



CITY OF NEW BEDFORD
JONATHAN F. MITCHELL, MAYOR

August 7, 2023

City Council President Linda M. Morad
and Honorable Members of the City
Council 133 William Street
New Bedford, MA 02740

RE: County Street Corridor Improvement Traffic Improvement Program (Project # 608535)
– Waiver of Damages and Appraisal

Dear Council President Morad and Members of the City Council:

I respectfully request that the City Council adopt the enclosed Order, pursuant to G.L. c. 79, § 7A, which waives the appraisal requirement and the right to any damages to which the City may be entitled to with respect to two (2) permanent easements and one (1) temporary easement, to be acquired for the Country Street Corridor Improvement Traffic Improvement Program (TIP) Project. The proposed Order further authorizes me, on behalf of the City of New Bedford, to execute the enclosed DOT forms: the “Certificate of Donation” for the permanent easements and a “Right of Entry – Without Prejudice” form for the temporary easements.

The County Street Corridor Improvement TIP Project is a MassDOT project scheduled for advertising on September 2, 2023, using state and federal funding. The Project limits extend along Country Street from Nelson Street northerly to a point just south of Union Street; a total distance of approximately 6,758 feet (1.28 miles) along the mainline (County Street). The project includes proposed roadway, geometric, and traffic control improvements intended to improve vehicular, bicyclist, and pedestrian safety, as well as vehicle capacity, traffic operations and ensuring ADA compliance within the Project limits. The proposed design of the Project area will require, but is not limited to: milling and resurfacing the existing paved roadway, restriping the roadway to provide bicycle accommodation, updating traffic signals, installing lighting, reconstructing sidewalks with new ADA compliant ramps, tree plantings, new green infrastructure areas, and constructing geometric improvements at intersections to provide enhanced turning maneuverability.

The proposed easements on City-owned property are located on the triangular shaped parcels known as Andrews-Dahill Park, shown on City of New Bedford Assessor’s Map 36 as

Lot 225, and Thomas D. Lopes Park, shown on City of New Bedford Assessor's Map 36 as Lot 149, respectively. The easements in question are shown on the enclosed plan entitled, "City of New Bedford County Street Preliminary Right of Way Plans Property Plan (Sheet 07 of 13)", as Permanent Easement 20 (PE-20) and Permanent Easement 21 (PE-21) —which will cover newly installed ADA compliant curb ramps at Andrews-Dahill Park— and Temporary Easement 63 (TE-63) for sidewalk reconstruction purposes abutting both parks.

These authorizations are enclosed for your consideration and if approved, must be enacted before the MassDOT project begins on September 2, 2023, and before drafting and approval of the Order of Taking that the Council ordered the Solicitor's Office on March 23, 2023 to prepare. Representatives of the Department of Public Infrastructure and Solicitor's Office will be available to answer questions at the August 17, 2023 City Council meeting.

Sincerely,



Jonathan F. Mitchell
Mayor

cc: Jamie Ponte, Commissioner of Public Infrastructure
Ryan Pavao, Associate City Solicitor



CITY OF NEW BEDFORD

CITY COUNCIL

August 17, 2023

ORDERED that, pursuant to G.L. c. 79, § 7A, the City of New Bedford hereby waives the appraisal requirement and the right to any damages the City may be entitled to with respect to two (2) permanent easements and one (1) temporary easement, to be acquired for the County Street Corridor Improvement Project, and further authorizing the Mayor to execute, on behalf of the City of New Bedford, a Certificate of Donation form for Permanent Easements PE-20 and PE-21, and a Right of Entry – Without Prejudice form for Temporary Easement TE-63 (copies attached).

The proposed easements, on City owned property, are located on the triangular shaped parcels known as Andrews-Dahill Park, upon which the Cape Verdean-American Veterans Memorial Square is located, and Thomas D. Lopes Park, shown on City of New Bedford Assessor's Map 36 as Lots 225 and 149, respectively. The easement areas are shown as Permanent Easements PE-20 and PE-21, and Temporary Easement TE-63 on the attached plan entitled "CITY OF NEW BEDFORD COUNTY STREET PRELIMINARY RIGHT OF WAY PLANS" (Sheet 07 of 13).

CERTIFICATE OF DONATION

Owner(s) of Record: City of New Bedford

City/Town: New Bedford Fed Aid Number: _____

Project: 608535

Parcel Number (ROW Plans) & Square Footage(s): Map 36, Lot 225, 48 S.F.

In Fee: \$0 Permanent Easement(s): PE-20 & PE-21

Temporary Easement(s): None for this Certificate of Donation

To: John DeLeire, Director
Right of Way Bureau
MassDOT/ Highway Division
10 Park Plaza - Room 6160
Boston, MA 02116-3973

This is to certify that the above referenced parcel(s) were donated by the owner(s) as provided for in the provisions of Title III, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.

The conveyance of these parcels will be accomplished by deed or Order of Taking and recorded in the Registry of Deeds.

This donation is made of my/our free will. I/we waive my/our right(s) to an appraisal and compensation. I/we have been given the Federal Aid Acquisition Guide for Property Owners and have reviewed it.

Owner(s)/ Authorized Representative

****All Owners of Records must sign****

Jonathan F. Mitchell, Mayor

Date

Authorized City/Town Official - Title

Jonathan F. Mitchell, Mayor

Date

Note: If the subject parcel(s) is/are owned by a corporation, estate, trust, etc., then an appropriate document, authorizing this donation must be attached to this document.

Note: An executed Affidavit from the municipality must be attached for this document to be valid for ROW Certification.

New Bedford
MASSACHUSETTS

RIGHT OF ENTRY - WITHOUT PREJUDICE

Owner(s) of Record: City of New Bedford

Address: Thomas D. Lopes and Andrews-Dahill Parks

Stations: 47+11 to 49+07; 51+26 to 51+49

Parcel Number (ROW Plans) & Square Footage(s): Map 36, Lots 225 & 149, 1,044 S.F.

Projects: County Street Corridor Improvement; Project File # 608535

Easement: TE-63

Permission is hereby given to the above municipality and the Massachusetts Department of Transportation, Highway Division or its duly authorized agents to enter upon my property in connection with the reconstruction of a roadway on the above named project. Plans for this project are located in the Municipal Offices. **A ROW Plan showing the impacts to my property are shown on the back page of this two sided document.** The purpose of this Right of Entry is to allow for changes and to carry out the work on my property as out lined below.

Milling, resurfacing and restriping the existing roadway, updating traffic signals, installing lighting, and reconstructing sidewalks with new ADA compliant ramps

This Right of Entry is made of my/our free will. I/we waive my/our right(s) to an appraisal and compensation. I/we have been advised of our rights for just compensation under the provisions of Uniform Act of 1970, as amended. This entry is to be made without prejudice to my rights in settlement of any claims for damages that may hereafter appear. I/we have been given the Federal Aid Acquisition Guide for Property Owners and have reviewed it.

Granted by: _____ / _____

Owner(s)/ Authorized Representative: Jonathan F. Mitchell, Mayor

Date

****All Owners of Records must sign****

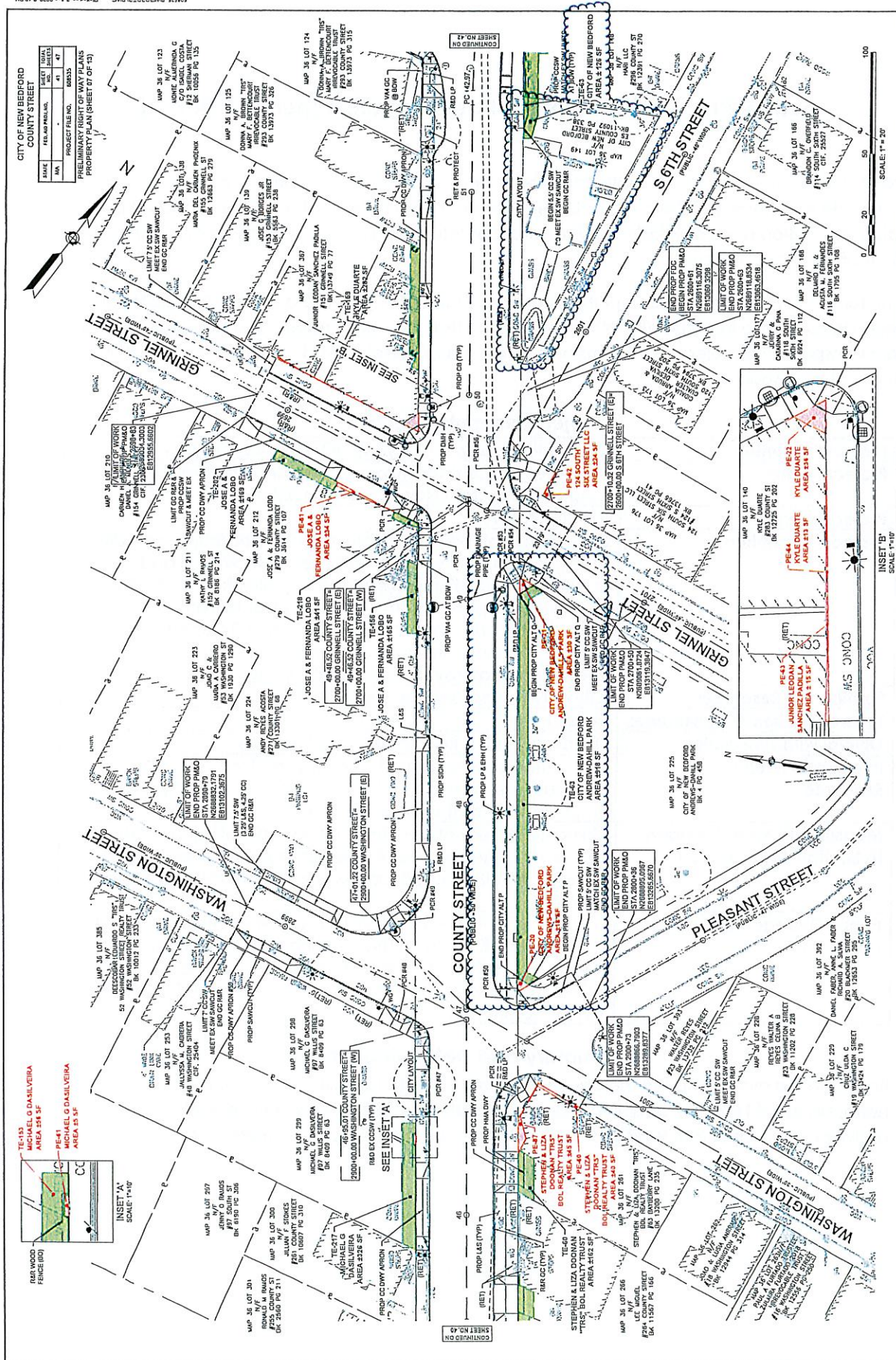
Recommended by: _____ / _____

Authorized City/Town Official - Title

Date

Jonathan F. Mitchell, Mayor

Note: If the subject parcel(s) is/are owned by a corporation, estate, trust, etc., then an appropriate document, authorizing this donation must be attached to this document. Note: An executed Affidavit from the municipality must be attached for this document to be valid for ROW Certification.



Section 4(f) *de minimis* Impact Determination [per 23 CFR 771]

NOTE: *De minimis* impacts are defined as those that, after considering any measures to minimize harm, do not adversely affect the activities, features or attributes that qualify a significant public park, recreation area, or wildlife and/or waterfowl refuge for protection under Section 4(f) of the DOT of 1966, as amended.

This form is prepared to document the analysis of planned impacts to a Section 4(f) facility and seek concurrence from the official with jurisdiction that the below-referenced MassDOT federal-aid transportation project's minor impacts would not adversely affect the operation/function of the subject resource.

Project Information Table

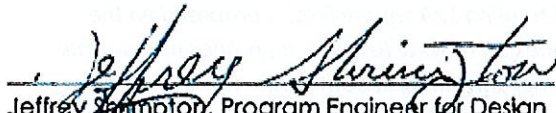
Project Proponent:	City of New Bedford and MassDOT Highway Division
Project Name:	New Bedford-Corridor Improvements and Related Work on County Street, from Nelson Street to Union Street (608535)
Project Location:	County Street
Project Description:	The purpose of the project is to improve pedestrian and driver safety along County Street. Proposed work will mill and resurface the existing paved roadway, restripe the roadway to provide bicycle accommodation, update traffic signals, install lighting, reconstruct sidewalks with ADA compliant ramps, and construct geometric improvements at intersections to provide enhanced turning movements.
Section 4(f) Resource:	City of New Bedford, Andrews-Dahill Park
Type of Section 4(f) Resource:	Public Park
Official with Jurisdiction:	Director of Parks, Recreation, and Beaches
Impacts to Section 4(f) Resource:	Two permanent easements are required for curb ramp construction, as shown in the attached right of way plans: PE-20 (21 square feet) and PE-21 (32 square feet).
Measures to Minimize Harm to Section 4(f) Resource:	Given the nature of the construction minimal harm will occur to the park. Therefore, all the necessary precautions will be taken to limit the impact on the park as improvements are made.
Public Outreach and public comments:	A Public Information Meeting took place on May 18, 2016. The meeting location was in the Meeting Room at the Main Library at 613 Pleasant Street in New Bedford. In addition, a public comment/review document has been drafted and awaits comments.

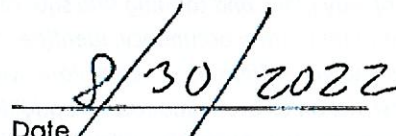
Summary and Determination

Based on the minor scope of the above-referenced impacts, including measures to minimize harm, MassDOT Highway Division has determined that the project will not adversely affect the activities, features or attributes that qualify the resource for protection under Section 4(f).

MassDOT Intent to make a *De Minimis* Determination

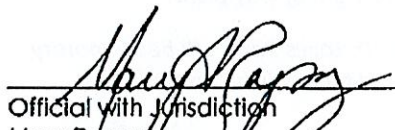
This notification hereby serves to inform the official with jurisdiction of MassDOT's intent to make a *de minimis* impact determination for the described proposed "use" of the subject Section 4(f) resource.

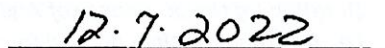

Jeffrey Thompson, Program Engineer for Design
Environmental Section, MassDOT Highway Division


Date

Section 4 (f) *De Minimis* Finding Concurrence

After consideration of any comments received from the public, as the official with jurisdiction over said resource, I hereby concur with the determination that "use" will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f).


Official with Jurisdiction
Mary Rapozo
Director of Parks, Recreation, and Beaches
City of New Bedford


Date

MassDOT Request for Federal Highway Administration (FHWA) Approval
MassDOT Highway Division requests final approval from FHWA that the proposed "use" of the above described Section 4(f) resource meets the criteria of a *de minimis* impact, as specified under 23 CFR 774.17.

**CASSANDRA CHASE
OSTRANDER**

Division Administrator (or designee)
Federal Highway Administration
Massachusetts Division

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CHASE OSTRANDER
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Date

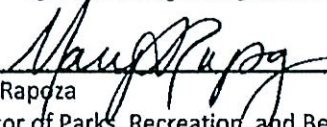
NEW BEDFORD: Corridor Improvements on County Street from Nelson Street to Union Street
Temporary Occupancies: ANDREWS-DAHILL PARK and THOMAS D. LOPES PARK
MASSDOT PROJECT #608535

The project, as designed, requires two temporary occupancies, also known as temporary easements, on parcels that comprise City-owned parks. One temporary occupancy, identified as TE-62 on the attached right of way plans and totaling 995 square feet, is proposed on the parcel known as Andrews-Dahill Park. A second temporary occupancy, identified as TE-63 and totaling 124 square feet, is proposed on the parcel known as Thomas D. Lopes Park. MassDOT and the City of New Bedford are proposing sidewalk reconstruction to accommodate the addition of ADA compliant ramps in both parks. The temporary occupancies are required for sidewalk and ramp construction, grading, and placing loam and seed.

As these parcels are city-owned public parks and serve a significant public recreational function, the temporary occupancies are subject to protection under Section 4(f) of the Department of Transportation Act of 1966, as amended.

You are the Official with Jurisdiction over these two parcels in accordance with regulations implementing Section 4(f). Your signature below will certify that the City of New Bedford is satisfied that MassDOT will meet the following conditions for the referenced project regarding the temporary construction impacts proposed within the areas identified as TE-62 and TE-63 on the attached right of way plans.

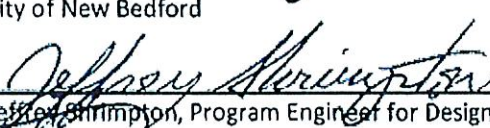
- 1. Duration (of the occupancy of Andrews-Dahill Park and Thomas D. Lopes Park) will be temporary, i.e., less than the time needed for construction of the project, and there will be no change in ownership of the land;*
- 2. The scope of the work is minor, i.e., both the nature and the magnitude of the changes to the 4(f) resources are minimal;*
- 3. There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purpose of the resources, on either a temporary or permanent basis;*
- 4. The land being used will be fully restored, i.e., the resources will be returned to a condition which is at least as good as that which existed prior to the project;*
- 5. Per this email and written concurrence herein, as the "official with jurisdiction" you are in agreement regarding the above-mentioned conditions.*



Mary Rapoza
Director of Parks, Recreation, and Beaches
City of New Bedford

12-7-2022

Date



Jeffrey Shrimpton, Program Engineer for Design
Cultural Resources/MEPA/NEPA
MassDOT Highway Division

8/30/2022

Date

CASSANDRA CHASE OSTRANDER

Digitally signed by CASSANDRA CHASE OSTRANDER
Date: 2022.12.29 11:28:33 -05'00'

Cassandra Ostrander, Program Development
Team Leader
Federal Highway Administration Massachusetts
Division

Date



ERIC JAIKES
City Solicitor

ELIZABETH McNAMARA
First Assistant City Solicitor

City of New Bedford
OFFICE OF THE CITY SOLICITOR

KREG R. ESPINOLA
OWEN J. MURPHY
Assistant City Solicitors

JOHN E. FLOR
THOMAS DAVID HOUGHTON
NICHOLAS D. DeMARCO
Associate City Solicitors

February 3, 2023

Jamie Ponte
Commissioner
Department of Public Infrastructure
1105 Shawmut Avenue
New Bedford, MA 02746
RE: County Street – Article 97

Dear Mr. Ponte:

You have requested an opinion whether approval pursuant to Article 97 of the Amendments to the Massachusetts Constitution is required to allow for the project work proposed on Assessor's Parcel 36-225 ("225").

In my opinion it does not based on the following.

Article 97 of the Amendments to the Massachusetts Constitution states in relevant part "[T]he people shall have the right to . . . the natural, scenic, historic and esthetic qualities of their environment . . . [L]ands and easements taken or acquired for such purpose shall not be used for other purposes."

The proposed work on 225 and 149 are shown on the enclosed plans and related documents you provided.

Parcel 36-225.

This parcel was acquired by the City of New Bedford by eminent domain taking from The Roman Catholic Bishop of Fall River adopted by the Board of Aldermen on May 12, 1926 and recorded on May 17, 1926 in the Bristol County Southern District Registry of Deeds in P. I. Book 4, Page 458.¹ The taking was expressly made "for recreational purposes."

This parcel consists of a triangular flat grass surface containing approximately 17,404 square feet with shade trees, benches for seating and a memorial containing two flag poles, a stone inscribed "Cape Verdean American Veterans Memorial Square Dedicated Nov. 15, 1970" (sic) and interspersed concrete walkways bordered by County Street, Pleasant Street and Grinnell Street. The work proposed consists of reconstructing the existing sidewalk and pedestrian ramps to provide ADA and AAB compliant sidewalk and pedestrian ramp access to the parcel to maintain and benefit access to and existing use of the parcel. The work requires temporarily disturbing and restoring land inside 225 at the boundary between it and the back of the County Street sidewalk and permanently reconstructing the handicap ramps at both ends of the County Street side of the parcel.

¹ The initials "P I" refer to "Public Index," a collection of six volumes in the Southern District registry in which various public real estate transactions are recorded, such as this taking, street acceptances etc.

Prior to 2013, Article 97 was given a broad construction to include a great deal of open land, i.e. land without any or few buildings, under a 1973 opinion by then Massachusetts Attorney General Robert Quinn. See Rep. A.G., Pub. Doc. No. 12, at 139 (1973). Then in 2103 the Supreme Judicial Court decided the case entitled *Majahan v. Department of Environmental Protection*, 464 Mass. 604, 984 N.E. 2d 821 (2013) in which the Court considerably narrowed what is covered by Article 97 to land “taken for those purposes, or subsequent to the taking was designated for those purposes in a manner sufficient to invoke the protection of art. 9,” 464 Mass. 604, 615, 984 N.E.2d 821, 829 (emphasis in original).

In 2017 the Supreme Judicial Court somewhat expanded the parameters of Article 97 land to include not just land specifically taken for Article 97 purposes but also to

“land not taken by eminent domain where there is no restriction recorded in the registry of deeds that limits its use to conservation or recreational purposes [but] there are circumstances where municipal parkland may be protected by art. 97 without any such recorded restriction, provided the land has been dedicated as a public park. A city or town dedicates land as a public park where there is a clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park” (emphasis supplied). *Smith v. City of Westfield*, 478 Mass. 49, 50, 82 N.E. 3d 390, 392 (2017).²

The issue in *Smith* was that the city wished to build a school on what was known as the “John A. Sullivan Memorial Playground or Cross Street Playground”: among the factors the court relied on were the city acquired the parcel by tax foreclosure, the city council had voted to turn it over to the playground commission and formally named it “John A. Sullivan Memorial Playground” which came to be known as “Cross Street Playground.”

One specification of proposed work is to temporarily disturb then permanently restore the grass behind 225 disturbed by the County Street sidewalk reconstruction. This does not constitute a violation of Article 97, in my opinion, because it is temporary and therefore not use for another purpose within the meaning of Article 97 in contrast to *Majahan* and *Smith* which involved permanent changes of purpose. Furthermore, this specification is the subject of an intent and endorsement to make a *de minimus* impact determination as further set forth in the next paragraph.

Even though *Majahan* and *Smith* involved permanent changes of purpose and despite the permanent nature of the specification of proposed work to permanently replace and install handicap ramps at either end of the County Street sidewalk, they do not constitute a violation of Article 97, in my opinion. While 225 was specifically taken for recreation and as such in my opinion would constitute Article 97 land (“taken by eminent domain [that] limits its use to conservation or recreational purposes [and . . . is [a] restriction recorded in the registry of deeds]” *Smith supra.*) the ramps are *de minimus* and as such

² This parcel is apparently called “Andrews-Dahill Park.” While no specific statute for the purpose of “recreation” is cited in the order of taking, in my opinion the acquisition fell and falls under G. L. c. 45, § 14 which provides in relevant part that cities and towns may acquire property “for the purposes of a public playground or recreation center, and may conduct and promote recreation, play, sport and physical education, for which admission may be charged, on such land and in such buildings.” While parks certainly can and do serve that purpose, there is a specific statute for park purposes, namely G. L. c. 45 § 3. This opinion request is directed only to Article 97, not parks in and of themselves, therefore no opinion is rendered here on the work as it relates to parks specifically and narrowly.

not use for another purpose within the meaning of Article 97 in my opinion. Taken together they constitute 48 square feet or .003% of the 17,404 square foot area of 225. In support, the ramps were the subject of an intent to make a *de minimus* impact determination pursuant to Section 4(f) of the DOT Act of 1966, as amended, 23 CFR 771, dated August 30, 2022 by Jeffrey Shrimpton, Mass DOT Highway Division Program Engineer for Design and endorsed in writing by Mary Rapoza, City of New Bedford Director of Parks, Recreation and Beaches dated December 7, 2022: the temporary disturb area was certified by Ms. Rapoza in writing dated December 7, 2022 as temporary and minor and so endorsed by the same Jeffrey Shrimpton.

I hope this fully answers your request for opinion, but if not, or if you have additional questions or need additional information, please contact me.

Very truly yours,

Thomas David Houghton

David Houghton
Associate City Solicitor

