important policy priorities for the City) are inapplicable to the Will and Article 97 issues before the Court because the statute on which Plaintiffs rely is an amendment to the Massachusetts Environmental Policy Act. MEPA has nothing to do with the issues presented by Plaintiffs' motions. And even if (contrary to fact) statutory environmental justice principles did apply here, the record establishes that the benefits of the Stadium renovation and activation to the surrounding community far outweigh the harms Plaintiffs imagine.

## I. The Project Will Increase—Not Decrease—the Public's Use and Enjoyment of the Stadium.

Plaintiffs assert that a renovated White Stadium will not constitute a work of "**public** utility and beauty," within the meaning of the Will, because the renovation will take access and use rights away from the public in order to give them to a private, for-profit enterprise. By their logic, taking a resource from the public to put it in the hands of a private company destroys the public nature of the Stadium. There are several flaws in this argument. The first of them is that the factual predicate is simply wrong: in reality, no resource is being taken from the public. **The public is not going to lose anything as a result of the Stadium renovation**.

The record establishes that the renovated Stadium will provide **increased hours of use** to both student athletes and the public generally, and it will give both groups access to **greatly improved facilities**. The Stadium will remain a work of "public utility" because its principal use will remain what it has been for 75 years: a Boston Public Schools sports stadium, used principally by BPS student athletes for their games and practices, and (when not used by BPS) by the general public for private recreation and other community events and activities.[1] Professional women's soccer will become one of these other activities, but nothing in the Will prohibits that. Just like the rest of the other activities, professional soccer will be subordinate to the principal and predominant BPS use.

The chart below details how the public's use of the renovated Stadium will compare with its use of the current Stadium:

[1] With respect to being a work of "beauty," White Stadium was beautiful when it was constructed in the 1940s, but it no longer is. The proposed renovations will restore its beauty, as well as enhancing its public utility—thereby fulfilling White's intent.

| Current White Stadium | Renovated White Stadium |
|---|---|
| • Poor quality field limits use to **~250 hours per year.** Esdaile Aff. ¶ 12. | • New field will triple BPS use: **~750-900 hours per year.** Esdaile Aff. ¶ 12. This will allow just as much football as today and more soccer, track, and other sports. |
| • When not otherwise used, open to the public **7 am-4 pm on weekdays**, closed on weekends. Esdaile Aff. ¶21. | • When not otherwise used, open to the public **7 am-10 pm seven days per week**. Esdaile Aff. ¶22. |
| • Bathroom facilities and locker rooms are in **poor condition**. Water is shut off during the winter due to poor infrastructure. Esdaile Aff. ¶7. No strength and conditioning or sports medicine facilities. *Id*. | • **State-of-the-art** indoor and outdoor **improved facilities** including weight and training rooms and sports medicine facilities. Epstein Aff. ¶24. |
| • Stadium is **not ADA-compliant**. Griffin Aff. ¶4. | • The Stadium will be **ADA-compliant**. McDaniel Aff. ¶36. |
| • Stadium is **not compliant with modern building codes**. McDaniel Aff. ¶6 | • Stadium will be **compliant with modern building codes**. McDaniel Aff. ¶ 26. |
| • **East Grandstand is gutted** due to a fire that occurred several decades ago. Esdaile Aff. ¶8. It is now only useable as a "dumping ground for equipment." *Id*. | • The **East Grandstand will include updated locker rooms and bathrooms, a strength and conditioning suite, sports medicine facilities, and updated office spaces for the BPS athletic department**. McDaniel Aff. ¶38. |
| • The West Grandstand has structural issues, including roof leaks, failing heating and lighting systems, and lack of air conditioning in the summer. It is not freely accessible to the public. Esdaile Aff. ¶7 | • The West Grandstand will be repaired and improved. McDaniel Aff. ¶38. No current public access will be eliminated. |
| • The **6-lane track** does not allow Boston Public Schools to host MIAA track and field events. Esdaile Aff. ¶16. | • New **8-lane track**, which complies with MIAA standards, and will allow Boston Public Schools to host MIAA track and field events. Esdaile Aff. ¶16 |
| • Due to its condition, White Stadium is currently **unreliable**, leading Boston Public Schools to schedule many games and practices at other facilities. Esdaile Aff. ¶17. | • The proposed rehabilitated White Stadium will be **reliable**, allowing Boston Public Schools to **schedule additional games, practices, and tournaments** at the facility. Esdaile Aff. ¶17. |
| • **No professional soccer games** for the public to enjoy. | • **Professional soccer games for the public to enjoy** at the Stadium, accompanied by **opportunities for community engagement and economic benefits for surrounding communities**. |

As this comparison reveals, Plaintiffs' concerns about something being taken from the public are unfounded. The record establishes that Boston Public Schools' students will be able to use the Stadium for more of their practices and games than they can today; the broader public will have expanded hours of access to the Stadium for personal recreational use when no events are taking place; school sporting events, practices, and community events and concerts will have priority over the professional team's games and practices; and the public will be able to enjoy professional soccer at the Stadium and reap the economic and community benefits the team will bring. The notion that the public will lose something is flatly wrong: it will, instead, gain a tremendous amount.[2]

With respect to the West Grandstand in particular, the public currently does not have free and unfettered access to the interior of the West Grandstand. The interior of the West Grandstand currently is used for Boston Public Schools' Athletic Department offices. That office use will be consistent in the renovated Stadium (although with BUSP making the office use, rather than BPS; BPS's offices will be in the renovated East Grandstand). Moreover, Plaintiffs overstate the exclusivity of the West Grandstand leased to BUSP. Currently, the public's access to the West Grandstand is limited to using the stairs and seats atop the West Grandstand. Esdaile Aff. ¶ 21. Under the proposed use agreement with BUSP, the City will retain a reciprocal license to use the West Grandstand, including the seats and stairs atop the West Grandstand and the proposed general concourse areas in the West Grandstand, on all days and at all times for City and BPS

[2] Plaintiffs' assertion that Defendants have admitted that "the Project will displace all regular season BPS football games currently played at White Stadium, in favor of a for-profit sports complex run by and for the benefit of BUSP" is rebutted directly by none other than BPS Senior Director of Athletics Avrey Esdaile: "[u]nder the proposed use agreement with BUSP, football games may continue to be played at White Stadium." Esdaile Aff. ¶20. The record also establishes that BUSP's use of the Stadium will be subordinate to BPS's athletic uses.

uses. McDaniel Aff. ¶¶ 10, 37(e). The public will continue to have access to the Stadium seats atop the West Grandstand during all school athletic events and other Stadium events, as it does today (although the seating will be much improved), and the public will continue to be able to use the stairs and concourses of the West Grandstand during events and for exercise when the Stadium is not otherwise in use. Accordingly, **the public is not losing any use of the West Grandstand that it currently has**.

As for the East Grandstand, the Stadium renovation will enhance the public's ability to utilize it. The interior of the East Grandstand is currently closed to the public, including BPS student athletes, as a result of the fire that destroyed the interior space. Esdaile Aff. ¶ 8. After the renovations are completed, BPS student athletes will be able to enjoy new, state-of-the-art facilities inside the East Grandstand, including updated locker rooms and bathrooms, a strength and conditioning suite, sports medicine facilities, and community event space with a kitchen. McDaniel Aff. ¶38. **These new amenities are not available to BPS students today**.

With respect to the "Grove" area to the south of the Stadium, that area currently is fenced-off and unavailable to the public. After the Stadium renovations, it will be opened to members of the public, which will be able to enjoy it during games and events as a space for obtaining food and refreshments, and for relaxing. **Once again, public access is increasing**. Nothing is being taken away.

Plaintiffs' suggestion to the contrary seems premised on a comparison between the proposed renovated Stadium and an imaginary renovated Stadium that is just as enhanced, but in which BUSP plays no part. That is a spurious comparison. The City is unable to dedicate the resources necessary to construct that imaginary stadium. Instead, the proper comparison is between the current Stadium—with all its problems and limitations—and the proposed renovated

Stadium—with all its benefits and enhancements—which includes BUSP's reasonable uses in exchange for its substantial economic and other investments. On that comparison, the proposed project clearly brings tremendous benefits to BPS students and the public in general, including increased utilization of the Stadium by both groups. It follows that if the current Stadium is a work of public utility (as it certainly is), so too will be the renovated Stadium.

One final point relating to this topic merits discussion. Plaintiffs are fundamentally wrong to suggest that BUSP's professional soccer use of the Stadium is in counterpoint to the public's use of the Stadium. To the contrary, professional soccer will enhance the public's use and enjoyment of the Stadium. The inhabitants of the City of Boston will find entertainment, inspiration, and recreation in watching world-class athletes compete in professional women's soccer games. Thus, the playing of professional soccer at White Stadium will enhance the Stadium's "public utility." "[T]he overwhelming majority of courts from other jurisdictions confronting this issue have determined that construction of a publicly owned stadium to be leased to professional sports teams serves a public purpose." *Citizens for Leaders with Ethics & Accountability Now! v. Washington*, 928 P.2d 1054, 1059 (Wash. 1996) (holding public provision of venue for Seattle Mariners serves proper public purposes).[3] The same is true here.

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3 *See, e.g., Schulz v. New York*, 189 N.Y.S.3d 765, 771 (N.Y. App. Div. 2023) (holding public appropriations to construct stadium for Buffalo Bills has public purpose as primary objective); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 74 (Tenn. Ct. App. 2001) (holding public financing of arena for professional NBA franchise determined to be for a public purpose); *Poe v. Hillsborough County*, 695 So. 2d 672, 676 (Fla. 1997) (holding public financing and development of facility for Tampa Bay Buccaneers serves valid public purpose); *Libertarian Party of Wisconsin v. Wisconsin*, 546 N.W.2d 424, 434 (Wis. 1996) (noting fact that Milwaukee Brewers will benefit from 30-year lease does not destroy predominant public purpose); *Kelly v. Marylanders for Sports Sanity, Inc.*, 530 A.2d 245, 257 (Md. 1987) (explaining that government acts pursuant to valid public purpose when provides financial support for Baltimore's Camden Yards stadiums for professional sports teams); *Lifteau v. Metropolitan Sports Facilities Comm'n*, 270 N.W.2d 749, 753-54 (Minn. 1978) (noting acquisition or construction of stadium for Minnesota Vikings and Minnesota Twins constitutes public purpose for which public

## II. The Will Does Not Prohibit Leasing Space in the Stadium to a Private Company Where the Lessee Provides Resources Needed for the Renovation and Maintenance of the Stadium.

A second flaw in Plaintiffs' position is their assertion that the Will requires that every inch of the Stadium must be dedicated to a public use every moment of every day, and that no part of it can ever be dedicated, leased, licensed, or used by a for-profit entity. Plaintiffs argue that "[t]he Project does not meet the test of being a project of exclusively public utility and beauty for the inhabitants of Boston" because the public will not be able to use 100% of the Stadium 100% of the time. Plaintiffs' Reply p. 8. The problem with this argument is a big one: the Will simply does not require this sort of exclusive public use; nor does it outlaw for-profit activities from operating in Fund properties like the Stadium. In fact, the word "exclusively"—which Plaintiffs find so important that they underline it for emphasis in their Reply—does not appear anywhere in the Will.

The Will does not require that a work established by the Fund must be used "exclusively" by the public, with no part of it leased to a for-profit entity—especially where (as will happen here) the lease to a for-profit entity generates revenue that will be used to support the construction and maintenance of the Stadium and provide entertainment and recreation for the public. To the contrary, in requiring "works of public utility and beauty, for the use and enjoyment of the inhabitants of the City of Boston," the Will speaks to the principal use of the works created by the Fund. It does not mandate that every inch of every building must be

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expenditures could be legally undertaken); *New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 580, 598 (N.J. Super. Ct. Law Div. 1971) (in considering public financing of New York Giants stadium, noting "the view that the construction and maintenance of stadiums and related facilities constitutes a public purpose has received virtually universal approval in most jurisdictions"); *Matter of Spectrum Arena, Inc.*, 330 F. Supp. 125, 127-28 (E.D. Pa. 1971) (noting arena used for professional and amateur sports entertainment is public property used for public purpose).

scrutinized in the manner Plaintiffs suggest. The test is whether the work as a whole—on balance, considering all the circumstances and the ways in which the work will be used—is a work of public utility and beauty used and enjoyed by the inhabitants of Boston. The Stadium certainly is, and will remain, that. The fact that portions of the renovated Stadium will be leased to BUSP does not change the fundamental character of the Stadium, which will continue to be a work of substantial public utility used on a daily basis by the public.

The suggestion that no part of a work established by the Fund can ever be made available to a for-profit organization in exchange for its contributions to creating and maintaining the work (and the public benefits it brings) is found nowhere in the Will. Plaintiffs simply invent it, and they cannot prevail in this case based upon their own inventions. In addition, the notion that a project's public purpose is destroyed by some incidental benefit to a private, profit-seeking party has been repeatedly rejected by the Massachusetts courts—especially where, as here, the for-profit entity will economically support the dominant public use. *See City of Boston v. Merchants Nat. Bank of Boston*, 338 Mass. 245, 248-49 (1958) (holding municipal auditorium "is of important value in promoting the public interests of a large city, a public advantage which is not swallowed up because conventions may also be of incidental benefit to private citizens"; the "structure does not have to be so designed as to become an unnecessary drain on the taxpayers. If a sound financial scheme embraces facilities which tend to make possible a more nearly full time use, it is not to be presumed that the dominant purpose ceases to be public and becomes private. The presumption is the other way"); *Opinion of the Justices*, 356 Mass. 775, 800 (1969) ("We think that the existence of a proper public purpose will not be destroyed if the Authorit[y] makes proper leases of the stadium complex or the arena (pursuant to a statute containing appropriate

standards) to a privately owned entity operating for profit. Indeed such leases may be essential to obtaining the revenues with which to pay the proposed bonds.").

Plaintiffs' position, moreover, is inconsistent with White's intentions as his attorney understood them shortly after his death. Addendum A to this brief is a letter dated January 15, 1925, from Charles Barnes, who was White's lawyer.[4] In the letter, Mr. Barnes, writing about the need to pay the costs of maintaining a building that could be constructed by the Fund, recognizes that the "costs of maintenance" of the building might have to "be met from some other source than out of the income of the fund after the building was completed." To that end, he writes that the responsibility for maintenance "would be a proper expense and should be a welcome expense of the city," and that the City "could be helped out by making a small charge for attendance for many gatherings or performances that might be held there," stating that he "know[s] Mr. White would approve of this." Addendum A at p. 3. He then goes on to state that **"[i]t is possible also that the building might be designed, without at all injuring its beauty or usefulness for its principal purpose, so that offices or quarters might be provided to produce a rental that would help out in the upkeep."** Addendum A at p. 3. Plaintiffs' contrary position cannot withstand this compelling evidence of White's intent.

Mr. Barnes's letter comports with the provisions of the Will, which expressly allow for the leasing of Fund property **without placing any restrictions on who the tenants may be**. It would have been easy enough for White to specify in his Will that Fund property may be leased only to not-for-profit organizations if that had been his intention, but he did not do so. Nor did White mandate in the Will that only real property he previously owned, and then became owned

[4] The City Defendants did not cite this letter in their initial opposition because counsel for the City Defendants first discovered the letter, which is maintained in the files of the Massachusetts Historical Society, after the Court's March 6, 2024, hearing.

by the Fund upon his death, may be leased, but not real property later acquired by the Fund. Once again, it would have been easy enough for White to write that if it had been his intention, but he did not. Plaintiffs do not have the right to impose restrictions that White chose not to impose.[5]

Further supporting this conclusion, the Will gives examples of a zoological garden and buildings therefor, an aquarium, and a forum of substantial proportions for public gatherings as permissible works to be created by the Fund. The Will does not mandate, however, that the zoo, aquarium, or forum must be operated by a not-for-profit organization. Once again, it would have been easy enough for White to state that restriction in his Will if he wished to do so, but he did not. And once again, Plaintiffs have no right to impose that restriction where White did not. Moreover, zoos, aquariums, and public gathering arenas routinely offer concessions and the sale of gifts and other merchandise onsite, and the operators of those concessions and stores often conduct those businesses to make a profit. White could have stated in his Will that for-profit operators are prohibited from operating in the Fund's work in those capacities, but he did not.[6]

Plaintiffs' suggestion that the renovated Stadium is impermissible because of the Will's statement that "no part of said income, however, shall be used for a religious, political, educational or any purpose which it shall be the duty of the City in the ordinary course of events

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5 The Dyson affidavit establishes that most of the Fund's properties that are currently leased to non-public entities were (just like the Stadium Property) acquired and either constructed or renovated using Fund income—including the Curley House, where ENC is the tenant. Dyson Aff. ¶¶ 5-16. (The Fund purchased the Curley house in 1988. *See* Suffolk County Registry of Deeds, Book 14734, Page 344.) This fact is inconsistent with Plaintiffs' effort to draw a distinction between the Fund's ability to lease its original property and its later-acquired property. The Fund has been leasing its later-acquired property for decades.

6 Zoos and aquariums also universally include areas that are inaccessible to the public (where animals live, fish swim, and staff work). This fact proves incorrect Plaintiffs' suggestion that the entire Stadium must be open to the public.

to provide" likewise is incorrect. A school sports stadium is not an educational use "which it shall be the duty of the City in the ordinary course of events to provide" because the City is not obligated to provide a sports stadium as part of its public schools.[7] It certainly is permissible for the City to do so, but it is not mandatory. Because the City has no "duty" to provide a stadium, the Will does not preclude using Fund property for a stadium. And even if it did, the Fund's income used to construct the Stadium was spent 75 years ago, and no additional Fund income will be spent on the current renovation project (which will be funded entirely by the City and BUSP).[8] In their fervency to kill this Project, the Emerald Necklace Conservancy and the other Plaintiffs now take the position that Boston Public Schools' control of White Stadium over the last 75 years violates the Will. This new position, if adopted, would effectively evict BPS's athletic programs from White Stadium, It also suggests Plaintiffs' earlier protestations over what they mischaracterize as BPS's diminished control of White Stadium are not genuine.

Relatedly, as the City Defendants have previously stated, the Stadium renovation project will not run afoul of the Will's restriction against Fund income becoming "mingled with other funds or applied in joint undertakings" because no fund income is being used for the project. McDaniel Aff. ¶ 41. Moreover, there is no "joint undertaking" because no Fund income or capital is being put into common ownership with private funds. Instead, what is happening is that

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[7] The Will suggested the creation of a zoo, even though a zoo is clearly "educational" among other attributes. *See, e.g.* Acts of 1991, c. 6, § 24(5)(q) (creating trustees of the Commonwealth Zoological Corporation who would "enrich the zoos as valuable community, **educational**, cultural, recreational and environmental institutions").

[8] Plaintiffs' argument that the Stadium and Stadium Property cannot possibly be a school building and yard because the Will prohibits "educational" uses is wrong both for the reason discussed above (a sports stadium is not an educational facility that the City is obligated to provide), and also because it attempts to mix arguments about what the Will allows with arguments about the Stadium Property's Article 97 status. Simply stated, the Stadium is an athletic facility. It is not protected parkland.

a work of the Fund, created in the 1940s, is being "improved, extended, enlarged or added to"—which the Will expressly allows. And no Fund assets are being sold or given to a private owner: the Fund will continue to be the record owner of the entire Stadium Property; the Boston Public Schools will maintain care, custody, and control; and when BUSP's lease ends, the Fund will own the entirety of the Stadium improvements outright—including the entire West Grandstand and other improvements being paid for by BUSP. The reality is that BUSP is enriching the Fund (by helping to pay for the construction of a renovated Stadium that the Fund will own), and by extension the public—not the other way around.[9]

### III. Plaintiffs' Interpretation of the Will Ignores Material Provisions in the Document.

In attempting to latch on to only those words in the Will that they think help them, Plaintiffs' arguments ignore the first principle of trust construction: "the intention of the settlor must be ascertained from the entire instrument, giving due weight to all its language." *See Stryker v. Kennard*, 339 Mass. 373, 377 (1959). *See also Dassori v. Patterson*, 440 Mass. 1039 (2004) ("To ascertain the settlor's intent, we look to the trust instrument as a whole . . . ."). First and foremost, the Will only imposes restrictions on the use of income from the Fund, and no income is being spent on the project at issue in this litigation. Plaintiffs' position also simply cannot be squared with the provisions in the Will allowing the leasing of Fund real estate (without limitation on who the tenants may be), allowing lessees to rebuild the premises leased to

[9] Because the West Grandstand areas to which BUSP will have exclusive use during the term of its lease **will be constructed and paid for by BUSP**, the Fund is not giving Fund proceeds to a private entity. Rather, the Fund is allowing BUSP to have time-limited exclusive use of certain areas in the new West Grandstand that will be constructed and paid for by BUSP, in exchange for (1) BUSP paying rent and giving the City—and the public—the right to use components of the Stadium being constructed and paid for by BUSP, and (2) the Fund owning the entirety of the improvements at the end of the lease.

them (as BUSP will do with a portion of the Stadium), and allowing works established by the Fund to be "improved, extended, enlarged or added to from time to time" (which is, ultimately, precisely what is happening here). Plaintiffs' inability to square their position with these provisions of the Will proves that Plaintiffs are wrong.

This case is not about whether a new stadium may be built: a 10,000-seat stadium has stood on the property for 75 years. It is, instead, about whether the existing White Stadium, which has fallen into a state of disrepair substantially limiting the public's ability to use it, can be renovated, rebuilt, and improved to once again be the "forum of substantial proportions for public gatherings" that White Stadium once was. In this respect, the Will is clear: White directed that "[a]ny work or works established from the Fund may be improved, extended, enlarged or added to from time to time." In order to fund the renovation and pay for the maintenance of the Stadium going forward, the City proposes to enter into a lease with BUSP and to have it pay for and perform some of the renovations. The Will allows this, saying that leases "where necessary shall provide for rebuilding by the lessees." And as Mr. Barnes's letter establishes, allowing a portion of the Stadium to be leased to pay for the renovation and maintenance of the work comports with White's intent and does not injure the Stadium's "beauty or usefulness for its principal purpose." Thus, the proposed renovation is entirely consistent with the Will.[10]

## IV. The Stadium Property Has Been a School Building and Yard, and Not Parkland Protected by Article 97, for Over 75 Years.

[10] The bottom line is that the Trustees of the Fund decided in 1949 that the Stadium should be a school building and yard and placed under the care, custody, and control of the Boston Public Schools. Their decision has been unchallenged for 75 years and cannot be assaulted now. To prevail in this case, Plaintiffs must prove that BPS's effort to revitalize the Stadium so that it can meet its intended purposes is impermissible, despite the Trustees having given the Stadium to BPS to be used for those very purposes. Plaintiffs cannot meet that burden.

The construction and use of the Stadium and its grounds as a school building and yard were approved, approximately 75 years ago, by the Trustees of the White Fund, the Mayor, the City Council, the Boston School Committee, and most importantly, the Legislature. Plaintiffs have alleged no facts that could support a conclusion that the City or the public's use of the Stadium Property since then evidences the City's "clear and unequivocal intent to dedicate [the Stadium Property] as a public park" or that "the public accept[ed] such use by actually using the land as a public park." *Smith v. Westfield*, 478 Mass. 49, 63 (2017). Despite all the facts to the contrary, Plaintiffs argue that the Stadium Property is indistinguishable from the surrounding areas of Franklin Park for Article 97 purposes.

Plaintiffs have offered no basis for the Court to ignore the special acts passed in 1947 and 1950, and the various votes and conveyances that happened in between them, which rendered the Stadium Property a "school building and yard." Nor have they adduced evidence that the Stadium Property has been used for other purposes in the 75 years since then. The record clearly establishes that the Stadium Property is, and has been for three-quarters of a century, a school building and yard, and not a public park. Article 97 therefore does not apply to it.

In their reply, Plaintiffs say nothing about Section 1 of Chapter 542 of the Acts of 1947 (Statutory Addendum Ex. 1), which authorized the City of Boston to convey to the Fund "any land, including park land, heretofore or hereafter acquired in fee by" the City "to be held thereafter **for the purposes of said article fourteenth**" of the Will. Those purposes do not include the maintenance of public parks. Thus, the 1947 Act confirms the Legislature's intention that any land conveyed to the Fund would no longer be part of Franklin Park.[11]

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11 The Court should observe the tension in Plaintiffs' arguments: on the one hand, they claim that the Stadium Property is a public park protected by Article 97; but, on the other hand, they claim that the current Stadium—which is a large concrete structure, and not a public park—must

After the 1947 Act was passed, and after the Boston School Committee requested that the Trust construct a stadium for school athletic events, the Trustees of the Fund decided to construct the Stadium, "voted that the City of Boston through Mayor Curley turn over the [Stadium] for such disposition as he might see fit," and voted in favor of "an announcement by His Honor the Mayor to the public that the School Department of the City will have full charge of the operation, care and maintenance of the [Stadium]." Sullivan Aff. Attachment. The Mayor then determined that "the stadium shall be conducted under the direction and control of the School Department." *Id.* And the Massachusetts Legislature voted that the "stadium, together with the estate upon which it stands, **shall be deemed to be a school building and yard, and shall be repaired, altered, improved and furnished in the same manner as a school building and yard** out of funds appropriated [by statute for the schools]." Acts of April 10, 1950, c. 291, § 1 (Statutory Addendum Ex. 2).

Plaintiffs ask the Court to invalidate the Legislature's duly-enacted 1947 and 1950 statutes based on their assertion that creating a stadium for scholastic athletic contests and for public exhibitions and gatherings is an educational use prohibited by the Will. Athletic contests meant to gather 10,000 spectators are sporting, community, civic, neighborhood, and entertainment events that are more than just "educational." The Trustees determined that they could spend the Fund's income to create the Stadium in 1947 and 1949, and the Massachusetts legislature agreed in 1950. The Court should not invalidate these decades-old statutes where it is perfectly reasonable to read the Will to allow for the creation of a stadium for school athletic events. A "statute is presumed to be constitutional and every rational presumption in favor of the

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be preserved as a work of public utility and remain open to the public. They cannot have it both ways.

statute's validity is made," *Pielech v. Massasoit Greyhound, Inc.*, 441 Mass. 188, 193 (2004), *citing St. Germaine v. Pendergast*, 416 Mass. 698, 702–704 (1993), including by avoiding readings that would render it unconstitutional where another reading that avoids constitutional infirmity is available, *Oracle USA, Inc. v. Commr. of Revenue*, 487 Mass. 518, 525 (Mass. 2021).

These acts from the 1940s and 1950 are definitive when it comes to the legal status of the Stadium. It is a school building and yard, and has been for decades. It is not a public park. And it is not the sort of natural open space protected by Article 97 (as a simple glance at the large concrete structure confirms). Plaintiffs have no evidence establishing otherwise.

Plaintiffs attempt to undermine this conclusion by citing to statements made in various documents that the Stadium is located "within" Franklin Park or similar language. But those statements are nothing more than accurate reflections of the fact that the Stadium Property is surrounded on all sides by land that is part of Franklin Park. They are not admissions that the Stadium Property itself is a part of the park. Moreover, McDaniel does not "specifically acknowledge[] that the Project might fall under Article 97" in their affidavit, as Plaintiffs contend. Reply p. 11. For this proposition, Plaintiffs cite to the City's Request for Proposals for the Stadium project (Exhibit B to McDaniel's affidavit). But the RFP says nothing more than that the "potential application of Article 97 is fact specific and it is the Proposer's obligation to assess whether its proposed program will require Article 97 approvals," and if so to obtain them. McDaniel, Exhibit B, pp. 15-16. McDaniel's statement is not a concession that Article 97 applies. And in any event, the property's legal status is determined by what happened in the 1940s and 1950, and by how the property has been used in the decades since then.

Plaintiffs also fail to address in any meaningful way the designation by the Executive Office of Energy and Environmental Affairs—the Commonwealth's agency charged with

overseeing administration of Article 97 dispositions—in its data that the Stadium Property is not subject to Article 97, unlike the rest of Franklin Park. The best they can do is to observe that the Commonwealth's data inaccurately reflects the boundaries of the Stadium Property. But (as the Court can confirm by interacting with the MassMapper tool itself if it wishes to do so), EOEEA's data states that the Stadium Parcel (Parcel ID of 1203486001), owned by the White Fund, is **not** Article 97 protected, while the portions of Franklin Park surrounding the Stadium Parcel (Parcel ID of 1203486000), which is owned by the City, are protected.[12] That is the data that matters, and it is "verified" by EOEEA.[13]

## V. Plaintiffs Have No Irreparable Harms.

In their reply, Plaintiffs have not rebutted the City Defendants' arguments establishing that neither of the harms Plaintiffs' claim (demolition of the current Stadium to allow for the construction of an improved Stadium that will enhance public use, and the signing of agreements that can be rendered unenforceable or invalid by a Court decision on the merits) constitute irreparable harms sufficient to justify an injunction. They simply reiterate that demolition and the signing of agreements would cause them irreparable harm. The Court can and should take Plaintiffs' silence as a concession that neither of these things constitutes an irreparable injury. The fact of the matter is that Plaintiffs will not be irreparably harmed by the implementation of improvements to the Stadium (to the contrary, they will be benefitted by having enhanced access to an improved facility), or by the signing of agreements that can be invalidated and rendered

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[12] It appears that the boundary line error stems from a mistaken delineation in the City's assessor's database. Ultimately, it is the 1947 deed conveying the Stadium Property that determines the property's boundaries, and that deed incorporates a plan depicting the correct boundaries (which encompass the entire Stadium).

[13] EOEEA's verification of this particular data is not undermined by the MassMapper's general disclaimer against using the Mapper tool (which contains myriad data from many different sources) for making legal decisions.

unenforceable in the future if need be. They therefore have not established any irreparable harm, and, as a result, are not entitled to injunctive relief.

## VI. MEPA's Environmental Justice Amendments Are Irrelevant to the Will and Article 97 Issues Before the Court.

In an effort to identify some irreparable harm supporting their request for an injunction, Plaintiffs invoke Chapter 8, Sections 55-60 of the Acts of 2021. That statute amended the Massachusetts Environmental Policy Act ("MEPA"), which is codified at G.L. c.30, Sections 61-62L, to require projects subject to state MEPA review to include in their MEPA filings assessments of their environmental impacts on neighborhoods defined in the statute as "environmental justice populations." The statute is limited to that context, however, and does not mandate consideration of environmental justice concerns in the context of the Court's determinations about the Will and Article 97. There is no MEPA question before the Court. Chapter 8, Sections 55-60 of the Acts of 2021, and the environmental justice protocols which it established in the MEPA context, therefore are irrelevant to the pending motions.

Moreover, while the City shares the Commonwealth's focus on environmental justice as a key public policy priority, the many public benefits of the Project, described throughout the City's filings, will provide direct and substantial benefits to surrounding communities. So even if the Court were to consider Plaintiffs' environmental justice considerations in deciding the pending motions, it should find that they weigh heavily in favor of allowing the Project to proceed without impediment. *See* McDaniel Aff. Exhibit C, Sections 5.8 and 5.9 ("Description of Economic Development Benefits and Community Benefits" and "Diversity and Inclusion Plan"); Epstein Aff. ¶ 24. The concrete benefits identified in the project documents outweigh Plaintiffs' speculative concerns about traffic and noise impacts, which are not supported by affidavits or

other actual evidence in the record—and which, frankly, make little sense, given that a 10,000-seat Stadium, and its impacts, have existed on this site for decades.

## VII. Nothing Else Plaintiffs Have Asserted Entitles Them to Injunctive Relief.

Plaintiffs argue that Section 4(E) of Chapter 642 of the Acts of 1966 (the Public Facilities Commission's enabling legislation) is limited to work on "municipal buildings." They are mistaken. Plaintiffs once again underline a word for emphasis that does not appear in the source material (in this case, the statute in question). Instead, Section 4(E) of Chapter 642 of the Acts of 1966 provides an exception to local ordinances (including zoning) where there is any "construction, reconstruction, alteration, remodeling, and demolition **by the commission** of structures and facilities." The language of the statute is clear: it applies to any project undertaken "by the commission." The trigger is not whether (as Plaintiffs mistakenly claim) the building is "municipal" (again, the statute simply doesn't say that), but rather whether the "commission" (defined in Section 1 of Chapter 642 to mean the public facilities commission) is undertaking the project.

Plaintiffs also are wrong to suggest that there will be inadequate review by the Landmarks Commission. BUSP's portion of the project is currently undergoing review by the Landmarks Commission, so the Commission will be providing review of the project. Nothing is lost by not requiring a second review by the Landmarks Commission of the City's portion of the project—the Landmark's Commission already is reviewing the entire project. And even if there were, Section 4(E) of Chapter 642 of the Acts of 1966 is clear that no review is required for a project undertaken by the Public Facilities Commission. Plaintiffs have no legal basis to insist upon an additional review, especially in this case where Plaintiffs lodge no claims under the Landmarks Commission's enabling legislation, which has its own processes for administrative remedies and judicial review.

## Conclusion

For the reasons stated above, and for the additional reasons provided in the City Defendants' initial opposition and presented during the Court's March 6, 2024, hearing, Plaintiffs' pending motions should be denied.

Respectfully submitted,

THE CITY OF BOSTON, and the TRUSTEES OF THE GEORGE ROBERT WHITE FUND,

By their attorneys,

/s/ Alan D. Rose
Alan D. Rose (BBO# 427280)
adr@rose-law.net
Sammy Nabulsi (BBO# 691503)
ssn@rose-law.net
ROSE LAW PARTNERS LLP
One Beacon Street, 23rd Floor
Boston, MA 02108 Telephone:
(617) 536-0040

/s/ Gary M. Ronan
Gary M. Ronan (BBO# 653899)
gronan@goulstonstorrs.com
Brian Dezurick (BBO# 713008)
bdezurick@goulstonstorrs.com
GOULSTON & STORRS PC
400 Atlantic Avenue Boston, Massachusetts 02110-3333
Telephone: (617) 482-1776

Dated: March 15, 2024

**Certificate of Service**

I certify that on March 15, 2024, we served a true and accurate copy of the foregoing document by electronic mail on:

Edward V. Colbert III
colbert@casneredwards.com
Caitlin Romasco
romasco@casneredwards.com
Alana V. Rusin
rusin@casneredwards.com
CASNER & EDWARDS LLP
303 Congress Street
Boston, MA 02210

Christopher C. Tsouros
christopher.tsouros@afslaw.com
ArentFox Schiff
Prudential Tower
800 Boylston Street
Boston, MA 02199

/s/ *Gary M. Ronan*
Gary M. Ronan

# Addendum A

HEMENWAY & BARNES

COUNSELLORS AT LAW

ALFRED HEMENWAY
CHARLES B. BARNES
ARTHUR G. MITTON

PEIRCE LONG
PHILIP B. BUZZELL

TELEPHONE HAYMARKET 67

334-338 TREMONT BUILDING
73 TREMONT STREET
BOSTON January 15, 1925.

Mrs. Frederick T. Bradbury,
285 Commonwealth Ave.,
Boston, Mass.

Dear Mrs. Bradbury:

I am returning to you enclosed Mr. Phelan's letter to you enclosing letter from the Mayor and letter from Mr. Cram to the latter.

As I said to you in our conversation, I find Mr. Cram's letter very interesting in view of what I know of Mr. White's ideas in the matter. Mr. Cram's ideas as expressed in general language on the first page and a part of the second page of his letter are singularly like Mr. White's. Mr. Cram's more specific vision, however, as expressed with more or less detail toward the end of the second page of his letter and following, is rather too comprehensive and multifarious to fit with what were Mr. White's ideas.

I know from my many talks with him that the blessing of beauty and the need of it in our city life were ever present in Mr. White's mind, and he had very specifically in mind the opportunity that might be offered from his gift to help supply that need with a building, which could be used for large public gatherings (in place of Mechanics Building!!!),

of supreme architectural beauty, something, as he used to say, that people would come to Boston to see just as we go to some otherwise unimportant foreign city just to see some building of especial beauty and perfection. You will recall that he speaks in the will of having in mind "a forum of substantial proportions for public gatherings, etc., which we do not possess" and that he says it is his intention that the "income, accumulated if need be for a time long enough to make it sufficient, should be used only for important civic improvements."

I am very glad that Mr. Cram has written this letter to the Mayor and glad to conclude from the fact that it has been forwarded to you that the suggestion in general strikes the Mayor favorably. The Health Units are, of course, a wonderful gift to the people of the city and afford a help of perhaps primary importance, but I am sure that it would be entirely in accord with Mr. White's views if hereafter the trustees, perhaps in the present administration, should decide to commit themselves to a plan of accumulating the income over a period of years and erecting for Boston in some commanding situation within the convenient reach of all a building which would afford an auditorium or forum for large public gatherings, and in that connection I think he would agree with Mr. Cram's idea of the foyer or municipal reception hall where distinguished visitors would be received and official receptions held. I agree with you, however,

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that to go on and add "reading rooms for men, women and children" and a creche and library, etc., would not at all fit with Mr. White's ideas. Of course, I suppose there would be problems to be met in carrying out such an idea, as, for instance, the cost of maintenance, which must be met from some other source than out of the income of the fund after the building was completed. So far as the building was used for city functions it would be a proper expense and should be a welcome expense of the city, and this could be helped out by making a small charge for attendance for many of the gatherings or performances that might be held there. I know Mr. White would approve of this because the willingness to pay a small admission fee would be the best earnest of a sincere desire on the part of the people to attend and might keep out the idle and merely curious. It is possible also that the building might be designed, without at all injuring its beauty or usefulness for its principal purpose, so that offices or quarters might be provided to produce a rental that would help out in the upkeep.

However, all of these questions are in the future, and I am very much pleased that men of Mr. Cram's high order of vision and taste and capacity are beginning to think along these lines.

Sincerely yours,

Ralph B. Barnes