COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11134

SANJOY MAHAJAN, *ET AL.*,
Plaintiffs-Appellees

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND BOSTON REDEVELOPMENT AUTHORITY,
Defendants-Appellants

ON DIRECT APPELLATE REVIEW
FROM A JUDGMENT OF THE SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

BRIEF OF *AMICUS CURIAE* SHIRLEY KRESSEL IN SUPPORT OF PLAINTIFFS-APPELLEES SANJOY MAHAJAN, *ET AL.*

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October 19, 2012

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Statement of the issue

Whether urban-renewal land, including the land at the eastern end of Long Wharf, is exempt from Article 97 of the Massachusetts Constitution.

Statement of interest

Shirley Kressel is a landscape architect and urban designer by training (Master of Landscape Architecture, 1983, University of Pennsylvania) and profession. She has spent much of her 19 years in Boston engaged in activism involving planning and development. In doing so, she has studied the workings of the Boston Redevelopment Authority (BRA), publishing many newspaper pieces about it, and testifying at numerous BRA and City Council hearings. She co-founded an organization of civic associations called the Alliance of Boston Neighborhoods (ABN) to share information about development and to advocate for reform. She is known among community activists and the press as one of the most knowledgeable citizens on the workings of the BRA. She appreciates this opportunity to contribute to the Court's consideration of the applicability of Article 97 to the public open spaces created under urban renewal.

Statement of the case and facts

For brevity and judicial economy, amicus adopts

Plaintiffs-Appellees' Statement of the Case and Statement of Facts.

Argument

I. The BRA was informed by the Office of the Attorney General that public open space acquired for urban renewal is subject to Article 97

In 1997, the BRA participated in a joint-venture proposal for a commercial-development project on part of City Hall Plaza, just as it is proposing for Long Wharf. As a result, the United States General Services Administration, represented by the United States Attorney's office for the District of Massachusetts, asked the Massachusetts Attorney General's office for its opinion on the applicability of Article 97. Letter of December 16, 1997 from Thomas H. Green, First Assistant Attorney General, to Thomas N. O'Brien, Director, BRA ("AG Letter," attached as Addendum A.), p. 1. The conclusion, "based on an extensive review of the past 35-year history of development plans and documents relating to City Hall Plaza," was that Article 97 applies to City Hall Plaza, and that the proposed project would therefore require a two-thirds vote of the Legislature. *Ibid*. The reasoning applies as well to Long Wharf.

Then, as now, the BRA argued that it may amend its urban renewal plans as it wishes. See AG Letter, fn. 2, p. 2. This argument, when applied to public open

spaces, was rejected out of hand: "Article [97] would have no meaning if it could be evaded by 'boilerplate' language that contemplated the possibility that the land be put to a different use." *Ibid.*

Then, as now, the BRA argued that the open space that it wished to redevelop was merely incidental or a "support" for development uses. AG Letter, p. 3. This argument, a central BRA claim in the case before this Court, was also rejected, quoting the BRA's Government Center Urban Renewal Plan, which emphasized the importance of this public space in accomplishing urban renewal. *Ibid.*

The criteria by which the land was determined to be subject to Article 97 included the following:

1. At acquisition and thereafter, the parcel's intended uses were limited to public open space. *Id.*, p. 2. Similarly, Long Wharf was designated as public open space in the BRA's Downtown Waterfront-Faneuil Hall Urban Renewal Plan and in subsequent BRA planning documents, government maintenance grant proposals, and City of Boston documents. Plaintiffs' Brief, pp. 11-13, pp. 28-29; Superior Court decision, RA2383-2384.
2. The open space was integral and essential to the Government Center Urban Renewal Plan, which stated that this land "shall be devoted to public open space." AG Letter, p. 2, quoting Government Center Urban Renewal Plan at 30. Similarly, Long Wharf would "retain its historic

position as the farthest projection of land into the harbor," would "become an observation platform," and is classified on the "Proposed Land Use" map as "public open space." Downtown Waterfront-Faneuil Hall Urban Renewal Plan, RA0477, RA0510.

3. The urban-renewal plan designation of the use as public open space had not been amended before Article 97 was adopted in 1972. AG Letter, p. 2. Similarly, the Downtown Waterfront-Faneuil Hall Urban Renewal Plan still lists Long Wharf as public open space. RA0510. A December 13, 1973 amendment to this Urban Renewal Plan specifically describes Long Wharf as "3 acres of public open space," and includes an updated Proposed Land Use map, also dated December 13, 1973, with shading showing Long Wharf, once again, as "public open space." BRA Document No. 2672, listed in the Amendments to the Downtown Waterfront-Faneuil Hall Urban Renewal Plan, RA0507.[1] The record does not contain any other amendments concerning Long Wharf, either before or after 1972, that would change its status from public open space (the amendment of May 29, 1975 concerns only the hotel portion of the wharf).

4. City Hall Plaza had been used as public open space since

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[1] The document itself is archived and available online at http://archive.org/details/amendmentstodown1115bost The relevant pages in the PDF file there are pp. 8 ("3 acres"), 21 (Land Use map), and 34 (magnified copy of the relevant portion of the map).

> the urban-renewal taking. AG Letter, p. 3. Similarly, Long Wharf continues to be used today as public open space. On Long Wharf stands a 1989 bronze plaque, erected by the BRA, dedicating "Long Wharf Park." RA2103. More recently, the BRA's 2006 Request for Proposals acknowledged "a small public plaza area ... immediately adjacent" to the shade pavilion that would be converted into a restaurant. RA0911.

For City Hall Plaza, these considerations led to the following conclusion: "Given this documentation and public record, there is no doubt that City Hall Plaza was acquired for `public open space.' Accordingly ... pursuant to Article [97], a two-thirds roll-call vote of the Legislature is required for a change in use or ownership ... ." AG Letter, p. 4. For Long Wharf, given the extensive evidence in the public record cited by the Plaintiffs and the Superior Court, the conclusion can be no different.

II. The BRA creates a false dichotomy between urban renewal and Article 97 purposes

The BRA's fundamental, incorrect argument in this case, repeated in closely similar formulations, is that urban renewal is separate from Article 97, and therefore that the BRA cannot take land for Article 97 purposes:

> The extent of the BRA's power of the land thus taken is circumscribed by the overriding purpose

> of eliminating substandard, decadent, or blighted conditions. BRA Reply Brief, p. 3.
>
> In summary, there is nothing in the text of G.L. 121B saying that the BRA may take for conservation or environmental purposes ... . Therefore the BRA does not have the power to take land for Article 97 purposes. *Ibid.*
>
> 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. *Id.*, p. 8.
>
> 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." *Ibid.*
>
> The environmental and conservation purposes of Article 97 are distinct from urban renewal ... . *Ibid.*

These grouped claims fail for several reasons:

1. Article 97 need not be expressly invoked in a statute for its purposes to fall within Article 97.
2. The plain text of the BRA's enabling act, G.L. 121B, gives the BRA the power to take land for Article 97 purposes.
3. The BRA took Long Wharf for, among other Article 97 purposes, historic-resource purposes.
4. The Appeals Court, in *Aaron v. BRA*, 66 Mass. App. Ct. 804 (2006), found that urban renewal is fully consonant with Article 97 purposes.
5. The BRA, in its brief in *Aaron v. BRA*, already conceded that urban renewal is fully consonant with Article 97 purposes.

These reasons are discussed in the sections following.

A. Article 97 need not be expressly invoked in a statute for its purposes to fall within Article 97

First, the BRA's claims reflect a confused understanding of Article 97. Land cannot be acquired "under Article 97." Rather, lands and easements are acquired under statutes, such as G.L. 121B; when the purpose of the acquisition falls within the purposes enumerated in Article 97, the lands and easements may not be disposed of without a two-thirds vote of the Legislature. Article 97 of the Massachusetts Constitution. The statute need not even expressly invoke the "general purposes of Article 97" for Article 97 protection to apply. *Op. Atty. Gen.* No. 45 ("Quinn Opinion"), Rep. A.G. Pub. Doc. No. 12 (June 6, 1973), 142.

Furthermore, the BRA's bald distinction between "preserv[ing] the character of the land" (alleged to be within Article 97's ambit) and "changing the present use of the land" (alleged to be the province of urban renewal) is false empirically. BRA Reply Brief, p. 8. Land is often taken from one use and turned into parkland or public open space--for example, the Paul Revere Mall in the North End of Boston, once mostly tenement housing and now public open space protected by Article 97. Boston Parks and Recreation Department *Open Space Plan 2002-2006*, RA1831 (Article 97 protection of Paul Revere Mall).

B. The plain text of the BRA's enabling act, G.L. 121B, gives the BRA the power to take land for Article 97 purposes

Second, the BRA's enabling act, G.L. 121B, grants the BRA the power to take land for "parks ... and other open spaces." G.L. 121B §45. Public open spaces, such as the end of Long Wharf, are natural resources "given protection under Article 97." Quinn Opinion, 147. Furthermore, conservation is a specifically enumerated purpose of the statute: "[T]he ... conservation ... of such areas [is a] public use[] for which private property may be taken by eminent domain," and "[A]ll powers relating to conservation and rehabilitation conferred by this chapter are for public uses and purposes for which public money may be expended and said powers exercised." G.L. 121B §45.

C. The BRA took Long Wharf for, among other Article 97 purposes, historic-resource purposes

Third, the BRA's argument at Long Wharf also fails as a matter of fact. The overall goal of the Downtown Waterfront-Faneuil Hall Urban Renewal Plan included "symboliz[ing] the importance of Boston's historic relationship to the sea." RA0474. For Long Wharf in particular, the BRA specified the following design objective: "Long Wharf is to retain its historic position as the farthest projection of land into the harbor, and will become an observation platform." Urban Renewal Plan §204(1)(f), RA0477. Thus, Long Wharf, a

National Historic Landmark before the BRA's taking, was taken for historic-resource purposes (in addition to the Article 97 purposes enumerated by the Superior Court).[2] Certificate of the Secretary of EEA on the ENF, RA1242 (National Historic Landmark). Historic resources are among the natural resources protected by Article 97. Quinn Opinion, 143.

However, the BRA has attempted to hide from public view the protected status of the site. At one time its owned-land database described Long Wharf, in the "Notes" section of the database entry, as a "Park at end of wharf with benches." Entry on Long Wharf from Defendant BRA's Owned Land Database, RA2105. This evidence was cited by the Superior Court. RA2383 (fn. 6). The current entry for Long Wharf no longer includes the notes, and bears a notation, "Last update: 11/25/2011." Current database entry for Parcel ID 0303004000, accessed online at the BRA's web site, 8/11/2012. Thus, some time after Plaintiffs' printing of the entry, and likely after its use in the Superior Court proceedings, the BRA altered its database site to efface this important evidence against interest.

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[2] Indeed, the BRA's plans for the seaward end of Long Wharf included programming it as the "Long Wharf Historic Park with information about its history." Boston Harbor Challenges and Opportunities for the 1980's, RA2161.

D. The Appeals Court, in *Aaron v. BRA*, found that urban renewal is fully consonant with Article 97 purposes

Fourth, in *Aaron v. BRA*, *supra*, the Appeals Court found that "urban renewal, concerned, as it is, with the improvement of the environment and surroundings in which the people of the Commonwealth live," is fully consonant with "the other public purposes found therein [in G.L. 260 §31]." *Aaron v. BRA* at 810. These public purposes in G.L. 260 §31, namely "conservation, open space, parks, recreation, water protection, and wildlife protection," are all Article 97 purposes. Quinn Opinion, 142-143, 147. In short, urban renewal is fully consonant with Article 97.

E. The BRA, in its brief in *Aaron v. BRA*, already conceded that urban renewal is fully consonant with Article 97 purposes

Finally, the BRA has already conceded that urban renewal and Article 97 purposes are consonant: It did so in its brief to the Appeals Court in *Aaron v. BRA*, a case cited by the BRA in its brief in the case at bar. BRA Brief (in case at bar), pp. 23, 30-31. The BRA's arguing differently now, for this Court, is at best disingenuous. For in its *Aaron* brief to the Appeals Court, the BRA rightly connected urban renewal to Article 97 purposes: "In addition to the fact that recreation, parks and open space are uses delineated in Chapter 121B, the entire urban renewal statute is aimed

at improving the physical environment in which people live and benefiting the health, safety and welfare of the community." Brief of Defendant-Appellee Boston Redevelopment Authority in *Aaron v. BRA* ("BRA's Brief in *Aaron*"), p. 17 (the cited pages from this brief are attached in Addendum B.). The BRA then explained that "[c]ontrary to [plaintiff]'s unsupported assertion that the public purpose of urban renewal is in discord with Section 31's proviso [listing environmental purposes], urban renewal is intimately concerned with addressing the physical environment in which people live, work and play." *Id.*, p. 18.

Now the BRA makes the same unsupported assertion as the plaintiff in *Aaron*, and it fails for the same reason. As the BRA stated in the title of Section C of its *Aaron* brief, "The Public Purpose Of Urban Renewal Includes Uses Of Urban Renewal Land For Parks, Recreation and Open Space As Well As For Development Of Buildings." *Id.*, p. 29. Here is the BRA's justification:

> Chapter 121B's Declaration of Necessity as set forth in the statute expressly provides that "the acquisition, planning, clearance, conservation, rehabilitation, or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, *recreational*, educational, hospital, business, commercial, industrial or other purpose, including provision of streets, *parks, recreational areas*, and other *open spaces*, are public uses and benefits[.]" G.L. 121B §45. The legislative declared necessity

> of urban renewal clearly contemplates that land may be acquired by eminent domain pursuant to a valid urban renewal plan for, *inter alia*, residential and recreational uses, which may include, but are not limited to, the planning and provision of parks and open space.

BRA's Brief in *Aaron*, p. 29 (emphasis added by BRA).

The emphasized provisions, and emphasized by the BRA, are Article 97 purposes. The BRA should not now be heard making the incorrect claims that it rebutted so well in *Aaron* (and which rebuttals were adopted in the Appeals Court decision). As the BRA said of the plaintiff's attempt in *Aaron* to distinguish urban renewal from environmental purposes, and as applies equally to the BRA now, "[t]his reasoning is incorrect and largely based on a misreading of the urban renewal statutes ... ." *Id.*, p. 23.

III. The BRA invents a spurious distinction between primary and incidental purposes regarding urban renewal

Faced with the plain text of its own enabling act, which references Article 97 purposes such as public open space and parks, the BRA invents a spurious distinction between "primary" purposes, allegedly urban renewal itself, and "incidental" purposes--allegedly the Article 97 purposes mentioned in G.L. 121B. In support, the BRA quotes one sentence from *Berman v. Parker*, 348 U.S. 26, 33 (1954): "For the power of eminent domain is merely the means to the end." BRA

Reply Brief, p. 7. However, even a cursory look at the holding in *Berman* defeats the BRA's attempts to stretch it to apply here, because the means-ends distinction in *Berman* was made to decide a constitutional question unrelated to the one before this Court.

The relevant extract from *Berman* is the following: "For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman*, at 33.[3] The means-ends distinction was relevant in *Berman* because the constitutionality of the urban-renewal statute under the Fifth Amendment turned upon the validity of the ends as a public purpose. *Id.*, at 31.

In contrast, the constitutional question in the case at bar, and obscured by the various BRA word plays, is not whether parks, plazas, and public open space are a means, but simply whether the BRA may take

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[3] The BRA's proclivity to omit relevant sentences also compromises its discussion of the doctrine of prior public use and *Muir v. Leominster*, 2 Mass. App. Ct. 587 (1974). Quoting *Muir*, at 591, the BRA claims that prior public use applies only if there is "legislative authorization of a taking for a particular purpose" or a "grant restricted to a public purpose." BRA Reply Brief, p. 10. Even ignoring the extensive documentation assembled in this case showing a taking of Long Wharf under G.L. 121B for public open space, this selective quotation from *Muir* omits another route to protection under prior public use: "formal dedication ... of this area as park land." *Muir*, at 592. Here, the BRA laid a large bronze plaque dedicating "Long Wharf Park." RA2103.

land for Article 97 purposes. Here the means-ends distinction is irrelevant: Article 97 contains no language requiring that the specified purposes be legislative ends rather than means before "lands and easements taken or acquired for such purposes" are protected by Article 97. Rather, Article 97 is to be "very broadly construed." Quinn Opinion, 142-143.

To evade the broad reach of Article 97, the BRA attempts to deny itself any power to take lands for Article 97 purposes. However, as the BRA argued in *Aaron*, the plain language of the BRA's enabling act gives it this power (see this brief, pp. 8, 10-12). It could hardly be otherwise. In *Berman*, the Supreme Court expressly called out creating parks and public open spaces as a valid public purpose whose furtherance was essential to the area's redevelopment:

> It was important to redesign the whole area so as to eliminate the conditions that cause slums--the over-crowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. ... The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers.[4]

Berman, at 35-36.

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[4] Just as in *Aaron*, and directly contrary to the BRA's argument in the case at bar, *Berman* supports the proposition that provision of parks is among the purposes of takings for urban renewal.

Regardless of whether the BRA took any parks, or this park, as an urban-renewal end or an urban-renewal means, they are protected by Article 97. A park is a park; a rose is a rose. The BRA's attempted end-means distinction is a distinction without a difference.

Article 97 applies no matter when and no matter why BRA took land for a park. Article 97 applies retroactively to parks already taken without mentioning Article 97, before Article 97 existed. There is no exception within Article 97 for urban-renewal parks. Article 97 applies across the board to all state and local government agencies, even relatively independent authorities like housing authorities, port authorities, and turnpike authorities, and certainly to a redevelopment authority of the City of Boston.

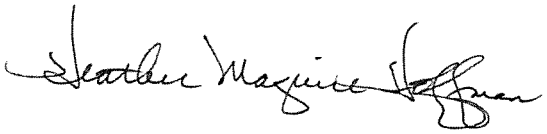
As Assistant Attorney General Thomas Green pointed out for City Hall Plaza, the Constitution does not forbid the BRA's project. It merely requires a high level of public support, as evidenced by a two-thirds roll-call vote of the Legislature (to prevent "ill-considered misuse or other disposition of public lands and interests held for conservation, development, or utilization of natural resources"). AG Letter, p. 4; Quinn Opinion, 148. The decision to go forward or not appropriately rests with the Legislature, the historical custodian and protector of the public's rights in parks. See *Lowell v. Boston*, 322 Mass. 709,

735 (1948). The BRA proposes, but, under our Constitution, the Legislature disposes.

Conclusion

For the reasons set forth above, amicus requests this Court to affirm the judgment of the Superior Court.

Respectfully submitted,
Shirley Kressel
by her attorney,



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Dated: October 19, 2012

Rule 16(k) certification

I, Heather Maguire Hoffman, certify that the 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);

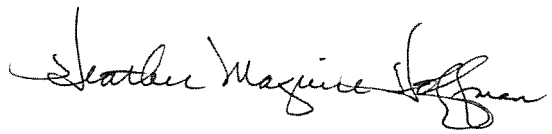
Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

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).



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Dated: October 19, 2012

Addendum A. **Letter of December 16, 1997 from Thomas H. Green, First Assistant Attorney General, to Thomas N. O'Brien, Director, BRA**

SCOTT HARSHBARGER
ATTORNEY GENERAL
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The Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, M.A. 02108 1698

December 16, 1997

BY FAX AND BY MAIL

Thomas N. O'Brien, Director
Boston Redevelopment Authority
Boston City Hall
Boston, MA 02201

Re: Applicability of Article 49 to proposed hotel and garage on City Hall Plaza

Dear Director O'Brien: Tom

I am writing you regarding a question of state law relating to the City Hall Plaza project. As you know, the United States Attorney's office for the District of Massachusetts, acting as counsel to the General Services Administration, sought our office's legal advice regarding the applicability of Article 49[1] of the amendments to the Massachusetts constitution to the proposed construction of a 350 room hotel and 700 car parking garage on City Hall Plaza. The question was presented to the state Attorney General's office by federal authorities because it involves an interpretation of state rather than federal law.

Article 49 and its common law predecessor, the "prior public use" doctrine, both require specific legislative approval for changes in use or ownership of certain kinds of public lands, including open public space and park land. This office has concluded, for the reasons set forth below, that Article 49 applies to the proposed City Hall Plaza project. Accordingly, this office believes that a two-thirds vote of the Massachusetts legislature is required prior to a change in use or ownership of City Hall Plaza from open public space to a private hotel and garage.

Our conclusions are based on an extensive review of the past 35 year history of development plans and documents relating to City Hall Plaza. This review reveals conclusively that the Plaza was expressly acquired by the City of Boston from the Boston Redevelopment Authority (BRA) as dedicated public open space. At the time of that acquisition, and thereafter, the parcel's permitted uses were expressly confined and dedicated to public open space. This

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[1]The language currently appearing in Article 49 was added in 1972 when the people voted to approve Article 97 of the Amendments to the Massachusetts constitution. In light of state constitutional history, what actually now appears as Article 49 is often referred to as Article 97. We will refer to the applicable language as "Article 49," the more proper designation.

public purpose also was an integral part of the overall design of the project, a part of the larger effort to renew the Government Center area formerly known as Scollay Square.

Permitted Uses Restricted To Public Open Space

At the time that Article 49 was adopted by the voters, City Hall Plaza was owned by the City of Boston, which had acquired it from the BRA in 1967. In the deed through which it acquired the property, the City agreed:

> Until May 25, 2004, to devote the granted premises to, and only to, the permitted uses specified in Chapter III of the Urban Renewal Plan for the Government Center Urban Renewal Area adopted by the Grantor on June 5, 1963, and approved by the City Council on May 25, 1964. . . .[2]

In the above-referenced section on the permitted use of Parcel 11, the site of the Plaza, Chapter III of the Urban Renewal Plan expressly stated that this land "**shall be devoted to public open space.**" Government Center Urban Renewal Plan at 30. (emphasis supplied). The Urban Renewal Plan's designation of the use of the Plaza parcel was not amended between 1967 (the acquisition date) and 1972 (when article 49 was adopted); indeed, it remains in place today.

Intended Uses Limited To Open Public Space

Our conclusions regarding the express documentary limitations on the public purposes for which the Plaza could be used are supported by a review of the public record regarding the intended uses of the Plaza. This record makes clear that the Plaza was not merely the space left over after the surrounding buildings were constructed, but a carefully designed piece of public space that was itself an integral part of the overall design of the redevelopment project.

As early as 1958, the planning for the redevelopment called for public open spaces as an integral part of the project. The project was described as a "civic center surrounded by large sweeping plazas, terraces and squares to attract pedestrians to the heart of the city." The Boston

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[2]The BRA notes that, while the City's deed required compliance with the Urban Renewal Plan, it also acknowledged that the Urban Renewal Plan may be amended from time to time. The applicable question, however, is whether the City acquired the land in 1967 for a use that was later made subject to Article 49. The evidence cited in this letter demonstrates that it did. Moreover, Article 49 would have no meaning if it could be evaded by "boilerplate" language that contemplated the possibility that the land be put to a different use.

Globe, October 16, 1958, p.3. A 1959 City Planning Board report called "the establishment of a new civic square" one of the "Basic Planning Objectives" for the Government Center project.

Similarly, architect I.M. Pei's master plan -- which was done prior to the order of taking through which the BRA originally acquired the land in October 1961 -- itself designates that Parcel 11, the site of City Hall Plaza, to be public open space. In addition, at a June 1963 Boston City Council hearing, Pei's partner Henry N. Cobb described the Plaza as "**the major public open space to be created by the Plan.**" (emphasis supplied)

At the 1963 unveiling of the final Government Center Plan, the BRA itself described its plan for the Plaza in this manner:

> The strong focal point of the Government Center will be the new City Hall and the Government Center Plaza. Comparable as a **monumental public space** to the most famous squares in Europe...(the) City Hall and the new plaza together will be "**comparable in function and relationship to the town meeting house and common** in an old-time New England village...(emphasis supplied)

While many have questioned whether the Plaza has lived up to this vision, the history of its development makes clear, for Article 49 purposes, that the property was acquired for public open space and public gathering purposes, not for private development. Of course, this understanding of the Plaza's intended purposes also is supported by its actual use for 30 years, during multiple BRA and City administrations, as a public open space. Indeed, Mayor Menino himself has characterized the Plaza as "Boston's primary public space (that) must be open and accessible to people in Boston at all times and must serve as a collective home for all people..." **City Record**, Vol. 87, No. 51, December 18, 1995.

Given this extensive public record, BRA Counsel's memorandum to this office, citing an out-of-context Urban Renewal Plan reference to the Plaza as "support" for "public and private office space," is unpersuasive.

Your outside counsel's effort to limit the scope of Article 49's application to "parks" that consist of parcel(s) of "undeveloped, natural land" seems at odds with the concept of urban public space preservation, and certainly runs counter to the broad public policy underlying Article 49, as interpreted by prior Attorneys General and the courts. As Attorney General Quinn opined in 1973, Article 49 is to be "very broadly construed" and "parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify." 1973 Opinion of the Attorney General No. 45, Pub. Doc. No. 12 at 142-43. The Attorney General is loathe to depart from this opinion of his predecessor and accordingly rejects the interpretation offered by BRA

...ined that Article 49's application to "parks" is limited to "undeveloped, natural land." BRA's counsel's alternative view, which would limit the scope of Article 49 to "natural resources," fails not only because the constitutional language is broader, but also because "natural resources" are commonly understood to include "open space" and "parks." See G.L. c. 12, § 11D; c. 214, § 7A.

Conclusion

In its reviews of Article 49 issues, this office has rarely seen documents and public history this clear and unambiguous as to the permitted and intended uses of public land. Given this documentation and public record, there is no doubt that City Hall Plaza was acquired for "public open space." Accordingly, we are of the opinion that, pursuant to Article 49, a two-thirds roll-call vote of the legislature is required for a change in use or ownership of the Plaza that includes the construction of a hotel. I note that this conclusion does not mean that the project cannot go forward, but simply that it requires legislative approval.

Thank you for your cooperation with our review of this matter.

Sincerely,

Thomas H. Green
First Assistant Attorney General

cc: Assistant United States Attorney John Capin

Addendum B. Cited pages from brief of BRA to the Appeals Court in *Aaron v. BRA*

1-10-06

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
SUFFOLK COUNTY

NO. 2005-P-1115

MBADIWE OKONGWU
Plaintiff-Appellant

v.

BOSTON REDEVELOPMENT AUTHORITY
Defendant-Appellee

On Appeal from a Judgment of the Superior Court Department of the Trial Court

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BRIEF OF
DEFENDANT-APPELLEE
BOSTON REDEVELOPMENT AUTHORITY

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In addition to the fact that recreation, parks and open space are uses delineated in Chapter 121B, the entire urban renewal statute is aimed at improving the physical environment in which people live and benefiting the health, safety and welfare of the community.

Chapter 121B sets forth a public process for addressing issues of environmental quality in urban areas covered by an urban renewal plan. Chapter 121B defines "urban renewal plan" in part as:

> a detailed plan, as it may exist from time to time, for an urban renewal project, . . . and which plan shall (1) conform to the general plan of the municipality as a whole and be consistent with any definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational, educational and community facilities and other public improvements[.]

M.G.L. c.121B, §1. In turn, Chapter 121B defines, in part, "urban renewal project" as involving "the demolition, removal, or rehabilitation of any such improvements whenever necessary to eliminate unhealthful, unsanitary or unsafe conditions, lessen density, mitigate or eliminate traffic congestion, reduce traffic hazards, eliminate obsolete or other uses detrimental to the public welfare, provide land

for needed public facilities or otherwise remove or prevent the spread of blight and deterioration[.]" M.G.L. c.121B, §1.

Contrary to Okongwu's unsupported assertion that the public purpose of urban renewal is in discord with Section 31's proviso, urban renewal is intimately concerned with addressing the physical environment in which people live, work and play. The public purpose of urban renewal seeks to eliminate those conditions that are unhealthy, unsafe or unsanitary and to provide a public process for addressing and resolving those environmental factors that have a direct and daily affect on citizens of Boston and citizens of this Commonwealth.

2. The Case Law Supports the Conclusion that Urban Renewal Fulfills a Public Purpose.

A taking of land for redevelopment in accordance with an approved urban renewal plan area is a public purpose. Benevolent and Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence, 403 Mass. 531, 539-540 (1988) ("Elks") ("Taking for redevelopment an area which is a 'blighted open area' as defined by G.L. c.121B, §1, is a public purpose.")

adverse possession where, as here, the land was held for a public purpose, Okongwu's claim must be denied as a matter of law.

II. THE DOCTRINE OF EJUSDEM GENERIS DOES NOT FORECLOSE THAT THE PUBLIC PURPOSE OF URBAN RENEWAL IS EXCLUDED FROM SECTION 31'S "OTHER PUBLIC PURPOSE" PROVISO.

Okongwu argues that the doctrine of ejusdem generis, when applied to the statutory proviso contained in Section 31 of General Laws Chapter 260, renders an interpretation that excludes the public purpose of urban renewal. Okongwu readily admits that urban renewal serves a public purpose. See Appellant's Brief at 12. However, he reasons that since land held by the Boston Redevelopment Authority for the public purpose of urban renewal serves an allegedly dissimilar public purpose from land held for those reasons listed in the statutory proviso; namely, conservation, open space, parks, recreation, water protection or wildlife protection, therefore land held for urban renewal was not intended by the Legislature to be within the meaning of "other public purpose." Appellant's Brief at 15.

This reasoning is incorrect and largely based on a misreading of the urban renewal statutes, the

C. The Public Purpose Of Urban Renewal Includes Uses Of Urban Renewal Land For Parks, Recreation and Open Space As Well As For Development Of Buildings.

Chapter 121B's Declaration of Necessity as set forth in the statute expressly provides that "the acquisition, planning, clearance, conservation, rehabilitation, or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, **recreational**, educational, hospital, business, commercial, industrial or other purpose, including provision of streets, **parks**, **recreational areas**, and other **open spaces**, are public uses and benefits[.]" M.G.L. c.121B, §45 (emphasis added). The legislative declared necessity of urban renewal clearly contemplates that land may be acquired by eminent domain pursuant to a valid urban renewal plan for, inter alia, residential and recreational uses, which may include, but are not limited to, the planning and provision of parks and open space.

Okongwu's assertion that the public purpose of urban renewal and the meaning of "other public purpose" proviso within M.G.L. c.260, §31 contradict each other is not supported by the Commonwealth's urban renewal statue. Assuming *arguendo* that Okongwu

Addendum C. Statutes and constitutional provisions

1. G.L. 121B §45

It is hereby declared that substandard, decadent or blighted open areas exist in certain cities and towns in this commonwealth; that each constitutes a serious and growing menace, injurious and inimical to the safety, health, morals and welfare of the residents of the commonwealth; that each contributes substantially to the spread of disease and crime, necessitating excessive and disproportionate expenditure of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution and punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities; that each constitutes an economic and social liability, substantially impairs or arrests the sound growth of cities and towns, and retards the provision of housing accommodation; that each decreases the value of private investments and threatens the sources of public revenue and the financial stability of communities; that because of the economic and social interdependence of different communities and of different areas within single communities, the redevelopment of land in decadent, substandard and blighted open areas in accordance with a comprehensive plan to promote the sound growth of the community is necessary in order to achieve permanent and comprehensive elimination of existing slums and substandard conditions and to prevent the recurrence of such slums or conditions or their development in other parts of the community or in other communities; that the redevelopment of blighted open areas promotes the clearance of decadent or substandard areas and prevents their creation and occurrence; that the menace of such decadent, substandard or blighted open areas is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the acquisition of property for the purpose of eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for

redevelopment incidental to the foregoing, the exercise of powers by urban renewal agencies and any assistance which may be given by cities and towns or any other public bodies in connection therewith are public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the acquisition, planning, clearance, conservation, rehabilitation or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, recreational, educational, hospital, business, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces, are public uses and benefits for which private property may be acquired by eminent domain or regulated by wholesome and reasonable orders, laws and directions and for which public funds may be expended for the good and welfare of this commonwealth.

It is further declared that while certain of such decadent, substandard and blighted open areas, or portions thereof, may require acquisition and clearance because the state of deterioration may make impracticable the reclamation of such areas or portions by conservation and rehabilitation, other of such areas, or portions thereof, are in such condition that they may be conserved and rehabilitated in such a manner that the conditions and evils enumerated above may be alleviated or eliminated; and that all powers relating to conservation and rehabilitation conferred by this chapter are for public uses and purposes for which public money may be expended and said powers exercised.

The necessity in the public interest for the provisions of this chapter relating to urban renewal projects is hereby declared as a matter of legislative determination.

2. G.L. 260 §31

No action for the recovery of land shall be commenced by or in behalf of the commonwealth, except within twenty years after its right or title thereto first accrued, or within twenty years after it or those under whom it claims have been seized or possessed of the premises; but this section shall not apply to the province lands in the town of Provincetown lying north and west of the line fixed by section twenty-five of chapter ninety-one, to the Back Bay lands, so called, in Boston, or to any property, right, title or interest of the commonwealth below high water mark or in the great ponds; provided, further, that this section shall not bar any action by or on behalf of the commonwealth, or any political subdivision thereof, for the recovery of land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose.

3. Article 97 of the Massachusetts Constitution

Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: - The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and 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 hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.