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 ENTRY OF JUDGMENT
FOR THE PLAINTIFFS IN THE SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

BRIEF OF PLAINTIFFS-APPELLEES SANJOY MAHAJAN ET AL.

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STATEMENT OF THE ISSUES

The appeals of the Massachusetts Department of Environmental Protection ("DEP") and Boston Redevelopment Authority ("BRA") raise different issues, which we restate as follows:

1. Whether land designated as public open space at the time it was taken or acquired under G.L. c. 121B is exempt from the requirements of Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"), even though Article 97 does not contain such an exemption. This issue is raised only by BRA.[1]

2. Whether the Chapter 91 license issued by DEP in this case, which allows BRA to lease public waterfront parkland for development of a private, commercial restaurant, is a disposition or change of use of land protected by Article 97. This issue is raised only by DEP.[2]

3. Whether the Plaintiffs are entitled to relief in the form of mandamus and declaratory judgment, as the

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[1] DEP does not contest the Superior Court's ruling that the land at issue is subject to Article 97.

[2] BRA acknowledges on p. 27 of its Brief, footnote 9, that it does not address this issue, but requests permission to submit authorities on it if the Court is inclined to consider it. This is a central issue in the case. The Court should conclude that BRA has waived this issue by failing to argue it in its Brief.

trial judge determined below. DEP and BRA both raise this issue.

STATEMENT OF THE CASE

On or about October 9, 2008, the plaintiffs, as ten residents of Massachusetts and Boston alleging damage to the environment, appealed DEP's written determination to grant BRA a c. 91 license ("License") pursuant to 310 CMR 1.01. Notice of Claim, RA1.

DEP's Office of Appeals and Dispute Resolution ("OADR") held a hearing on the appeal on February 24, March 2, and March 9, 2009. OADR Recommended Final Decision, RA1975. On or about January 29, 2010, DEP issued a final decision affirming the issuance of the License for construction of a restaurant and bar. Final Decision, RA2006. The plaintiffs, all parties to the DEP proceeding and aggrieved by the final decision, filed a complaint in Superior Court pursuant to G.L. c. 30A, sec. 14, G.L. c. 214, sec. 1, and G.L. c. 249, sec. 5, seeking to void the License. Complaint, RA2015. The plaintiffs also sought mandamus to compel compliance with Article 97, and declaratory relief. Id.

In the Superior Court, Judge Fahey found that the land at issue was taken or acquired for Article 97

purposes, that the plaintiffs were entitled to mandamus and declaratory relief, and vacated the License. Memorandum of Decision, RA2384.

BRA and DEP appealed. This Court granted direct appellate review. Plaintiffs seek affirmation of the Superior Court judgment.

STATEMENT OF FACTS

A. Physical Description of the Site

The land at issue is "public waterfront parkland" at the seaward (eastern) end of Long Wharf in Boston Harbor. Certificate of the Secretary of EEA on the Environmental Notification Form (“ENF”), RA1211. Long Wharf is the terminus for the Norman B. Leventhal Walk to the Sea leading from Boston's highest point, Beacon Hill, to Boston's "furthest projection into the harbor." Boston Harborwalk Initiative Website, RA1040.

Photographs of the site are in the Record at RA173-177, RA181-182, and RA439-446.

The seaward end of Long Wharf -- roughly the portion eastward of the Custom House building -- is a plaza of approximately 33,000 square feet (or 180 feet by 180 feet) paved with granite flagstones and open on three sides to the water. DEP Written Determination Approving Chapter 91 license (hereafter, "Written

Determination" or “License”), RA69; Existing Conditions Plan Accompanying Petition of BRA, RA61; BRA aerial photograph of Downtown Waterfront dated March 30, 2008, RA439. Near its southern edge, the plaza contains a large inlaid compass rose, and park benches facing northward across the plaza. Ibid.; Existing Conditions Plan Accompanying Petition of BRA, RA61.

The plaza's northern side contains its only structure: an open-air, 3,430-square-foot timber-and-brick shade pavilion roughly 100 feet long in the east-west direction and 30 feet wide in the north-south direction. BRA aerial photograph of Downtown Waterfront dated March 30, 2008, RA439; RA69; ENF, Attachment E, RA1256; Existing Conditions Plan Accompanying Petition of the BRA, RA61. The shade pavilion is roofed with supporting columns and is open to the air (except for the small enclosed area near its western end that is an emergency exit and ventilation shaft for the MBTA Blue Line). BRA photographs of Long Wharf Pavilion exterior and interior circa 2006, RA441-442; Id., RA443-445; RA1259-1262; RA69.

In front of the pavilion at its eastern (seaward) end are park benches facing the Harborwalk and the water beyond. See two photographs of the Long Wharf pavilion from pre-filed testimony of Thomas Schiavoni, RA181. Along the Harborwalk, between the benches and water's edge, are public binoculars for viewing the harbor. See five photographs of the seaward end of Long Wharf from pre-filed testimony of Mark Paul, RA175.

At the eastern end of the plaza stands a flagpole in the shape of a ship mast. Site Plan Accompanying Petition of BRA, RA60 (showing flagpole as dot in center of square); BRA photographs of view corridor on Long Wharf looking seaward, RA436. At its base is a plaque entitled "Long Wharf Park" and the year 1989; the park's dedicators are listed as "City of Boston," "Boston Redevelopment Authority," "National Park Service," and "Commonwealth of Massachusetts." RA2103.

B. <u>Use of the Park</u>

Numerous witnesses presented testimony during the OADR hearing on the quiet and peaceful character of the seaward end of Long Wharf. Testimony of Anne M. Pistorio, RA188; Sanjoy Mahajan, RA1136, 150; Mark Paul, RA170, 172; Selma Rutenburg, RA183.

Long Wharf is unique among the wharves and parks in the downtown/waterfront area in the combination it provides of expansive harbor views -- surrounded on three sides by, and projecting far into the water -- and a spacious, quiet public space in which to enjoy them. Pre-filed testimony of Sanjoy Mahajan, RA150; Mark Paul, RA170; Selma Rutenburg; RA183.

The park is utilized extensively by residents and visitors for passive-recreation purposes, including for enjoying marine sights and sounds, not least the "superb view of Boston Harbor," and for enjoying its historic character: built between 1711 to 1715, Long Wharf is a National Historic Landmark and the "oldest continuously operated wharf in the nation." Pre-filed or rebuttal testimony of Anne M. Pistorio, RA188; Sanjoy Mahajan, RA1136, 150; Mark Paul, RA170, 172 Selma Rutenburg, RA183; Boston Globe, "Better (and worse) walk", July 28, 2001, RA1185 ("superb view"); ENF, RA1242 ("National Historic Landmark"); BRA's Long Wharf Interpretative Plan, RA1007 ("oldest...wharf").[3]

The park is also the site of "large public gatherings and scheduled public events such as

[3] Plaintiffs agree with BRA's history of Long Wharf on pp. 8-9 of its Brief.

fireworks displays and tall ship events." Written Determination, Special Condition #5b, RA75.

Plaintiffs disagree with the frequent statements in the BRA and DEP Briefs, which are not substantiated by evidence in the record, that the park is underutilized. On the substantial utilization of the park, see Plaintiffs' witness testimony cited above.

C. BRA, City, and State Repeatedly Classify the Site as Public Open Space

BRA, the City of Boston, and state agencies have repeatedly classified the site -- in planning documents and in descriptions of its current use -- as public open space, parkland, and for passive recreation protected by Article 97:

1. BRA's April 1965 "Proposed Land Use Plan, Downtown Waterfront-Faneuil Hall Urban Renewal Area" depicts Long Wharf as "public open space." RA510.

2. In 1979, a Master Plan was prepared for the BRA, covering a large portion of the Boston waterfront, including the land at issue. "Summary of Long Wharf Master Plan," paragraph headed "Planning Background," RA523.[4] The BRA adopted the plan, which committed Long

[4] The Master Plan was prepared by Sasaki Associates, architectural planners and designers. The Summary of Long Wharf Master Plan summarizes the Long Wharf portion of the full Sasaki report "Boston Harbor Challenges and Opportunities for the 1980's." Id.

Wharf to be "developed as a simple, uncluttered, public open space." Id.[5]

3. The full report's specific proposals for Long Wharf include:

> Develop two public open spaces...the [second] at the terminus of the "Walk-to-the Sea." Boston Harbor Challenges and Opportunities for the 1980's, RA2161.
>
> Program the second open space as the Long Wharf Historic Park with information about its history. Id.
>
> Construct sheltered sitting pavilions for the use of waiting boat passengers and the general public... Id.[6]

4. For the Long Wharf project, BRA received $825,000 from the US Department of the Interior, along with a matching grant from the city, for "rebuilding Long Wharf pier as part of a waterfront park and open space system." Boston Globe, March 7, 1980, "Long Wharf design pact OK'd by BRA", RA1181.

5. Long Wharf was renovated in the 1980's with funds from the federal government through the Land and Water

[5] The goals for Long Wharf listed in the full report include: "The large open space at the end of Long Wharf should convey to visitors the noteworthy events in Long Wharf's rich history." Boston Harbor Challenges and Opportunities for the 1980's, RA2161.

[6] The photograph of the plaza as viewed from the water and credited to Sam Sweeney shows a shade pavilion and open space. Id. The map shows a "multi-use shade structure" at the end of Long Wharf. Id. One of the line drawings is captioned "shade structure at the end of Long Wharf," and shows an open shade structure. Id.

Conservation Fund (“LWCF”) and from other public agencies. Letter of February 24, 2009 from Melissa Cryan, RA1272; Mahajan rebuttal testimony, para. 5, RA1131. The project included a "passive park by the Boston Redevelopment Authority, County of Suffolk." LWCF project agreement, RA2176.[7]

6. In June 1983, BRA received an earlier Chapter 91 License No. 988 for work at Long Wharf, which permitted the BRA to "renovate and maintain Long Wharf...in conformity with the accompanying License Plan No. 988." ENF, Attachment E (Chapter 91 Licenses Nos. 977 and 988), RA1263. On the license plan, the stated purpose for the eastern end of Long Wharf is "Passive Recreation." Id., License Plan No. 988, sheet 1 of 2, RA1267. The shade structure was erected as part of Chapter 91 license No. 977. ENF, Attachment E, RA1256.[8]

7. Regarding the "outer end of Long Wharf", the Massachusetts Department of Environmental Management's

[7] This renovation was part of a three-phase project, the first phase being to make a "park at the east end." The first phase was the only phase completed. BRA's Boston Inner Harbor Passenger Water Transportation Plan, RA773.

[8] DEP states, on p.5 of its brief: "The record does not reflect that Legislative approval under Article 97 was required" for these two licenses. There is nothing in the record to reflect that legislative approval was NOT required.

Long Wharf Final Report (1985) says that, "...the central part of this space might be devoted to a park-like seating area" (emphasis added) and "the opportunity also exists to create a fairly large park area." Long Wharf Final Report, RA2294; Id., RA2298.[9]

8. In 1989, with the completion of the park, BRA erected a bronze dedication plaque at the base of the flagpole entitled "Long Wharf Park." Photo of bronze plaque at Long Wharf, RA2103.

9. In 2006, BRA issued a Request for Proposals (“RFP”) entitled "Long Wharf Pavilion Cafe/Restaurant Re-Use,” (this RFP resulted in the project that is the subject of these proceedings) in which it acknowledged that the shade structure was "originally intended for passive waterfront recreation." BRA's Request for Proposals, RA907 ("passive waterfront recreation"). It further acknowledges that, "a small public plaza area is located immediately adjacent to the building [the shade pavilion]." Id., RA911.

[9] The choices presented in the report are between an active area with a "slightly raised observation platform" or a formal landscape with a "more elegant seating and waiting area." Id., RA2298. Consistent with these options, on the "Urban Design issues" map, the plaza, including the shade pavilion, is marked a "Recreation Area." Id., RA2292.

10. The park at Long Wharf is designated "Protected Open Space" in the City of Boston Parks Department Open Space Plan 2002-2006. RA1831. The Open Space Plan lists Long Wharf as subject to Article 97, the LWCF, c. 91, and the Wetlands Protection Act. Ibid.; Id., RA1847.[10]

D. BRA'S Taking of Long Wharf is Based on the 1964 Urban Renewal Plan, as Amended in 1965

1. Orders of Taking

BRA took Long Wharf, including the land at issue, by eminent domain in 1970. BRA's Resolution and Order of Taking dated June 4, 1970 ("1970 Order of Taking"), RA513. The 1970 Order of Taking incorporates the "findings, determinations and descriptions set forth" in the February 4, 1965 Order of Taking ("1965 Order of Taking"), "concerning and describing the Downtown Waterfront-Faneuil Hall Urban Renewal Area." Ibid.

In the 1965 Order of Taking, BRA "determined" that the takings are required to "carry out the purposes of said Urban Renewal Plan" 1965 Order of Taking, final par., RA521. The 1965 Order of Taking refers to the Urban Renewal Plan adopted on April 24,

[10] Other protected open spaces owned by BRA and protected under Article 97 include City Hall Plaza, Curley Memorial Plaza, and Christopher Columbus Park. Id., RA1831.

1964, entitled “Downtown Waterfront-Fanueil Hall Urban Renewal Area.” (hereafter the “Urban Renewal Plan”) Ibid., first par. The Urban Renewal Plan is at RA467-511.

2. Purposes of the Urban Renewal Plan

In the Urban Renewal Plan, the “Proposed Land Use Plan,” (“Proposed Land Use Plan”) Exhibit B to the Urban Renewal Plan, depicts Long Wharf as "public open space." RA510.[11] "Long Wharf is to retain its historic position as the farthest projection of land into the harbor, and will become an observation platform." Id., development characteristic (f), RA477.

The Urban Renewal Plan further includes the following planning objectives and design principles related to parks and natural and historic resources:

> create an area for the development of marine or marine-oriented activities designed to stimulate tourism and symbolize the importance of Boston's historic relationship to the sea. Urban Renewal Plan, objective 11, RA474.

[11] The shade pavilion, the subject of Chapter 91 license No. 977 in 1983, was built many years after the "Proposed Land Use" map was prepared and is not shown on it. ENF, Attachment E (Chapter 91 Licenses Nos. 977 and 988), RA1256. On the map, the larger building marked with a triangle is the Custom House, and the smaller building with a triangle is the Chart House.

> provide public ways, parks and plazas, which encourage the pedestrian to enjoy the harbor and its activities. Ibid. objective 14.
>
> providing maximum opportunity for pedestrian access to the water's edge. Id., principle 3, RA475.

E. BRA's Proposed Restaurant and Bar at Long Wharf

BRA's 2006 RFP, entitled "Long Wharf Pavilion Cafe/Restaurant Re-Use," announces that, "The Project Site is available for lease from the BRA for commercial (restaurant) development." BRA RFP, RA907. One purpose is, "Provide a financial rate of return to the BRA in the form of lease payments." Id., RA913. The "minimum acceptable lease terms" included a $142,500 first-year rent and, to offset construction costs, offered a $300,000 rent credit. Id., RA919.

In 2007, BRA applied to DEP for a c. 91 license to change the long-standing use as public waterfront parkland and public open space used for passive recreation and convert it to private restaurant use. Chapter 91 Waterways License Application, C.5, RA51. In particular, BRA applied to enclose and expand the park's shade pavilion from its current size of 3,430 square feet to 4,655 square feet and to add outdoor dining of 2,586 square feet in order to construct a late-night restaurant and bar with takeout service and

outdoor table service. Ibid.; Written Determination, finding 2, RA70.

On or about September 17, 2008, DEP issued a Written Determination of its intent to issue a Chapter 91 license to BRA to construct a 4,655 square-foot restaurant and bar in this park. Ibid., RA69, RA70 (finding 2). BRA's photographic mock-ups of the proposed restaurant, ("Doc's"), are at RA464-465.

Enclosing the shade pavilion would significantly degrade views from the plaza and the Harborwalk, views of the water, of marine-related features along the waterfront, and of other objects of scenic, historic or cultural importance to the waterfront. Testimony and rebuttal testimony of Sanjoy Mahajan, RA151-153, RA1138. Not least, the windowed walls in the BRA's mock-up photos do not afford a view through the structure. Ibid; BRA design "mock-up" images of restaurant project, RA463-465. Even if the windowed walls functioned as claimed, they would provide a view primarily of restaurant activity within. Ibid. The use of windowed walls would not mitigate the loss of expansive water views that the public now enjoys, including through the shade structure. BRA photographs of Long Wharf Pavilion exterior and

interior circa 2006, RA0441 (showing current see-through views).

The License is valid for 30 years, renewable at BRA's request for another 30 years. Written Determination, RA74. The License is revocable by DEP only for "noncompliance," after it has "given written notice of the alleged noncompliance" and "afforded [Licensee] a reasonable opportunity to correct said noncompliance." Id., Standard Condition #4, RA77.

BRA was also granted 14 zoning variances by the Boston Zoning Board of Appeals to allow for, among other permissions, live entertainment, take-out service, and outdoor food and alcohol service until midnight. Boston Zoning Board of Appeals, RA351.

According to the License, the whole plaza area of approximately 33,155 square feet would be leased to the prospective restaurant operator. License, finding 2, RA70. BRA has not included the lease itself in the record. The License also authorizes BRA to "transfer to the restaurant operator maintenance responsibility of the public open space measuring approximately 25,915 square feet" (the area remaining from the 33,155 square feet after subtracting the to-be-

expanded-and-enclosed pavilion and the outdoor seating area). Ibid., finding 2. The restaurant operator is:

> expected to be an active steward of the surrounding open space, performing routine maintenance of the pedestrian amenities, including keeping the binoculars in good working order and picking up trash on a daily basis. Id., finding 5, RA71.

F. Environmental Notification Form (ENF)

The Executive Office of Environmental Affairs ("EOEA", now Executive Office of Energy and Environmental Affairs, "EOEEA") Article 97 Land Disposition Policy mandates that, except in exceptional circumstances (and then only after an extensive review procedure), the EOEEA and its agencies "shall not change the control or use of any right or interest of the Commonwealth in and to Article 97 land." RA1173.

There is no evidence that BRA attempted to obtain the legislative approval for this project or to comply with the EOEA Land Disposition Policy.

However, during DEP's c. 91 process, these deficiencies were not as evident as they could have been because BRA, in two places on the ENF that it submitted to comply with the Massachusetts Environmental Policy Act, G.L.c.30, sec. 61, 62-62I,

explicitly described the project as not involving an Article 97 land conversion. ENF, RA1229, RA1232, II.D.

The BRA so described the project despite the following: 1) The land's being listed as Article 97 land in the City of Boston Parks and Recreation Department's Open Space Plan, to which BRA contributed. RA1420 ("BRA contributed"), RA1831, RA1847; 2) BRA's having erected a bronze plaque on Long Wharf in 1989 dedicating "Long Wharf Park." Photo of Bronze Plaque at Long Wharf, RA2103; 3) BRA's describing the land, in its "owned-land database," as a "park located at end of Wharf." Entry on Long Wharf from Defendant BRA's Owned Land Database, RA2105.

It did so also despite the statement by the BSC Group, which prepared the Chapter 91 license on behalf of BRA, in a response to DEP's "Application Completeness Review," that, "the appropriate forem [sic] for Article 97 conversion of land use is during the MEPA review." RA338-342.

SUMMARY OF ARGUMENT

BRA claims, without any legal support, a broad exemption from Article 97 for all land taken for urban renewal purposes. BRA's position would eviscerate Article 97. (pp. 19-20).

Article 97, enacted in 1972, provides that any disposition or change of use of land held or acquired for natural resource purposes must be approved by a two-thirds vote of the general court. In addition, Massachusetts has long recognized the prior public use doctrine requiring explicit legislation to dispose or change the use of parkland, including the land at issue here. Article 97 applies retroactively and the description of natural resources in it should be construed broadly. (pp. 20-28).

The Superior Court correctly ruled that the eastern end of Long Wharf was taken for Article 97 purposes. The Urban Renewal Plan pursuant to which Long Wharf was taken in 1970 identifies among its aims several Article 97 purposes. This area has for decades been identified as open space or parkland by BRA, the City of Boston, and the Commonwealth in official planning documents. (pp. 28-30).

Although BRA's principal argument is that Article 97 does not apply to land taken for urban renewal, Article 97 contains no such exemption, nor does BRA cite any statute or case on point. Nor could it: G.L. c. 121B, sec. 45 provides that the purposes for which

land can be taken for urban renewal include parks, recreation, and open space. (pp. 30-38).

The License authorizes a change of use from parkland to a restaurant and bar, with a 30-year lease, renewable for another 30 years. Pursuant to G.L. c. 91, sec. 15, a c. 91 license conveys a mortgageable interest. It must be recorded and runs with the land. It conveys valuable property rights. It is not a mere license, revocable at will. The Superior Court's conclusion that the License is an Article 97 disposition or change of use is correct. Its conclusion that the License is tantamount to an easement is correct. DEP's indifference to Article 97 is contrary to its c. 91 Regulations, which require it to foster Article 97. (pp. 38-45).

The Superior Court correctly determined that mandamus should issue. Several cases have held that mandamus is the remedy for violation of Article 97 or of the prior public use doctrine. (pp. 45-50).

ARGUMENT

I. BRA's Unprecedented Argument that the Urban Renewal Statute Trumps the State Constitution Must Fail

For the first time, this Court is presented with an argument that the state constitution may be

disregarded where it inconveniences a state agency acting pursuant to an enabling statute. Specifically, BRA argues that it may disregard Article 97 where it intersects with the urban renewal statute. As discussed in detail below, this position offends the basic principles of constitutional and statutory interpretation. Worcester County National Bank v. Commissioner of Banks, 340 Mass. 695, 701 (1960).

BRA's position that Article 97 does not apply to land taken for urban renewal finds no support in the law, and is contrary to its own enabling statute. Indeed, G.L. c. 121B, sec. 45 provides that the purposes for which land can be taken for urban renewal include parks, recreation, and open space. Article 97 does not exempt land taken for urban renewal purposes.

If adopted by this Court, BRA's stance would render Article 97 effectively meaningless. Article 97 protection would be eliminated for any and all parks and open spaces taken under urban renewal plans, from Provincetown to Richmond. Other public agencies inconvenienced by Article 97 would follow suit.

Judge Fahey in the Superior Court recognized the importance of this seminal issue, and properly rejected BRA's argument, finding that the land at

issue was taken or acquired for Article 97 purposes, and vacating the License. Memorandum of Decision, RA2384. Plaintiffs ask this Court to affirm that decision.

II. Disposition or Change of Use of Article 97 Land Requires Two-Thirds Legislative Approval

Article 97 provides broad protection against conversion of public parkland. It was submitted to the voters of Massachusetts in November 1972 and approved by them. It provides:

> 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.
>
> * * *
>
> 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.

Article 97's application is illustrated in Toro v. Mayor of Revere 9 Mass. App. Ct. 871, 872 (1980). The Appeals Court there held that, where land was conveyed by the city to the conservation commission to maintain and preserve it for the use of the public for conservation purposes and the city later transferred

the land to a private party without compliance with Article 97, mandamus was proper.

"Article 97 is designed to supplement, not supplant, the doctrine of 'prior public use'" which has long been established in Massachusetts law. Rep. A.G. Pub. Doc. No. 12, at 139, 145-146 (1973). Applying the prior public use doctrine, this Court held in Robbins v. Department of Public Works, 355 Mass. 328, 331 (1969): "The rule that public lands devoted to one public use cannot be diverted to another public use without plain and explicit legislation authorizing the diversion is now firmly established in our law." This "rule has been stringently applied" in furtherance of the "policy of the Commonwealth to keep parklands inviolate." Id.

Numerous decisions have blocked attempts by governmental bodies to convert parks to other uses, and the term "parks" has been broadly construed. "A public park normally is an open space maintained for the recreation and pleasure of the public." City of Salem v. Attorney General, 344 Mass. 626, 631 (1962). In Salem, this Court rejected a proposal to construct a public school on three acres of a twenty-one acre parcel held in trust as a public park by the City of

Salem, holding that such use would be inconsistent with the donor's intent that the land be a public park. Id. at 631. In reaching this conclusion, the Court recognized that " 'in the general acceptance of the term, a public park is said to be a tract of land, great or small, dedicated and maintained for the purposes of pleasure, exercise, amusement, or ornament; a place to which the public at large may resort to for recreation, air, and light.' " Id. at 630 (quoting King v. Sheppard, 157 S. W. 2d 682, 685 (Tex. Civ. App. 1941)).

For example, this Court has made clear that Copley Square "is an open square and a public park, intended for the use and benefit and health of the public." Attorney Gen. v. Williams, 174 Mass. 476, 477-78 (1899); Attorney Gen. v. Williams, 178 Mass. 330, 334-35 (1901), aff'd sub nom. Williams v. Parker, 188 U.S. 491 (1903).

Shade trees, and by extension shade structures like that present on Long Wharf, are indicia of public parks. "Playgrounds and public shade trees acquired and maintained by cities and towns are closely analogous in their essential features to parks." Higginson v. Slattery, 212 Mass. 583, 588 (1912)

(citations omitted). "The planting, maintenance and care of shade trees by cities and towns were held to be a purely public service without any element of special advantage to the municipality, undertaken distinctly for the public weal, and not for the private emolument of the municipality." Id. (citing Donohue v. City of Newburyport, 211 Mass. 561 (1912)).

The public's rights in parkland are strictly guarded in our law; for example, regarding Boston Common and the Public Garden, this Court held that the City of Boston:

> holds the title to the Common and the Public Garden in a corporate capacity as an agency of government as distinguished from a private or proprietary capacity. It has long been settled that parks and commons are held and maintained by municipalities not as private owners for their own particular uses but for the benefit of all members of the public who might have occasion to resort to them.

Lowell v. City of Boston, 322 Mass. 709, 731-732 (1948); see also Cabot v. Assessors of Boston, 335 Mass. 53, 62 (1956).

In Lowell, 322 Mass. at 741, this Court ultimately decreed "that the city has title to the Common and the Public Garden subject to an easement in favor of the general public for the purposes of a public park." This principle holds no less than to

the BRA's interest in Long Wharf: It is held for the benefit of the public, and "cannot be diverted to another inconsistent public use without plain and explicit legislation." See Robbins, supra, at 331.

This principle has a long history of support in Massachusetts case law. "The property of which a city or town has acquired absolute ownership as an agency of the state, and which it holds strictly for public uses, is subject to legislative control." Higginson v. Slattery, 212 Mass. 583, 585 (1912) (citations omitted). "The city holds the Common for the public benefit, and not for emolument, or as a source of revenue." Id. at 586. "The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the state under modern conditions." Id. at 590. In contrast, one of BRA's objectives for the project here is to "Provide a financial rate of return to the BRA in the form of lease payments." RA913.

With reference to Article 97, "The common meaning of the term 'dispose of' is 'to transfer into new hands or to the control of someone else (as by selling or bargaining away).'" Perry v. Robbins, 2001 WL 1089484, *10 (Mass. Super. Sept. 6, 2001) (quoting

Webster's Third New International Dictionary (1964)). Article 97 "clearly seeks to prevent a public entity from depriving the people for whose benefit conservation land was acquired of the enjoyment of that conservation land by changing its use," and "also expresses the concern that disposal of protected land, i.e., the transfer of title or control of such land, is a 'different way' of depriving the people for whose benefit it was acquired of its use for conservation purposes." Id.

Therefore, "the super-majority legislative approval requirement applies to any disposition of land acquired for Article [97] purposes regardless of whether, following the disposition, the land will be used by the transferee for recreational purposes." Id. (citing Opinion of the Justices, 383 Mass. 895, 918 (1981)). Indeed, "[t]he public purpose for which a city has acquired land in fee by the exercise of eminent domain may be changed by law and the land devoted to some other public use. . . The Legislature in making such designation of a new public use represents the public . . ." Higginson, 212 Mass. at 591 (citation omitted, emphasis added). In denying

that legislative action is required, BRA is ignoring more than one hundred years of settled law.

III. The Superior Court Properly Relied Upon a 1973 Attorney General Opinion Construing Article 97

A 1973 opinion of the Attorney General states that Article 97 applies retroactively to land acquired prior to the 1972 amendment to the state constitution. Rep.A.G., Pub.Doc. No. 12, supra. This Opinion was cited in Opinion of the Justices, 383 Mass. 895, 918 (1981), where this Court also concluded that Article 97 applies retroactively. The Attorney General's Opinion interpreted very broadly the phrase "shall not be used for other purposes or otherwise disposed of":

> the dispositions for which a two-thirds vote of the General Court is required include transfers between agencies of government, from public ownership to private. Outright conveyance, takings by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements and all means of transfer or change of legal or physical control are thereby covered, without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.
>
> Rep.A.G., Pub.Doc. No. 12 at 143-144.

The Attorney General further stated that "[w]ithin any agency or political subdivision any land, easement or interest therein, if originally taken or acquired for the purposes stated in Article

97, may not be 'used for other purposes' without the requisite two-thirds roll-call vote of each branch of the Legislature." Id.

The Attorney General concluded that the term "natural resources" in Article 97 should be taken to signify at least the items listed in Article 97 and in statutes describing natural resources, including G.L. c. 21, sec. 1, c. 12, sec. 11D, and c. 214, sec. 7A. Id. at p. 143.

IV. Land Taken for Urban Renewal Is Not Exempt From Article 97; BRA's Contrary Argument is Baseless

A. The Superior Court Correctly Ruled that Long Wharf Was Taken For Article 97 Purposes

The Superior Court's ruling that the land was taken for Article 97 purposes is well supported in the evidence. RA2383-2384. See Statement of Facts, p. 11. First, Long Wharf, a National Historic Landmark, is to "retain its historic position as the farthest projection of land into the harbor. ENF, RA1242 ("National Historic Landmark"); Urban Renewal Plan Development Characteristic (f) RA477. Second, Long Wharf "will become an observation platform." Ibid. Third, Long Wharf is designated "public open space" Urban Renewal Plan, Proposed Land Use Plan, RA511. Each of these three purposes is an Article 97 purpose.

BRA does not have free reign to make a taking for any purpose it wants under the guise of urban renewal. G.L. c. 121B, sec. 48 requires approval of an urban renewal plan under that section for any urban renewal project. In this case, the 1970 taking was pursuant to the 1964 Urban Renewal Plan. RA513.

BRA argues on page 26 of its Brief that the Superior Court erred in finding that the 1964 Renewal Plan served Article 97 purposes because, according to BRA, the purposes cited by the Superior Court are "incidental" to the basic goals of urban renewal in the area. BRA does not cite to any language or provision of the Urban Renewal Plan identifying these purposes as "incidental."[12] Indeed, the Urban Renewal Plan does not identify those purposes as "incidental."

BRA represents on pages 7-8 of its Brief that the legal description of Long Wharf in the 1970 Order of Taking does not include any reference to natural resources, parkland, or open spaces. BRA is incorrect. The 1970 taking incorporated the 1965 taking, which incorporated the Urban Renewal Plan. In the Urban Renewal Plan, the "Proposed Land Use" map

[12] BRA does not challenge the Superior Court judge's ruling that the purposes she identified are Article 97 purposes (if not incidental).

showed the seaward end of Long Wharf as “Public Open Space” with no structures on it (the map did not show the shade structure, which was not licensed until 1983.) See BRA Brief, p. 7, n. 3.

BRA’s position would eliminate Article 97 protection for all parks and open spaces across the Commonwealth taken pursuant to any urban renewal plan, such as Christopher Columbus Park. See RA431. It would open the door for numerous public agencies to make the same argument and eviscerate Article 97.

B. Article 97 and Urban Renewal Are Not Mutually Exclusive

BRA claims that the purposes cited by the Superior Court cannot change the fundamental nature of the taking, which was to eliminate blight under c. 121B, therefore not to protect natural resources under Article 97. BRA Brief, 26-27.

However, urban renewal and Article 97 are not mutually exclusive. The urban renewal taking statute, G. L. c. 121B, sec. 45, includes Article 97 purposes among the purposes for which land can be taken, including parks, recreation land, and open spaces. Article 97 was enacted in 1972, after the approval of the Urban Renewal Plan and the 1970 taking. It

applies retroactively. Opinion of the Justices, 383 Mass. 895, 918 (1981). It is not necessary that the acquisition or taking refer specifically to Article 97 in order for Article 97 protection to apply. Rep. A.G., supra at 140; DEP Brief, Addendum 6.

BRA argues that it lacks the power to take land for Article 97 purposes, and that the provision in G.L. c. 121B, sec. 45 authorizing it to take land for parks, recreational areas, and other open spaces is "incidental" to the main purpose of urban renewal. BRA Brief, 23-25.

G.L. c. 121B, sec. 45 provides that land can be taken by an urban renewal authority for:

> 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.

G.L.c. 121B, sec. 45. (emphasis supplied).

According to the plain language of the statute, the provision of parks, recreational areas, and other open spaces is a purpose for which land can be taken

for urban renewal.[13] There is no language in Article 97 or in G. L. c. 121B that says that urban renewal land is exempt from Article 97, its predecessor Article 49, or the prior public use doctrine.

Rather, in Aaron v. Boston Redevelopment Authority, 66 Mass. App. Ct. 804, 810, n. 10 (2006), the Appeals Court noted that the urban renewal plan in that case listed among its objectives "to provide sites for . . . play areas, open spaces, and essential community facilities" and said that G.L. c. 121B, sec. 45 declared as a "public use and benefit … 'streets, parks, recreational areas, and other open spaces.'" The above note from Aaron squarely holds that the provision of parks, recreational areas, and other open spaces are among the purposes of urban renewal. They are not "incidental" to urban renewal. Article 97 and urban renewal are not mutually exclusive.

BRA misinterprets Aaron, (supra) to support its claim that urban renewal and Article 97 are "distinct" and "independent." BRA Brief, 23, 30-31.[14] The issue

[13] According to the sentence structure of the statute, these purposes are of equal rank with the other listed purposes, such as business, commercial and industrial. Indeed, parks and open spaces are particularly valuable and important in heavily developed areas according to the Urban Renewal Plan. RA503.

[14] BRA apparently did not read the whole case. It ignores footnote 10.

in Aaron was whether the limitations period applied to a claim of adverse possession involving land that had been taken by BRA for urban renewal; in particular, whether the second clause of G.L. c. 260, sec. 31, applied. That clause referred to land held for conservation, open space, parks, recreation, water protection, wildlife protection, or other public purposes. Id. at 809-810. The Appeals Court held that land taken for urban renewal was held for an "other public purpose" within the meaning of c. 260, sec. 31. Id. at 808-811. The Court nowhere held that urban renewal and Article 97 are mutually exclusive. Rather, the Court recognized that the universes of land held for urban renewal and conservation, park and similar purposes overlap. Land can belong to both universes simultaneously. Id.

Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005), also cited by BRA, is similarly inapplicable to this case. In that case, the Town Meeting voted to accept certain land for conservation purposes, but no deed was prepared, accepted, or recorded (by the Town). In those circumstances, this Court said that the locus never became specifically

designated for conservation purposes in the first instance. Id. at 508.

The Superior Court judge in the present case acknowledged Board of Selectmen of Hanson, but found that the land at issue here was taken for an Article 97 purpose. Decision, RA2383.

BRA cites Benevolent & Protective Order of Elks, 403 Mass. 531, 551-552 (1988) and Papadinis v. City of Somerville, 331 Mass. 627, 632 (1954) in support of its argument that the purposes listed in G.L. c. 121B, sec. 45 are "incidental" to the purposes of the urban renewal statute. Neither case supports this argument. They support the irrelevant proposition that a valid taking may result in private gain. Id.

Finally, BRA argues on p. 27-30 that it must have the ability to make changes as circumstances change. It says that inserting the legislative process into its decision-making would be "micro-managing." This argument also fails. First, as discussed above, Article 97 purposes are included among urban renewal purposes, and there is no exemption in Article 97 for land taken for urban renewal.

Second, Article 97 does not prohibit all dispositions or changes of use. It merely requires a

vote of the Legislature to do so. According to BRA, it is exempt not only from Article 97 but also from the prior public use doctrine.

Although legislation is required, legislative reports on Article 97 show that legislative approval is not unduly burdensome. The Joint Committee of the Massachusetts Legislature on Local Affairs issued a Report dated March 2000 entitled "New School Construction and the Loss of Article 97 Land," and another Report dated February 2005 entitled "An Updated Analysis of Article 97 Land Transfers." Joint Committee on Local Affairs and Regional Government, 2003-2004 Article 97 Sub-Committee Report. The 2000 Report indicated that for the period 1989-1998, one-hundred and seventy-six (176) Article 97 land transfer bills were filed, and one-hundred and fifty (150) were signed into law. Of the 150 bills passed, thirty-two (32) contained provisions for replacement land.

The 2005 Report indicated that there were one-hundred (100) Article 97 municipal land transfers enacted into law during the 1999-2000, 2001-2002, 2003-2004 sessions. It said that the number of transfers was higher between 1999-2004 than the number

occurring between 1995-1998 and many of the transfers involved small amounts of land.

The Legislative Reports make clear that the Legislature approves numerous Article 97 transfers.[15] BRA presents no evidence that Article 97 approval is impossible or unduly burdensome. Other than its erroneous argument that land taken for urban renewal is exempt from Article 97, BRA presents no reason why it need not comply with the constitution.[16]

Third, BRA already does not have untrammeled discretion. An urban renewal project must meet the requirements of G.L. c. 121B, sec. 48. An urban renewal taking must also be for a purpose listed in sec. 45. Finally, an urban renewal agency is required by 760 CMR 12.03 to "submit all proposed minor and major changes to the Department (of Housing and Community Development) for approval."[17]

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[15] The record is silent as to whether BRA has obtained or sought two-thirds Legislative approval for Article 97 transfers in the past. A review of the Acts and Resolves on the Massachusetts Government website for the years 2004 through 2012 shows no Article 97 enactments involving BRA land.

[16] There is a bill pending in the Legislature, H.3438, "The Public Lands Preservation Act," that would strengthen Article 97.

[17] There is no evidence that the Department of Housing and Community Development has approved the project at issue in this case.

Fourth, the rules of constitutional and statutory interpretation defeat BRA's argument that Article 97 can be disregarded if it interferes with the purposes of the urban renewal statute. It is settled that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." Worcester County National Bank v. Commissioner of Banks, 340 Mass. 695, 701 (1960). Such a construal is available in this case: Urban renewal land, if taken for Article 97 purposes, is protected by Article 97.

C. The Superior Court Did Not Reach the Merits of the 30A Appeal

In Section III of its Brief, BRA asks this Court to review and affirm the decision of DEP to issue the c. 91 License, pursuant to G.L. c. 30A, sec. 14, which provides that any person aggrieved by a final agency decision may obtain judicial review in Superior Court. It does not authorize a petition by a party who is content with the agency decision to petition the Superior Court to reaffirm it.

G.L. c. 30A, sec. 15 provides that the Supreme Judicial Court and Appeals Court shall have concurrent jurisdiction to review any orders made in the Superior

Court pursuant to G.L. c. 30A sec. 14. It does not say that a party may bypass the Superior Court and file a c. 30A, sec. 14 appeal directly in this Court.

The Plaintiffs are the only parties who are aggrieved by the DEP decision and who have filed a 30A appeal to the Superior Court. The Superior Court did not reach the merits of the Plaintiffs' c. 30A appeal. If this Court reverses the decision of the Superior Court, it should remand the case to the Superior Court to consider the Plaintiffs' c. 30A, sec. 14 appeal.

V. The Superior Court Correctly Ruled the License is an Article 97 Disposition or Change of Use

A. The License Authorizes Construction of a Private, Commercial Restaurant on Public Parkland

The Superior Court judge ruled that the License in this case is an Article 97 disposition or change of use. She did not rule, nor do the Plaintiffs argue, that every c. 91 license is an Article 97 disposition.

The License authorized a conversion of the shade pavilion to a restaurant, construction of an addition to the shade pavilion, and outdoor seating. RA69. It authorized the lease of the entire 33,155 square foot area to the restaurant operator and authorized BRA to "transfer to the restaurant operator maintenance

responsibility of the public open space measuring approximately 25,915 square feet." RA70, RA75.

DEP's representation on pp. 27-28 of its Brief that the description of the lease in the License "is simply descriptive and not relevant to the Chapter 91 issues" ignores the facts. The License has no meaning other than to authorize construction of a restaurant, the substance of the project from the outset. See BRA's description of the project in its application for a c. 91 license: "The project includes the redevelopment and expansion of the Long Wharf pavilion for a restaurant." RA51. Construction of the restaurant is not an incidental or secondary portion of some other project.

B. This Chapter 91 License Conveys Valuable Property Rights

G. L. c. 91, sec. 15 provides that a c. 91 license "is hereby made a mortgageable interest lawful for investment by any banking association ... ." The term of the License is thirty years, and is renewable for another thirty years. RA74. Pursuant to G. L. c. 91, sec. 18 and the terms of the License itself, it must be recorded in order to be valid. RA78. A c. 91 license runs with the land unless otherwise provided

in the license. 310 CMR 9.23(1). G. L. c. 91, sec. 18 provides that a c. 91 license shall be revocable by DEP for noncompliance, but shall not be revoked for noncompliance without written notice and an opportunity to cure.

DEP says that the Legislature may revoke a c. 91 license pursuant to G.L. c. 91, sec. 15, but does not cite a single instance in which the Legislature has done so. Section 15 additionally provides that revocation by the Legislature is a "taking of real property," requiring "just compensation" for "valuable structures, fillings, enclosures, uses or other improvements built, made or continued."

According to the application for the License, the estimated cost of the construction is $500,000.00. RA51. The License conveys valuable rights, sufficient to justify a large investment in reliance on it.

DEP quotes G.L. c. 91, sec. 15 on p. 27 of its Brief as saying that the grant of a c. 91 license "shall not convey a property right," but leaves out the first part of the sentence in the statute: "Except as provided herein." The project here is a major commercial project requiring substantial

investment, all in reliance on the License and the valuable property rights that it conveys.

The Superior Court's conclusion that the License is an Article 97 disposition in these circumstances is thus well justified. As the judge explained in footnotes 8 and 9, the transfer of legal control is tantamount to granting an easement in that DEP gave BRA certain rights of use over the land. RA2385. In addition, even if the License did not itself dispose of the Land, BRA's foreseeable lease constitutes a transfer of legal control.

C. The Superior Court Correctly Determined that the Chapter 91 License in Question is Akin to an Easement, Not a License in the Usual Sense

The License is no mere license. A license is a bare permission to do something on the land of another. Cheever v. Pearson, 16 Pick. 266, 233 Mass. 266, 273 (1834). It is revocable at the will of the owner of the property and is revoked by the alienation of the property. Sturnick v. Watson, 336 Mass. 139, 142 (1957). The Appeals Court in Beal v. Eastern Air Devices, Inc., 9 Mass. App. Ct. 910, 911 (1980) held that the fact that an instrument is entitled "license" is not dispositive on whether it is a license and therefore revocable at the will of the landowner. In

that case, the Appeals Court stated that "the use of the term 'license' is not dispositive and is merely a 'misdescription.'" Id. (quoting Baseball Publishing Co. v. Bruton, 302 Mass. 54, 56 (1938)).

A c. 91 license is not revocable at the will of the owner and is not terminated by the conveyance of the land. This License conveys far more rights than a license. The Superior Court judge correctly concluded that the License is tantamount to the granting of an easement.

DEP relies heavily on Miller v. Commissioner of Department of Environmental Management, 23 Mass. App. Ct. 968 (1969). DEP Brief, 24-26.

The facts and license in Miller are materially different from the facts and License in this case. First, in Miller, the Department of Environmental Management ("Department") issued a one-year permit, revocable at the will of the Department, for operation of a cross-country skiing program. In contrast, the License is valid for thirty years (and renewable for another thirty years), and can by revoked by DEP only in case of non-compliance, and then only after notice and failure to cure. Written Determination, RA74; RA77, Standard License Condition 4. Secondly, the

Miller permittee would groom and maintain trails in a portion of a state forest, with all aspects of the operation under the supervision of the Department. The permit did not change the use from public recreation. In contrast, the License in this case changes the use from public open space to private restaurant use.

Furthermore, unlike the revocable permit in Miller, the License must by its terms be recorded to be valid, and runs with the land. Written Determination, RA78; G. L. c. 91, sec. 18; 310 CMR 9.23 (1).

D. The Chapter 91 Regulations Require DEP to Foster Article 97 Purposes_

The c. 91 Regulations provide that they are promulgated by DEP to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands, including fostering the rights of the people under Article 97.

310 CMR 9.01(2) (copy in Addendum A).[18] DEP nevertheless argues that Article 97 is not its concern.

This Court discussed the purposes of the c. 91 Regulations in the landmark case of Moot v. Department of Environmental Protection, 448 Mass. 340, 347 (2007). It held that the c. 91 Regulations promulgated by DEP cannot take away rights that can be relinquished or extinguished only by the Legislature. Id.

310 CMR 9.11(3)(c)(3) provides that DEP will consider an application for a c. 91 license to be complete only if certain items are provided, including "g. Copies of all other state regulatory approvals if applicable pursuant to 310 CMR 9.33; or a satisfactory explanation as to why it is appropriate to postpone receipt of such documentation to a later time prior to license or permit issuance, or to issue the license or permit contingent upon subsequent receipt of such approvals." (copy attached at Addendum B).

[18] In its Memorandum In Opposition To Plaintiffs' Motion For Judgment on the Pleadings filed in Superior Court, DEP said: "All that means is that DEP, in administering the statutory and regulatory scheme, must act consistently with Article 97." RA2090. But DEP does not contest the trial judge's conclusion that Article 97 applies. DEP's position of indifference to Article 97 in this Court is inconsistent with 310 CMR 9.01(2).

According to DEP: 1) Article 97 and c. 91 are "two separate and distinct" legal regimes. DEP Brief, p. 22; 2) BRA, but not DEP, may need Legislative approval if it is determined that Article 97 applies to the project. DEP Brief, p. 35; 3) The permitting process enables applicants to determine the contours of a project and it would be inefficient to require Article 97 approval before a project is approved. DEP Brief, p. 36.

DEP ignores: 1) a purpose of the c. 91 Regulations is to foster Article 97 purposes; 2) 310 CMR 9.11(3)(c)(3)(g) implies that a c. 91 license is intended to be issued at or near the completion of the permitting process; 3) the Superior Court has already ruled that the land is subject to Article 97, and DEP does not contest that ruling; 4) BRA applied for the c. 91 license for this project in 2007. RA51. BRA emphasizes the extensive nature of the proceedings to date. BRA Brief, pp. 16-21. There is no evidence that the plans as approved in the License are anything but final.

VI. The Superior Court Ruled Correctly that Mandamus and Declaratory Relief Should Issue

The Superior Court ruled correctly that the Plaintiffs did not need to show particularized harm but rather had standing by reason of their citizenship to enforce a public duty. Pilgrim Real Estate Inc. v. Superintendent of Police of Boston, 330 Mass. 250 (1953).

The decision of this Court in Gould v. Greylock Reservation Commission, 350 Mass. 410 (1966) is right on point. In that case, five citizens of Berkshire County sought to invalidate a lease of a portion of a state forest and a management agreement that would permit an aerial tramway, ski lift, and ski resort. This Court held that Greylock Reservation, as rural parkland, is not to be diverted to another inconsistent public use without plain and explicit legislation. Id. at 419. It held that the statute creating the Commission did not give it unfettered discretion over a large, unique tract of public park land. Id. at 422. "We recognize that in recent years much wholly proper use has been made of authorities to carry out important projects. Nevertheless, these entities present serious risk of abuse, because they are frequently relieved of statutory restrictions and regulation applicable to other public bodies." Id. at

425-426. This Court held: "A writ of mandamus is to issue to the Commission and to the Authority commanding them to cancel the 1960 lease and the 1964 management agreement. A declaration is to be made stating that these instruments in their present form are not now authorized by the enabling acts." Id. at 427.

In Town of Concord v. Attorney General, 336 Mass. 17, 27 (1957) this Court held that "where a public officer owes a specific duty to the public to perform some act or service not due the government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by mandamus the performance of the duty required by law."

Mandamus is indeed an extraordinary remedy and is available only where the law provides no other adequate and effectual relief. McCarthy v. Mayor of Boston, 188 Mass. 338, 340 (1905). However, where the petitioner has no other adequate and effective relief, and unless he can bring a petition for a writ of mandamus, there "would or might be a failure of justice," the writ of mandamus is properly brought. Id.

Mandamus has been held to be an appropriate remedy in cases involving compliance with Article 97 and the prior public use doctrine. In Toro v. Mayor of Revere, 9 Mass. App. Ct. 871 (1980) the Appeals Court held that an action in the nature of mandamus would lie to recover conservation land conveyed by the city to a private party without compliance with Article 97.

In Robbins v. Department of Public Works, (supra), this Court held that a writ of mandamus should issue commanding that certain lands not be transferred from the Metropolitan District Commission to the Department of Public Works unless and until legislation authorizing such transfer is duly enacted. Id.

Toro, Gould, and Robbins all hold that mandamus is the appropriate remedy to enforce Article 97 or the prior public use doctrine.

DEP argues on p. 36 that mandamus will not lie when an agency has already acted, citing Doherty v. Ret. Bd. of Medford, 425 Mass. 130 (1997). Doherty was a dismissed police officer who appealed a decision of the Retirement Board pursuant to G.L. c. 32, sec. 16. This Court held that the review was in the nature of

certiorari, not mandamus, as argued by the officer. Id. at 134. The statement that mandamus does not lie if administrative action was already taken is dicta.

Doherty is not on point. Gould, (supra) and Toro, (supra) are on point, and both held that mandamus was appropriate in situations where the agency had already acted.

DEP and BRA also argue that mandamus will not lie where the act of the agency is discretionary. Article 97 uses the word "shall." It is mandatory, not discretionary.

The cases cited by DEP and BRA relative to discretionary acts are not on point; for example, Town of Boxford v. Massachusetts Highway Department, 458 Mass. 596 (2010) (statute providing that DEP "may" issue regulations does not create a duty to do so); Perrella v. Mass. Turnpike Authy., 55 Mass. App. Ct. 537, 540 (2002)(decision by Turnpike Authority to construct road allowing access to land within highway cloverleaf was discretionary).

Finally, DEP argues on p. 37 that mandamus will not lie if any other effective remedy exists. However, neither BRA nor DEP identifies any effective remedy available to the Plaintiffs. Rather, DEP

argues repeatedly that Article 97 compliance is separate and distinct from c. 91, and agrees with the judge's conclusion that DEP lacks authority to interpret and apply Article 97 during the c. 91 license process: an acknowledgment that there is no other effective remedy. The Superior Court judge correctly concluded that Plaintiffs had no other effective remedy, and that she should determine the Article 97 issues (noting that the parties agree that the courts have jurisdiction to over Article 97).[19]

CONCLUSION

This Court should affirm the decision of the Superior Court.

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[19] But for the decision of the Superior Court, the restaurant operator may already have obtained a mortgage on the strength of the License.

Certification Of Brief

In accordance with Mass. R. App. P. 16(k), I, Michael J. O'Neill, hereby certify that Appellee's Brief:

1. Makes reference to page numbers in the appendix at which those referenced parts of the record appears.

2. Provides copies of the statutes, rules, and regulations.

3. Does not exceed the number of allowed pages.

4. The form of the brief complies with Mass. R. App. P. 20.

_____

Michael J. O'Neill

CERTIFICATE OF SERVICE

I, Michael J. O'Neill, certify that on July 30, 2012, I have served two copies of the foregoing document upon counsel below for all parties by first-class mail, postage prepaid.

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ADDENDUM A

310 CMR 9.01(2):

ADDENDUM B

310 CMR 9.11(3)(c)(3)(g)