NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12738

TOWN OF SUDBURY vs. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & another.[1]

Suffolk. October 1, 2019. - September 22, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[2]

Massachusetts Bay Transportation Authority. Easement. Real Property, Easement. Public Utilities, Electrical transmission line.

Civil action commenced in the Land Court Department on September 27, 2017.

Motions to dismiss were heard by Gordon H. Piper, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

George X. Pucci (Audrey A. Eidelman also present) for the plaintiff.

Thaddeus A. Heuer for Massachusetts Bay Transportation Authority.

Joshua A. Lewin for NSTAR Electric Company.

[1] NSTAR Electric Company, doing business as Eversource Energy.

[2] Chief Justice Gants participated in the deliberation on this case prior to his death.

Mark R. Rielly & Rachel C. Thomas, for New England Power Company & another, amici curiae, submitted a brief.

Jessica Gray Kelly & Daniel C. Johnston, for NAIOP Massachusetts & others, amici curiae, submitted a brief.

GAZIANO, J. In this appeal, we consider the scope of the common-law doctrine of "prior public use." Under this long-standing doctrine, public lands acquired for one public use may not be diverted to another inconsistent public use unless the subsequent use is authorized by plain and explicit legislation. Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969). Here, we are asked to extend this doctrine and to determine that the prior public use doctrine bars the diversion of public land devoted to one public use to an inconsistent private use. Because such a sweeping change would not advance the purposes of the doctrine, and would create widespread uncertainty concerning numerous existing holdings of private land that were transferred by public entities, we decline to adopt the municipality's proposed reworking of the doctrine. Accordingly, we affirm the Land Court judge's decision dismissing the complaint, albeit, in part, on somewhat different grounds.[3]

[3] We acknowledge the amicus briefs submitted by NAIOP Massachusetts, the Real Estate Bar Association for Massachusetts, Inc., and The Abstract Club; and New England Power Company and Massachusetts Electric Company, both doing business as National Grid.

1. Prior proceedings. In November 2017, the town of Sudbury (town) filed an amended complaint in the Land Court seeking to prevent defendant Massachusetts Bay Transportation Authority (MBTA) from entering into an option agreement with defendant NSTAR Electric Company, doing business as Eversource Energy (Eversource), for an easement to install an electric transmission line underneath about nine miles of a disused right of way (ROW), approximately 4.3 miles of which extend through the town. The town argued that the prior public use doctrine precludes the MBTA from transferring public land to another public entity for an inconsistent use, here, changing the use of the ROW from the purpose set forth in the eminent domain transfer -- the extension and operation of mass transportation services -- to the installation and maintenance of underground electric transmission lines, absent legislative authorization.

The first count of the complaint sought a judgment declaring that the "inconsistent public use is illegal under the Massachusetts prior public use doctrine unless and until it is specifically authorized by legislation." The second count sought to enjoin MBTA's diversion of the inactive ROW to an inconsistent public use. The defendants moved to dismiss the complaint based on the town's lack of standing and the failure to state a claim for a violation of the prior public use

doctrine. See Mass. R. Civ. P. 12 (b) (1), (6), 365 Mass. 754 (1974).

A Land Court judge denied the defendants' motions to dismiss for lack of jurisdiction, see Mass. R. Civ. P. 12 (b) (1), after concluding that the town had standing to bring the claim, albeit that "the [t]own's standing appears at the precipice of adequacy." The judge then allowed the defendants' motions to dismiss on the ground that the complaint failed to state a claim upon which relief can be granted. See Mass. R. Civ. P. 12 (b) (6). In so doing, the judge ruled that Eversource is a private corporation and not, as the town claimed, a public entity. The judge declined the town's urging that he extend the long-established doctrine of prior public use to situations involving the diversion of an authorized public use of land to an inconsistent private use. The town appealed to the Appeals Court, and we transferred the case to this court on our own motion.

2. Background.[4] The MBTA acquired the ROW in part through an indenture from the trustees of the property of the Boston and Maine Corporation (B&M), subject to an easement for B&M's

[4] The facts are drawn from the complaint, the exhibits attached to the complaint, and undisputed documents provided by the parties in connection with the proceedings. See Lipsitt v. Plaud, 466 Mass. 240, 241 (2013); United States ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201, 208 (1st Cir. 2016).

continued use of the ROW as a freight railroad, and subsequently through a taking by eminent domain for purposes of providing and extending mass transportation services. The MBTA has not constructed an extension of its transportation system through the ROW, and the ROW has been inactive as a rail line for over forty years. Although the rails and rail beds are still extant, the area has become heavily wooded. Multiple sections of the ROW abut environmentally sensitive areas, such as Federal, State, and private conservation areas, a farm, a fishery, streams, ponds, and wetlands. Numerous other sections abut "dense" areas of private properties, some of which are subject to conservation restrictions under G. L. c. 184, §§ 31-33. Parts of the ROW currently are used by the public as a walking or hiking trail, and other stretches generally serve as wooded areas of wildlife habitat. The railroad tracks and railroad beds formerly used by B&M have not been removed, and continue to extend through the ROW.

The 1976 indenture from B&M provided that, for consideration of $36,549,000, B&M granted the MBTA "all of [B&M's] right, title and interest . . . sufficient to permit the [MBTA] to operate a passenger and freight rail service over the rail line rights of way . . . and to [B&M's] rights of way and other lands thereon and including all track, signals, bridges, buildings, shops, towers, and other improvements affixed

thereto." B&M "reserve[d] unto themselves, their successors and assigns, the right and easement as are appropriate and necessary to the continuance of [B&M's] freight transportation business."

In 1977, the MBTA acquired title to the ROW in fee simple, pursuant to G. L. c. 161A, § 3 (o), "for[, among other things,] the purpose of providing and extending mass transportation facilities for public use." The order of taking was made subject to the same freight easement that was reserved to B&M in the indenture, as well as "all easements for wires, pipes, conduits, poles, and other appurtenances for the conveyance of water, sewerage, gas, oil, and electricity."

On June 9, 2017, the MBTA entered into an option agreement with Eversource. The agreement entitles Eversource to lease an easement in the ROW and to install an underground 115-kilovolt electrical transmission line, subject to obtaining "any necessary permits or approvals." The option agreement further provides that the MBTA reserves the right to relocate the transmission lines to anywhere within the ROW if the MBTA determines that the lines are interfering with its use of the ROW for transportation purposes. If exercised, the agreement is expected to generate $9.3 million for the MBTA over the subsequent twenty years.

The preferred route for the underground transmission line, through the entire length of the ROW, is approximately nine

miles.[5] The route begins at Eversource's Sudbury substation and travels through the ROW northwest through Sudbury, Marlborough, Hudson, Stow, and then Hudson again. In Hudson, the transmission line would proceed underneath public roadways to Eversource's Hudson substation.

The MBTA also has entered into a lease agreement with the Department of Conservation and Recreation (DCR) to allow for the construction of a segment of the Massachusetts Central Rail Trail (MCRT) over the buried transmission lines to be placed in the ROW. Under the terms of the option agreement, the easement granted to Eversource is subject to the provisions of the DCR lease, and Eversource is precluded from "materially interfer[ing] with or disturb[ing] the DCR's use of its leased premises." According to the complaint, "Eversource and DCR are entering into a memorandum of understanding in an effort to memorialize agreements related to design, permitting, construction, operation, and maintenance of both the underground electric transmission line and the above-ground publicly accessible rail trail within the MBTA ROW. Eversource has

[5] An alternative route, which Eversource believes would be much more expensive than using the ROW, would be placed under existing streets in Sudbury. Another alternative to provide the increase in electric transmission in this area that Eversource believes will be necessary to prevent power outages would involve modifying or replacing above-ground power lines. This option is not preferred for a number of reasons.

stated that it expects that DCR will be responsible for maintenance of the ROW following completion of the transmission project."

The proposed transmission project is subject to regulatory approval from the Energy Facilities Siting Board (EFSB) and the Department of Public Utilities (DPU), as well as review under the Massachusetts Environmental Protection Act (G. L. c. 30, §§ 61 et seq.) and the Wetlands Protection Act (G. L. c. 131, § 40), and by the Executive Office of Energy and Environmental Affairs and the Sudbury conservation commission. Eversource has undertaken the approval process with respect to the EFSB and the DPU, who have consolidated their proceedings in the matter.

In support of the town's argument that the transmission project is a diversion of one public use to another, the complaint states that Eversource's applications to regulatory entities describe the proposed service and Eversource as public. In its petition to the EFSB, Eversource maintains that the proposed transmission lines would serve a "compelling public use and purpose." The new transmission lines are necessary, Eversource asserts, in order to meet its customers' growing energy needs and to avoid service outages, which are estimated to occur given the current facilities and increasing demand. Eversource also maintains that coupling the underground

transmission line with the MCRT would confer a "public benefit," thus justifying approval of the project.

3. Discussion. a. Standard of review. "We review the denial of a motion to dismiss de novo, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." Edwards v. Commonwealth, 477 Mass. 254, 260 (2017), citing Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). In assuming the facts as alleged, however, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). To survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The facts alleged must "'plausibly suggest[] (not merely [be] consistent with)' an entitlement to relief." Iannacchino, supra, quoting Bell Atl. Corp., supra at 557. See Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 609 (2017) (complaint survives motion to dismiss "if it includes enough factual heft" to raise basis for relief beyond speculation). "[A] well-pleaded complaint may proceed even if it appears 'that

a recovery is very remote and unlikely.'" Bell Atl. Corp., supra at 556, quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

b. Standing. The MBTA urges us to affirm the Land Court judge's decision, but on the alternative ground that the town lacked standing to bring a claim under the prior public use doctrine. "The issue of standing may be raised at any time." See Matter of the Receivership of Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 56 (2001), quoting Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). According to the MBTA, the judge erred in finding "an automatic rule of injury-free municipal standing."

"To have standing in any capacity, a [plaintiff] must show that the challenged action has caused the [plaintiff] injury." Slama v. Attorney Gen., 384 Mass. 620, 624 (1981). See Enos v. Secretary of Envt'l Affairs, 432 Mass. 132, 135 (2000), quoting Bonan v. Boston, 398 Mass. 315, 320 (1986) ("standing requires 'a definite interest in the matters in contention in the sense that [a plaintiff's] rights will be significantly affected by a resolution of the contested point'"). Although "it is settled that G. L. c. 231A does not provide an independent statutory basis for standing," Enos, supra, citing Pratt v. Boston, 396 Mass. 37, 42-43 (1985), a party has standing under the statute where the defendant has "violated some duty owed to the

plaintiff[]," Enos, supra, quoting Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction, 382 Mass. 527, 532 (1981), and where the plaintiff "can allege an injury within the area of concern of the statute or regulatory scheme." Service Employees Int'l Union, Loc. 509 v. Department of Mental Health, 469 Mass. 323, 328 (2014), quoting Enos, supra. See Northbridge v. Natick, 394 Mass. 70, 75 (1985) ("An injury alone is not enough; a plaintiff must allege a breach of duty owed to it by the public defendant").

In prior cases, this court generally has held that cities and towns lack standing to challenge zoning board decisions. See Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 506 n.9 (2008) ("The town is not a 'person aggrieved' within the meaning of this statutory provisions"); Burlington v. Bedford, 417 Mass. 161, 165 (1994) (no standing where there was no duty owed to town, and town's injury was too "remote, speculative, and undefined"). See also Planning Bd. of Hingham v. Hingham Campus, LLC, 438 Mass. 364, 368 (2003) (town's planning board was not "person aggrieved" as required to have standing under statute). At the same time, in cases involving zoning and permitting, abutting landowners are afforded a rebuttable presumption of standing. See Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 33-34 (2006).

As the town points out, we have considered a case involving a change in a prior public use where the plaintiff was a municipality, see Selectmen of Braintree v. County Comm'rs of Norfolk, 399 Mass. 507 (1987) (Braintree). The town contends that this court's decision in Braintree "establishes that the [t]own has stated a valid claim upon which relief can be granted under the prior public use doctrine." In finding that the town had standing to bring its claims under the prior public use doctrine, the judge relied on the argument the town advances concerning our decision in Braintree, id. at 510-513. He reasoned that we "implicitly" must have conferred standing on the municipality in that case because we decided the case without any discussion of the municipality's standing to bring its claim.

Our holding in Braintree, 399 Mass. at 510-513, however, did not establish, as the town argues and the Land Court judge appears to have adopted, "an automatic rule of injury-free municipal standing." Nothing in Braintree should be read to confer automatic standing where a town brings a claim under the doctrine of prior public use. To survive a motion to dismiss under the prior public use doctrine, any entity, including a town, must establish standing, i.e., a claim of individualized harm. The question then becomes whether the complaint in this case sufficiently asserted an individualized harm to the town,

see Hingham, 451 Mass. at 506 n.9; Slama, 384 Mass. at 624, so as to withstand the motion to dismiss.

At the outset, we note that the town has no ownership interest in the ROW itself. The town asserts an individualized injury to town lands that abut the ROW, cf. Standerwick, 447 Mass. at 33-34, as well as apparently implicitly asserting representative standing on behalf of numerous others: Federal authorities who oversee Federal wildlife refuges, State and private trustees of conservation land and farms, and many private owners of residential properties, all of which also abut the ROW at some point. See Slama, 384 Mass. at 624.

The noted harms listed in the complaint, but not further discussed after having been identified, include the loss of 27.96 acres of trees, the loss of wildlife habitat, danger to certain species already designated as at risk, loss of recreational space, loss of aesthetic value, and reduction in property values. For most of these claims, the town either does not have standing to assert them, or the asserted harm is not legally cognizable.

Of the 4.3 miles (or 22,704 feet) of the ROW that run through the town, the town asserts that it owns various parcels, totaling 6,145 linear feet of land, that abut the ROW, that is, approximately twenty-seven percent of the total length of the land abutting the ROW within the town. The complaint delineates

two Federal wildlife refuges, a farm that is run as a joint State and private project, several areas of conservation land held under private trusts as well as town-owned conservation parcels, wetlands, ten vernal pools, and eight perennial streams as at risk of harm from the transmission project.[6] The complaint also asserts the diminution in property values for the many "dense[ly]" located residential parcels that abut the ROW, and loss of aesthetic view.[7]

The town has no standing to bring a claim under the prior public use doctrine concerning the majority of the land abutting the ROW in which the town has no property interest. See Slama, 384 Mass. at 624 ("[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party"; "[r]epresentative standing is generally limited to cases in which it is difficult or impossible for the actual rightholders to assert their claims" [citation omitted]). The individual property owners and the government entities who own

---

[6] The water, wetland, and conservation areas enumerated abut or are proximate to the ROW; none is actually within the ROW.

[7] The complaint also presents as alleged harm that, if the project were to include certain types of fill around bridge abutments that affect floodplains, additional permits and agency review would be necessary. Any asserted harm that might result if particular mandated remediation procedures were not followed is entirely speculative. Moreover, the planned work as described in the complaint involves the electric wires remaining within the existing bridge footprint for the three bridges at issue, obviating any need for fill around newly dug abutments.

or manage these properties are not in that position. They could, and in some cases already have, pursued their own claims regarding the transmission project before the EFSB and the DPU.

Similarly, "[d]iminution in the value of real estate is a sufficient basis for standing only where it is 'derivative of or related to cognizable interests protected by the applicable zoning scheme.'" Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 123 (2011), citing Standerwick, 447 Mass. at 31-32. "Zoning legislation 'is not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live.'" Kenner, supra at 123-124, citing Tranfaglia v. Building Comm'r of Winchester, 306 Mass. 495, 503-504 (1940). Thus, the "alleged diminution in value of [town] property is not a basis for standing." Kenner, supra at 124.

While the complaint says little other than listing the assertedly affected land and stating that loss of habitat and harm to wildlife will result, with respect to at least a few of the asserted losses,[8] the complaint sets forth specific, legally cognizable injuries, so long as we accept that the injury

[8] These include the claim that the cold water fishery at Hop Brook will be negatively affected by loss of tree cover and the resulting rise in water temperature, the potential contamination of drinking water resource areas during removal of the railroad tracks, and the potential danger to certain protected species whose habitat encompasses town conservation land.

resulting from the change to the ROW depends on some type of legally cognizable interest that the ROW remain in its current, disused, and overgrown condition.

As to that injury, the town seeks injunctive and declaratory relief for harm that purportedly would arise if the trees on the ROW were cleared to create an access road and rail trail, and the transmission wires and containers were installed. Only if one starts with the premise that the ROW will continue to be a rarely used strip of woodland with occasional recreational uses is it possible to infer any type of harm from the proposed clearing of a strip of land within the ROW, the placement of the underground conduits and the electrical wires, and the permanent paving of a narrower strip within the ROW. Indeed, if the MBTA chose to resume or extend rail or bus service along the ROW, it necessarily would have to remove, permanently, more than double the area of trees that Eversource contemplates removing for this project. The complaint does not state any ground on which the town would be entitled to insist that the ROW remain unused, or would be able to preclude the MBTA from using the ROW for the explicitly authorized purposes of operating freight and passenger rail service, as well as other mass transportation activities, for which the MBTA paid B&M $36,549,000.

Undoubtedly it is for all of these reasons that the motion judge found that "the [t]own's standing appears at the precipice of adequacy" before he dismissed the case on other grounds. In these circumstances, we assume without deciding that the town would be able to establish some individualized harm, and therefore has standing. See Bell Atl. Corp., 550 U.S. at 556.

c. Doctrine of prior public use. The doctrine of prior public use is a "firmly established" creation of the common law, dating back to the Nineteenth Century. See Smith v. Westfield, 478 Mass. 49, 60-61 (2017), citing Old Colony R.R. v. Framingham Water Co., 153 Mass. 561, 563 (1891), and Boston Water Power Co. v. Boston & W.R. Corp., 23 Pick. 360, 398 (1839). Under this doctrine, "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." Robbins, 355 Mass. at 330. See, e.g., Brookline v. Metropolitan Dist. Comm'n, 357 Mass. 435, 440 (1970) ("The principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end has been well established in our decisions"); Sacco v. Department of Pub. Works, 352 Mass. 670, 672 (1967) (specific statutory language is required to divert land devoted to one public purpose to another inconsistent public purpose); Higginson v. Treasurer & Sch. House Comm'rs of Boston, 212 Mass.

583, 591 (1912) (public purpose for which city has acquired land by eminent domain may be changed to another inconsistent public use by "plain and explicit legislation to that end"); Old Colony R.R., supra ("There can be no doubt that the Legislature may take, or authorize a corporation to take, land for a public use, which has previously been appropriated by legislative authority to a different public use . . . [b]ut it will not be deemed to have done so unless its intention so to take such land is plainly manifested in the statute").

To survive the defendants' motions to dismiss, the town was required to plead sufficiently that the option agreement met all four elements of the doctrine of prior public use: (1) a subsequent public use; (2) previous devotion of the property to only "one public use"; (3) an inconsistent subsequent use; and (4) a lack of legislative authorization. See Smith, 478 Mass. at 60, quoting Robbins, 355 Mass. at 330. See, e.g., Higginson, 212 Mass. at 591, citing Eldredge v. County Comm'rs of Norfolk, 185 Mass. 186 (1904).

On appeal, as they did before the Land Court judge, the MBTA and Eversource raise a number of grounds in support of their motions to dismiss for failure to state a claim upon which relief can be granted, e.g., failure to show that the option agreement violated the doctrine of prior public use. The defendants argue that dismissal was required because the public

uses for which the ROW initially was acquired by the MBTA were not a single use; Eversource's right under the option agreement to use the ROW to construct and operate an underground transmission line is not inconsistent with the MBTA's rights to use the ROW for mass transportation services; the subsequent inconsistent use must be public, not private, and here, Eversource is a private entity; and the MBTA's enabling legislation, G. L. c. 161A, contains specific provisions authorizing the MBTA to grant easements that do not interfere with rail service, and further obligates the MBTA to maximize its nontransportation revenue.[9]

[9] Even if a subsequent use is inconsistent, the prior public use doctrine is satisfied where the Legislature has adopted the subsequent public use by plain and explicit legislation. See Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969). The MBTA argues that its enabling statute, G. L. c. 161A, satisfies that requirement here, either by explicitly allowing the MBTA to grant the easement to Eversource, or by abrogating the common-law doctrine by necessary implication. See Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 521 (1980) (discussing repeal of common law by direct enactment or necessary implication). Under its enabling statute, the MBTA has the authority to grant easements over "any real property held by the authority" that do not "unduly" interfere with mass transportation facilities, G. L. c. 161A, § 3 (m); and to "develop, finance and operate the mass transportation facilities and equipment in the public interest," including the disposition of real property without any further legislative approval, G. L. c. 161A, § 5 (a)-(b). In addition, the MBTA is obligated to "[e]stablish and implement policies that provide for the maximization of nontransportation revenues from all sources." G. L. c. 161A, § 11. Because of the result we reach, we need not address these arguments by the MBTA further.

As stated, in allowing the motions to dismiss, the judge relied on his determination that Eversource is a private entity, the use at issue is a private use, and the doctrine of prior public use does not apply to a subsequent inconsistent private use. Based on this, the judge did not reach the defendants' arguments concerning the other three elements of the prior public use doctrine: prior devotion of the property to only "one public use"; an inconsistent subsequent use;[10] and the absence of legislative authorization. See, e.g., Smith, 478 Mass. at 60, quoting Robbins, 355 Mass. at 330.

On appeal, the town contends that the judge's decision was erroneous for two reasons. First, while Eversource is a private corporation, its use of the ROW for an underground electrical transmission line to service its customers is in reality a public use. Second, the judge's narrow construction of the prior public use doctrine "would defeat the purpose of the [doctrine], which is to protect public land acquired for a

[10] While the complaint states that railroad use would be impossible if the underground transmission wires were to be constructed, the MBTA asserts that it currently operates commuter rail service on some lines over such underground conduits. The judge did not reach the issue whether Eversource's proposed use is inconsistent with the prior use, and, for purposes of the motions to dismiss, we must accept the town's assertion that the use would be inconsistent. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007), quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

particular public use . . . without the required legislative awareness and specific authorization."

i. Public use of the ROW. For the prior public use doctrine to be applicable under our existing law, we must accept the town's contention that the option agreement in reality is a diversion to a public use. The town maintains that the prior public use doctrine focuses on the "use" of the land, not on the corporate status of the user. The town points out that Eversource represented in its petition before the EFSB and the DPU that the project serves "a compelling public use and purpose,"[11] and that the construction of the MCRT walking and biking trail through the ROW confers a further "public benefit." Moreover, the town argues, Eversource is able to pass along the costs of the project to its public ratepayers.

Relying on this asserted public use, the town contends, as it did in the Land Court, that this court's decision in Braintree, 399 Mass. at 509, "establishes that the [t]own has stated a valid claim upon which relief can be granted under the prior public use doctrine." The comparison is inapt. First,

[11] In its brief, Eversource contests some of the town's assertions about the content of Eversource's statements to the EFSB, and points to a published set of documents it says do not contain the asserted language. For purposes of a motion to dismiss, however, we assume "that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp., 550 U.S. at 555.

the judge properly rejected the contention that Eversource is a public entity, or that the transmission project is a public use. Second, our holding in Braintree, supra, did not suggest that the doctrine of prior public use applies to a subsequent private use.

The judge rejected the town's efforts "to paint the [p]roject as one of public use." He recognized that, in regulatory proceedings, Eversource argues that laying the transmission lines underneath the ROW will afford a public benefit with respect to power grid enhancements and, later, the construction of the MCRT in concert with the DCR. Nonetheless, he concluded, "[t]hat a utility, owned by its shareholders, is subject to considerable public oversight does not make it a public entity for purposes of the legal doctrine. . . . Nor does the fact that a utility such as Eversource only can proceed to build and operate power lines with the approval of public regulatory agencies, and has its rates reviewed in a public manner."

We agree. Eversource's proposed use of the MBTA ROW to construct and operate underground transmission lines is not a public use. Eversource, a domestic corporation, privately owns and operates its electric transmission and distribution systems. See ENGIE Gas & LNG LLC v. Department of Pub. Utils., 475 Mass. 191, 206 (2016) ("The business of electric distribution

companies is to plan for, build, and operate distribution infrastructure . . . ; deliver electricity; and be compensated for doing so"). Eversource will pay taxes on the transmission line as an asset, see G. L. c. 59, § 18, Fifth, and is entitled to earn a profit on its investment through rates approved by the DPU. See G. L. c. 164, § 94. See Higginson, 212 Mass. at 589 (court focuses on "character of the use"); Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 525 (1887) ("[public] use is in the public at large").

Like many other privately owned corporations doing business in the Commonwealth, such as banks and common carriers, Eversource is publicly regulated. In order to site a new electric transmission line, Eversource is required to demonstrate to the EFSB and the DPU that the project "will or does serve the public convenience and is consistent with the public interest" and is "reasonably necessary for the convenience or welfare of the public." See G. L. c. 164, § 72; G. L. c. 40A, § 3. A statutory requirement that regulators consider the public's interest in siting transmission lines, however, does not convert the construction and operation of a four-mile segment of a privately owned electric transmission grid into a public use.

ii. Extension of doctrine to diversion to private use. The town's second argument rests on the mistaken premise that

the sole purpose of the prior public use doctrine is to prevent the diversion of public land acquired for a particular public use to any inconsistent use without specific legislative awareness and approval.

Although the prior public use doctrine undoubtedly protects public land, it developed in our common law as a means to resolve conflicts over the use of public lands between State-chartered corporations, municipalities, or other governmental agencies that might claim authority to use another government entity's land, or to take the land by eminent domain, in a potentially never-ending cycle of takings.[12] See, e.g., Brookline, 357 Mass. at 436-437 (dispute between town and State agency over taking of property previously acquired as parkland for road construction); Needham v. County Comm'rs of Norfolk, 324 Mass. 293, 295-297 (1949) (dispute between town and county commissioners over relocation of public way on strips of land

[12] The prior public use doctrine has been applied particularly stringently to protect public lands acquired as "parkland." Smith v. Westfield, 478 Mass. 49, 61 (2017). "The policy of the Commonwealth has been to add to the common law inviolability of parks express prohibition against encroachment." Higginson v. Treasurer & Sch. House Comm'rs of Boston, 212 Mass. 583, 591-592 (1912). See Robbins, 355 Mass. at 330; Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 419 (1966). We noted in Mahajan v. Department of Envtl. Protection, 464 Mass. 604, 616 (2013), that the "spirit" of art. 97 of the Amendments to the Massachusetts Constitution derived from the public use doctrine, and that the protections of inconsistent subsequent use in that doctrine in large part were intended to ensure that public parkland remain parkland.

previously appropriated for school and library); Bauer v. Mitchell, 247 Mass. 522, 525 (1924) (dispute between trustees of agricultural school and county commissioners over attempt to take portion of school land for hospital sewage system); Boston & Albany R.R. v. City Council of Cambridge, 166 Mass. 224, 224 (1896) (dispute between city and railroad over city's taking of land to build park); Old Colony R.R., 153 Mass. at 563-564 (dispute between railroad and water company over operation of pumping station on land previously acquired for rail use).

The doctrine of prior public use prevents the absurd result of public entities, each with the authority to exercise eminent domain, taking and retaking the same property from each other "ad infinitum."[13] Commonwealth v. Massachusetts Turnpike Auth., 346 Mass. 250, 254-255 (1963). See Appleton v. Massachusetts Parking Auth., 340 Mass. 303, 310 (1960) (specific legislative authority required in order to prevent governmental agency from engaging in "roving eminent domain"). See generally Comment, Judicial Balancing of Uses for Public Property: The Paramount

[13] The doctrine of prior public use also promotes "fiscal and social stability" by protecting the long-term interests of a municipality or other government agency which "may have expended resources for the improvement of property in reliance on a continued right to use that property." Somerset v. Dighton Water Dist., 347 Mass. 738, 742 (1964). See Norfolk So. Ry. v. Intermodal Props., LLC, 215 N.J. 142, 162-163 (2013) (common-law rule developed to create certainty among public entitles, each with authority to exercise power of eminent domain over same property).

Public Use Doctrine, 17 B.C. Envtl. Aff. L. Rev. 893, 896 n.35 (1990) (prior public use doctrine was developed to avoid "impropriety of the [S]tate's nullifying its own prior dedication of property to public use, without specific consideration of the superseding public use"); Wilson, The Public Trust Doctrine in Massachusetts Land Law, 11 B.C. Envtl. Aff. L. Rev. 839, 866-867 (1984) (prior public use doctrine establishes priorities between multiple governmental entities each possessing power of eminent domain). See also Georgia Dep't of Transp. v. Jasper County, 355 S.C. 631, 635 (2003) (prior public use doctrine is "a rule of law limited to controversies between two [entities] each possessing a delegated, general power of eminent domain" [citation omitted]); In re Vt. Gas Sys., Inc., 2017 VT 83, ¶ 19 (purpose of common-law doctrine is to "protect public uses and to prevent land from being condemned back and forth between competing condemners, which would result in a lack of consistent public use of the land").

In this case, involving a transaction between public and private entities for a subsequent private use of land, we are not called upon to resolve a conflict over eminent domain authority. The common-law prior public use doctrine has never been applied to bar a subsequent private use carried out by a private entity. While the town urges that we extend the

doctrine of prior public use to encompass a diversion to an inconsistent private use, the town has not demonstrated that the benefits of expanding the prior public use doctrine to encompass subsequent inconsistent private uses outweigh the value of adhering to our long-standing common-law formulation. To adopt a vastly expanded view of the doctrine in order to add a similar requirement for diversion to an inconsistent private use would not serve the purposes of the doctrine we have discussed, and would lead to numerous deleterious consequences. Among other things, countless prior transfers of interests in land, including many easements for utility wires and pipes, and water and sewage pipes, would be called into question. Yet, as the town itself recognizes, these types of transactions between government and private entities are frequent and critical to maintaining a municipality's infrastructure. See Somerset v. Dighton Water Dist., 347 Mass. 738, 742 (1964). Moreover, it would render future developments between public and private entities, which, according to the amici, have been blossoming in the Commonwealth,[14] prohibitively expensive and time consuming to undertake.

[14] The amici point to several very recent housing projects involving public and private entities to create hundreds of units of much-needed affordable housing that also generates revenue for the government entities involved, affordable child-care facilities to address severe shortages, and the leasing of

As the Land Court judge explained, "at both the local and [S]tate level, transfers of government-owned property to private ownership happen with frequency, and at times in cases where the land's title was acquired by the public owner for an express public purpose which may be at odds with the private grantee's ensuing use." Thus, an expansion of the doctrine of prior public use to include subsequent private uses would "give rise to a significant number of lawsuits challenging the public disposition of . . . real estate." The concerns raised by the amici that "[i]mposing upon the Legislature a new common law requirement to provide site-specific approval before any such project could commence construction would add great uncertainty as to schedule (and, therefore, project costs), making development involving public land or rights therein far less attractive to the private sector than it is today" also are persuasive.

4. Conclusion. Because we decline to extend our long-standing doctrine of prior public use to include a diversion from public use to an inconsistent private use, the town cannot prevail on either of its claims, and we accordingly affirm the Land Court judge's decision allowing the defendants' motions to dismiss.

---

land along State highways to support electrical panels that save the Department of Transportation millions of dollars annually.

So ordered.