

NOTIFY 34

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 10-0802-H

SANJOY MAHAJAN and others<sup>1</sup>

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION and  
another<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR  
JUDGMENT ON THE PLEADINGS AND BRA'S CROSS-MOTION FOR JUDGMENT  
ON THE PLEADINGS

On September 17, 2008, defendant the Massachusetts Department of Environmental Protection ("DEP") granted defendant Boston Redevelopment Authority ("BRA") a G. L. c. 91 license ("the chapter 91 license") authorizing BRA to build a restaurant around a shade structure located on the eastern end of Boston's Long Wharf. The plaintiffs move for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) arguing that the chapter 91 license violates Article 97 of the Massachusetts Constitution<sup>3</sup> and that the issuance of the license was an error of law. The plaintiffs seek a writ of mandamus under G. L. c. 249, § 5 and a declaratory judgment under G. L. c. 231A. BRA cross-moves for judgment on the pleadings asking the court to affirm DEP's decision. For the following reason, the plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED** and BRA's Cross-Motion for Judgment on the Pleadings is **DENIED**. This court **VACATES** DEP's decision to issue the chapter 91 license.

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<sup>1</sup> Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot

<sup>2</sup> Boston Redevelopment Authority

<sup>3</sup> The plaintiffs also argue that in granting the license, the DEP Commissioner failed to properly apply G. L. c. 91.

## BACKGROUND

The land at issue is located on the eastern end of Boston Harbor's Long Wharf. Long Wharf is a designated National Historic Landmark, and is the site of water transportation, public transportation, hotels, retail establishments, and restaurants. It is also part of the Harborwalk—a pedestrian passageway that enhances public access to the waterfront. In 1970, under Boston's 1964 Urban Renewal Plan, BRA took by eminent domain a large portion of Long Wharf, including a shade structure on the eastern end ("the 1970 Taking").

In 2008, BRA proposed a plan to redevelop the eastern end of Long Wharf by building a waterfront restaurant with outdoor seating, takeout service, and a bar. As a part of the project, BRA sought to enclose and expand the shade structure. Specifically, BRA planned to add 1,225 square feet to the enclosed shade structure which currently occupies 3,430 square feet.

BRA obtained 14 zoning variances from the Boston Zoning Board of Appeals which allowed for live entertainment, takeout service, and food and alcohol service until 1:00 a.m. at the proposed restaurant. In addition, because the site of the proposed restaurant is located on filled tidelands, BRA was required to obtain a license from DEP pursuant to G. L. c. 91, § 18. BRA applied for a chapter 91 license and on September 17, 2008, DEP granted the license.

The plaintiffs, who are residents of Boston's North End, appealed DEP's decision to issue the chapter 91 license. They argued that the restaurant would create unnecessary noise and would damage public open space, parkland, and scenic quality. On January 29, 2010, the DEP Commissioner ("the Commissioner") issued a final decision affirming the grant of the chapter 91 license.

The plaintiffs now appeal the final decision. The crux of their argument is that the site at issue is protected under Article 97 of the Massachusetts Constitution, and that any change in use

or disposition of the land requires two-thirds approval from the legislature. According to the plaintiffs, the chapter 91 license authorized a disposition and change of use in land, and that because it was done without legislative approval, the license is invalid. The plaintiffs seek a declaratory judgment under G. L. c. 231A and a writ of mandamus under G. L. c. 249, § 5 ordering DEP to enforce Article 97's requirements.<sup>4</sup>

## DISCUSSION

### A. **DEP Commissioner's Jurisdiction to Interpret and Apply Article 97**

In her final decision, the Commissioner declined to address the plaintiffs' argument that the chapter 91 license violates Article 97. The Commissioner stated that DEP lacks jurisdiction over Article 97 and therefore, she cannot interpret or apply Article 97. The plaintiffs argue, however, that DEP assumed jurisdiction over Article 97 by issuing certain policy pronouncements and that the Commissioner's failure to address Article 97 was an error of law. This court disagrees.

The plaintiffs do not offer sufficient support for their argument that DEP assumed jurisdiction by issuing certain policy pronouncements. Moreover, it is well-established that an administrative agency has "only the powers, duties and obligations expressly conferred upon it by . . . statute . . . or such as are reasonably necessary . . . [to carry out] the purpose for which it was established." Saccone v. State Ethics Comm'n, 395 Mass. 326, 335 (1985), quoting Hathaway Bakeries, Inc. v. Labor Relations Comm'n, 316 Mass. 136, 141 (1944). General Laws chapter 91 sets forth DEP's powers, duties, and obligations with respect to issuing chapter 91 licenses. The statute does not grant DEP authority to interpret Article 97 or apply it when ruling

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<sup>4</sup> In addition, the plaintiffs invoke G. L. c. 30A arguing that DEP's decision was an error of law. Because, as discussed below, this case can be disposed of based on Article 97, this court need not consider the plaintiffs' argument on this point.

on a chapter 91 license. In fact, Article 97, a constitutional amendment, is independent of chapter 91.

This court therefore accepts the Commissioner’s conclusion that review of Article 97 is outside the scope of DEP’s authority. The parties agree that this court has jurisdiction to interpret and apply Article 97, and accordingly, it will do so at this time. See Hartford Acc. & Indem. v. Commissioner of Ins., 407 Mass. 23, 26-27 (1990) (where question of law is outside the scope of an agency’s discretion, the matter must be committed to the courts for disposition).

**B. Article 97’s Retroactivity**

Article 97 applies only to lands and easements taken or acquired by governmental entities. Long Wharf was taken by eminent domain in 1970. Article 97, however, was not adopted until 1972. The defendants argue that Article 97 is not retroactive and that because it did not exist at the time of the 1970 Taking, it cannot be applied to the land at issue.

This court disagrees. The June 6, 1973 opinion of Attorney General Robert H. Quinn (“the Quinn Opinion”) clearly states that Article 97 applies retroactively. Rep. A.G., Pub. Doc. No. 12, 139, 140-141 (1973) (“the House of Representatives asks . . . whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97 . . . . I answer in the affirmative.”). The Quinn Opinion is good law and is consistently used in applying and interpreting Article 97. Thus, in accordance with the Quinn Opinion, this court concludes that Article 97 is retroactive and may be applied in the present case.

**C. Article 97’s Applicability to the Land at Issue**

Article 97 provides that the “people shall have the right to clean air and water . . . and the natural, scenic, historic, and esthetic qualities of the environment” and that “the protection of the

people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is . . . a public purpose.”<sup>5</sup> It grants the legislature power to “enact legislation necessary or expedient to protect such rights.” Specifically, Article 97 authorizes the legislature to “provide for the taking . . . or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish [Article 97’s] purposes.” Under Article 97, if the legislature takes or acquires land or easements for such purposes, the land or easement “shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote . . . of each branch of the [legislature].”

To determine whether the land at issue is subject to Article 97, this court must consider whether the land at issue was taken or acquired for an Article 97 purpose, and if so, whether the chapter 91 license effected a change in use or disposition of Article 97 land.

1. Whether the Land at Issue was Taken or Acquired

The parties agree that in 1970, BRA acquired a large portion of Long Wharf under the 1964 Urban Renewal Plan. The defendants maintain, however, that a portion of Long Wharf’s eastern end, which contains the land at issue, was excluded from the 1970 Taking. The defendants assert that because the land at issue was not “taken,” it is not subject to Article 97. This court disagrees.

The 1970 Order of Taking, which references the recorded plan, describes the acquired area as follows: The westerly boundary is “by Atlantic Avenue, as shown on [the recorded plan], 257.45 feet;” the northerly boundary is “by land now or formerly of [BRA] as shown on said Plan, 968.59 feet;” the easterly boundary is “by Boston Harbor[,] 274.48 feet;” and the southerly

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<sup>5</sup> Article 97 amended Article 49 of the Massachusetts Constitution. While some authorities still refer to the provision as Article 49, this court will refer to it as Article 97.

boundary is “by land now or formerly of New England Aquarium as shown on said Plan, 963.93 feet.” Thus, the 1970 Taking Map and Order of Taking indicate that Long Wharf’s eastern end, including the land at issue, was part of the 1970 Taking. Contrary to the defendants’ assertion, there is no indication that a portion of the eastern end was excluded from the 1970 Taking. Rather, the record shows that the land at issue was included in the 1970 Taking.

2. Whether the Land at Issue was Taken for an Article 97 Purpose

In order for Article 97 to apply, the land at issue must have been taken for an Article 97 purpose. See Board of Selectmen v. Lindsay, 444 Mass. 502, 504-506 (2005). BRA acquired the land at issue under the 1964 Urban Renewal Plan, which sought to encourage urban renewal and development. The defendants argue that the 1964 Urban Renewal Plan’s goals are inconsistent with Article 97’s conservation objectives, and therefore, the land at issue was not taken for Article 97 purposes. This court disagrees.

The record shows that the 1964 Urban Renewal Plan served at least three Article 97 purposes. First, the 1964 Urban Renewal Plan aimed to “provide public ways, **parks**, and plaza.” Record at 1609-1610 (emphasis added). Providing parkland is an Article 97 purpose. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 141-142 (Article 97 purpose is carried out by parkland acquisition; Article 97 requirements apply to parkland). The parties dispute whether the land at issue qualifies as parkland. While the record contains evidence that the land at issue is parkland,<sup>6</sup> this court need not address this dispute because the 1970 Taking served additional Article 97 purposes.

Second, the 1964 Urban Renewal Plan sought to create parks and plazas “which encourage the pedestrian to **enjoy the harbor and its activities . . .**” Record at 1609-1610

<sup>6</sup> For example, a bronze plaque at Long Wharf’s eastern end contains the words, “Long Wharf Park,” and references the National Park Service. See Plaintiffs’ Additional Exhibits and References Relevant to Article 97, Exhibit 4. In addition, BRA’s owned-land database notes the “Park located at the end of [Long] Wharf with benches.” See *id.*, Exhibit 5.

(emphasis added). The Quinn Opinion states that affording a means of **utilizing** natural resources, such as water, in harmony with their conservation is an Article 97 purpose. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 142. Thus, by creating a plan which encouraged pedestrians to use and enjoy the harbor and waterfront, the 1964 Urban Renewal Plan served an Article 97 purpose.

Third, the 1964 Urban Renewal Plan aimed to “establish . . . **open spaces** and views for both the pedestrian and the motorist.” Record at 1609, 1611 (emphasis added). A fundamental purpose of Article 97 is to protect, conserve, and develop natural resources, which includes open spaces. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 143 (open spaces are natural resources for the purpose of Article 97). Because open spaces are natural resources which Article 97 seeks to protect, conserve, and develop, by creating open spaces, the 1964 Urban Renewal Plan served an Article 97 purpose.

In sum, because the 1964 Urban Renewal Plan aimed to create parkland, open space, and a means of utilizing and enjoying the harbor, it served Article 97 purposes. Accordingly, the land at issue, which was taken under the 1964 Urban Renewal Plan, was taken for Article 97 purposes.

### 3. Change in Use or Disposition of Article 97 Land

As noted, Article 97 states that land taken or acquired for Article 97 purposes “shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote . . . of each branch of the [legislature].” Thus, because the land at issue is protected by Article 97, any disposition or change in use of the land requires two-thirds approval from the legislature.

#### *a. Disposition of Article 97 Land*

The plaintiffs argue that by issuing the chapter 91 license, DEP authorized a disposition of Article 97 land. According to the plaintiffs, because the license disposed of Article 97 land without the requisite legislative approval, the license is invalid. This court agrees.

The Quinn Opinion defines disposition as a transfer of legal or physical control as between agencies. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144. By issuing the chapter 91 license, DEP ceded to BRA the right to develop the land at issue by constructing a restaurant. In addition, the chapter 91 license authorized BRA to enter leases with third parties regarding the land at issue.<sup>7</sup> Without the chapter 91 license, BRA would not enjoy such rights over the land at issue. Thus, by issuing the chapter 91 license, DEP transferred to BRA an extent of legal control over the land at issue.<sup>8</sup> This transfer of legal control constitutes a disposition of Article 97 land.<sup>9</sup>

*b. Change in Use of Article 97 Land*

Not only did the chapter 91 license create a disposition of Article 97 land,<sup>10</sup> it authorized a change in use of Article 97 land.

A change in use of Article 97 land includes a “change of use within a governmental agency.” See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144. When it was taken under the 1964 Urban Renewal Plan, the land at issue was to be used as parkland, open space, and as a

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<sup>7</sup> The record indicates that in connection with proposed project, BRA may enter leases with third parties.

<sup>8</sup> At the least, the transfer of legal control is tantamount to granting an easement in that DEP gave BRA certain rights of use over the land at issue. The Quinn Opinion characterizes the taking or granting of easements as a disposition under Article 97. Rep. A.G., Pub. Doc. No. 12 at 144.

<sup>9</sup> Even if the chapter 91 license did not itself dispose of Article 97 land, BRA’s foreseeable lease of the land to a third party constitutes a transfer of legal control. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144, citing United States v. Gratiot, 39 U.S. 526 (1840) (disposition may include a lease). In its letter approving the chapter 91 license, DEP noted BRA’s plan to lease the shade structure for restaurant use. Lease of the land at issue to a third party constitutes a disposition of Article 97 land. *Id.*

<sup>10</sup> The defendants assert that the chapter 91 license did not create a disposition of Article 97 land because the license was revocable. While there is support for the assertion that revocable licenses do not result in dispositions (see Miller v. Commissioner of Dep’t of Environ. Mngm’t, 23 Mass. App. Ct. 968, 970 (1987)), this court need not analyze whether the chapter 91 license is “revocable.” Even if the chapter 91 license did not effect a disposition, it clearly resulted in a change in use.



means of utilizing and enjoying the harbor. Under the proposed project, however, the land at issue would be used as a restaurant and commercial establishment. This commercial use would differ from the land at issue's original Article 97 use. Thus, by authorizing the new development, the chapter 91 license facilitated a change in use of Article 97 land.

As with disposition of Article 97 land, a change in use of Article 97 land requires legislative approval. See *id.* (land originally taken or acquired for Article 97 purpose may not be “used for other purposes” without two-thirds vote from the legislature); cf. *Robbins v. Department of Pub. Works*, 355 Mass. 328, 330 (1969) (discussing public use doctrine). Because the chapter 91 license authorized a change in use and disposition of Article 97 land without the requisite legislative approval, the chapter 91 license is invalid.

In sum, because the land at issue was taken for Article 97 purposes, and because the chapter 91 license effected a disposition and change in use of Article 97 land, two-thirds votes from the legislature is required before BRA can go forward with its proposed development.

#### **D. Mandamus; Declaratory Judgment**

Having determined that Article 97 applies to the land at issue, this court must determine whether the plaintiffs are entitled to relief in the nature of mandamus and declaratory judgment.

##### 1. Mandamus

The plaintiffs seek a writ of mandamus under G. L. c. 249, § 5 ordering DEP to enforce Article 97. This court concludes that the plaintiffs are entitled to a writ of mandamus.

At the outset, the defendants argue that because the plaintiffs did not suffer particularized harm, they lack standing to bring an action in the nature of mandamus. In an action in mandamus, however, plaintiffs who lack a specific interest in the matter at hand have standing by reason of their citizenship to bring an action to enforce a public duty. Pilgrim Real Estate,

Inc. v. Superintendent of Police of Boston, 330 Mass. 250, 251 (1953). Here, the plaintiffs seek to “secure on the part of the [DEP] the performance of a public duty . . . .” Id. Thus, contrary to the defendants’ argument, the plaintiffs have standing to seek a writ of mandamus.

Mandamus is appropriate in cases, such as this, where the plaintiffs seek to set aside the illegal performance of a duty, or compel the performance of public duty by a public official. Town of Concord v. Attorney Gen., 336 Mass. 17, 27 (1957); see, e.g., Mariano v. Building Inspector of Marlborough, 353 Mass. 663, 666 (1968) (compelling building inspector to revoke building permit); Siegemund v. Building Comm’r of City of Boston, 259 Mass. 329, 335 (1927) (addressing building commissioner’s failure to enforce zoning act). In this case, the plaintiffs seek to compel the defendants to comply with Article 97.

Mandamus is an extraordinary remedy and is available only where the law provides no other adequate and effectual relief or no other opportunity for judicial review. See McCarthy v. Mayor of Boston, 188 Mass. 338, 340 (1905). Mandamus should be granted where there would otherwise be a failure of justice. Id.; see also Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dep’t, 448 Mass. 57, 59-60 (2006).

The defendants argue that mandamus is not available because the plaintiffs have other ways of enforcing their rights—specifically, because DEP’s decision is reviewable under G. L. c. 30A (“30A”). According to the defendants, the plaintiffs can obtain judicial review through the 30A process, in which the court could remand DEP’s decision. A 30A proceeding, however, would not offer meaningful judicial review of the Article 97 issue. See McCarthy, 188 Mass. at 59-60. As noted, the DEP Commissioner lacks jurisdiction to interpret Article 97. Thus, even if this court remanded the decision to DEP pursuant to 30A, on remand, DEP would still be unable to interpret and apply Article 97. Because DEP lacks jurisdiction to interpret Article 97, which is

the focus of the plaintiffs' complaint, the 30A process would not allow for meaningful judicial review of this critical issue.

In addition, because there is no private right of action under Article 97, the plaintiffs cannot obtain judicial review by bringing a claim under Article 97. See Chase v. The Trust for Public Land, 16 LCR 135, 139 (Mass. Land Ct. 2008); see also Enos v. Secretary of Environ. Affairs, 432 Mass. 132, 142 n.7 (2000). Thus, mandamus is the only vehicle through which the plaintiffs can obtain meaningful judicial review of the Article 97 issue. Although mandamus is an extraordinary remedy, it is warranted in the present case, and without it, there would be a failure of justice. See McCarthy, 188 Mass. at 59-60.

## 2. Declaratory Judgment

This court also concludes that the plaintiffs are entitled to declaratory relief under G. L. c. 231A. As discussed above, this court finds that Article 97 applies and that BRA must comply with Article 97's requirements and restrictions before commencing the proposed project. This court rejects the defendants' argument that declaratory relief is unwarranted because the claim is duplicative with the claim under G. L. c. 30A, § 14. As noted above, the 30A proceeding would not afford meaningful judicial review of the Article 97 issue. Therefore, the claims are not duplicative and the plaintiffs are entitled to declaratory relief.

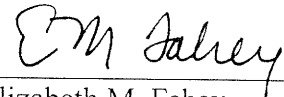
## **E. Conclusion**

In sum, this court finds that Article 97 applies to the land at issue and that the issuance of the chapter 91 license effected a disposition and change in use of Article 97 land. Because the license was issued without obtaining the requisite legislative approval under Article 97, the chapter 91 license is invalid. Because this court finds the chapter 91 license invalid for failure to

comply with Article 97, this court need not address the parties' additional arguments concerning the license's validity under the Waterways Statute.

**ORDER**

For the reasons state above, it is hereby **ORDERED** that the plaintiffs' Motion for Judgment on the Pleadings be **ALLOWED** and BRA's Cross-Motion for Judgment on the Pleadings be **DENIED**. In light of the restrictions under Article 97, DEP's final decision to issue the chapter 91 license is **VACATED**, and the chapter 91 license is voided.



Elizabeth M. Fahey  
Justice of the Superior Court

DATED: June 10, 2011