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STATEMENT OF THE ISSUES

1. Whether the Land Court properly ruled that Dennis Housing Authority's grant of a mortgage without the consent of the Board of Selectmen violated the reverter provisions contained in the deed conveying the Property from the Town to the Housing Authority.

2. Whether Land Court properly ruled that the reverter provisions contained in the deed executed by the Board of Selectmen conveying the Property from the Town to the Dennis Housing Authority were authorized by the vote of Town Meeting.

## STATEMENT OF THE CASE

This matter is a suit brought by the Appellant, Faneuil Investors Group Limited Partnership ("Faneuil") to reinstate the mortgage it held on property located on East-West Dennis Road in the Town of Dennis (the "Town") formerly owned by the Dennis Housing Authority ("the DHA") and described in a Deed from the Town of Dennis to the DHA (the "Deed") dated February 22, 2002 and filed with Barnstable County Registry District of the Land Court as Document Number 863726 (the "Property"). Property reverted to the Town as a result of the entry on the Property by the Board of Selectmen of the Town for violation of the restrictions set forth in the Deed, namely the grant of a mortgage by the DHA to Citizens Bank of Massachusetts. Upon information and belief, Faneuil is the current holder of the note and mortgage by assignment from Citizens Bank of Massachusetts.

Faneuil argues that the grant of a mortgage is not a conveyance under Massachusetts law, and further argues that even if a mortgage is a conveyance, the language in the Deed prohibiting conveyance or transfer without the written consent of the Board of Selectmen exceeded the authority granted by the vote

of Town Meeting that approved the transfer of the  
Property to the DHA.

## STATEMENT OF FACTS

The parcel of land which is the subject of this litigation is located at 812 East-West Dennis Road in the Town of Dennis and consists of 6.41 acres as shown as Lot 2 on Land Court Plan No. 39747B and which is described in Certificate of Title No. 164506 ("Property"). (A. 57).

On May 8, 2001, Dennis Town Meeting unanimously voted, in Article 28, to undertake the following action:

"[T]o authorize the Board of Selectmen to acquire by eminent domain, with the consent of the owner, for the purposes of affordable housing [the Property]; and further to authorize the Board of Selectmen to transfer ownership and/or control to the Dennis Housing Authority or similar housing agency for the purpose of providing affordable housing for low and moderate income residents of all ages provided said property shall be made available to Dennis residents under a local preference program to the extent permitted by law. Any deed transferring the property shall provide that in the event that the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the Town of Dennis, acting by and through its Board of Selectmen."

(A. 16). Damages in the amount of \$735,000 were approved by Town Meeting and paid to the owner of record upon the filing of the Order of Taking.

On August 14, 2001, the Town, acting by and through the Board of Selectmen (the "Board") acquired the Property through an Order of Taking and filed at the Barnstable County Registry District of the Land Court ("Registry") as Document No. 841,774. (A. 17). As required by Land Court Title Standards, a certified copy of the Town Meeting vote was filed with the Order of Taking. (A. 21-22).

On February 22, 2002, the Town, acting by and through the Board, conveyed the Property to the DHA for nominal consideration of One Dollar by means of a deed which was filed on March 7, 2002 at the Registry as Document No. 863,726 (the "Deed"). (A. 18-19).

The Deed included the following provisions:

[I]f the Property is not used for affordable housing purposes as set forth below, the Town and its successors may enter and revest itself of the title to the Property.

This deed conveys a fee simple subject to a condition subsequent, with a possibility of reverter retained by the Town.

The Town shall have the right to enter upon the Property and revest title back to it upon the occurrence of any one of the following events:

- (1) The Grantee ceases to exist or function as a municipal housing authority, or be recognized as a housing authority by the Commonwealth of Massachusetts Department

of Housing and Community Development and its successors.

(2) The Property is conveyed or transferred without the written consent of the Board of Selectmen of the Town.

(3) The total number of housing units on the Property at any one period of time exceeds twenty-eight (28) housing units.

(A. 18). The Deed was reviewed and approved by the Chief Title Examiner of the Land Court. The restrictions set forth in the Deed were noted on the Certificate of Title No. 164506.

(A. 23).

On March 4, 2002, the DHA executed a series of financing documents including a document entitled "Citizens Bank of Massachusetts Mortgage, Assignment and Security Agreement" which purported to convey to Citizens Bank of Massachusetts ("Citizens") as security for a loan in the amount of \$400,000 and which purported to encumber the Property ("Mortgage").

(A. 88-100). The Mortgage was filed at the Registry as Document No. 863,727. (A. 88).

On May 2, 2006, Dennis Town Meeting voted, in Article 30, to undertake the following action:

"[T]o authorize the Board of Selectmen to release the right of reverter contained in that certain deed from the Town to the Dennis Housing Authority dated March 7, 2002

. . . on terms deemed in the best interest of the Town and to accept as consideration for such release a grant of a perpetual affordable housing restriction from the Dennis Housing Authority in substantially the same form that is on file at the office of the Town Clerk for the purpose of ensuring the retention of housing for occupancy by low and moderate income persons and families."

(A. 110). Consideration for the release of the right of reverter was never provided to the Town.<sup>1</sup>

On July 14, 2007, Citizens executed a document entitled "Assignment of Mortgage, Assignment and Security Agreement" which purported to assign to Faneuil, the Mortgage ("Assignment of Mortgage"). The Assignment of Mortgage was filed at the Registry as Document No. 1,068,874. (A. 54).

On February 1, 2008, at the request of the Board, Dennis Town Counsel sent notice to the DHA of its intent to exercise the right of reverter contained in the February 22, 2002 on the grounds that the DHA impermissibly granted the Mortgage to Citizens in contravention of the condition in the Deed prohibiting the transfer of the Property without written consent of the Board of Selectmen. (A. 56).

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<sup>1</sup> The Record Appendix contains no documentation that said consideration for release of the right of reverter was ever granted by the DHA.

On March 5, 2008, the DHA voluntarily conveyed the Property to the Town of Dennis by means of a deed which was filed on March 12, 2008 at the Registry as Document No. 1,084,826. (A. 57).

## ARGUMENT

A. The Court Correctly Ruled that a Mortgage is a Conveyance under Massachusetts Law and Therefore Dennis Housing Authority's Grant of a Mortgage Violated the Reverter Provisions Contained in the Deed.

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Faneuil argues that the Land Court erred in deciding that the grant of the Mortgage by the DHA was a conveyance or transfer of title. It is well settled law in the Commonwealth that a mortgage is a conveyance that gives title to the mortgagee subject to defeasance upon the mortgagor's performance of the conditions of the mortgage and the promissory note. Eno and Hovey, Real Estate Law, 28 M.P.S. §9.2, 4th ed. 2004). See also Eno and Hovey, 28 M.P.S. at §9.5 ("An instrument given with mortgage covenants is in fact a warranty deed"); G.L. c.183, §19; Negron v. Gordon, 373 Mass. 199, 204 (1977) (mortgagee holds bare legal title subject to defeasance on the mortgagor's performance of the obligation secured by the mortgage); Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753 (1972) (mortgagee holds legal title to mortgaged real estate).

Faneuil would like the Court to believe that there is so much doubt in the Commonwealth about the effect of a mortgage on a right of reverter that

Citizens was too confused to know that it should have obtained the required consent from the Board.

(Appellant's Brief, p.15). Further, Faneuil argues that the Land Court's decision was "extremely harsh". What would be "extremely harsh" is rewarding a lender who does not follow the basic principles of standard conveyancing practice, i.e. performance of a title examination to ensure that your mortgage is a valid first lien free of all encumbrances. Any examination of the title to the Property would have disclosed the restrictions on the conveyance to the DHA, but the Mortgage is noticeably missing any reference to the restrictions listed in the Deed and referenced on the Certificate of Title. See Exhibit A to Mortgage, Legal Description of Mortgaged Premises, A. 99; Exhibit B to Mortgage, Permitted Encumbrances, A. 100.

A valid first mortgage was a requirement of the commitment letter issued by Citizens (A. 27). The DHA, as borrower, was also required to provide Citizens with a Standard American Land Title Association (ALTA) mortgagee's title insurance policy binder "containing no exceptions other than those approved by the Lender". (A. 28). Any responsible title insurance company would have noted on such

policy binder the terms and provisions of the Deed from the Town to DHA. Furthermore, any responsible lending officer would look for reassurance that such restrictions would not impact the validity of his lien or the title granted by the mortgage. Even assuming the Board was aware that DHA granted, or was planning to grant, a mortgage to Citizens, there was nothing to prevent DHA or Citizens from requesting a meeting with the Board to vote its consent for such a transaction. In this sense, this assent is not such an insurmountable procedure which the DHA or Citizens could have satisfied prior to the grant of the Mortgage.

Accordingly, the Land Court's decision that a mortgage is a conveyance and therefore DHA's grant of the Mortgage violated the reverter provisions contained in the Deed should be affirmed.

B. The Court Correctly Ruled That the Reverter Provisions Contained in the Deed Were Authorized By the Vote of Town Meeting.

As stated by the Land Court in its Memorandum and Order, the board of selectmen of a town has broad authority to impose conditions on the transfer of real estate. The language in the Deed merely established the mechanics by which the Town's right to receive the

property back upon violation of the conditions of the transfer. The vote under Article 28 of the May 8, 2001 Dennis Annual Town Meeting authorized the Board of Selectmen to acquire the Property by eminent domain and transfer ownership and/or control to the Housing Authority "for the purpose of providing affordable housing for low and moderate income residents of all ages." (A. 22). The vote further stated that "[a]ny Deed transferring [the Property] shall provide that in the event that the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the Town of Dennis, acting by and through its Board of Selectmen." Id.

In accordance with this Town Meeting authorization, the Board took the Property on behalf of the Town on August 14, 2001 and, thereafter, on February 22, 2002, conveyed the Property on behalf of The Inhabitants of the Town of Dennis to the DHA by the Deed. (A. 13-14, 18-20). Faneuil's argument that the Board did not have authorization to include a right of reverter in the event that "the Property is conveyed or transferred without the written consent of the Board of Selectmen of the Town" belies the authority granted by the Legislature through the

passage of G.L. c.40, §3, which provides that "[a] town may hold real estate for the public use of the inhabitants and may convey the same by a deed of its selectmen thereto duly authorized". It is without question that the Board was "duly authorized" by Town Meeting to convey the Property to the Housing Authority with the included right of reverter, its vote specifically authorizing action "for the purpose of providing affordable housing". (A. 16).

Moreover, the Appeals Court has held that a lease executed by the executive of a municipality which differed in "substantial respect" from what was approved by its legislative body would not be enforceable against the municipality. See Salem Sound Development Corp. v. City of Salem, 26 Mass.App.Ct. 396, 399-400 (1988) (city's lease with operator of marina invalid where mayor executed lease with provision requiring city approval of additional boat slips that was stricken by city council). In contrast, the instructions given by the Town of Dennis' legislative body, its Town Meeting, to its executive, the Board, in its unanimous approval of Article 28 on May 8, 2001, were in perfect concert

with the Board's actions in conveying the subject property.

Town Meeting authorized the Board to take back the Property by a reverter provision in the event that "the [P]roperty ceases to be used for the purposes [of affordable housing]". A conveyance of the Property without Board consent justifiably raises concerns about whether a motive to profit from the Property's development would eclipse the Property's purpose as an affordable housing site. In this sense, the right of reverter was not only authorized, but practical.

Additionally, there are serious public policy implications to consider if the Town, through the Board, is prevented from executing its valid right of reverter in furtherance of promoting the construction of affordable housing in the Town. In short, reinstating the Mortgage would do serious harm to the Town's stated public purpose of ensuring that property purchased at a significant cost to the Town for affordable housing purposes remain dedicated to that public purpose.

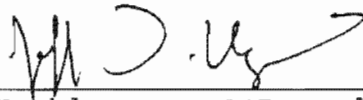
Accordingly, the Land Court's decision that Dennis Town Meeting authorized the Board's insertion of the right of reverter into Deed should be affirmed.

CONCLUSION

For the reasons argued herein, the Land Court's  
Judgment should be affirmed.

DEFENDANTS-APPELLEES  
MEMBERS OF THE  
DENNIS BOARD OF SELECEMEN

By their attorneys,



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(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT

BARNSTABLE, ss.

MISC. CASE NO. 378678 (KCL)

_____		)
FANEUIL INVESTORS GROUP		)
LIMITED PARTNERSHIP,		)
		)
Plaintiff,		)
		)
v.		)
		)
JAMES OTIS, CHARLES CROWELL,		)
PAUL McCORMICK, HEIDI SCHADT,		)
and SHERYL McMAHON, as members of		)
the BOARD OF SELECTMEN FOR THE		)
TOWN OF DENNIS and the DENNIS		)
HOUSING AUTHORITY,		)
		)
		)
Defendants.		)
_____		)

**MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR LIS  
PENDENS, DISMISSING ITS CLAIMS, AND STRIKING ALL REFERENCES TO ITS  
MORTGAGE AND OTHER INTERESTS FROM THE TOWN OF DENNIS'  
CERTIFICATE OF TITLE**

*Introduction*

Plaintiff Faneuil Investors Group Limited Partnership is the assignee by purchase of a \$400,000 note from the Dennis Housing Authority (the "Authority") to Citizens Bank of Massachusetts ("Citizens Bank" or "Citizens"), which it contends is secured by a first mortgage on the registered land at 812 East-West Dennis Road (Route 134) in South Dennis. It brought this action to establish the current validity and priority of that mortgage, and has moved pursuant to G.L. c. 185, § 15(b) for approval of a memorandum of *lis pendens* giving record notice of its claim. The Town of Dennis is the present registered owner of the property and denies the current validity of the mortgage. The defendant Board of Selectmen for the Town of Dennis (the

“Board”) has filed a special motion to dismiss the plaintiff’s complaint pursuant to G.L. c. 185, § 15(c).<sup>1</sup>

For the reasons set forth below, I DENY the plaintiff’s *lis pendens* motion, DENY the Board’s G.L. c. 185, § 15(c) special motion to dismiss, but consider the Board’s motion as one under Mass. R. Civ. P. 12(b)(6) and ALLOW it on that basis. Based upon the undisputed facts, as a matter of law, the plaintiff does not have a valid mortgage on the land at issue in this case, and I order all references to that mortgage and the plaintiff’s other interests STRICKEN from the town’s certificate of title.<sup>2</sup>

### *Analysis*

The relevant facts are straightforward and undisputed.<sup>3</sup> The land in question is a 6.41-acre parcel of registered land that the town acquired by eminent domain, with the consent of its prior owners, on August 14, 2001.<sup>4</sup> The taking occurred pursuant to a unanimous May 8, 2001 town meeting vote which, *inter alia*,

authorize[d] the Board of Selectmen to acquire by eminent domain, with the consent of the owner, for the purposes of affordable housing, the [6.41 acre parcel] . . . with the buildings thereon . . . ; and further to authorize the Board of Selectmen to transfer ownership and/or control to the Dennis Housing Authority or similar housing agency for

<sup>1</sup> The defendant Dennis Housing Authority filed a motion to join that special motion (filed May 23, 2008).

<sup>2</sup> G.L. c. 184, § 15 motions permit the court to consider affidavits, while Rule 12(b)(6) motions are more limited in the range of materials properly part of the record. In this case, where the parties agree that a single legal issue is dispositive of the case; all the facts relevant to that issue are undisputed and either alleged in the verified complaint, included in the documents attached to or referenced in that complaint, or subject to judicial notice; and the parties have had (and taken) a full opportunity to brief and argue that issue in light of those facts; I may decide the motion under Rule 12(b)(6) and consider all of these materials. See Mass. R. Civ. P. 8(f) (all pleadings to be “so construed as to do substantial justice”); see also *Schaer v. Brandeis University*, 432 Mass. 474, 477-78 (2000) (in addition to well-pleaded factual allegations appearing in the complaint, Rule 12(b)(6) permits court to take into consideration matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint); *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004) (“Where, as here, the plaintiff had notice of . . . documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment.”).

<sup>3</sup> The facts come from the verified complaint, the documents attached to or referenced in that complaint, the various deeds and certificates of title to the property on file with the Barnstable Registry District (of which this court may take judicial notice), and the stipulations of counsel at the hearing of the parties’ motions.

<sup>4</sup> The land in question is lot 2 on the attached Decision Sketch. It was previously part of a larger, 19.3-acre parcel of registered land (Lots 1 and 2 on that sketch).

the purpose of providing affordable housing for low and moderate income residents of all ages provided said property shall be made available to Dennis residents under a local preference program to the extent permitted by law. Any deed transferring the property shall provide that in the event the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the Town of Dennis, acting by and through its Board of Selectmen.

Extract, Annual Town Meeting at 2 (May 8, 2001). The town subsequently took the property and, by deed dated February 22, 2002, conveyed it for nominal consideration (one dollar) to the Authority. The conveyance, however, explicitly was made subject to “a condition subsequent, with a possibility of reverter retained by the town” as follows:

The Town shall have the right to enter upon the Property and re-vest title back to it upon the occurrence of any of the following events:

- (1) The Grantee ceases to exist or function as a municipal housing authority, or be recognized as a housing authority by the Commonwealth of Massachusetts Department of Housing and Community Development and its successors.
- (2) The Property is conveyed or transferred without the written consent of the Board of Selectmen of the Town.
- (3) The total number of housing units on the Property at any one period of time exceeds twenty-eight (28) housing units.

Notwithstanding the foregoing, no such entry shall occur until such time as the Town has notified the Authority of such occurrence and the Authority fails to cure such event to the reasonable satisfaction of the Town within thirty (30) days of receipt of such notice.

Deed from the Inhabitants of the Town of Dennis to the Dennis Housing Authority (Feb. 22, 2002). The deed was duly authorized and signed by the Board, with its conditions “accepted and agreed as perpetual conditions by the Dennis Housing Authority as authorized by vote of its board.”<sup>5</sup> *Id.* The deed was filed with the Registry on March 7, 2002 as document number 863,726 and noted on the certificate of title’s encumbrance sheet with the description

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<sup>5</sup> The deed from the town to the Authority was one for a “determinable or qualified fee” (an estate to continue until the happening of a certain event, which, in its pure form, causes the estate to cease by its own limitation upon the happening of that event without a re-entry by the grantor, *see First Universalist Society v. Boland*, 155 Mass. 171, 174 (1892); 1 L. Jones, *A Treatise on the Law of Real Property* §§ 628-629, at 518-19 (Bowen-Merrill Company 1896)), with a condition subsequent (notice by the town that the “event” had occurred, and the Authority’s failure to cure within 30 days after receipt of that notice). Both types of estates (determinable or qualified fee and deeds with a condition subsequent) are recognized and enforced in Massachusetts. *See First Universalist Society*, 155 Mass. at 174-176.

“restrictions.” Transfer Certificate of Title No. 164506 (March 7, 2002) (issued to the Authority).

Five months prior to the conveyance of the property from the town to the Authority, the Authority secured a \$400,000 construction and permanent loan commitment from Citizens Bank. Loan commitment letter from Citizens Bank to Dennis Housing Authority at 1 (Dec. 18, 2001). The commitment provided that “the [l]oan shall be secured by a valid first mortgage upon the fee simple title on the [p]roperty,” with “[t]he final legal description of the [p]roperty [to be] approved by [Citizens] and its counsel.” *Id.* The commitment also required the Authority to provide Citizens with “a Standard American Land Title Association (ALTA) mortgagee’s title policy binder containing no exceptions other than those approved by [Citizens].” *Id.* at 2. Under the terms of the commitment, Citizens had “no obligation to close the [l]oan in the event of . . . (iv) [the] failure of [the Authority] or any [g]uarantor to comply with the terms and conditions of [the] commitment letter; or (v) [if] any collateral offered for the [l]oan or any documents, instruments, agreement or information furnished to [Citizens] pursuant to [the] commitment [was] not in all respects in form and substance satisfactory to [Citizens].” *Id.* at 4.

By subsequent agreement of Citizens and the Authority, the time for performance and completion of the closing was extended to March 4, 2002, when the closing occurred. By that time, the property had been deeded from the town to the Authority, Deed from Inhabitants of the Town of Dennis to the Dennis Housing Authority (Feb. 22, 2002), and the deed contained the three “determining events” listed above. Citizens closed the loan with knowledge of those limitations on the Authority’s fee interest in the property.<sup>6</sup> The Authority’s certificate of title

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<sup>6</sup> I infer this from the fact that the loan closed, the loan documents required that “the final legal description of the [p]roperty must be approved by [Citizens] and its counsel” (which would have involved a review of the deed). Citizens had the right to refuse to fund the loan if any of its collateral “was not in all respects in form and substance satisfactory to [Citizens],” and the Authority was required to provide Citizens with title insurance with “no

issued on March 7, 2002. The certificate references the Authority's deed (Document No. 863,726 ) (explicitly describing the deed as "restrictions") and, immediately thereafter, references the Citizens mortgage (Document No. 863,727), the Authority's collateral assignment of contracts, licenses, permits, leasehold interests and other rights to Citizens (Document No. 863,728), and the Citizens financing statement (Document No. 863,729). Citizens assigned all of these interests to the plaintiff on July 11, 2007, as duly noted on the certificate of title (Document Nos. 1,068,874 and 1,068,875).

In Massachusetts, a mortgage is a conveyance of title, *Maglione v. BancBoston Mortgage Corp.*, 29 Mass. App. Ct. 88, 90-91 (1990), and the mortgagee can only acquire such title as the mortgagor possesses and has the capacity to grant, *see Coraccio v. Lowell Five Cents Savings Bank*, 415 Mass. 145, 151-152 (1993); *Brewster v. Weston*, 235 Mass. 14, 17 (1920). Thus, Citizens acquired rights to something less than a full fee simple interest and could only assign the rights it possessed to the plaintiff. Accordingly, I must determine what Citizen's interest was and, more importantly, what that interest is today, if any.

If the full language of the deed controls, the plaintiff presently has no interest in the property whatsoever. By the terms of that deed, the Authority's title terminated when it mortgaged the property to Citizens (a conveyance of title) without the written consent of the Board, the Board gave notice, the Authority failed to "cure" within thirty days, and the town reentered the property and revested title back to it.<sup>7</sup> The plaintiff does not contest this. Rather, it

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exceptions other than those approved by [Citizens]" (which would have involved a review of the title insurance policy). Loan commitment letter from Citizens Bank to the Dennis Housing Authority at 1, 2 (Dec. 18, 2001).

<sup>7</sup> The parties agree that the Board never gave written consent to the mortgage, the Board gave thirty-day notice of its intent to reenter and revest by letter dated February 21, 2008, and the Authority failed to "cure" within that thirty-day period. The town reentered and revested pursuant to the terms of the deed: "The town shall have the right to enter upon the property and revest title back to it upon the occurrence of any of the following events: . . . The property is conveyed or transferred without the written consent of the Board of Selectmen of the town." Deed from the Inhabitants of the Town of Dennis to the Dennis Housing Authority at 1.

The Authority confirmed the town's exercise of its right of reverter by deed dated March 5, 2008, the

contends that the Board had no authority to add this “occurrence” to the deed, but instead was limited to the language of the town meeting vote. As recited above, the town meeting vote “authorize[d] the Board of Selectmen to transfer ownership and/or control to the Dennis Housing Authority or similar housing agency for the purpose of providing affordable housing” and stated that “[a]ny deed transferring the property shall provide that in the event the property ceases to be used for the purposes provided herein, the title to said parcel shall revert to the Town of Dennis, acting by and through its Board of Selectmen.” Extract, Annual Town Meeting at 2. Since the property had not “cease[d] to be used” for affordable housing while title was in the name of the Authority, the plaintiff argues that title is still in the Authority or, at the least, is still subject to the plaintiff’s mortgage since, in the plaintiff’s view, “reverter” never occurred and the Authority’s deed back to the town could only grant what the Authority possessed — a title subject to the mortgage.<sup>8</sup>

The question is thus one of municipal law as applied to the facts of this case. Was the Board limited in the terms and conditions that it could place on the conveyance to the precise terms of the town meeting vote, or did it have the authority to add additional conditions that, in its judgment, enabled it to carry out the town meeting vote’s intent more easily and with more certainty?

The analysis begins with G.L. c. 40, § 3, which provides that “[a] town may hold real estate for the use of the inhabitants and may convey the same by deed of its selectmen thereto

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Authority’s certificate of title was cancelled, and a new certificate of title was issued naming the town as the property’s fee simple owner on March 12th (Certificate No. 185434).

There is nothing in the written record to indicate what the Authority did with the property prior to its deed back to the town or, for that matter, what it did with the \$400,000 it borrowed from Citizens. At oral argument, counsel represented that nothing has been built on the property, no one has been housed, and all the money borrowed had been spent on “plans” and related expenses.

The question of what the plaintiff could do with the property if the loan went into default and foreclosure took place was raised at oral argument. The plaintiff responded that the use of the property would continue to be restricted to affordable housing. If the property was used for any other purposes, the plaintiff conceded that its title would revert to the town.

duly authorized.” The town could *only* act through the Board and the town meeting vote clearly authorized a conveyance with a *mandatory* reverter (“*shall* revert”) “in the event the property ceases to be used [for affordable housing] purposes.” *Id.* (third emphasis added). The deed to the Authority from the Board states not only that the land is to be used for affordable housing purposes, but also gives the town the right to reenter the property and revest title in the town if the property was ever conveyed or transferred without the Board’s written consent. The issue is thus whether this provision was “authorized” by the town meeting vote within the meaning of G.L. c. 40, § 3.

The plaintiff cites two cases for the proposition that a town’s selectmen are held strictly and exclusively to the precise terms of the town meeting vote. Neither of those cases, however, so holds. *Cape Cod Steamship Co. v. Selectmen of Provincetown* ruled *only* that a town’s selectmen could not act *in contravention* of state statutes. 295 Mass. 65 (1936) (granting a ferry company a private, exclusive berthing privilege at a wharf violated the statute that mandated it remain public). *City of Lawrence v. Stratton* ruled *only* that the mayor could not convey city property on terms *in contravention* of the city council’s authorizing vote. 312 Mass. 517 (1942) (in which the mayor, by allowing the purchaser to spend *less* (\$40,000) than the city council had directed the purchaser spend to repair and restore the buildings on the property (\$50,000)<sup>9</sup> and adding a completely unrelated condition that the property not be used for the storage or sale of gasoline, contravened the city council’s vote).<sup>10</sup>

The provision at issue (the prohibition on conveyance of the property without the written

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<sup>9</sup> The deed from the mayor required that “seventy-five percent of the buildings and structures on said premises shall be repaired, restored and conditioned” but, as the court noted, “no one contends that this was the equivalent of the condition contained in the vote.” *City of Lawrence*, 312 Mass. at 520.

<sup>10</sup> *City of Lawrence* arguably would invalidate “occurrence (3)” in the deed (the limitation on the total number of housing units on the property at any one period of time, which neither appeared in the authorizing vote nor reasonably relates to the Board’s ability to ensure that the use of the property is limited to affordable housing). However, that part of the deed is severable and not at issue in this litigation.

consent of the Board) is not in contravention of the town meeting vote. Rather, it is in complete harmony with that vote and is a reasonable means of ensuring that the property's use remains as the town meeting vote intended. Even assuming, as the plaintiff argues, that the use of the property would be confined to affordable housing regardless of who owned it, the town has a legitimate interest in knowing who precisely would build and maintain that housing and in placing reasonable conditions on any conveyance to assure compliance with the town's intent that quality affordable housing be built and occupied in timely fashion. Not all developers are the same. Some, for example, are better organized, experienced, and financed than others, and thus able to build a "better" project more quickly, with greater assurance of adequate maintenance thereafter. A foreclosing bank, primarily interested in the repayment of its loan, might not share these goals to the same degree as the town. By requiring that the Board give written consent to any conveyance, by mortgage (with the right of foreclosure) or otherwise, the town ensured that it could directly monitor the identity of any subsequent owner and, to a reasonable degree, the particulars of any subsequent use. The need for Board consent provided a mechanism to address these issues "up front" and eliminated the need for litigation in the event of disagreement. G.L. c. 40, § 3 certainly contemplates the Board's ability to implement a town meeting vote in such a way, *i.e.*, reasonable and consistent additional terms that enable the Board to more easily and efficiently carry out the town meeting intentions. The law does not expect or require town meeting to involve itself in micromanagement of real estate transactions. *See Salem Sound Development Corp. v. Salem*, 26 Mass. App. Ct. 396, 398-399 (1988) (noting that a town meeting is a "lay body, not having continuity, largely unacquainted with the finer conventions familiar to deliberative assemblies having regular meetings, and functioning within relatively rigid constraints, both as to time and as to scope of action"). Such management and

enforcement can only come from an executive body. G.L. c. 40, § 3, authorizing selectmen as the body that makes the actual conveyance, recognizes this and can only be interpreted as authorizing the Board to include consistent additional terms, directly and reasonably related to the letter and spirit of the town meeting vote. *Contrast Salem Sound Development Corp.*, 24 Mass. App. Ct. at 399 (invalidating a lease when its terms were “different in a *substantial respect* from that which arguably had council approval” (emphasis added)).

Since “occurrence (2)” in the deed was within the authority granted by the town meeting vote and thus a valid provision of the conveyance, since it was violated when the Authority mortgaged the property to Citizens without the Board’s written consent, and since the town has now exercised its right of reverter, the town’s title is not encumbered by the plaintiff’s mortgage and the plaintiff’s complaint thus fails to state a claim upon which relief can be granted.<sup>11</sup> Mass. R. Civ. P. 12(b)(6). All references to that mortgage, and to any other purported interest by Citizens or the plaintiff in the property, shall be **STRICKEN** from the town’s certificate of title and the plaintiff’s claims in this case are **DISMISSED** in their entirety, with prejudice.<sup>12</sup>

I cannot, however, grant the town’s special motion to dismiss under G.L. c. 184, § 15(c).

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<sup>11</sup> This result may seem harsh, but it is not. Citizens was aware of the terms of the Authority’s deed at the time it funded the loan and easily could have gone to the Board to get the Board’s consent before making such funding. Its loan commitment gave it the clear right to refuse funding if it received anything less than a first mortgage on a full fee simple interest, and the full discretion to accept anything less than that. I can only assume that Citizens made a clear-eyed business judgment to fund the loan knowing its risks and that the plaintiff’s later purchase of this loan also was made in knowing assumption of its risks.

<sup>12</sup> The plaintiff’s argument that the town meeting vote of May 2, 2006, authorizing the Board to release the right of reverter contained in the deed “on terms deemed in the best interest of the town, and to accept as consideration for such release a grant of a perpetual affordable housing restriction from the Dennis Housing Authority in substantially the same form that is on file at the office of the Town Clerk for the purpose of ensuring the retention of housing for occupancy by low and moderate income persons and families,” Extract, Annual Town Meeting (May 2, 2006), nullifies the reverter has no merit. No such “grant of a perpetual affordable housing restriction” has ever been given and the Board has never voted to release the reverter, much less outlined what it considered suitable terms for doing so. Indeed, the May 2, 2006 town meeting vote is a further indication that the town’s deed accurately reflects the town meeting vote’s intentions; it directly references the March 7, 2002 deed from the town to the Authority, it directly references the right of reverter contained in that deed, and it recognizes the need for a degree of discretion in the Board (its authorization to the selectmen to release the reverter “on terms deemed in the best interest in the town”). *Id.*

Such a motion requires a finding that the plaintiff's claims were devoid of any reasonable factual support, devoid of any arguable basis in the law, or subject to dismissal based on a valid legal defense, and I cannot make that finding. I disagree with the plaintiff's legal arguments and, in particular with its interpretation of the holdings in *Cape Cod Steamship Co.* and *City of Lawrence, supra*, but those interpretations were arguable ones and certainly not frivolous. The town's motion for dismissal under G.L. c. 184, § 15(c) is thus **DENIED**. Judgment shall issue accordingly.

**SO ORDERED**

By the court (Long, J.)

Attest:

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Deborah J. Patterson, Recorder

Date: 28 May 2008

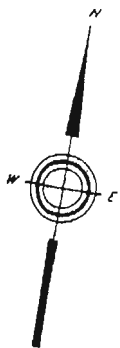
**A TRUE COPY**  
**ATTEST:**

*Deborah J. Patterson*  
**RECORDER**

Not to Scale

David R. Smith, Jr.  
L.C. No. 40089<sup>A</sup>  
Cert. No. 85017

Louis O. Kelley et al.



C.B.

d.h.C.B.

C.B.

Gladys M. Englert

Owner unknown

d.h.C.B.

C.B.

EAST-WEST DENNIS (60.00 Wide) ROAD

C.B.

C.B.

1

C.B.

John C. Monoog

448.15

d.h.  
C.B.

Spk.

d.h.  
C.B.

C.B.

d.h.  
C.B.

2

C.B.

d.h.  
C.B.

Bd.

d.h.  
C.B.

C.B.  
(broken)

d.h.  
C.B.

OLD CHATHAM ROAD

Warren C. McDermott et ux.  
L.C. No. 32278<sup>A</sup> Cert. No. 32230

AIRLINE (49.50 Wide) ROAD

L.C. No. 32278<sup>A</sup>

(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT

BARNSTABLE, ss.

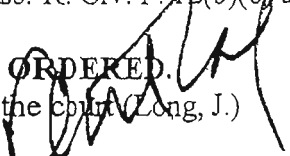
MISC. CASE NO. 378678 (KCL)

_____		)
FANEUIL INVESTORS GROUP		)
LIMITED PARTNERSHIP,		)
		)
Plaintiff,		)
		)
v.		)
		)
JAMES OTIS, CHARLES CROWELL,		)
PAUL McCORMICK, HEIDI SCHADT,		)
and SHERYL McMAHON, as members of		)
the BOARD OF SELECTMEN FOR THE		)
TOWN OF DENNIS and the DENNIS		)
HOUSING AUTHORITY,		)
		)
Defendants.		)
_____		)

JUDGMENT

Plaintiff Faneuil Investors Group Limited Partnership brought this action to establish the current validity and priority of a mortgage from the Dennis Housing Authority to Citizens Bank of Massachusetts, and has moved pursuant to G.L. c. 185, § 15(b) for approval of a memorandum of lis pendens giving record notice of its claim. The Town of Dennis is the present registered owner of the property and denies the current validity of the mortgage. The defendant Board of Selectmen for the Town of Dennis has filed a special motion to dismiss the plaintiff's complaint pursuant to G.L. c. 185, § 15(c).

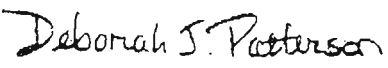
For the reasons set forth in the court's Memorandum and Order Denying Plaintiff's Motion for Lis Pendens, Dismissing its Claims, and Striking all References to its Mortgage and other Interests from the Town of Dennis' Certificate of Title of this date, I find and rule that the plaintiff does not have a valid mortgage on the land at issue in this case, and I order all references to that mortgage and the plaintiff's other interests STRICKEN from the town's certificate of title. Accordingly, I DENY the plaintiff's *lis pendens* motion, DENY the Board's G.L. c. 185, § 15(c) special motion to dismiss, but consider the Board's motion as one under Mass. R. Civ. P. 12(b)(6) and ALLOW it on that basis.

SO ORDERED.  
By the court (Long, J.)  


Attest:

\_\_\_\_\_  
Deborah J. Patterson, Recorder

Dated: 28 May 2008

A TRUE COPY  
ATTEST:  
  
RECORDER

CERTIFICATE OF SERVICE

I, Jeffery D. Ugino, hereby certify that on the below date, I served two copies of the foregoing Brief of Defendants-Appellees Board of Selectmen of the Town of Dennis by first class mail, postage prepaid, to the following counsel of record:

Dana A. Curhan, Esq.  
101 Arch Street, Suite 305  
Boston, MA 02110

John R. Costello, Esq.  
800 Route 6A  
P.O. Box 2054  
Dennis, MA 02638

Dated: September 30, 2008

  
\_\_\_\_\_  
Jeffery D. Ugino

CERTIFICATION PURSUANT TO MASS.R.A.P. 16(K)

I, Jeffery D. Ugino, certify that the Brief filed on behalf of the Defendants-Appellees Members of the Dennis Board of Selectmen complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass R. A. P. 20 (form of briefs, appendices, and other papers).

Dated: September 30, 2008

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Jeffery D. Ugino (BBO# 660353)  
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