COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11134

SANJOY MAHAJAN et al.,

Plaintiffs-Appellees

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION and

BOSTON REDEVELOPMENT AUTHORITY

Defendants-Appellants

Direct Appellate Review of a Decision and Judgment of
The Suffolk Superior Court

REPLY BRIEF OF APPELLANT BOSTON REDEVELOPMENT AUTHORITY

Denise A. Chicoine (BBO# 564152)
dchicoine@elcpc.com
Debra C. Leggett (BBO# 633456)
dleggett@elcpc.com
ENGLANDER, LEGGETT & CHICOINE P.C.
44 School Street, Suite 800
Boston, MA 02108
Tel. (617) 723-7400

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I. AN EMINENT DOMAIN TAKING UNDER M.G.L. CHAPTER 121B MUST BE STRICTLY CONSTRUED AS GRANTING ONLY THE RIGHTS NECESSARY TO ACCOMPLISH THE GOALS OF URBAN RENEWAL.

"The taking of land from a private owner against his will for a public use under eminent domain is an exercise of one of the highest powers of government." Devine v. Nantucket, 449 Mass. 499, 506 (2007), quoting Lajoie v. Lowell, 214 Mass. 8, 9 (1913). It is a power that resides in the legislature and passes to municipalities only by explicit delegation. Lichoulas v. City of Lowell, 78 Mass.App.Ct. 271, 276 (2010); Trustees of Reservations v. Stockbridge, 348 Mass. 511, 514 (1965) (power of eminent domain must be in express terms or by necessary implication; "it is not to be inferred from vague and doubtful general phrases"). "It is well established that eminent domain statutes must be strictly construed because they concern the power to condemn land in derogation of private property rights." Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd., 453 Mass. 135, 141 (2009). "[T]here must be strict compliance with the statutory authority and all precedent conditions must be performed before land can be taken for public uses from a private owner against his

will." Burwick v. Massachusetts Highway Dept., 57 Mass.App.Ct. 302, 307 (2003), quoting Radway v. Selectmen of Dennis, 266 Mass. 329, 335 (1929).

In a taking by a public authority, the legislature only grants such rights as are reasonably necessary to accomplish the public purpose. Agostini v. North Adams Gas Light Co., 265 Mass. 70, 73 (1928). Stated differently, "[t]he purpose of the taking fixes the extent of those rights." Barnes v. Peck, 283 Mass. 618, 628 (1933) (city took such rights as were reasonably necessary to build all structures necessary to use the waters of the river to the best advantage to the extent authorized by the taking statutes). The statutory text itself is "the principal source of insight into the legislative purpose." Providence & Worcester R.R. Co., 453 Mass. at 142; New Bedford v. Energy Facilities Siting Council, 413 Mass. 482, 485 (1992). The Court does not have the power to imply language in a statute if the legislature has not provided it. Providence & Worcester R.R. Co., 453 Mass. at 146; New England Power Co. v. Selectmen of Amesbury, 389 Mass. 69, 74-75 (1983).

In this case, M.G.L. ch. 121B §11 and §45 are the statutory provisions defining the purposes for which

the BRA may take land by eminent domain.[1] The legislative goals are unequivocally stated as the elimination of substandard, decadent, or blighted open areas in urban settings, and to promote sound community growth. M.G.L. ch. 121B § 45; see also Boston Redevelopment Authority v. Charles River Park C Co., 21 Mass. App. Ct. 777, 783 (1986). The condition precedent to the validity of a BRA taking is a BRA finding that the area is blighted, decadent, or substandard. The extent of the BRA's power over the land thus taken is circumscribed by the overriding purpose of eliminating substandard, decadent, or blighted conditions.

In summary, there is nothing in the text of M.G.L. ch. 121B which states that the BRA may take for conservation or environmental purposes, and the Court may not imply this language. Therefore the BRA does not have the power to take land for Article 97 purposes.

[1] The full text of M.G.L. ch. 121B §11 and §45 are in Addenda E to the BRA's principal brief.

II. AN URBAN RENEWAL PLAN MAY CREATE PARKS AND OPEN SPACES TO ELIMINATE BLIGHT, BUT THESE INCIDENTAL USES ARE NOT COVERED BY ARTICLE 97.

"The basic question where the interest was acquired by eminent domain is what interest the taking authority intended to acquire . . . as shown by the relevant documents." Bateman v. Bd. of Appeals of Georgetown, 56 Mass. App. Ct. 236, 239 (2002); Boorstein v. Massachusetts Port Authy., 370 Mass. 13, 17 n. 6 (1976). Here, the relevant documents are the BRA's 1965 and 1970 Orders of Taking, and the Downtown Waterfront-Faneuil Hall Urban Renewal Plan dated April 15, 1964 as amended ("1964 Urban Renewal Plan"). RA0520-0522; RA0512-0518; RA0466-0511. The BRA's 1965 Order of Taking explicitly described the purposes of the taking:

> WHEREAS the Boston Redevelopment Authority . . . determined that the area hereinafter described within the City of Boston constitutes a substandard and decadent area . . . and further determined in accordance with . . . all other powers granted by said Chapter 121 that a project for the assembly and renewal of said area, hereinafter called the "Downtown Waterfront-Faneuil Hall Project Area" described in "Annex A," ought to be undertaken
>
> WHEREAS the Boston Redevelopment Authority has determined that the taking in fee simple by eminent domain of said area . . . is necessary and reasonably required to carry out the purposes of the Housing Authority Law and said Urban Renewal Plan

RA0520-0522. The BRA then acquired the Long Wharf Pavilion by means of the 1970 Order of Taking which incorporated the 1965 Order of Taking. RA0512-0518. The 1964 Urban Renewal Plan defined the planning objectives and goals for the land taken and created a framework of initial proposed uses to meet the planning goals. RA0466-0511. In addition to the objectives and goals outlined in the BRA's principal brief at pp. 9-11, the 1964 Urban Renewal Plan specified:

> SECTION 202 Planning Objectives
>
> . . .
>
> (5) To encourage productive and intensive use of land.
>
> SECTION 203 General Design Principles
>
> . . .
>
> (2) To establish an active urban character for the area by the intensive utilization of land and by the mixing of compatible land uses.
>
> SECTION 304 Public Improvements
>
> Public improvements will include, as necessary, the abandonment, provision, improvement, extension, reconstruction, construction, and installation of utilities . . . streets, rights-of-way, open space, and other facilities in order to carry out the provisions of the Urban Renewal Plan.

SECTION 902 Relationship to Definite Local Objectives

. . .

(4) The Plan will provide a system of public open spaces within the project which will facilitate pedestrian access and heighten the appeal of the new buildings. This goal has long been an important part of the planning objectives for the area.

RA0473; RA0475; RA0480; RA0503. Significantly, the BRA possesses the power to modify the 1964 Urban Renewal Plan at any time, subject to certain restrictions.[2] RA0505 §1101.

The central premise of the Resident Appellees' argument reveals a fundamental misunderstanding of urban renewal. The Resident Appellees state: "Urban renewal land, if taken for Article 97 purposes, is protected by Article 97." Brief of Plaintiffs-Appellees, p. 37. This circular argument is based on the misguided idea that any references in an urban renewal plan to open space or parks means the land is

[2] In accordance with § 1101 of the 1964 Urban Renewal Plan, material alterations to the requirements, controls, or restrictions may require the developers' consent and/or the approval of the Boston City Council and State Division of Urban and Industrial Renewal.

covered by Article 97.[3] However, as the Supreme Court explained almost sixty years ago, in urban renewal "the power of eminent domain is merely the means to the end." Berman v. Parker, 348 U.S. 26, 33 (1954). Removing the harm - the slum, the blight, the nuisance - is the public purpose for which takings may be made, and the subsequent use, whether a sale to a private developer or use as a park, is incidental. M.G.L. ch. 121B §45; see id. at 35; see also J.D. Masterman, Real Estate Title Practice, §13-1 (2d ed. 2010).

Creating parks and conserving natural resources is not the primary objective of urban renewal, but a means to eliminate blight. A prime example is the 1964 Urban Renewal Plan. The BRA sought to "establish an active urban character for the area by the intensive utilization of land" and simultaneously "provide a system of public open spaces within the project which will facilitate pedestrian access and

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[3] Amicus Sierra Club makes much the same argument. Notably, the Sierra Club misquotes this Court's Amicus Brief Announcement by inserting the words "dedicated to public use as open space." The docket entry dated June 11, 2012 states: "The issue presented is whether certain land on the eastern end of Long Wharf in Boston is protected under Article 97 of the Massachusetts Constitution, requiring a two-thirds vote of the Legislature to effect a disposition or change in use of the land."

heighten the appeal of the new buildings." RA0475 §203; RA0503 §902. Acknowledging that pedestrian access and open space "has long been an important part of the planning objectives for the area" the 1964 Urban Renewal Plan called for, among other things, "the abandonment, improvement, or construction of . . . rights-of-way [and] open space . . ." RA0503 §902; RA0480 §304. At Long Wharf, as in many other parts of the City of Boston that have benefitted from BRA planning, the "intensive utilization of land" co-exists with green space.

In contrast to urban renewal, land is acquired under Article 97 because it is "a resource which could best be utilized and developed by being conserved within a park." Op. Atty. Gen. 142 (June 6, 1973). By definition then, a taking under Article 97 is to preserve the character of the land, whereas an urban renewal taking is to change the present use of the land. The environmental and conservation purposes of Article 97 are distinct from urban renewal, just as they are distinct from a taking for highway purposes, or a taking for airport purposes.[4] The BRA is not

[4] Cf. Hanrahan v. Town of Fairhaven, 1998 WL 90741 n. 5 (Mass. Super. 1998) ("When the Town took the Old

arguing that the urban renewal statute trumps the state constitution, as Resident Appellees contend. Brief of Plaintiffs-Appellees, p. 19. Rather, by its plain language, Article 97 only protects land "taken or acquired" for environmental or conservation purposes, and subsequent use of land as park or open space cannot change the statutory purpose of the taking.

III. THE PRIOR PUBLIC USE DOCTRINE IS NOT APPLICABLE TO LONG WHARF, AS THE PARCEL WAS BLIGHTED PRIOR TO THE TAKING AND LONG WHARF HAS NEVER BEEN DEVOTED TO ONE PUBLIC USE.

The doctrine of prior public use is a judicially evolved concept to further the Commonwealth's policy of protecting public parkland. Brookline v. Metropolitan Dist. Comm'n, 357 Mass. 435, 439-440 (1970); Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969); Sacco v. Department of Pub. Works,

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Railroad Bed by eminent domain, it was taken for sewer, parking and highway purposes. Accordingly, Article 97 does not apply. Although there is a playground in the school yard, the Bates land was acquired for school purposes, not environmental or conservation purposes."); Op. Atty. Gen. 61 (April 12, 1976) (Article 97 would not restrict Massport from transferring Belle Isle Marsh to the Metropolitan District Commission because "the land in question was acquired for airport purposes and not for the conservation-related purposes enumerated in Article 97.")

352 Mass. 670, 673 (1967); Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 419 (1966). These cases stand for the proposition that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end. However, the prior public use rule "applies only to those lands which are in fact devoted to one public use." Muir v. Leominster, 2 Mass.App.Ct. 587, 591 (1974). In Muir, Leominster had used the land for a time as a playground. The Muir Court found that there had been neither prior legislative authorization of a taking for a particular public purpose nor a prior public or private grant restricted to a particular public purpose. Id. As a result, the city was not required to continue to use the land as a playground, or for any particular purpose, but could use it as the city saw fit based on the municipality's changing needs. Id. at 592.

In this case, it cannot be disputed that Long Wharf was not a park before the BRA took it by eminent domain. It was a working fish wharf covered with warehouses in the early part of the twentieth century (RA0434) which had fallen into disuse and deteriorated

by the 1950s. As discussed *supra*, the BRA's statutory authority to take Long Wharf was based on the finding that the area was blighted, decadent, or substandard. M.G.L. ch. 121B §§ 11, 45. The BRA's eminent domain action in 1965 was not a taking for one particular purpose, as the land could be re-utilized for any public use or benefit described in M.G.L. ch. 121B §45[5] to eliminate blight.

The BRA's urban renewal efforts, detailed in its principal brief at pp. 13-16, transformed Long Wharf over the past four decades from a dilapidated pier to a vibrant marina and pedestrian destination on Boston's waterfront. Consistent with the 1964 Urban Renewal Plan, a portion of Long Wharf is open space and the perimeter of Long Wharf is part of the Harborwalk.[6] The Long Wharf Pavilion at issue in this

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[5] The statute lists as "public uses and benefits" "residential, governmental, recreational, educational, hospital, business, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces." Mass. Gen. Laws Ann. ch. 121B, § 45

[6] The Boston Harborwalk Initiative is the centerpiece of the City's harbor agenda to provide public access to the waterfront. The BRA began the Harborwalk planning process for the waterfront in the early 1980s with the goal of creating a continuous 47-mile waterfront walkway along Boston Harbor. The Harborwalk connects the city's neighborhoods to its

case, created pursuant to the BRA's urban renewal powers as an MBTA vent structure, remains subject to the 1964 Urban Renewal Plan. Accordingly, the use of the Long Wharf Pavilion may be modified depending on what is needed to eliminate blight and prevent its recurrence. RA0505 §1101; M.G.L. ch. 121B §45; see also Comm'r of Dept. of Community Affairs v. Boston Redevelopment Authority, 362 Mass. 602, 615 (1972) (legislative scheme vests urban renewal agencies like BRA with expertise and discretion to determine best manner to eliminate blight as conditions change over time).

CONCLUSION

This Court should determine that the Long Wharf Pavilion is not subject to Article 97. The inescapable conclusion of black letter law regarding eminent domain and statutory construction is that M.G.L. ch. 121B does not confer upon the BRA the authority to effectuate an Article 97 taking. The BRA's eminent domain power derives only from M.G.L.

Harbor, leading to recreational, cultural, and historic attractions, and direct connections to public transit, including water transportation facilities. RA1038-1053.

ch. 121B §§ 11, 45, and, regardless of the use to which the land is later put under an urban renewal plan, such land is not within the scope of Article 97. The doctrine of prior public use has no applicability to the Long Wharf Pavilion because the parcel was blighted before the BRA's eminent domain taking and it was never devoted to one public use after the taking.

Respectfully submitted,

Boston Redevelopment Authority

By its attorneys,

Denise A. Chicoine (BBO# 564152)
Debra C. Leggett (BBO# 633456)
ENGLANDER, LEGGETT & CHICOINE P.C.
44 School Street, Suite 800
Boston, MA 02108
Tel. (617) 723-7400

Date: September 20, 2012

CERTIFICATE OF SERVICE

I hereby certify, under the penalties of perjury, that I have made service, on this 20th day of September, 2012, of the following:

Reply Brief of Appellant Boston Redevelopment Authority

upon counsel of record, by hand, addressed as follows:

For Plaintiffs-Appellees Sanjoy Mahajan, et al.

Gregor I. McGregor, Esq.
Luke Legere, Esq.
McGregor & Associates
15 Court Street, Suite 500
Boston, MA 02108

For Defendant-Appellant Mass. DEP

Annapurna Balakrishna, Esq.
Assistant Attorney General
Office of the Attorney General
One Ashburton Place,
Boston, MA 02108

For Amicus Curiae The Sierra Club

Thomas B. Bracken, Esq.
33 Mount Vernon Street,
Boston, MA 02108

Denise A. Chicoine (BBO# 564152)
dchicoine@elcpc.com
ENGLANDER, LEGGETT & CHICOINE P.C.
44 School Street, Suite 800
Boston, MA 02108
Tel. (617) 723-7400

Certificate of Compliance
Pursuant to Mass. R. A. P. 16(k)

I, Denise A. Chicoine, hereby certify that the foregoing brief 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, etc.);

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).

Denise A. Chicoine (BBO# 564152)
dchicoine@elcpc.com
ENGLANDER, LEGGETT & CHICOINE P.C.
44 School Street, Suite 800
Boston, MA 02108
Tel. (617) 723-7400