

### 3.3.2 EVALUATION OF EXISTING CONDITIONS

---

#### B. Supporting Documents

2. Doherty Site - Deed  
Covenant Review



**CITY OF WORCESTER, MASSACHUSETTS**  
Law Department

David M. Moore  
City Solicitor

December 2, 2019

Russell K. Adams  
Ass't. Commissioner - Engineering & Architectural Services  
Department of Public Works  
City of Worcester, Massachusetts

Re: *Newton Hill Questions*

Dear Mr. Adams,

On August 23, 2019 I provided you with a title opinion confirming the city's ownership of the property known as Newton Hill, and more precisely on the twenty acres where the existing Doherty High School facilities now stand and where a new building could be constructed.

This memo addresses questions raised during the public comment period about the title history of Newton Hill.

First and foremost, nothing changes the fact that the city of Worcester holds title to this property. The city acquired this property by virtue of a deed of John W. Wetherill to the city of Worcester dated June 1, 1888 and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 644. This deed was one of three deeds and two orders of taking recorded simultaneously in June of 1888. This primary original acquisition parcel conveyed 45.77 acres of land to the city for the "purpose of a "Public Park." It was from this 47 acre parcel that, 73 years later, a twenty-acre parcel was delineated and transferred to the School Department for "school purposes." This transfer was authorized and accomplished in 1961 under a decree of the Supreme Judicial Court and allowed for the construction of the current Doherty High School on the "Doherty Parcel."

After public review of the August 23<sup>rd</sup> title opinion we received several questions concerning this conclusion. The remainder of this memo addresses those issues and questions.

**The first issue questions the original 1888 deeds on the basis that the city lacked authority to acquire Newton Hill.**

Twice before the actual conveyances in 1888, the city sought and received special legislation authorizing the acquisition of Newton Hill: chapter 263 of the Acts of 1884 and, before that, chapter 196 of the acts of 1873. By their terms, the 1884 act expired after one year and the earlier 1873 act expired after two years.

There can be no question that, by June 1, 1888, the authority granted by these acts had expired. The question is whether there is a third special act authorizing this acquisition or whether there was some other legal authority or process that allowed the city to proceed with this acquisition.

It is virtually impossible to imagine that the city acted without legal authority in the acquisition of this land. Newton Hill was and is a prominent landmark in the city. It was actually referred to as the “new city common.” This, plus the two prior special acts, indicates that the inhabitants of Worcester were generally aware, and that city officials in particular were aware, that the city needed special authority to make this acquisition. The reasons that these deadlines appear to have expired are a matter for city historians as clearly there is more to the story of the acquisition of these parcels than what we can learn from recorded documents. There are a number of theories that fill this gap.

First, it is likely that the legislature amended the 1884 act to expand the time in which the city had authority to acquire the Newton Hill parcels. This type of amendment would have been in the form of a paragraph in an unrelated special act or an act included in the state budget or some other larger pieces of general legislation. The Acts and Resolves books from that era are not searchable; making the review of every act of the legislature for a four-year period a daunting, if not impossible, task. It is for situations like this where the courts would apply the doctrine whereby the law presumes that public officials act with legal authority in conducting public business.

Second, the legal principle of adverse possession grants ownership of land to anyone, including government entities, who occupies it and treats it as his own for twenty uninterrupted years. Adverse possession may be accomplished “in pais” in that formal proceedings are not required to accomplish a taking. See, G.L. c.79 §10. If the city officials who managed the acquisition of this land in 1888 were somehow derelict in their duties so as to act with expired legal authority, the city would have acquired title as early as 1908 by adverse possession. (As of 2020, the city will have owned this land for over 130 uninterrupted years).

Third, the General Court has recognized the city’s ownership of Newton Hill in at least three special acts adopted over a time span of 98 years: chapter 121 of the acts of 1960, authorized the city to use up to 20 acres of the Newton Hill parkland for school purposes; chapter 203 of the Acts of 2012 stated that, whenever the land was not needed for school purposes it would be returned to park use; and, finally, chapter 574 of the acts of 1914, in authorizing the construction of a fire alarm building in the park, tacitly recognized that the city owned the land. None of these acts would have occurred unless the city owned the land in question.

Lastly, the recorded documents show that the state Supreme Judicial Court decreed in 1961 that the city could use 20 acres of parkland as the site of the then-new Doherty High School. This decree surely would not have been issued if the city was unable to demonstrate that it owned the land. It is a virtual certainty that, given the level of scrutiny one would expect from the legislature and the Supreme Judicial Court, that a key fact, ownership of the land, was put to the test and proved in favor of the city.

**The second question focuses on the validity of the original change in use from park purposes to school purposes.**

City property is acquired and held by the city for some particular public purpose, i.e., water, sewer, school, highway, fire department, economic development, the seat of the city government (City Hall), etc. See *Harris v. Town of Wayland*, 392 Mass. 237, 240 (1984) and G.L. c. 40, §§ 3, 14, 15, and 15A. That public purpose can be changed if the officer or board presently controlling the land determines that it is “no longer necessary” for the existing use and if the city council votes to transfer the property to another public purpose or to dispose of the land, returning it to private use and ownership. G.L. c. 40 §15A.

Since 1972, park land and conservation land has been protected by an amendment to the state constitution (“Article 97”). This article applies whenever there is a proposal to sell or change the use of city land held for conservation or environmental purposes. In such a case, Article 97 requires a two-thirds vote of the state legislature. This vote is in addition to the local actions described above (declaration of surplus and city council vote to sell or change use of city land).

Clearly the use of this land was changed from park purposes to school purposes. This question was apparently at the heart of the 1961 decision of the Supreme Judicial Court. The fact that the city filed an action against the attorney general suggests that this was most likely a “cy pres” action seeking court approval of a change in the authorized use of public property. The language of the decree indicates that approval of a change in use of the land was the central issue in the case. The court stated:

“it is ordered, adjudged and decreed that the city of Worcester be and is hereby authorized to use twenty acres of the park land known as Newton Hill ... as delineated on an attached plan entitled “Land Acquired by the City of Worcester for School Purposes ...”.

The ruling in the 1961 case was issued by the state’s highest court. It is binding, valid and immutable today because any appeal period has long since expired. Its conclusion cannot be re-litigated now because the legal doctrine of *res judicata* prevents settled matters from being re-litigated. See *Degiacomo v. City of Quincy*, 476 Mass. 38 (2016)(a decree in prior equity proceeding that city was authorized to execute proposed lease was *res judicata* to successor trustee’s action); *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 2367 (1994).

Therefore, it is indisputable that 1) the city owns Newton Hill; and, 2) a 20-acre portion of Newton Hill is held by School Committee for school purposes.<sup>1</sup> This question, having been litigated fully, cannot be re-litigated now to reach a different result.

There is one more legal obstacle to anyone seeking a court determination that the city is prohibited from using this property as the location of Doherty High School. The law places limits on the time periods by which lawsuits must be filed and served. Whether it be three years,

---

<sup>1</sup> It has also been raised that the 1961 SJC Decree only authorized the city to use the land for school purposes and not specifically to construct a school building on it. This argument fails because the construction and operation of school buildings is clearly a sub-component of “school purposes” in general. See, Worcester City Charter, §4-1(d)(5): The school committee is vested with the power to “take control of all school buildings and grounds connected therewith.”

or six years or twenty years (the longest possible), the statute of limitations would prohibit any new legal actions.

**Conclusion.** The fact is that the city is not now changing the use of this parcel. There is no need for a declaration of surplus, no votes of the city council are required and no vote of the state legislature is required. The city is acting consistently with the change of use decreed by the Supreme Judicial Court in 1961. By using this parcel to construct a new Doherty High School the city would not be doing anything that it isn't already doing and, in fact, has been doing for almost 60 years.

Sincerely,

A handwritten signature in black ink that reads "David M. Moore". The signature is written in a cursive style with a large, stylized initial "D".

David M. Moore  
City Solicitor

cc: Edward M. Augustus, Jr., City Manager  
Joseph M. Petty, Mayor

**ATTACHMENT A**

Atlas Sketch showing the  
Five Original Newton Hill Acquisition Parcels

- Deed of John W. Wetherill conveying 15,000 s.f. of land to the city of Worcester dated June 1, 1888 and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 642;
- Deed of John W. Wetherill conveying 45.77 acres of land to the city of Worcester dated June 1, 1888 and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 644;
- Deed of William S. Lincoln 5.2 acres of land to the city of Worcester dated June 4, 1888 and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 648;
- Order of Taking of 2.7 acres of land from Nathan S. Johnson adopted on May 28, 1888 by the Board of Park Commissioners of the city of Worcester and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 647;
- Order of Taking of 0.8 acres of land from Chauncey adopted on June 4, 1888 by the Board of Park Commissioners of the city of Worcester and recorded in the Worcester District Registry of Deeds in Book 1266 at Page 648.