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Thomas J. Frain at the now-closed Fernald Developmental Center in Waltham, a state facility that had long been supported by the Walter E. Fernald Corp.; the SJC recently ruled that the corporation, and not the state, is the registered owner of land in Templeton

For nonprofit, battle with state over land comes at a huge cost

SJC: Legislature's inclusion of 600 acres in bill a mistake

By Kris Olson
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The meeting in Thomas J. Frain's Bolton office in spring 2007 should have been a pleasant one. Representatives of the Walter E. Fernald Corp., an all-volunteer nonprofit serving the developmentally disabled, had gathered with officials from the state's Department of Conservation and Recreation to hash out a win-win deal.

The corporation would sell to the state some 600 acres off Route 202 in Templeton that it had acquired over the years. The sale of the "Norcross Hill property," as it was known, not only would bolster the corporation's support of Massachusetts' intellectually disabled population, including residents of the now-shuttered Fernald Developmental Center in Waltham, but it also would ensure that the property — a mix of farmland and unspoiled woodlands — would remain pristine.

The meeting would come to an abrupt end, however, when an appraiser retained by the corporation arrived with bad news: There was a lien on the property. Unbeknownst to anyone in the room, Gov. Jane M. Swift, some five years earlier, had signed into law a bill that, ironically, had a similar end goal as the proposed sale: ensuring that the land would be used only for "forest and open space protection, management and conservation; environmental education, environmental research and public access for passive recreation and enjoyment."

Eight expensive years later, the Supreme Judicial Court has affirmed that a Land Court judge correctly concluded the Templeton parcels were mistakenly included in the bill, clearing the title to the land — and granting the right to determine its future — to the Fernald Corp.

Painstaking inquiry

To reach his decision, Land Court Judge Keith C. Long traced the history of what became the Walter E. Fernald Corp. back to its founding in 1850 as "the Massachusetts School for Idiotic and Feeble-minded Youth."

The case, Long wrote, turned on whether the corporation acquired the land in its private capacity or, as the commonwealth contended, as an agent or agency of the state, "making the property state-owned."

That that would be a source of considerable confusion is hardly remarkable. Not only had the corporation benefited from state aid throughout much of its existence, but what became the Walter E. Fernald Developmental Center on a state-owned parcel in Waltham had been run under the ambit of the Department of Mental Retardation (later the Department of Developmental Services) from 1987 until the

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Nonprofit's battle with state comes at a heavy cost

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last resident left the facility last November. At the behest of the corporation, the Legislature had also purchased approximately 1,660 acres of other land in Templeton in the late 1800s.

To further cloud the issue, the corporation had taken steps to strengthen its ties to the state prior to acquiring the Templeton land. In 1917, the Massachusetts Constitution was amended to prohibit public money from "maintaining or aiding any school … which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth."

Not wanting to see its flow of state aid dry up, the corporation petitioned the Legislature to amend its charter to grant to the governor and Governor's Council the power to confirm the school's trustees, thereby sidestepping the so-called "anti-aid amendment."

Yet the corporation had used its private funds — $4,500 in all — to buy the land at issue in the case. The acquisitions began in 1923 and continued in 1929, with the largest portion, a 366-acre parcel formerly owned by Gardner Savings Bank, added in 1939. Another half-acre would complete the parcel 30 years later.

Making matters worse, the deeds identified the purchaser of the properties in four different ways: "Massachusetts School for the Feeble-Minded, a corporation"; "Walter E. Fernald State School, a Massachusetts corporation"; "Walter E. Fernald State School"; and, in one case, the "Commonwealth of Massachusetts."

Judge Long ultimately concluded — and the SJC agreed — that the words on the deed were less important than the source of the funds.

However, the funding source may have been moot, had Long or the SJC endorsed the state's contention that the organization, while once a private corporation, had "morphed over time into a public one."

Long acknowledged that the corporation's board of trustees and that of the state-run school were one and the same but concluded they "wore two hats," able to act as public officers as well as in a separate, private capacity. The 1850 act establishing the corporation had never been repealed, and the state had never appropriated any money to purchase the corporation's assets, making any such taking unconstitutional, Long wrote.

Long leaned heavily on the corporation's annual reports, which consistently distinguished its assets from the state's and showed that the corporation had its own treasurer.

"If the corporation was truly part of the state, its accounts would have been audited by the state auditor's office," Long wrote. "Instead, they were audited by an outside, private accounting firm."

Long also declined to accept the state's alternate argument that, around 1921, the corporation "effectively ceased to exist, and was only reconstituted in 1987 following the reform of the Department of Mental Health." Nor did he agree that the state was the "intended grantee" of the deeds, simply because the school's publicly appointed board had decided to purchase the land.

In the end, Long even gave the Fernald Corp. more than it had requested, granting it title "free and clear" of any of the state's claims, including to the parcel that had been deeded to the commonwealth, the "attendant circumstances" indicating that deeding the property to the state was "clearly a mistake."

In its opinion, the SJC endorsed Long's findings while also ruling that Long had not erred in rejecting the commonwealth's sovereign immunity defense (see sidebar).

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Thomas J. Frain serves as vice president of the board of trustees for the Walter E. Fernald Corp.

Should it have come to this?

While the litigation began around 2010, the corporation had put the state on notice that it was interested in resolving the issue of who owned the land decades earlier.

Long's opinion references a letter from now-deceased Fitchburg attorney Robert L. Ware on April 15, 1993, "finally addressing the issue of title to real estate in Templeton owned by the private corporation named above."

A May 30, 2001, letter from Belmont lawyer Anne Hanford, who remains a Fernald trustee, includes the paragraph: "As the Corporation has been waiting several years now to resolve the title to the Norcross Hill property, and is anxious to develop a plan for that property that will benefit the retarded people of Massachusetts, please confirm that title does stand in the name of the Walter E. Fernald State School Corporation."

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>
> — Thomas J. Frain

By the time that letter was written, two title reports had been prepared — one in 1998, the other in 1999, the latter commissioned by the state — each reaching a similar conclusion: the Walter E. Fernald Corp. owned the parcels.

While the state report dealt with only one of the contiguous properties, Frain believes the report should have convinced the state of the corporation's claim to all the land or at least prompted further investigation.

Nonetheless, the parcels made it into the 2002 legislation, which former state Sen. Stephen Brewer, D-Barre, says was designed to stop the state from exploiting a wide swath of "incredibly scenic and agricultural land."

That the Department of Mental Retardation might not control all the land was apparently never considered. Certainly, the Fernald Corp. was never put on notice that the bill was pending, only discovering its passage several years later.

The Department of Developmental Services "stonewalled the corporation for years and encumbered land they absolutely knew they did not own," Frain says, adding that the corporation was forced into suing.

He says the ensuing battle has cost the Fernald Corp. approximately $259,000 in legal fees since 2010 — a sizeable figure given that tax returns show the corporation ended Fiscal Year 2013 with about $185,000 in net assets.

"Unfortunately, the positions of the prior attorney general [Martha Coakley] and DDS in this action have nearly drained the resources of one of the commonwealth's most venerable charities," says Frain, who worked on the case with colleagues Frank E. Bonanni and C. Alex Hahn.

When asked for comment, a spokesman for the AG's Office referred inquiries to the defendant Department of Developmental Services and Division of Capital Asset Management and Maintenance.

Brendan Moss, spokesman for the Executive Office for Administration & Finance, the agency that oversees the Division of Capital Asset Management and Maintenance, says the state's decision to challenge the Land Court decision was a "typical appeal" and that the state simply thought the law was on its side.

DDS officials echoed that sentiment, stating in an email: "As the decision indicates, there was a very complicated history of the acquisition and ownership of the land in question turning upon not simply an analysis of the title documents, but also an interpretation of the statutory enactments concerning the corporation and its relationship to the state. As a result, the commonwealth agencies, in conjunction with the [AG's Office], determined that an appeal from the decision was appropriate."

A personal mission

For Frain, 53, the case has been a personal battle. He has a mentally disabled brother who was abused in a group home, which Frain says has fueled decades of volunteer work and advocacy. He has had a long affiliation with the Massachusetts Coalition of Families and Advocates, or COFAR, which led him to the Fernald Corp., where he serves as vice president of the board of trustees.

Both organizations attend to a long-suffering population, according to Frain.

"Most of it goes on in the shadows, out of earshot and away from the often helpful role of government oversight and regulation," he says.

While the Department of Developmental Services occupies a $1.8 billion line item in the state budget, the legal battle with the Fernald Corp. is but one example of an agency that is "recalcitrant and unresponsive, leaving it to the few that have the means to hold them accountable," Frain says.

The Bolton lawyer says the corporation's priority remains safeguarding the parcel's natural beauty, which now may mean selling it to the Mount Grace Land Conservation Trust.

Jim Staton, president of the Fernald trustees, estimates that proceeds from such a sale would likely top the $2 million to $3 million range.

"Various and sundry lawyers tried over the years to clarify the title, but it was the persistence of Mr. Frain and his associates that finally pulled it off," Staton says. MLW

Sovereign immunity no savior

When the commonwealth handed over a state-funded title report showing the Fernald Corp. was the rightful owner of at least a portion of a parcel in Templeton, it "essentially lost any substantive defense to the corporation's declaratory judgment action," Thomas J. Frain says.

The state's focus instead shifted to what Frain calls "a sweeping interpretation of sovereign immunity that would have allowed the state to seize land by fiat."

The Supreme Judicial Court recently agreed that the case lies outside the limits of sovereign immunity.

"We now hold, however, that our common-law sovereign immunity doctrine does not reach the specific type of suit at issue here, namely, one in which a plaintiff asserts its own ownership of specified parcels of recorded land," Justice Barbara A. Lenk wrote for the court.

That was enough for the SJC to distinguish the present matter from the 1961 case Executive Air Serv., Inc. v. Division of Fisheries & Game, in which a challenge to the state's deeds and certificates of title to registered, rather than recorded, land were rejected on sovereign immunity grounds.

The SJC noted that it has been reluctant to apply the doctrine of sovereign immunity where it would not serve one of three goals: "to protect the discretionary functions of a public official," "to prevent the unauthorized actions of a public official," or "to shield the public fisc from the specter of virtually unlimited liability."

The present case did not further those goals, the SJC concluded.

Lenk said the SJC "need not decide here whether our common-law doctrine of sovereign immunity is unconstitutional, in whole or in part. Nevertheless, in drawing the bounds of that doctrine, we recognize that it strains against constitutionally protected values," including the right, under Article I of the Massachusetts Declaration of Rights, of "acquiring, possessing and protecting property."

The state also failed to convince the court that "the availability of a land registration action reinforces the conclusion that the Commonwealth is immune from [declaratory judgment act] claims," Lenk said.

Neither of two possible readings of that suggestion was persuasive, she said. Even if the Legislature "did not endeavor, in the declaratory judgment act or the land registration statute, to waive its common-law sovereign immunity," that does not mean the state cannot be sued without legislative consent, she wrote. Rather, sovereign immunity is "subject to judicial limitations."

Alternatively, the SJC said it did not agree that "the Legislature replaced common-law sovereign immunity with a statutory scheme that funnels all land disputes involving the Commonwealth to land registration proceedings," differentiating the state's land-registration statute from the federal Quiet Title Act.

While the SJC took a step back and allowed Beacon Hill to take "comprehensive legislative action" to abrogate sovereign immunity in the tort law context, it was under no obligation to defer similarly judicial rulemaking in what it characterized as a "narrow, well-defined type of suit," Lenk said.

— Kris Olson