

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL DOCKET NO. 2484CV0477EMERALD NECKLACE CONSERVATORY & others¹vs.CITY OF BOSTON & others²**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'
MOTIONS FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION AND LIS PENDENS**

Emerald Necklace Conservatory and twenty individuals (collectively, “Plaintiffs”) brought this action against the City of Boston (the “City”), the Trustees of the George Robert White Fund (“Board of Trustees”), and Boston Unity Soccer Partners, LLC (“BUSP”) (collectively, “Defendants”) seeking to stop proposed construction and renovation at White Stadium, located in Franklin Park. Before the Court is Plaintiffs’ Motions for Temporary Restraining Order, Preliminary Injunction, and Lis Pendens, seeking to enjoin Defendants from taking any steps toward proceeding with the proposed project.

The Court held a hearing on the Motions on March 6, 2024, and, with the Court’s leave, the parties have submitted supplement briefing. Upon consideration of the arguments, pleadings, and relevant legal standards as discussed herein, Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction is **DENIED**. Plaintiffs’ Motion for Lis Pendens is also **DENIED**.

¹ Beth Abelow; Jerrold Abelow; Jon Ball; Carla-Lisa Caligua; Rory Coffey; Jamie Cohen; John R. Cook; Louis Elisa; Derrick Evans; Marjorie Greville; Melissa Hamel; Pamela Jones; Arlene Mattison; Karen Mauney-Brodek; Jean McGuire; Beverly Merz; Daniel K. Moon; Rodney Singleton; Ben Taylor; Renee Welch

² Michelle Wu, Ruthzee Louijeune, Maureen Joyce, James E. Rooney, and Hannah L. Kilson, as Trustees of the George Robert White Fund; Boston Unity Soccer Partners, LLC

BACKGROUND

The Early History of Franklin Park Playstead

In 1883, the City acquired the land that became Franklin Park – including the property at issue – via an eminent domain taking pursuant to An Act for the Laying Out of Public Parks in or Near the City of Boston, St. 1875, c. 185. Designed by Frederick Law Olmsted in 1885, Franklin Park sits at the intersections of the Jamaica Plain, Dorchester, Roxbury, and Mattapan neighborhoods of the City. It is the City’s largest open space and is one in a chain of nine parks known as the Emerald Necklace.

Franklin Park Playstead, built between 1887 and 1888, is an area of approximately forty acres on the north side of Franklin Park. Olmsted designed the Playstead, “to be used for the athletic recreation and education of the city’s school boys, for occasional civil ceremonies and exhibition, and for any purpose likely to draw spectators in crowds.” It was the first part of Franklin Park to be completed and it opened to the public on June 12, 1889.

The White Charitable Trust Fund

In 1922, pursuant to the terms of the will (the “Will”) of philanthropist George Robert White (“White”), a charitable trust fund (White Fund) was established to hold real estate and other property that White contemporaneously bequeathed to the City.³ Pursuant to the Will, “the net income [from the White Fund is] *only to be used for creating works of public utility and beauty, for the use and enjoyment of the inhabitants of the City of Boston.*” Will, art. 14 (emphasis added), *Stoneman*, 263 Mass. at 257-258. The Will further decreed that, “[a]ny work

³ Specifically, Article 14 of White’s will (the “Will”) provided in “Article Fourteenth” that the rest and residue of his property of every nature should go to the City of Boston, “to be held as a permanent charitable trust fund to be known as the George Robert White Fund.” See *Stoneman v. Boston*, 263 Mass. 255, 257 (1928). The City accepted the devises and bequests by City Council vote on March 11, 1922. *Id.* at 258.

or works established from the Fund may be improved, extended, enlarged or added to from time to time, but the current expense of their care and maintenance shall be borne by the City.” Will, art. 14. The Will also established that the “control and management of [the White Fund] and the disbursement of the income shall be in the hands of a board of five trustees to consist of the Mayor, who shall be its chairman, the President of the City Council, the City Auditor, the President of the Chamber of Commerce and the President of the Bar Association of the City of Boston” (“Board of Trustees”). Will, art. 14.

In effect, the White Fund “is an entity managed by the [C]ity.” *Crowley v. Contributory Ret. Appeal Bd.*, 07-P-686, 2008 Mass. App. Unpub. LEXIS 405, at *6 (Mass. App. Ct. Oct. 31, 2008), citing *Stoneman*, 263 Mass. at 257-258. “The Supreme Judicial Court has determined that the [C]ity holds legal title to trust property and is also a trustee of the [White Fund], and that the five trustees are agents of the [C]ity, with ‘the duty of management.’” *Crowley*, 2008 Mass. App. Unpub. LEXIS 405, at *7, citing *Boston v. Dolan*, 298 Mass. 346, 349-350 (1937). See *Fox of Boylston St. Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 819-820 (1994).

The Building of White Stadium

In 1945, a proposal was made to transfer a portion of the Franklin Park Playstead to the White Fund to enable the construction of an athletic stadium for use by Boston Public Schools (BPS). On November 13, 1947, following two votes and with the Mayor’s approval, the City Council ordered that a 14-acre portion of the Playstead (the “Stadium Property”) be sold to the White Fund “*for the purpose of the establishment of a stadium on said land.*” Transfer Instrument, Complaint Exhibit B (emphasis added). The next day, the formal conveyance was effectuated by instrument recorded with the Suffolk Registry of Deeds that conveyed the Stadium Property to the White Fund in exchange for a \$20,000 payment to the City. Thus, the

White Fund became the owner of the Stadium Property.

Following the conveyance, the City used \$1,240,000 from the White Fund to construct a sports stadium with 10,000 seats. The stadium was dedicated in 1949 under the name, “the George Robert White Schoolboy Stadium” (White Stadium). At the time of its opening, the White Fund Board of Trustees entrusted the custody and control of White Stadium to the BPS School Committee.

On April 10, 1950, the Massachusetts Legislature enacted into law that,

So long as [White Stadium] shall remain in the custody and control of the [BPS] school committee ... said 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] . . . and shall be cared and maintained in like manner out of fund appropriated.

St. 1950, c. 291, § 1 (emphasis added).

Use and Management of White Stadium

Since its opening in September 1949, White Stadium and the Stadium Property have remained in the custody and control of the School Committee. Together, they consist of the White Stadium building, the land on which White Stadium sits, athletic courts to the east, and a fenced, rectangular plot to the south, known as the “Grove.” The BPS Athletic Department also has offices on the second floor of White Stadium’s West Grandstand. From 1950 to current day, White Stadium has been used by BPS for boys’ and girls’ sports, including soccer, football, cheerleading, cross-country, and outdoor track and field. The uses for the field are limited by the field’s current condition to approximately 250 hours per year.

White Stadium is also used each year for BPS graduation ceremonies, moving up ceremonies, a free summer sports camp operated by Boston Centers for Youth & Families, and other public recreational activities, such as basketball, tennis, the finish line for the Boston Half

Marathon, Special Olympics events, and music, cultural, and community festivals and gatherings. When not in use by BPS or a permitted event, White Stadium is open to the public from 7 a.m. to 4 p.m. Monday through Friday, when the public is permitted to use the track and traverse the bleachers of the West Grandstand. While the Stadium has bathroom facilities and water fountains, they are inoperable in the winter when the water must be turned off.

All requests to use White Stadium for events are submitted to BPS and must be approved by BPS Facilities and Athletics Departments. The BPS Athletics Department is solely responsible for scheduling, maintenance, groundskeeping, and the opening and closing of White Stadium to the public, and it does not receive any money from the White Fund for these tasks.

Limited by BPS's existing resources, White Stadium has fallen into a state of disrepair. Decades ago, the East Grandstand was significantly damaged by a fire, rendering it unsafe and unusable for anything other than storage. The poured concrete foundation of the grandstands has structural deficiencies, such as expansion joint failure, cracking, and deterioration. The lighting, plumbing, and HVAC systems are at end of their useful life. Water damage is visible from seepage through the stadium floors. White Stadium does not comply with current building codes, fire codes, nor the Americans with Disabilities Act (ADA). The quality of the athletic field has deteriorated. There is no public access to the Grove.

Request for Proposals for Public-Private Partnership to Repair White Stadium

In late 2022, Mayor Michelle Wu's administration began exploring the possibility of a public-private partnership to facilitate the renovation and repair of White Stadium (the Proposed Project).⁴ On April 25, 2023, the City issued a "Request for Proposals for Lease of the West

⁴ The record is silent as to whether the Board of Trustees was consulted regarding the proposed public-private partnership. Currently, Mayor Wu is the chairman of the Board of Trustees, and other Trustees are Ruthzee Louijeune, President of the City Council, Maureen Joyce, City Auditor, James E. Rooney, President of the Chamber of Commerce, and Hannah L. Kilson, President of the Boston Bar Association.

Grandstand and Adjacent Areas of the Stadium in a Public-Private Partnership to Achieve City’s Comprehensive Stadium Renovation Plan to Serve Boston Public Schools Athletics” (the “RFP”). The RFP contemplated that the City and a private partner would enter into a lease agreement for the West Grandstand and the Grove (collectively, the “Leased Premises”).

The RFP set forth a lease date on or around July 1, 2024, for a ten-year term with two ten-year options for renewal. Although the private partner would lease the West Grandstand, the RFP required a reciprocal license from the private partner allowing the City/BPS to use the West Grandstand on all days and times when the City uses the Stadium for BPS athletic games and other athletic and non-athletic events, including City-permitted community events. The RFP also required the private partner to accommodate “certain track and field activities” in the Grove.

Under the Proposed Project, the City assumed responsibility for the renovations to the East Grandstand, the track, and the athletic field. Under the RFP, a private partner would bear responsibility for renovations to the West Grandstand and the Grove and for making other professional-level upgrades to the Stadium Property. The RFP proposed that BPS give the private partner certain lease and license rights to use White Stadium subject to limitations that protect White Stadium’s primary use by BPS.

The Proposed Project, as set forth through the RFP, thereby sought to renovate White Stadium in the following manner: (1) erecting a new East Grandstand for updated BPS Athletics Department offices, student strength and conditioning space, sports medicine facilities, improved locker rooms, and student study spaces;⁵ (2) enlarging the existing track from a six-lane to an eight-lane track;⁶ (3) constructing a new, professional-grade athletic field; (4) renovating the

⁵ The East Grandstand locker rooms, administrative offices, strength and conditioning suite, sports medicine facilities, student study areas, and BPS athletic storage areas would be used exclusively by BPS.

⁶ BPS is currently unable to host Massachusetts Interscholastic Athletic Association (MIAA) track and field events, as the 6-lane track does not meet MIAA’s standards, which require an 8-lane track.

Grove and connecting it with the Playstead beyond the Stadium Property; (5) creating new entrances to White Stadium; (6) making White Stadium ADA-compliant; and (7) improving of the West Grandstand, among other upgrades. The proposed renovations would provide BPS coaches, students, and families better access to restrooms, water fountains, and accessibility accommodations; a professional level track and athletic field, including lighting and maintenance; ADA compliant seating; and a new scoreboard.

Proposed Agreement Between the City and BUSP

BUSP was the sole entity that responded to the City’s RFP. BUSP, a limited liability company, has been awarded a franchise for a professional women’s soccer team in Boston by the National Women’s Soccer League (NWSL). BUSP describes itself as a Boston-based professional sports enterprise, formed, funded, and controlled by women, dedicated to promoting women’s sports and advancement at all levels. More than 90% of BUSP’s invested capital to date is invested or controlled by women, and more than 30% is controlled by investors of color. The BUSP Board of Directors is comprised entirely of women.⁷

In response to the RFP, BUSP submitted a “Technical Proposal” and a “Price Proposal” on June 26, 2023. The Price Proposal proposes that BUSP pay \$400,000 to rent for the Leased Premises for the first year, with the rent increasing annually thereafter, at a rate of three percent. Additionally, BUSP would share advertising and concessions revenue with the City and make annual contributions to the community, beginning at \$500,000 and also increasing at a rate of three percent annually.⁸

⁷ Jennifer Epstein is the Controlling Manager of BUSP, as well as a founding member and lead investor. Other principals include Stephanie Connaughton, Ami Kuan Danoff, Anna Palmer, Jasmine Robinson, and Linda Whitlock.

⁸ The community contributions would be distributed in partnership with the City toward local and neighborhood business development, particularly along Seaver Street, Blue Hill Avenue, Egleston Square, and Mattapan Square. The community contributions would be designated to the health and wellness of black and brown communities in

Thereafter, Deputy Chief of Operations for the City, Morgan McDaniel, convened an evaluation committee to review BUSP's proposal. The evaluation committee consisted of representatives from BPS, the City's Operations Cabinet, the Public Facilities Department, the Boston Transportation Department, and the Boston Parks and Recreation Department. The committee determined that BUSP's proposals met the minimum qualification requirements and were advantageous to the City. On July 31, 2023, the City issued a designation letter, tentatively awarding BUSP a lease of the Leased Premises. On December 18, 2023, BUSP submitted a Project Notification Form for the White Stadium Renovation to Boston Planning & Development Agency ("BPDA").

BUSP's objective in partnering with the City on the White Stadium renovation is to deliver an appropriate playing venue for professional-level women's league soccer matches, a requirement of BUSP's expansion rights agreement with the NWSL. For BUSP to achieve this objective, the entirety of White Stadium must be renovated in time for the Spring 2026 soccer season. Without a committed venue, BUSP's NWSL expansion rights could be terminated.

Pursuant to the Proposed Lease Agreement, BUSP would have use of the entirety of White Stadium for up to twenty game days during the NWSL season from March through November. Such exclusive use would begin two hours prior to kick-off and end one hour after

the Franklin Park area, youth development with an emphasis on young girls, and supporting Franklin Park. In addition to a lease, BUSP's Technical Proposal makes several local economic development commitments to the City. They include: (1) looking to communities around Franklin Park to fill various BUSP positions; (2) establishing yearlong and summer internships prioritizing neighborhood youth; (3) aiming to have more than 50% of game-day concessions sourced from local food vendors; (4) aiming to have over 50% of all BUSP contracts come from local businesses; (5) hiring local designers to create BUSP team merchandise; (6) creating a gameday community spotlight to feature a local organization or business during half time; and (7) aiming for half of all contracts to be with minority-owned business enterprises, women-own business enterprises, and local businesses. BUSP's Technical Proposal also makes several community benefit commitments to the surrounding neighbors and BPS. They include: (1) dedicating a neighborhood fan section and creating a multi-lingual presentation to create an inclusive game experience; (2) offering scholarships to select BPS students to enhance access to high performance club soccer; and (3) developing a BUSP Mentorship Program with BPS to provide students access to professional women athletes and BUSP staff to create an equal playing field for girls in sports.

the game concludes or 11 p.m., whichever is sooner. BUSP would also have exclusive use for up to twenty practice sessions to occur prior to each game and be no more than three hours in duration.

A Proposed Use Agreement between the City and BUSP establishes an order of priority for use of White Stadium. The first priority for use would be for major City, community, and BPS special events. The second priority would be BPS athletic games and competitions, unlimited in number, as well as no more than twenty BUSP home games. The third priority would be BPS practices, which shall not be affected by BUSP home games, and other City events. The fourth priority would be no more than one BUSP practice, limited to a three-hour period, during the week prior to each BUSP home game. BUSP practices would be scheduled only after accommodating all BPS athletic games and practices, City events, and community events permitted by the City. When no scheduled events are occurring, the public would have access to the grandstands, track, and the Grove from 7 a.m. through 10 p.m. every day, including weekends. The public does not currently have any access to the East Grandstand, Grove area, or weekend access to White Stadium.

BUSP's Technical Proposal envisions leaving intact the existing curved, white stucco façade of White Stadium intact, including the art deco-style sculpture over the doors. BUSP's redevelopment of the West Grandstand calls for demolishing the current grandstand structure and constructing a new grandstand building equipped with bucket seats and a roof canopy.⁹ The West Grandstand building would include professional team office space, professional locker rooms, a press box and media areas, corporate suites, a suite-level midfield terrace, a lounge, two kitchens, at least four "team facilities" rooms, team storage space, an administrative staff room,

⁹ While the City would bear the responsibility for the renovation of the East Grandstand, BUSP would also add a roof canopy to the East Grandstand.

and various utility and mechanical equipment rooms.

The renovation of the Grove area would transform the plot into an open space available for community programs and open to the public when White Stadium is open to the public. The BUSP's Technical Proposal includes three distinct proposals, allowing varying degrees of flexible use. Depending on the proposal, the Grove could continue to remain an open rectangular plot of land, it could contain a circular pathway with space for mobile retail tents and food trucks, or the Grove could hold a raised earthwork connecting to the remainder of the Playstead with space for additional structures underneath. Other BUSP proposals for the Stadium Property include an entry plaza to the west, new paved access pathways, new lighting, additional mobile seating at the north and south ends of the stadium, and a large scoreboard.

Pursuant to the terms of the Proposed Lease Agreement, the West Grandstand – including its general concourse areas – and the Grove would remain accessible to BPS and the public at all times, outside of BUSP games and permitted practices. The press box and media areas in the West Grandstand would remain accessible to BPS, but not the public. Public access would be limited or prohibited in the West Grandstand locker rooms, trainer rooms, coach and management offices, warmup and equipment area, security room, usher and referee spaces, concessions, and the ticketing office.

The Proposed Project contemplates BUSP having significant ongoing obligations to support the maintenance of the leased premises, the field, and other portions of the Stadium Property. Specifically, BUSP, at its sole cost and expense, will bear the responsibility for performing and completing all maintenance and landscaping of the athletic field and maintaining the athletic field in a professional condition. The City projects this maintenance by BUSP, previously limited by BPS resources, will allow for use of the field to increase from

approximately 250 hours per year to 750-900 hours per year.

Proposed Funding for the Proposed Project

The City intends to fund its portion of the Proposed Project by issuing general obligation bonds. No money from the White Fund would be used. In turn, BUSP would commit at least \$30 million to the Proposed Project, although current estimates indicate the amount necessary to complete BUSP's obligations may be as high as \$50 million.

Review and Approval of the Project

The Project has been under review to date by various public agencies and community stakeholders. This on-going process includes the BPDA's review of a potential zoning amendment; hearings before the Boston Landmarks Commission and Boston Parks Commission; and proceedings on BUSP's Project Notification Form under Article 80 of the Boston Zoning Code. Numerous other meetings and briefings with various community and stakeholder groups have also occurred.¹⁰

Currently, BUSP and the City are in the design development phase of the coordinated Proposed Project design. Additionally, the unified project bidding and construction phase was set to begin in February 2024, with early site work projected to begin in April 2024. Construction on the Proposed Project is projected to begin in January 2025. BPS and BUSP envisage occupancy of the renovated White Stadium and the beginning of operations in December 2025, with the NWSL season to start in March 2026.

¹⁰ A detailed schedule of twenty-six meetings from July 5, 2023 through February 12, 2024 is in evidence. This schedule includes meetings the City held with various BPS employees, Neighborhood Associations, Plaintiff Emerald Necklace, the Franklin Park Coalition, Representatives of the Puerto Rican Festival, Boston Art and Soul Music Festival, and Franklin Park Zoo. The schedule also details meetings held for the public by the City, the BPDA, BPS, and the Boston Landmark Commission.

The Plaintiffs

Emerald Necklace Conservancy, Inc. is a Massachusetts non-profit organization dedicated to the maintenance, restoration, protection, and improvement for public use of Franklin Park and other public parks in the Emerald Necklace. The twenty individual plaintiffs are Boston residents. Plaintiffs brought this action to stop what they perceive to be the pending privatization of the Stadium Property.

DISCUSSION

Plaintiffs' Verified Complaint consists of four counts. In Count I ("Violation of Public Charitable Trust"), Plaintiffs seek a declaratory judgment that the City and the Board of Trustees breached the public trust, breached the contract with White, and breached their fiduciary duties to the residents of Boston by transferring the Stadium Property to BUSP for private use. Count II ("Violation of ... Article 97 and ... G.L. c. 3, § 5A") seeks declaratory judgment against all Defendants for failing to comply with the requirements of the art. 97 process, including submitting materials to the Secretary of Energy and Environmental Affairs under G.L. c. 3, § 5A, and petitioning for the requisite vote in the Legislature. Count III seeks equitable / declaratory relief to restrain Defendants from causing damage the Stadium Property by failing to adhere to art. 97 process and impairing. Lastly, Count IV seeks preliminary / permanent injunctive relief enjoining all Defendants from: (1) entering into any agreement transferring that would allow BUSP to build upon and exclusively control the West Grandstand and the Grove; (2) failing to comply with art. 97 process; (3) continuing with the RFQ process for the City's portion of the Proposed Project; and (4) failing to engage in art. 80 review.

To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits of its claim; and (2) that it will suffer irreparable harm if a preliminary

injunction does not issue. *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). If the moving party satisfies this burden, the court must then balance the risk of irreparable harm to the moving party against any similar risk of irreparable harm to the opposing party created by granting the injunction. *Id.* at 617. “In the context of a preliminary injunction, the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity.” *Id.* at 617 n.11.

Plaintiffs have failed to meet their burden.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

“The movant’s likelihood of success is the touchstone of the preliminary injunction inquiry. If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” *Foster v. Commissioner of Corr.*, 488 Mass. 643, 651 (2021) (quotation omitted).

A. Terms of the Proposed Project

As set forth *supra*, a core allegation of Plaintiffs’ claims is that the Proposed Project impermissibly converts White Stadium and the Stadium Property to private access and use. Specifically, Plaintiffs allege that the Proposed Lease Agreement and other agreements would grant BUSP, “exclusive, full-time private use of the interior of the ... new West Grandstand and the Grove development” and “extensive, exclusive, and private use of the entire [Stadium Property], ... during at least twenty (20) weekend days, and likely for an additional 20 practice sessions on Friday evenings.” Complaint ¶¶ 42, 43 (emphasis in original).

These allegations about the terms of the Proposed Lease Agreement are refuted by the documents. Pursuant to the Proposed Lease Agreement, BUSP would lease the West Grandstand and the Grove and license the athletic field for games and practices. During game day hours,

members of the public would need to possess a ticket to access White Stadium. The lease would be accompanied by additional agreements granting the public and BPS use of areas of the leased property at other times. The Proposed Use Agreement would subordinate the scheduling of BUSP games and practices to major community and BPS events and BPS athletic games and competitions. Pursuant to the Proposed Project, on BUSP gamedays, White Stadium would be restricted to ticketed patrons (a.k.a., members of the public), only from two hours before game kick-off until one hour after the game concludes or 11 p.m., whichever is sooner. BUSP also would be entitled to exclusive use of White Stadium *athletic field* for no more than twenty practices, for no more than *three hours each*. As for the Grove, BUSP would not maintain exclusive, full-time private use of the area. Instead, public access to this area would be expanded, as the public currently has no access.

B. Compliance with Terms of the Will

Plaintiffs contend the terms of the Will prohibit the City from renovating White Stadium with a private partner, limiting public access to any portion of the Stadium Property, and/or leasing any portion of the Stadium Property to a private entity violate the terms of the Will. However, the renovation of White Stadium pursuant to a public-private partnership – which will bring a professional women’s soccer team to Boston and prioritize BPS and public access – appears consistent with the terms of the Will.

1. “Works of Public Utility”

Plaintiffs rely on “Article Fourteenth” of the Will, which mandates that “the *net income* [of the White Fund] only [] be used for creating *works of public utility and beauty, for the use and enjoyment* of the inhabitants of the City of Boston.” Will, art. 14 (emphasis added), *Stoneman*, 263 Mass. at 257-258. Here, the Proposed Project would not use money from the

White Fund, so it is not apparent that Article Fourteenth applies. Even assuming, *arguendo*, that the real estate held by the White Fund, including Stadium Property, is part of the “net income”, the Proposed Project is nonetheless consistent with the Will’s terms.

In considering what White intended by “works of public utility and beauty, for the use and enjoyment” of Boston residents, the Will includes an illustrative description,

While I think that Boston has now few, if any, superiors in beauty and in the many privileges it affords to its citizens, [] I believe it has greater possibilities for the future, and there are several public blessings among those afforded by other cities, – such as a zoological garden and handsome buildings therefor, an aquarium, ***a forum of substantial proportions for public gatherings***, etc., – which we do not possess. It is with such things as these in mind that I have established the foregoing trust fund.

Will art. 14 (emphasis added). In 1947, the City sold the 14-acre Stadium Property to the White Fund for the express purpose of building a stadium. There was no contention at the time that constructing a stadium, which bore White’s name, violated the terms of the Will. Nor was any such objection raised in the more than 70 years that White Stadium has been in operation.

Additionally, the Will’s mandate that the works be, “*for the use and enjoyment of the inhabitants of the City,*” plainly does not require unlimited or exclusive public access without limitation. Two examples contained within the Will, zoos and aquariums, restrict access to many areas for safety reasons, they run hours of public operation, and they close to the public at various times for upkeep and private functions.

The legal character of White Stadium as a public facility does not change merely because a private party also benefits from its use. “[A] public advantage . . . is not swallowed up because [events in the building] may also be of incidental benefit to private citizens.” *Boston v. Merchants Nat’l Bank*, 338 Mass. 245, 248-249 (1958) (directive of City auditorium commission to build municipal auditorium suitable for both public exercises and rental for privately sponsored exhibitions met the definition of public purposes and was not disqualified from the use

of money raised by taxation). “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.” *Id.* at 249. “The crucial inquiry in cases such as this, where there may be benefits to private parties, is whether the private benefits are primary or are merely incidental to achievement of the public purpose.” *Opinion of Justices to House of Representatives*, 368 Mass. 880, 885 (1975) (determining whether tax money is being used for public purposes).

The Stadium Property, to date, has not allowed unrestricted or exclusive public access. Instead, BPS manages White Stadium’s public access hours to 7 a.m. to 4 p.m. Monday through Friday, subject to BPS events. The Proposed Project would expand public access to weekends and until 10:00 p.m. daily, with the support BUSP maintenance and security personnel. The Proposed Project would also expand the usable hours of the playing surface from 250 hours to at least 750 hours annually. BUSP games and practices would only consume a fraction of this time. Next, the Proposed Project would provide public access to the East Grandstand and the Grove, where presently, the public has no access. Finally, the Proposed Project would create additional spaces within the Stadium Property for public use, such as bathrooms and kitchens that function year-round, covered seating, and an entry plaza, and additional areas for the use of BPS students, including locker rooms and bathrooms, a conditioning suite, and sports medicine facilities.

Plaintiffs’ argument that the use of White Stadium by a for-profit women’s professional sports team would limit *per se* Boston residents’ use and enjoyment of White Stadium is unavailing. In addition to increasing public access and amenities, the Proposed Project places obligations on BUSP to engage BPS students, local businesses, local residents, female and minority business owners, female athletes, and lower income residents with opportunities and

income stemming from the team's residency. The Proposed Use Agreement, establishing the hierarchy of Stadium uses, further reinforces the predominant public purpose. The scheduling of professional soccer games and practices would be preempted by BPS sporting events and ceremonies, as well as public festivals and events. The private benefits are not primary, but instead are subsidiary to White Stadium's public purposes.

2. Lease to Private Entity

Moreover, the Will specifically contemplates leases of White Fund property, with the only requirement that any leases "be subject to revaluations . . . every ten (10) years." The proposed lease agreement between the City and BUSP is for a ten-year term. The Will places no restriction on who or what entities – public or private – may lease White Fund property.¹¹ In its reply brief, the City Defendant points to the historical record, asserting that the terms of the Will have always been interpreted against a backdrop of practical financial considerations. Defendants offer a January 15, 1925 letter, in which Charles Barnes, White's lawyer, confirms that the "cost of maintenance, . . . must be met from some other source than out of the income of the [White Fund] after the building was completed." Barnes Letter, City Defendant's Reply Addendum A. Barnes then suggests the City could charge for attendance at gatherings and performances to defray costs. Finally, Barnes writes, "[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."

There is no specific provision of the Will that prohibits White Fund properties from generating money or allowing for-profit entities to lease portions of White Fund property. Based on the language of the Will and the interpretation of the Will's provisions by White's lawyer

¹¹ Indeed, at the time the Will took effect, many of the numerous buildings White left to the City had commercial tenants.

three years after his death, the agreement to lease a portion of the Stadium Property to a private entity does not by itself violate the terms of the Will. Likewise, when read in context, the Will's requirement that maintenance and upkeep of White Fund real estate shall be borne by the City, merely indicates an intent the White Fund assets not be devoted to that purpose. Nothing in the Will prohibits the City from subcontracting those duties.

3. The Will Prohibits Mingling the Income of the Fund

The Will directs that, "no part of said income shall be mingled with other funds or applied in joint undertakings, but that each work established under this gift shall be separate and distinct" (emphasis added). The Will thus imposes a prohibition on mingling the income dispersed from the White Fund with money from other sources. No dispersed income from the White Fund, in fact no White Fund money, principle or income, is to be used on the Proposed Project. Instead, funds from the City and funds from BUSP would pay the costs of renovation of White Stadium. Additionally, reading the provisions of the Will as whole, including the language allowing for leases and costs to be paid by money outside of the White Fund, the Will does not express an intent to prohibit the City from accepting private funds for renovations to real estate owned by the White Fund.

Based on the foregoing, Plaintiffs are not likely to be successful on the merits of their claims that the Proposed Project violates the terms of the Will.

C. Application of Article 97

Plaintiffs argue that the Stadium Property is state conservation land subject to the protection of Article 97 of Amendments to the Massachusetts Constitution, and thus, the Proposed Project may not proceed without invocation of the art. 97 approval process.

Article 97 provides that "[l]ands and easements taken or acquired" for conservation

purposes “shall not be used for other purposes or otherwise disposed of” without the approval of a two-thirds roll call vote of each branch of the Legislature. “[T]he language of Article 97 is ‘relatively imprecise’ and [] its provisions must be interpreted ‘in light of the practical consequences that would result from . . . an expansive application, as well as the ability of a narrower interpretation to serve adequately the stated goals of art. 97.’” *Smith v. City of Westfield*, 478 Mass. 49, 56 (2017), quoting *Mahajan v. Department of Env’t Prot.*, 464 Mass. 604, 614-615 (2013).

“[L]and may be protected by art. 97 where it was neither taken by eminent domain nor acquired for any purposes set forth in art. 97 provided that, after the taking or acquisition, it ‘was designated for those purposes in a manner sufficient to invoke the protection of art. 97.’” *Smith*, 478 Mass. at 63, quoting *Mahajan*, 464 Mass. at 615. “[L]and is not taken for art. 97 purposes simply because it ‘incidentally’ promotes conservation, or because it ‘simply displays some attributes of art. 97 land generally,’ or because ‘a comprehensive urban renewal plan may identify, among other objectives, some objectives that are consistent with art. 97 purposes.’” *Id.* at 57, quoting *Mahajan*, 464 Mass. at 613-614, 618.

In determining the action necessary to designate land to protection under art. 97, the SJC has examined two related common-law doctrines: the dedication of land for public use (the public dedication doctrine) and the doctrine of prior public use. *Id.* at 58 citing *Mahajan*, 464 Mass. at 616.

The “public dedication doctrine” occurs when privately owned land has areas dedicated to public use, such as roadways subject to the easement of public ways. *Id.* at 58-59. Similarly, “[a] city or town that owns land in its proprietary capacity and uses the land for a park may also dedicate the parkland to the use of the public.” *Id.* at 59. In this circumstance, “[t]he general

public for whose benefit a use in the land was established by an owner obtains an interest in the land in the nature of an easement.” *Id.*, citing *Lowell v. Boston*, 322 Mass. 709, 730 (1948) (applying the public dedication doctrine to hold that the City did not possess title to the Boston Common and the Public Garden free from any restriction, because the City plainly dedicated the Common and the Public Garden to the use of the public as public park).

The related doctrine of “prior public use” dictates that “public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion.”¹² *Id.* at 60, quoting *Robbins v. Department of Pub. Works*, 355 Mass. 328, 330 (1969). The doctrine “is applied more ‘stringently’ where a public agency or municipality seeks to encroach upon a park.” *Id.* at 61, quoting *Robbins*, 355 Mass. at 330. “[P]arkland protected by art. 97 includes land dedicated by municipalities as public parks that, under the prior public use doctrine, cannot be sold or devoted to another public use without plain and explicit legislative authority.” *Id.* at 62. The *Smith* Court held that the language of art. 97, “must be understood in this common-law context.” *Id.* at 61.

The question here is whether the Stadium Property was permanently dedicated by the City as a public park, or whether the City has evinced an intent to use the Stadium Property as school property. “Under our common law, land is dedicated to the public as a public park when the landowner’s intent to do so is clear and unequivocal, and when the public accepts such use by actually using the land as a public park.” *Id.* at 63. “The clear and unequivocal intent to dedicate public land as a public park must be more than simply an intent to use public land as a park temporarily or until a better use has emerged or ripened.” *Id.* “[T]he intent must be to use the land permanently as a public park, because the consequence of a dedication is that ‘[t]he general

¹² The court infers from this language and the facts of *Smith* that converting a public park to public school property is not a continuation of the land’s use as a public park.

public for whose benefit a use in the land was established . . . obtains an interest in the land in the nature of an easement’ and ‘upon completion of the dedication it becomes irrevocable.’” *Id.*

“The recording of a deed or a conservation restriction is one way of manifesting [a clear and unequivocal intent to dedicate land as public park].” *Smith*, 478 Mass. at 63. There is no such deed or conservation restriction in this case. When the 14-acre Stadium Property was sold by the City to the White Fund in 1947, the instrument recorded with the Suffolk Registry of Deeds did not restrict the parcel’s use to conservation or recreation purposes.

Instead, the historic record supports both a municipal and legislative intent to use White Stadium as a school building. Olmsted first designed the Playstead in 1889 as a recreational area to be used by school children. The Stadium Property was conveyed to the White Fund in 1947, “for the purpose of the establishment of a stadium.” White Stadium then opened to the public in 1949 under the name, “the George Robert White Schoolboy Stadium.” At the time, then-Mayor James M. Curley wrote to the Chairman of the BPS School Committee, Dr. Patrick J. Foley, “I have this day given my approval of the vote passed by the [Board of] Trustees . . . and the ***stadium shall be conducted under the direction and control of the School Department.***” Proceedings of School Committee June 7, 1949, Plaintiffs’ Supplemental Memorandum Exhibit B (emphasis added).

On June 13, 1949, George L. Driscoll, the Secretary of the White Fund addressed the School Committee, informing them that the Board of Trustees had voted White Stadium be, “turned over to the City,” and that “the Trustees favor 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 new Schoolboy Stadium in Franklin Park.***” Proceedings of School Committee June 13, 1949, Plaintiffs’ Supplemental Memorandum Exhibit B (emphasis added).

Thereafter, the School Committee unanimously accepted the “care, custody and control of the George Robert White Fund Schoolboy Stadium.” *Id.* (emphasis added).

In 1950, 22 years before enacting Article 97, the Legislature codified this purpose, providing that “[s]o long as [White Stadium] shall remain in the custody and control of the [BPS] school committee ... said stadium ... **shall be deemed to be a school building and yard[.]**” St. 1950, c. 291, § 1. The Stadium Property has been used consistently by BPS since White Stadium was completed in 1949. BPS maintains White Stadium and manages its use. Unlike with other land in Franklin Park, the Boston Parks and Recreation Department is not involved in the operations or maintenance of the Stadium Property in any way.

Plaintiffs contend that White Stadium cannot be used for educational purposes under the terms of the Will, and therefore White Stadium could never be used primarily as a school building. The Will states, “that **no part of said income ... 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 to provide.” Will art. 14 (emphasis added). The simplest explanation is that the Stadium’s use as facility for sports and other extracurricular events falls within a recreational, rather than an educational purpose, even though the users are public school children. This would make White Stadium’s use by BPS for sports consistent with the terms of the Will, while still outside the scope of art. 97.

“[A]rticle 97 applies to all property that was taken or acquired for art. 97 purposes, including property taken or acquired before its ratification in 1972.” *Smith*, 478 Mass. at 62. The Legislature may provide statutory approval for a change in use to property previously protected by art. 97. See *Amaral v. City of Gloucester*, No. 21-P-843, 2022 WL 3269082, at *2-3 (Mass. App. Ct. Aug. 11, 2022) (Rule 23.0) (statute specified that land was to be transferred to

school committee for school purposes was sufficient for art. 97).¹³ Plaintiffs argue that the vote of the Legislature in 1950 was insufficient to change the use of White Stadium because the Legislature could not subvert the terms of the Will that prohibited educational use of White Fund property, and the vote did not comply with the two-thirds legislative vote now required by art. 97. As previously reasoned, allowing school children recreational use of White Stadium does not facially violate the terms of the Will. Further, while art. 97 applies to lands previously designated for protection, Plaintiffs cite no precedent to support their contention that it applies retroactively to invalidate acts of the Legislature designating lands for other purpose.

Lastly, Plaintiffs argue that the City's intent to use the Stadium Property permanently as parkland is evinced by the City's 2023-2029 Open Space and Recreation Plan (Open Space Plan), which lists White Stadium as under art. 97 protection. Defendants presented evidence by way of affidavit that the listing was a scrivener's error, which will be corrected and removed in the publication of the next Open Space Plan.

“[P]olicy statements do not have the legal force of a statute or regulation.” *Id.* at *4, citing *Northbridge v. Natick*, 394 Mass. 70, 76 (1985). “[L]and is not taken for art. 97 purposes . . . because ‘a comprehensive urban renewal plan may identify, among other objectives, some objectives that are consistent with art. 97 purposes.’” *Smith*, 478 Mass. at 57, quoting *Mahajan*, 464 Mass. at 618.

The art. 97 designation in the Open Space Plan is also contradicted by the Commonwealth “MassMapper Interactive map,” which reflects data maintained by the Executive

¹³ To the extent that the Plaintiffs assert that the City's initial acquisition of the Playstead in 1883 for Franklin Park encumbered the Stadium Property with a perpetual parkland conservation restriction, this is not supported by the evidence. Further, any designation of exclusive and permanent parkland was extinguished when the City conveyed the Stadium Property to the White Fund in 1947 for the express purpose of building a stadium, and thereafter the Legislature voted that White Stadium shall be deemed a school yard.

Office of Energy and Environmental Affairs (EOEEA). EOEEA submits data into the MassMapper electronic document that EOEEA collects and maintains in furtherance of its oversight of art. 97 dispositions pursuant to G.L. c. 5A and the Public Land Preservation Act, Chapter 274 of the Acts of 2022.

Comparing the purported scrivener's error in the Open Space Plan to the seven decades of consistent City and BPS practice, there is insufficient evidence that the City intended to dedicate the Stadium Property to an art. 97 purpose. There is no evidence that the City accepted federal conservation funds to rehabilitate White Stadium. See *Smith*, 478 Mass. at 64. There is no evidence of a clear and unequivocal intent by the Boston Redevelopment Authority to make White Stadium permanently a public park. See *Mahajan*, 464 Mass. at 618-619. There is no evidence of a City Council vote to dedicate White Stadium permanently as conversation land or transfer of White Stadium to the conservation commission. See *Selectmen of Hanson v. Lindsay*, 444 Mass. 502, 506-508 (2005). The notation in the Open Space Plan, in light of the opposing evidence offered by the City Defendant, is insufficient to meet Plaintiffs' burden.¹⁴

Considering the totality of the circumstances, no clear or unequivocal intent to use the Stadium Property as a public park, rather than for use as school property, has been established. In contrast, the intent associated with the land, to build a stadium for use by BPS, was explicitly recorded as such. Where the Stadium Property was never recorded or deeded as a public park and the City evinced no intent to use the space permanently as public parkland, but rather school

¹⁴ Since 1971, all of Franklin Park, including the Stadium Property, has been listed on the National Park Services' National Register of Historic Places. Plaintiffs point to c. 772 of the Acts of 1975 to argue White Stadium's designation as an historic landmark. Chapter 772 of the Acts of 1975 is "An act Establishing the Boston Landmarks Commission," by which all landmarks are designated by the Boston Landmarks Commission. In 1980 Franklin Park was designated by the Boston Landmarks Commission as a designated landmark. There appears to be a dispute of fact as to whether White Stadium itself was ever so designated. Regardless, the evidence indicates that the City is undertaking the required process through the Boston Landmarks Commission to review the Proposed Project.

property, the protections of Article 97 are not invoked. See *Smith*, 478 Mass. at 63-64.

Plaintiffs are not likely to be successful on the merits of their claims that the Proposed Project is subject to art. 97.

D. Application of the Zoning Code

Plaintiffs assert that the City is required to comply with Article 80 of the Boston Zoning Code for its portion of the Proposed Project.¹⁵ Article 80 is a Boston zoning regulation that pertains to development review of large projects, such as urban renewal plans. See *Katsiane v. Boston Redevelopment Auth.*, 2021 Mass. App. Unpub. LEXIS 405, at * 2 (Mass. App. Ct. July 23, 2021). See also *St. Botolph Citizens Comm. v. Boston Redevelopment Auth.*, 429 Mass. 1, 6-7 (1999) (overview of Boston Zoning Code development review requirements).

The City asserts that its portion of the project is exempt from local zoning requirements, including Article 80 development review. Chapter 642 of the Acts of 1966 established the City of Boston Public Facilities Department. Chapter 462, § 4(E) provides, “[t]he construction, reconstruction, alteration, remodeling, and demolition by the [public facilities] commission shall be subject to the provisions of [G.L. c. 143] relative to the safety of persons in buildings, **but shall not be subject to any other** building, fire, garage, health or **zoning law** or any building, fire, garage, health or zoning ordinance, rule or regulation applicable **in the city of Boston.**” (emphasis added). The City asserts the Proposed Project would be carried out by the Public Facilities Department at the direction of the Public Facilities Commission, thereby invoking the caveat in St. 1966, c. 642, § 4(E).

Plaintiffs respond that St. 1966, c. 642, § 4(E), exempts municipal buildings from Article 80, rather than work done by the Public Facilities Commission. Plaintiffs argue that the East

¹⁵ BUSP currently is undergoing an art. 80 review for its portion of the Proposed Project, as well as review by the Landmarks Commission.

Grandstand of White Stadium is not a municipal building. Based on review of St. 1966, c. 642, § 4(E), Article 80, and the history of White Stadium as detailed within this decision, I find that Plaintiffs are not likely to be successful on the merits of their claims that the provisions of Article 80 apply to the City Defendant's portion of the Proposed Project.

E. Other Environmental Impacts

Plaintiffs seek equitable relief restraining Defendants from continuing with the Proposed Project based upon a failure "to fully and properly examine the environmental impacts of the Project." Plaintiffs' argument is based on Defendants' failure to engage in the art. 97 process and adhere to the requirements of G.L. c. 3, § 5A. As previously discussed, the Plaintiffs are not likely to succeed on the merits of their art. 97 claim (Count II) and thus, their prospects on Count III are similarly dour.

General Laws c. 3, § 5A, mandates certain requirements where a public entity, such as the City, wishes to "use for another purpose or otherwise dispose of land, an easement or other real property interest subject to Article [97]" The City, however, does not intend to dispose of the land or use it for another purpose. The Stadium Property does and will continue to house White Stadium. For the reasons previously set forth, Plaintiffs have failed to demonstrate that the Stadium Property is subject to art. 97 or that leasing a portion of White Stadium to a private entity will alter the public use of White Stadium. Given the continuation of current use under the Proposed Project, G.L. c. 3, § 5A, does not apply.

As discussed above, the Plaintiffs have failed to demonstrate a likelihood of success on the merits of Counts I, II, III, or IV.

II. IRREPARABLE HARM

In addition to demonstrating a likelihood of success on the merits, Plaintiffs must also

show that irreparable harm will result from a denial of the injunction. *Massachusetts Port Authority v. Turo Inc.*, 487 Mass. 235, 239 (2021). “A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment.” *Id.* at 246, quoting *GTE Prods. Corp. v. Stewart*, 414 Mass. 721, 724 (1993).

Plaintiffs assert irreparable harm will ensue absent a preliminary injunction because the demolition and renovation of White Stadium, and any lease and/or license agreements contracted between the City and BUSP, will negatively change the nature of White Stadium, limit the public’s enjoyment, and have an immediate detrimental impact on the neighborhoods abutting Franklin Park. I am not persuaded.

The Proposed Project would upgrade White Stadium significantly from its current, dilapidated condition. The proposal does not alter White Stadium’s identity as a BPS athletic stadium, expand the footprint of White Stadium, nor develop areas of Franklin Park outside the Stadium Property. The design offered in BUSP’s Technical Proposal preserves White Stadium’s historic white stucco façade and art deco sculptures while bringing White Stadium into compliance with current safety codes. Upon renovation, White Stadium’s potential recreational uses would be expanded, not restricted. Enlarged access throughout the stadium, covered seats, the opening of the Grove, and a professionally maintained track and field would likely increase the use and enjoyment of White Stadium and the Stadium Property, a clear benefit to BPS and the residents of Boston. Plaintiffs have failed to show how realization of the renovated White Stadium would cause them irreparable harm.

Plaintiffs also have failed to show they will suffer irreparable harm if the City contracts with BUSP, including any contracts that apportion responsibility for the Proposed Project. For the purposes of a preliminary injunction, “only rights which may be irreparably lost are those not

capable of vindication by a final judgment, rendered at law or in equity.” *Packaging Indus. Grp., Inc.*, 380 Mass. at 617 n.11. The contracts between the City and BUSP at issue here could be the subject of future litigation and judgments if Defendants’ actions are truly *ultra vires*.

Similarly, Plaintiffs’ assertion that the City’s RFQ’s for its portion of the Proposed Project construction will cause irreparable harm is unavailing. There is no indication RFQ’s bind the City, and if they did, such agreements could be subject to future litigation and judgments. Plaintiffs have failed to show how proceeding with the RFQ process will cause irreparable harm that a final judgment cannot remedy.

Finally, Plaintiffs allege that, as residents in the communities surrounding Franklin Park, they will suffer irreparable harm when BUSP uses the renovated White Stadium and Stadium Property for women’s professional soccer games. They point to the detrimental impact that crowds, noise, traffic, and lighting will have on Environmental Justice communities¹⁶ and Franklin Park. These are significant concerns.

Although the grandstand seating capacity of White Stadium would remain the same post-renovation, one design plan calls for additional mobile seats. Based on BUSP’s expressed mission and its purpose in partnering with the City, it is apparent that BUSP hopes the professional women’s soccer games will draw a crowd.

The BUSP Technical Proposal suggests various measures to lessen the environmental impacts of gamedays on the surrounding area. Which measures would be adopted and whether particular steps would be deemed sufficient by the City to mitigate neighborhood concerns is to be determined. The evidence shows that Article 80 review is still underway for the BUSP portion of the Proposed Project. There will be additional public IAG meetings as part of the

¹⁶ G.L. c. 30, §§62-62L

Article 80 review, and additional public meetings of the Boston Landmarks Commission and Parks Commission. The City will be hosting public workshops in April 2024 in each affected neighborhood to present, review, and solicit feedback on BUSP's proposed traffic management and control plan for game days. A final plan has yet to be advanced as this public feedback process is pending. The concerns expressed about game day impacts are valid, but it is legally premature to address these concerns by way of a preliminary injunction now, two years before Defendants anticipate the stadium will host a BUSP game. The facts have yet to be developed to support the Plaintiffs' assertion of irreparable harm.

III. BALANCING OF HARMS

The Court need not engage in a balancing of harms where the Plaintiffs have failed to establish a likelihood of success on the merits and a risk of irreparable harm. Here, where the public interest is central to the inquiry, however, I elect nonetheless to review the balance of harms. This inquiry further supports my decision.

To balance the harms to each side, the court considers whether, "in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *King v. Shank*, 92 Mass. App. Ct. 837, 839 (2018), quoting *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001). The potential harm to the Plaintiffs has been discussed previously and the Plaintiffs have not met their burden of demonstrating irreparable harm.

In contrast, Defendants have demonstrated they will suffer irreparable harm from an injunction. If BUSP and the City are unable to complete renovations to White Stadium on the projected timetable, BUSP would likely be compelled to withdraw from the Proposed Project and partnership with the City. Pursuant to BUSP's expansion rights agreement with the NWSL,

BUSP must have an appropriate professional-level playing venue for its professional women's soccer team by Spring 2026. Failure to meet that requirement could result in the NWSL revoking BUSP's expansion rights for an NWSL team.

The evidence presented supports Defendants' assertion that the City is unable financially to undertake the necessary renovations to White Stadium without private investment, and a private partner's continued commitment is necessary to bear the costs of maintenance and upkeep of White Stadium. Plaintiffs assert that the City can renovate White Stadium without private financing, but Plaintiffs offer no evidence to support their contention.

Renovating a 75-year-old, 10,000 seat, outdoor stadium with necessary structural and system upgrades to bring it into compliance with building and safety codes is expensive. BUSP was the only entity that responded to the City's RFP. The detriment to the City if the injunction issues and BUSP withdraws from the Proposed Project are mainly two-fold: (1) White Stadium may not be renovated and would remain in a state of deterioration and partial use, and (2) Boston may lose the opportunity to have its own professional women's soccer team. Even if Defendants ultimately prevailed and the Proposed Project could proceed, any delay could result in rising costs associated with the Proposed Project, reducing the buying power of the \$50 million the City has been allocated to the renovation. I conclude the City may suffer irreparable harm should a preliminary injunction enter halting the progress on the Proposed Project.

Where the Plaintiffs' motion seeks to enjoin governmental action, the judge must also find that "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). As discussed above, a decision by BUSP to withdraw from the partnership likely would result in White Stadium remaining in its current deteriorated state with the East Grandstand

inaccessible and the stadium non-compliant with current building codes, including fire codes and the ADA. BPS students and the public have a strong interest in a safe and accessible stadium. The issuance of a preliminary injunction now would adversely affect this public interest.

IV. LIS PENDENS

Plaintiffs have motioned the Court for a lis pendens. “A lis pendens is a written notice that alerts prospective buyers of property to pending lawsuits that claim an interest in that property.” *Ferguson v. Maxim*, 96 Mass. App. Ct. 385, 388 (2019). The Court “shall” issue a memorandum of lis pendens if “the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof.” G.L. c. 184, § 15. “The action at law or suit in equity which is within the scope of the statute is one where the right or title of the parties in some particular real estate, the subject matter of the action or suit, is involved, and where the purpose of the proceedings is to determine the title and rights of the parties.” *McCarthy v. Hurley*, 24 Mass. App. Ct. 533, 535 (1987).

The Plaintiffs have provided no authority for the proposition that they may seek a lis pendens based on general assertion of public right to property. The Court has found none. The purpose of a lis pendens is to alert potential buyers that there is pending litigation asserting a competing or superseding right the property’s title or use. *Wolfe v. Gormally*, 440 Mass. 699, 702 (2004). Thus, “[i]n order to take advantage of the lis pendens statute, a party ‘must be asserting in a judicial proceeding a claim *on his own behalf* of some interest in the real estate or some right to use and occupy it.’” *Shrewsbury v. Seaport Partners Ltd. P’ship*, 63 Mass. App. Ct. 272, 277 (2005) (emphasis added), quoting *McCarthy v. Hurley*, 24 Mass. App. Ct. 533, 536 (1987). The Plaintiffs have not alleged that they hold any individualized interest or right to the

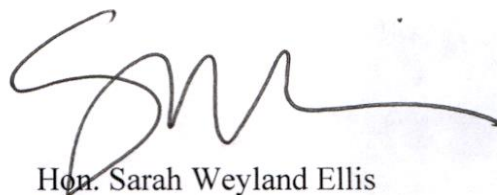
Stadium Property beyond that of any other Boston resident.¹⁷

Consequently, the Plaintiffs' motion for approval of memorandum of lis pendens is DENIED.

ORDER

For the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is DENIED. Plaintiffs' Motion for Lis Pendens is also DENIED.

So ordered this 22nd day of March 2024.



Hon. Sarah Weyland Ellis
Justice of the Superior Court

¹⁷Additionally, the language of the Verified Complaint is insufficient to support the application for Lis Pendens. General Laws c. 184, § 15, dictates that the proceedings underlying a request for a memorandum of lis pendens must be commenced by a verified complaint. *DeCroteau v. DeCroteau*, 90 Mass. App. Ct. 903, 906 (2016). Ms. Karen Mauney-Brodek attests, that she has read the amended complaint and, “found that the allegations of fact set forth therein are based on [her] own personal knowledge and are true, except as to those allegations stated to be based on information and belief.” This is an insufficient attestation to support a memorandum of lis pendens.