
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SUFFOLK, SS.

No. 11134

SANJOY MAHAJAN ET AL.,
Plaintiffs-Appellees,

v.

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

DIRECT APPELLATE REVIEW OF AN DECISION AND JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF THE APPELLANT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARTHA COAKLEY
Attorney General

Annapurna Balakrishna, BBO # 655051
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108-1598
(617) 727-2200, ext. 2678
email: annapurna.balakrishna@state.ma.us
April 30, 2012

TABLE OF CONTENTS

Statement of the Issues 1

Statement of the case 2

1. DEP protects the Commonwealth's interest in its navigable waters through the Chapter 91 license and permit program. 2

2. DEP granted the Chapter 91 License to BRA after determining that BRA's proposed project served a proper public purpose. 4

3. The Residents received further DEP review of the Chapter 91 License. 7

4. The DEP Commissioner affirmed the issuance of the Chapter 91 License and denied the Resident's motion for summary decision. 9

5. The trial judge vacated the Commissioner's final adjudicatory decision by ordering declaratory relief and a writ of mandamus. 11

Summary of argument 14

Argument 16

I. The Residents lacked standing to challenge DEP's issuance of the Chapter 91 License to BRA. 16

A. The Residents did not allege, nor does the record show, that any of them were sufficiently aggrieved to appeal the Chapter 91 License under G.L. c. 30A, § 14. 16

B. Because DEP had no duty to enforce Article 97 here, the Residents did not have standing to ask for a writ of mandamus against it. 20

C.	The lack of a duty owed to the Residents by the DEP Commissioner under Article 97 also dooms their claim for declaratory relief.	21
II.	DEP can issue a Chapter 91 License without a two-thirds vote of the Legislature, whether or not BRA's land is subject to Article 97.	22
A.	Only the relinquishment of land or an easement taken or acquired for an Article 97 purpose triggers the vote requirement.	24
B.	The Chapter 91 License here did not convey a property interest.	27
C.	The Chapter 91 License alone cannot "change the use" of BRA's land under Article 97.	28
D.	The Superior Court also erred in holding that the Chapter 91 License "disposed of" Article 97 land.	31
E.	It would be inefficient to require BRA to obtain Legislative approval before it can seek the various other approvals it needs for its project.	34
III.	The trial judge incorrectly vacated DEP's decision and voided the Chapter 91 License through declaratory and mandamus relief.	36
A.	A writ of mandamus did not lie here where DEP acted, its action involved the exercise of discretion, and the Residents had an alternative remedy.	36

B. The Residents failed to state a claim "plausibly suggesting entitlement" to declaratory relief where they alleged no direct violation of Article 97 by DEP. 41

C. The Residents' request for declaratory judgment against DEP was misplaced. 42

Conclusion 43

TABLE OF AUTHORITIES

Cases

Alliance AFSCME/SEIU, AFL-CIO v. Com.
427 Mass. 546, (1998) 21, 39

Alliance to Protect Nantucket Sound, Inc. v.
Energy Facilities Siting Bd.,
457 Mass. 663 (2010) 2, 34

Ames v. Attorney Gen.,
332 Mass. 246 (1955) 20

Arno v. Commonwealth,
457 Mass. 434 (2010) 3, 4, 21, 30

Bd of Health of Sturbridge v. Bd. Of Health
of Southbridge, 461 Mass. 548 (2012) 15, 18

Bd. of Health of Woburn v. Sousa,
338 Mass. 547 (1959) 40

Bd. of Selectman of Hanson v. Lindsay,
444 Mass. 502 (2005) 23-24

Brewster v. Sherman, 195 Mass. 222 (1907) 20

Channel Fish Co., Inc. et al. v. Boston Fish
Market Corp., 359 Mass. 185 (1971) 39

Comm'r of Pub. Works v. Cities Service Oil
Co., 308 Mass. 349 (1941) 4, 30

Chelsea Yacht Club v. Mystic River Bridge
Auth., 330 Mass. 566 (1953) 26

Cranberry Growers Service, Inc. v. Town of
Duxbury, 415 Mass. 354 (1993) 25

Doherty v. Ret. Bd. of Medford,
425 Mass. 130 (1997) 36, 37

Enos v. Sec'y of Env'tl. Affairs,
432 Mass. 132 (2000) 17, 21

<u>Harvard Crimson, Inc. v. Presidents & Fellows of Harvard College,</u> 445 Mass. 745 (2006)	40-41
<u>Higgins v. Dep't of Env'tl. Protection,</u> 64 Mass. App. Ct. 754 (2005)	17, 42
<u>Hertz v. Sec'y of the Executive Office of Env'tl. Affairs,</u> 73 Mass. App. Ct. 770 (2005)	17
<u>Iannacchino v. Ford Motor Co,</u> 451 Mass. 623 (2008)	41
<u>Kaplan v. Bowker,</u> 333 Mass. 455 (1956)	20
<u>Lily Transport Corp. v. Bd. of Assessors of Medford,</u> 427 Mass. 228 (1998)	42
<u>Miller v. Dep't of Env'tl. Mgmt.,</u> 23 Mass. App. Ct. 968 (1987)	22, 25, 29, 30, 31
<u>Moot v. Dep't of Env'tl. Protection,</u> 448 Mass. 340 (2007)	2, 21
<u>Moot v. Dep't of Env'tl. Protection,</u> 456 Mass. 309 (2010)	2
<u>Opinion of the Justices to the Senate,</u> 383 Mass. 898 (1981)	23, 24, 31
<u>Opinion of the Justices to the Senate,</u> 383 Mass. 927 (1981)	25, 31
<u>Perella v. Massachusetts Turnpike Auth.,</u> 55 Mass. App. Ct. 537 (2002)	20
<u>Rines v. Justices of the Superior Court,</u> 330 Mass. 368 (1953)	36
<u>Robbins v. Dep't of Public Works,</u> 355 Mass. 328 (1969)	33, 34
<u>Roslindale Motor Sales, Inc. v. Police Comm'r of Boston,</u> 405 Mass. 79 (1989)	39
<u>Sabree v. Commonwealth,</u> 437 Mass. 1015 (2002)	40

<u>Tax Equity Alliance for Massachusetts & others v. Comm'r of Revenue, 423 Mass. 708 (1996)</u>	19
<u>Town of Boxford v. Massachusetts Hwy Dep't & another, 458 Mass. 596 (2010)</u>	38
<u>Town of Reading v. Atty. Gen., 362 Mass. 266 (1972)</u>	37

Statutes

G.L. c. 30A, § 14	passim
G.L. c. 91, § 1	2, 3
G.L. c. 91, § 2	2, 3, 5
G.L. c. 91, § 10	2, 3
G.L. c. 91, § 14	2, 3, 4, 39
G.L. c. 91, § 15	2, 4, 25, 30
G.L. c. 91, § 16	2
G.L. c. 91, § 17	2
G.L. c. 91, § 18	2, 4, 5, 15, 28, 30, 40
G.L. c. 231A	11, 20, 21
G.L. c. 249, § 5	11

Court Rules

Superior Court Standing Order 1-96	38
Massachusetts Rules of Civil Procedure, Rule 12(b)(6)	40, 41

Regulations

310 Code Mass. Regs. § 9.00 <u>et seq.</u>	2, 7
310 Code Mass. Regs. § 9.12(2)(a)	17

Massachusetts Declaration of Rights

Mass. Const. art. XLIX (amended by Mass.
Const. art. 97) 11

Other Authorities

A.L. Eno Jr., W.V. Hovey & M. Pill, Real
Estate Law, §28 (4th ed. 2004) 26

Black's Law Dictionary 931 (7th Ed. 1999) 26

Op. Atty. Gen. 142 (June 6, 1973) 31

EEA Article 97 Land Disposition Policy 31

Statement of the Issues

This case concerns two distinct claims. The first concerns whether a plan by the Boston Redevelopment Authority (BRA) to redevelop land that it owns must be approved by the Legislature under Article 97 of the Amendments to the Massachusetts Constitution (Article 97). The second claim asks whether the Department of Environmental Protection (DEP) correctly issued a waterways license under G.L. c. 91 to BRA for its project (the Chapter 91 License). The Superior Court (Fahey, J.) vacated DEP's decision because DEP did not seek, or require BRA to seek, Legislative approval before issuing the Chapter 91 License. DEP's appeal raises the following issues:

1. Did the Residents have standing to challenge DEP's issuance of the Chapter 91 License?
2. Did the trial judge err in holding that the Chapter 91 License by itself effected a disposition or change in use of Article 97 land that required Legislative approval?
3. If the Residents had standing, should the trial judge have granted mandamus or declaratory relief to vacate DEP's final adjudicatory decision, instead of reviewing the decision under G.L. c. 30A, § 14?

Statement of the case

1. DEP protects the Commonwealth's interest in its navigable waters through the Chapter 91 license and permit program.

The BRA's proposed project is located on "Commonwealth tidelands," which are "tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant or implied condition subsequent that it be used for a public purpose." G.L. c. 91, § 1. This fact triggered BRA's obligation to apply for the Chapter 91 License from DEP as part of a State and local permitting and zoning requirements for the proposed project.

As has been aptly summarized elsewhere, e.g., Moot v. Dep't of Env'tl. Protection, 448 Mass. 340, 342 (2007), S.C., 456 Mass. 309 (2010), Chapter 91, together with the Waterways regulations at 310 Code Mass. Regs. § 9.00 et seq., governs development on filled and flowed "tidelands." Moot, 448 Mass. at 342; see also G.L. c. 91, §§ 1-2, 10, 14-18 (reproduced in Addendum, Tab 1). Tidelands are a "broad but single category of the estuarine complex comprising the shore and submerged lands lying between the mean high water mark and the seaward boundary of the Commonwealth." Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 676 n.25 (2010) (internal quotations and citation omitted) (Alliance); see also G.L. c. 91, § 1 (definitions). Unless

relinquished by an express Act of the Legislature, the public has certain rights in all tidelands. Arno v. Commonwealth, 457 Mass. 434, 436-37 (2010).

The Legislature delegated the duty to administer and implement Chapter 91 to two agencies within the Executive Office of Energy and Environmental Affairs (EOEEA). Those agencies are the Department of Conservation and Recreation (DCR) and DEP. See G.L. c. 91, § 1 (defining "department" to mean DCR in enumerated sections of Chapter 91 and DEP in all other sections). DCR supervises lands, flats, shores, and rights in tidewaters belonging to the Commonwealth and protects and develops the rights and property of the Commonwealth of harbors and tidewaters. G.L. c. 91, §§ 2, 10. This authority includes the right to sell, convey, and lease certain specified lands. Id. § 2. DEP, on the other hand, "protect[s] the interests of the commonwealth in areas described [in Chapter 91] in issuing any license or permit authorized [under Chapter 91]." Id. §§ 2, 10.

Under that authority, DEP licenses the construction of structures on both filled and flowed tidelands. G.L. c. 91, § 14. "No structures . . . for nonwater[-] dependent uses of tidelands . . . may be licensed" unless DEP after a hearing determines that "said structures . . . shall serve a proper public purpose [that] shall provide greater public benefit

than public detriment to the rights of the public in said lands[.]” Id. § 18. Every license must “state the conditions on which it is granted, including but not limited to the specific use to which the licensed structure . . . is restricted[.]” G.L. c. 91, § 18. “Any changes in use or structural alteration of a licensed structure . . . shall require the issuance by [DEP] of a new license[.]” Id.

Chapter 91 licenses are “revocable at the discretion of the general court, or by [DEP], for noncompliance with the terms and conditions set forth [in that license].” Id. § 15; see id. § 18; Arno, 457 Mass. at 450 (recognizing that “such licenses are - and always have been - revocable”); see Comm’r of Public Works v. Cities Service Oil Co., 308 Mass. 349, 355 (1941) (explaining that, since 1869, the authority to erect structures in tide waters “should be construed as a revocable license”). Finally, “the grant of a license . . . shall not convey a property right, nor authorize any injury to property or invasion of the rights of others.” G.L. c. 91, § 15.

2. DEP granted the Chapter 91 License to BRA after determining that BRA’s proposed project served a proper public purpose.

This case concerns a parcel of land on Long Wharf that BRA took by eminent domain in 1970 under the city of Boston’s 1964 Urban Renewal Plan. Recommended Final Decision (RFD) at 9 (reproduced in Addendum, Tab 3);

Record Appendix (RA) at 1969. Long Wharf happens to be located on filled tidelands. RFD 2-3. For that reason, among the approvals that BRA needs to redevelop this land includes a Chapter 91 license from DEP. G.L. c. 91, §§ 2, 14, 18.

This land was the subject of two Chapter 91 licenses issued in 1983: the Massachusetts Bay Transport Authority (the MBTA) received License 977 for a ventilation shaft and emergency egress for its blue line subway and BRA received License 988 for renovations to the plaza area surrounding the pavilion on the property. RA 39, 74. The record does not reflect that Legislative approval under Article 97 was required before DEP's predecessor agency issued each license.

BRA now proposes to alter and add a use to a shade structure that sits on Long Wharf. RA 401-02, 411. The shade structure currently provides fresh air, ventilation, and emergency egress for the subway tunnel that runs below Long Wharf. Id. BRA plans to convert the structure to a restaurant by enclosing it and building a small addition. RFD at 9-10. The structure will continue to ventilate and serve as an egress for the subway. RA 232-35. So that the "general public can [continue to] enjoy the harbor vista," RFD at 19-20, BRA also proposes to place 18 seasonal

shaded tables on the parcel of land, independent of the restaurant, for public use. Id.

During the Chapter 91 licensing process, DEP's Waterways Program determined: 1) that the proposed restaurant is a nonwater-dependent use on tidelands; 2) that the project, as conditioned by DEP, complied with all applicable standards of the Waterways regulations and requirements of the Boston Municipal Harbor Plan; and 3) that the project, as conditioned by DEP, serves a proper public purpose that provides greater benefit than detriment to the rights of the public. RA 69-71. Based on those determinations, DEP's Waterways Program issued a "Written Determination . . . of its intent to approve [BRA's] application, subject to [several] conditions," RA 69-78, and the associated Chapter 91 license that incorporates those conditions (the Chapter 91 License). RA 74; see RA 71. In particular, DEP "authorize[d] and license[d]" BRA to "enclose the existing one-story structure . . . and to construct and maintain four structural alterations" in accordance with plans submitted in June 2008. RA 74.

The Chapter 91 License has eleven Special Conditions as well as eight Standard Conditions. RA 74-77. The Special Conditions require, inter alia, that BRA "ensure that the restaurant operations do not block access to the MBTA ventilation shaft and

emergency egress authorized under License 977," to provide restrooms for use by the general public during business hours regardless of patronage, and allow BRA to "transfer to the restaurant operator maintenance responsibility of the public open space." RA 74-75. The Standard Conditions state that the Chapter 91 License "shall be revocable by [DEP] for noncompliance with the terms and conditions" and "is granted subject to all applicable Federal, State, County, and Municipal laws, ordinances, and regulations[.]" RA 77.

3. The Residents received further DEP review of the Chapter 91 License.

Appellees, a group of Boston residents (the Residents), appealed the Waterways Program's issuance of the license to DEP's Office of Appeals and Dispute Resolution. RA 12; see RA 1-12. They claimed that the project would cause excessive noise and pollution and spoil the views they currently enjoyed in the existing open space. E.g., RA 109, 168, 171, 179, 188.

DEP assigned the matter to a hearing officer, who identified eight issues for resolution. RA 115. All eight issues related to the question of whether BRA's project complied with Chapter 91 and its regulations at 310 Code Mass. Regs. § 9.00 et seq. RA 115-16. The Residents then filed a legal memorandum arguing that the project did not comply with the Chapter 91 regulations. RA 273-81. DEP and BRA opposed. RA 333-

432. All parties filed evidence to support their positions. RA 432-1175.

On the first day of the hearing, the Residents also moved for summary decision. RA 1176-79. They argued that BRA failed to disclose that the project site was parkland that received federal funding and that the use of such land cannot be changed without Legislative approval under Article 49 of the Massachusetts Constitution, as amended by Article 97 of the Amendments (Article 97) (reproduced in Addendum Tab 2). RA 1176.¹

In response, BRA and DEP argued that the hearing officer had no power to decide the issue of whether Article 97 applied to Long Wharf. RA 1197. They noted that the Residents raised that issue at the pre-screening conference and that the hearing officer ruled that the question lay outside the scope of the

¹ Article 97 declares that the "people shall have the right to clean air and water . . . and the natural, scenic, historic, and esthetic qualities of their environment" and that "the protection of the people in their right to the conservation, development[,] and utilization of the agricultural, mineral, forest, water, air[,] and other natural resources . . . are a public purpose." Mass. Const. art. XLIX (amended by Mass. Const. art. XCVII). Article 97 then grants to the Legislature the power to enact laws to protect such rights and to take or buy lands, easements, or other interests, to accomplish those purposes. Id. Lands or easements taken for Article 97 purposes "shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote . . . of each branch of the General Court." Id.

Chapter 91 regulations. RA 1198-99. They also submitted a letter from the Stateside Coordinator of the Land and Water Conservation Fund (LWCF)² explaining that: 1) the proposed restaurant directly abutted a LWCF project; 2) BRA's plan initially had seating in LWCF protected park boundaries; 3) BRA agreed to move the seating off of the LWCF park boundary line and put planters on the boundary line to delineate where the restaurant ended and the project began; and 4) if the License included those two conditions, then "the project causes no detriment to the public interest" as described in the Chapter 91 regulations. RA 1206.

4. The DEP Commissioner affirmed the issuance of the Chapter 91 License and denied the Resident's motion for summary decision.

After a two-day hearing and a site visit, the hearing officer issued a Recommended Final Decision (the RFD) recommending that the Commissioner affirm the issuance of the Chapter 91 License and deny the Residents' motion for summary decision. RA 1969-2005 (reproduced in Addendum, Tab 4). In doing so, she agreed with BRA and DEP's assertions regarding the

² The LWCF State Assistance Program was established in 1965 to help preserve and develop quality outdoor recreation resources for all United States citizens.

LWCF grants are provided to states and through states to local government jurisdictions on a matching basis for the acquisition of land and development of facilities for public outdoor recreation.

Article 97 question. RFD 5 n.3; RA 1974. Regarding Chapter 91, she determined that:

(1) BRA's project served a proper public purpose by incorporating growth that would activate open spaces and support year-round day and evening activity, RA 1978;

(2) the Residents did not present evidence that undermined testimony that the project would provide reasonably direct nonwater-related benefits to the public, RA 1981-85;

(3) the project would promote public use on the seaward end of Long Wharf in a clearly superior manner by providing shaded seating for the public independent of the restaurant, flood mitigation measures, a year-round destination, restrooms for public use, and seating with harbor views on benches, RA 1985-89;

(4) the project met the regulatory requirements regarding alternative setback distances, RA 1989-1991, public views of the water, RA 1992-93, and historic resource requirements, RA 1993-94;

(5) the Residents did not have standing to appeal the License because none of them demonstrated sufficient aggrievement, RA 1994-1999; and

(6) the project would provide greater benefit than detriment to rights of the public in tidelands by revitalizing an underutilized structure with the use of private funds, creating job opportunities and

public amenities that do not currently exist, generating capital investment that will allow improvements to adjacent open space, encourage year-round pedestrian use, and attract pedestrians to the waterfront. RA 2000-2004.

Shortly afterwards, the DEP Commissioner adopted the RFD, "except for the portion . . . regarding the issue of . . . standing," as the final decision of DEP. RA 2006 (reproduced in Addendum, Tab 4). The DEP Commissioner stated that she "need not reach the standing issue because the [Residents'] challenge of the Permit fails on the merits." RA 2006. Finally, she stated that "[a]s discussed in the RFD, the evidence that the [Residents] presented at the Adjudicatory hearing was summary in nature . . . in stark contrast to the detailed and credible evidence presented by [BRA and DEP]." RA 2006.

5. The trial judge vacated the Commissioner's final adjudicatory decision by ordering declaratory relief and a writ of mandamus.

The Residents appealed DEP's final decision to the Superior Court under G.L. c. 30A, § 14, G.L. c. 231A, and G.L. c. 249, § 5. RA 1-12. They alleged that DEP "acted in excess of its statutory authority and unconstitutionally in violation of Article 97 and of Article 30 of the Massachusetts Declaration of Rights (Separation of Powers) when it issued a decision approving a change in use and control that lacked the

required two-thirds vote of the Legislature" and that DEP wrongly concluded that BRA's project complied with Chapter 91 and its regulations. RA 2017 (Compl. ¶ 22). Based on those allegations, the Residents asked the court to "declare . . . [the Commissioner's] final decision . . . to be null and void and in violation of constitutional and statutory provisions" and that DEP and BRA "failed to follow the proper procedure for changes in a park, usurped Legislative authority, and violated Article 97[.]" RA 2018 (Compl. ¶¶24-25).

The Residents did not allege that DEP owns any "lands" or "easements" on Long Wharf. Further, though the Residents alleged that they were "aggrieved" by DEP's decision, RA 2017, they did not in the Complaint identify any interests that would be substantially affected or harmed by DEP's decision. See RA 2015-18.

DEP moved to dismiss the Residents' claim for declaratory relief, describing that request against as duplicative and moot because the court's decision on the merits of the Chapter 30A claim would declare the Residents' rights. See RA 2011. DEP also argued that the Residents failed to state a claim for declaratory relief because the Chapter 91 License was not a disposition or change in use under Article 97.

The trial judge denied DEP's motion without prejudice. RA 2011. The Residents and BRA cross-moved for judgment on the pleadings; DEP opposed the

Residents' motion and renewed its motion to dismiss. RA 2012. DEP took no position regarding the question of whether BRA's land was subject to Article 97.

In June 2011, the trial judge issued a "Memorandum of Decision and Order" (Decision) (reproduced in Addendum, Tab 5) granting the Residents' motion for judgment on the pleadings, denying BRA's cross-motion for judgment on the pleadings, vacating DEP's decision, and voiding the Chapter 91 License. RA 2378-2389. First, the trial judge agreed with DEP that the agency did not have jurisdiction to interpret and apply Article 97. Decision at 3-4. Next, the trial judge determined that BRA's land was taken for an Article 97 purpose. Decision at 4-7. Third, the trial judge held that the Chapter 91 License created a transfer of legal control that effected a change in use of Article 97 land that required a two-thirds vote of the Legislature. Decision at 7-9.

Based on those determinations, the trial judge found that the Residents "are entitled to a writ of mandamus" and ordered both DEP and BRA to comply with Article 97. Decision 9-11. She held that the Residents had standing to seek mandamus because they sought to "'secure on the part of [DEP] the performance of a public duty.'" Decision at 10 (citing the Residents' motion for judgment on the pleadings). She reasoned

that "mandamus is the only vehicle through which the [Residents] can obtain meaningful review of the Article 97 issue" because "the 30A process would not allow for meaningful judicial review of this critical issue" where "the DEP . . . lacks jurisdiction to interpret Article 97." Decision at 10.

The trial judge also concluded that the Residents deserved declaratory relief and stated that she "rejects [DEP's] argument that declaratory relief is unwarranted because the claim is duplicative with the claim under G.L. c. 30A, § 14." Decision at 11. She declined, however, to "address the parties' additional arguments concerning the license's validity under the Waterways Statute." Decision at 11. Finally, she found the Chapter 91 License "invalid for failure to comply with Article 97," Decision at 11-12, and ordered that "DEP's final decision to issue the chapter 91 license is VACATED, and the chapter 91 license is voided." Decision at 12 (emphasis original).

Summary of argument

The Residents lack standing to bring this action against DEP. First, they do not have standing under the Administrative Procedure Act because they did not allege, and the record does not show, that BRA's proposed project will significantly affect their ability to enjoy harbor views or otherwise enjoy the waterfront. They also lack standing to seek a writ of

mandamus against DEP where DEP had no duty to apply, interpret, or enforce Article 97 here. That DEP owes no duty to them under Article 97 also dooms their request for relief under the Declaratory Judgment Act.

Second, judicial review of final DEP decisions proceeds under G.L. c. 30A, § 14. Under that statute, the trial judge could reverse DEP's decision only after concluding that the decision contained legal error and that such error prejudiced the Residents' substantial rights. But the trial judge did not reach either conclusion. Instead, ignoring the exclusive method of judicial review prescribed by the Legislature, she improperly vacated DEP's decision through declaratory relief and a writ of mandamus.

This error is highlighted by an internal inconsistency in the trial judge's decision. On one hand, she agreed with DEP that the agency had no power to decide whether BRA's land is subject to Article 97. Inconsistently, however, she then went on to hold that DEP committed legal error by refusing to apply and enforce the very same constitutional provision - Article 97.

On the merits, the Chapter 91 License here did not itself transfer or convey a property right. Thus DEP's decision to issue the Chapter 91 License could not have triggered the two-thirds vote requirement under Article 97.

Significantly, the Chapter 91 License does not excuse BRA from complying with other laws, including Article 97. Accordingly, if BRA's proposed project does in fact trigger Article 97, an issue that is itself open to debate, BRA cannot rely on the Chapter 91 License to start its project before complying with Article 97 or any other applicable law. But those issues do not concern the Chapter 91 License. This Court should not, as the trial judge did, allow the Residents to use a challenge to the Chapter 91 License as a vehicle to air their Article 97 issues and to drag DEP into aspects of BRA's project that do not relate to DEP's duties under Chapter 91.

Argument

- I. **The Residents lacked standing to challenge DEP's issuance of the Chapter 91 License to BRA.**
 - A. **The Residents did not allege, nor does the record show, that any of them were sufficiently aggrieved to appeal the Chapter 91 License under G.L. c. 30A, § 14.**

Administrative and judicial review of a DEP decision to issue a waterways license proceeds under G.L. c. 30A, § 18. Accordingly, before she could "set aside or modify" DEP's decision, the trial judge needed to have concluded that the Residents' substantial rights were prejudiced by DEP's legal errors. G.L. c. 30A, § 14(7); accord Bd. of Health of Sturbridge v. Bd. of Health of Southbridge, 461 Mass.

548, 557, 559 (2012) (Sturbridge) (explaining that plaintiff must establish both aggrievement and error). The record below does not support such a conclusion.

First, the Residents' Complaint fails to allege facts that demonstrate a plausible basis for standing. In fact, the Complaint does not allege any facts that indicated that any of the Residents' individual interests would be substantially prejudiced by DEP's decision. RA 2015-18. Indeed, they could not have. After all, it is the BRA's decision to begin the proposed project without seeking Legislative approval under Article 97 (if required), and not the Chapter 91 License, that might potentially harm the Residents. It is perhaps for that reason that the Residents allege only that they are "aggrieved," RA 2017, a statement that is legally insufficient to establish standing under even the most liberal reading.

Before DEP, but not in their Complaint, the Residents claimed that the project would aggrieve them by creating excessive noise and pollution and denying them views of the harbor. E.g., RA 109, 168, 171, 179, 188. See also RFD at 27-29 (analyzing aggrievement under the Waterways regulations and finding none).³ But those earlier allegations are not a basis for standing

³ The Commissioner declined to adopt the hearing officer's determination on standing after deciding that doing so was unnecessary. RA 2006.

here, because the BRA's proposed project would impact their views from public place. See Higgins v. Dep't of Env'tl. Protection, 64 Mass. App. Ct. 754, 757 (2005) (concluding that a development's interference with abutters' views of tidelands alone was insufficient to establish standing to appeal a Chapter 91 license granted for nonwater-dependent use to DEP) (citing 310 Code Mass. Regs. § 9.12(2)(a)). See also Hertz v. Sec'y of the Executive Office of Env'tl. Affairs, 73 Mass. App. Ct. 770, 774 (2005) (citing Higgins, 64 Mass. App. Ct. at 756-758 and quoting Enos v. Sec'y of Env'tl. Affairs, 432 Mass. 132, 139 n.6 (2000) to explain that plaintiffs lacked standing where relevant regulations "did not create 'a right in the particular plaintiff[s] to redress those injuries.'").

Even if the Chapter 91 regulations do create some sort of right for these Residents to appeal a license that would impact their view from a public place or create excessive noise and pollution, the record in this case did not show that BRA's project would substantially harm such interests. First, Long Wharf currently is not peaceful, tranquil, or undeveloped. RFD at 2; RA 397, 409, 418, 1907. According to the hearing officer's factual findings, which the Commissioner adopted and the Residents did not challenge, the project location "is the site of water transportation, public transportation, hotels, retail

establishments, and restaurants[,]” as well as “the Harborwalk - a pedestrian passageway that enhances public access to the waterfront.” RFD at 2; RA 397, 409, 418, 1907. Further:

- The proposed project will build seating with views of the harbor available to the general public and free of charge, RFD 19, RA 425;
- the height, scale, and massing of the shade structure will not change, RFD 23, RA 412;
- the project will not interfere with the use of the Harborwalk, RFD 23, RA 413;
- the proposed design will not adversely impact the view corridor from State Street or sight lines to the water from the Harborwalk, RFD 23, RA 425; and
- and the existing open views through the pavilion would be maintained through the use of windowed walls. RFD 24, RA 411.

The record thus shows that BRA's proposed project will not significantly affect their ability to view the harbor and otherwise enjoy the waterfront.

Instead, the proposed project is designed to enhance the public's ability to enjoy this particular stretch of the already busy waterfront area. The Residents therefore lack standing to challenge the Chapter 91 License under G.L. c. 30A, § 14.

B. Because DEP had no duty to enforce Article 97 here, the Residents did not have standing to ask for a writ of mandamus against it.

The Residents also cannot seek a writ of mandamus against DEP under the public right doctrine. Cf. Decision at 9-10. Under that doctrine, a citizens group has, under certain circumstances, standing to bring a mandamus action to "procure the enforcement of a public duty." Tax Equity Alliance for Massachusetts & others v. Comm'r of Revenue, 423 Mass. 708, 714 (1996) (citations and additional quotation marks omitted). In such cases, plaintiffs act under the public right to have a specific duty performed that the law requires to be performed. Id. (citation omitted). That is not the case here.

As explained infra, DEP does not have any power to dispose of or change the use of BRA's land here. See Argument Part II. Nor does any law require DEP to enforce Article 97 when it issues a Chapter 91 license, again, a point that the trial judge acknowledged. See Decision at 3-4. Thus, the Residents lack standing to seek mandamus relief against DEP for an alleged failure to comply with Article 97.

Assuming for the purposes of argument that DEP's issuance of the Chapter 91 License was somehow unconstitutional once the Article 97 question arose, the Residents still would not have standing to seek mandamus relief against DEP on that issue. This Court

has declined to extend the public duty exception to grant standing to a group seeking to challenge the substantive constitutionality of an official action. Alliance AFSCME/SEIU, AFL-CIO v. Com., 427 Mass. 546, 550 (1998) (remanding case for dismissal for lack of subject matter jurisdiction). Instead, the "public right doctrine has always been limited to the enforcement of clear and unequivocal duties, such as election officials' duty to count ballots correctly," and does not apply where, as here, a "plaintiff seeks to reverse a discretionary decision that was well within the statutory responsibilities of that authority[.]" Perella v. Massachusetts Turnpike Auth., 55 Mass. App. Ct. 537, 540-41 (2002) (citing Kaplan v. Bowker, 333 Mass. 455, 460 (1956), Ames v. Attorney Gen., 332 Mass. 246, 250-52 (1955), Brewster v. Sherman, 195 Mass. 222, 225 (1907); and others). The Residents thus did not have standing to seek mandamus relief against DEP.

C. The lack of a duty owed to the Residents by the DEP Commissioner under Article 97 also dooms their claim for declaratory relief.

For similar reasons, the Residents cannot seek declaratory relief against DEP regarding Article 97. To have standing to sue DEP under G.L. c. 231A, the Residents' interest must come within the zone of interests arguably protected by Article 97 and DEP "must additionally have violated some duty" owed to

them. Enos, 432 Mass. at 135. As even the trial judge recognized, DEP has no power, let alone a duty, to interpret or apply Article 97 in the context of a Chapter 91 licensing proceeding. Further, the Residents' constitutional right to clean air and water under Article 97 would not have entitled them to challenge the DEP Commissioner's decision under G.L. c. 231A. Enos, 432 Mass. at 142 n.7. So, the Residents had no right to declaratory relief against DEP regarding Article 97.

II. DEP can issue a Chapter 91 License without a two-thirds vote of the Legislature, whether or not BRA's land is subject to Article 97.

This case concerns two separate and distinct legal regimes that happen to co-exist at the same site. Each legal regime relates to a different aspect of the land. Chapter 91 applies here because the land is on filled tidelands. Article 97 may apply here, depending on the purposes for which BRA took the land.

The two regimes have distinct purposes and methods to achieve those purposes. Chapter 91 directs DEP to preserve, protect, and promote the public's water-based rights through the Act's licensing scheme. See p. 2-4 supra. By contrast, Article 97 protects the right of the people "to the conservation, development[,] and utilization" of natural resources in the Commonwealth. Mass. Const. art. XLIX (amended by Mass. Const. art. XCVII) To that end, Article 97

requires that "[l]ands or easements taken or acquired" to protect the public's Article 97's rights "shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote . . . of each branch of the general court." Id.

Despite these distinct purposes and methods, the trial judge found that DEP's issuance of the revocable Chapter 91 License to BRA here fell within Article 97's "used for other purposes or otherwise disposed of" language. The grant of a license under Chapter 91 per se however, has never been thought to implicate Article 97 in a way that requires a two-thirds vote of the Legislature before the license can issue. See Arno, 457 Mass. at 449-51. Nor could it, as the Chapter 91 License conveys no property rights.

Further, as Moot made clear, DEP cannot extinguish, relinquish, or otherwise dispose of public rights or the Commonwealth's interests in tidelands and submerged lands. Moot, 448 Mass. at 347; see also Arno, 457 Mass. at 452-53. That BRA acquired land with Chapter 91 public trust rights, and may have subsequently dedicated that land to Article 97 purposes, affects what BRA can do with the land but does not transform the underlying Chapter 91 public trust rights in any way or subject DEP's regulation of those public trust rights to Article 97.

A. Only the relinquishment of land or an easement taken or acquired for an Article 97 purpose triggers the vote requirement.

To date, this Court has not analyzed the meaning of the words "used for other purposes or otherwise disposed of" in Article 97. The only case on point is a 1987 Appeals Court decision that disposed of the question in one sentence. Miller v. Dep't of Env'tl. Mgmt., 23 Mass. App. Ct. 968, 969 (1987) (concluding that agency's issuance of revocable permit did not require Legislative approval under Article 97). While Miller may have been terse, its holding is consistent with this Court's Article 97 jurisprudence and thus further undermines the trial judge's decision.

In 1981, the Justices of this Court advised that the Commonwealth's relinquishment of anything other than land or an easement in tidelands would not trigger Article 97's vote requirement. Opinion of the Justices to the Senate, 383 Mass. 895, 918-19 (1981) (Opinion I). The statement arose in the Court's response to the Senate's question regarding the constitutionality of a proposed law that would eliminate any "vestigial" interests of the Commonwealth in certain tidelands. Id. at 897-98. The Senate wanted to know if the bill, if enacted into law, required Legislative approval under Article 97. Id. at 900. The Court explained that it "d[id] not treat the omission of lesser property rights from the

two-thirds voting requirement as accidental or meaningless[.]” Id. at 918-19. After noting that “it is clear that not all the Commonwealth’s interests in tidelands amount to easements,” the Court stated that “any disposition of such [property interests lesser than easements] is not subject to the two-thirds vote requirement of art. 97[.]” Id. at 919. See Opinion of the Justices to the Senate, 383 Mass. 927, 937 (1981) (Opinion II) (reaching same conclusion regarding a similar bill).

More recently, this Court held that a town did not have to comply with Article 97’s vote requirement before selling town land to a private party where the town voted on, but did not record, a conservation restriction on that land. Bd. of Selectmen of Hanson v. Lindsay, 444 Mass. 502, 509 (2005) (Hanson). A properly recorded conservation restriction would have transferred the land the custody of the town’s conservation commission for an Article 97 purpose. Id. at 505-06. Relying on its vote to impose the restriction, the town “asserted that the sale of the locus . . . was invalid and void because it did not comply with” Article 97’s vote requirement. Id. at 503. The Court disagreed, reasoning that the town needed to have recorded the conservation restriction for that interest to prevail over that of the bona fide purchaser for value. Id. at 505.

Opinion I, Opinion II, and Hanson all addressed the question of "what" sorts of interests cannot be sold or relinquished without Legislative approval. The advisory opinions answered: an ownership interest in land or an easement and no interest "lesser" than those. Hanson clarified that a public ownership interest in land or an easement was not enough to trigger Article 97's vote requirement. The ownership interest also had to have been clearly and publicly taken or acquired for an Article 97 purpose.

Consistently with these cases, the Appeals Court concluded that a revocable permit granted by the Department of Environmental Management (DEM) was **not** a "disposition of 'lands and easements'" that required Legislature approval under Article 97. Miller, 23 Mass. App. Ct. at 969 (quoting Article 97). In that case, DEM granted a permit to a ski operator to run a program and maintain trails in a DEM-controlled state forest. Id. at 969. Miller is consistent with this Court's Article 97 jurisprudence because DEM did not, when it issued the permit, relinquish land or an easement held for an Article 97 purpose or authorize the ski operator to do so.⁴ So too here, where DEP's Chapter 91 License to BRA did not do so either.

⁴ Cf. Cranberry Growers Service, Inc. v. Town of Duxbury, 415 Mass. 354, 357 & n.2 (1993) (declining to
(footnote continued)

B. The Chapter 91 License here did not convey a property interest.

"[T]he grant of a license" under G.L. c. 91 "shall not convey a property right[.]" Id. § 15. So, contrary to the trial judge's conclusion, see Decision at 8, BRA's right to lease the land did not derive from the Chapter 91 License. Rather, BRA has that right because it owns the land. And BRA's authority to lease its own land is only relevant to DEP to the extent that it implicates Chapter 91, which it did not here. As such, the trial judge was wrong to find that the License "transferred to BRA an extent of legal control" by "authoriz[ing] BRA to enter leases with third parties." Decision at 8.⁵

While the Chapter 91 License acknowledges that BRA planned to lease its property, RA 50, the acknowledgement is simply descriptive and not relevant

(footnote continued)

decide whether town could lease land without Legislative approval and noting, without comment, that Miller held that a revocable permit was not a disposition).

⁵ The trial judge incorrectly equated the Chapter 91 License with an easement. See Decision at 8 n.8. A license is "revocable permission to commit some act that would otherwise be unlawful[.]" Black's Law Dictionary 931 (7th ed. 1999) (Black's). An easement, on the other hand, "is an interest in land[.]" Id. 527. Unlike an easement, a license creates no estate, or any other interest, in land. A.L. Eno Jr., W.V. Hovey & M. Pill, Real Estate Law, §28 (4th ed. 2004) (citing Chelsea Yacht Club v. Mystic River Bridge Auth., 330 Mass. 566 (1953)). See also Black's 527. Thus, the License cannot be "tantamount" to an easement for Article 97 or any other purpose.

to the Chapter 91 issues. In fact, the Chapter 91 License does not require BRA to satisfy any conditions in order to lease the land. RA 49-58. And the Chapter 91 License further defines BRA, not the lessee, as the "Licensee" that must comply with its terms. RA 54.

The Chapter 91 License thus grants no property interests to BRA. All it does is certify that BRA's plan complies with Chapter 91 and its regulations and conditions the exercise of rights that BRA already has. As such, "[Article 97] is not an obstacle" to BRA's ability to obtain a Chapter 91 license. Haugh v. Simms, 64 Mass. App. Ct. 781, 790 (2005) (concluding that Article 97's vote requirement was not triggered by court decision that allowed landowner to lay utilities on an easement held by the Commonwealth on private land because the court decision created no new interests or property rights). In short, if Article 97 requires BRA to seek Legislative approval, then Article 97 would affect BRA's ability to use the Chapter 91 License but it would not have anything to do with whether the license complies with Chapter 91 and its regulations.

C. The Chapter 91 License alone cannot "change the use" of BRA's land under Article 97.

Though the Chapter 91 License gives BRA permission to conduct its chosen activities on its land, Decision at 8-9, the license by itself cannot

change the use of that land. Contrary to the trial judge's conclusion, the license only certifies that a change in use proposed by the applicant complies with Chapter 91. It is just one of the many approvals that BRA needs for its project. Ultimately it is BRA, the project proponent, and not DEP, a licensing authority, who is the actor for the purposes of Article 97.

The case that the trial judge cited for the proposition that the Chapter 91 License changed the use of BRA's land for Article 97 purposes, Robbins v. Dep't of Public Works, does not support her conclusion. 355 Mass. 328, 330 (1969). In Robbins, a residents' group challenged the transfer of certain parcels of land from DCR's predecessor agency, the Metropolitan District Commission (MDC), to the Department of Public Works. Id. at 328. Citing the prior public use doctrine, which states that public lands devoted to one public use cannot be diverted to an inconsistent public use without explicit authorizing legislation, Robbins held that MDC could not transfer the parcels without such authorization. Id. at 331-32. The case therefore might stand for a rule that DCR, the agency that has authority to sell, convey, or lease certain lands under G.L. c. 91, § 2, may, in some circumstances need additional Legislative approval. Nothing in Robbins, however, indicates that an agency's regulatory decision to license the use of

land not owned by that agency is a change in use under the prior public use doctrine.

The Attorney General Opinion cited by the trial judge on this issue also does not support her conclusion. Contrast Decision at 9 (citing Quinn opinion) with Op. Atty. Gen. 142, 144 (June 6, 1973) (Op. Atty. Gen.) (reproduced in Addendum, Tab 6). Attorney General Robert Quinn opined that the "used for other purposes" standard applied to "[a] change in use within a governmental agency or within a political subdivision." Op. Atty. Gen. at 144 (emphasis original); see also id. p. 147 (advising that intra-agency changes in uses of land from Article 97 purposes are subject to the vote requirement). So, according to Attorney General Quinn, the vote requirement might apply to the BRA if its parcel is Article 97 land even if BRA decides not to transfer (i.e., lease) any property interests. Nothing in the Attorney General's opinion, however, indicates that the requirement also applies to an agency who grants a revocable license, like DEP.

Moreover, like all licenses granted under G.L. c. 91, § 18, the Chapter 91 License was "granted subject to all applicable Federal, State, County, and Municipal laws, ordinances, and regulations[.]" RA 57. Thus, should BRA fail to comply with other Federal, State, or local requirements, which include Article 97

(if applicable), the proposed work cannot proceed despite the issuance of the Chapter 91 License. Accordingly, as explained infra in Argument Part III, the Superior Court's use of either writ of mandamus or declaratory relief to void the Chapter 91 License was simply unnecessary notwithstanding any potential future Article 97 issue.

D. The Superior Court also erred in holding that the Chapter 91 License "disposed of" Article 97 land.

Despite acknowledging that Miller "support[s] the assertion that revocable licenses do not result in dispositions" under Article 97, Decision at 8 n.10, the trial judge here nevertheless concluded that the Chapter 91 License "disposed of Article 97 land without the requisite legislative approval" and "is invalid." Id. at. 10. The trial judge erred by ignoring binding precedent. That error was compounded when she misinterpreted an Opinion of the Attorney General on Article 97 and undermined further by a contrary interpretation of the relevant Article 97 language by EOEEA in its guidance to its subsidiary agencies, such as DCR, which, unlike DEP, can sell, convey, improve, and lease State lands.

First, it is unclear why the trial judge chose to disregard Miller where the permit issued by DEM in that case was similar to the Chapter 91 License here. There, for example, DEM's permit allowed the permittee

to conduct an activity on land during a specific time period. Miller, 23 Mass. App. Ct. 969.⁶ Similarly, the Chapter 91 License here allows the BRA to conduct an activity on Long Wharf over a specific time period. RA 54 (License valid for thirty years). Further, like the Miller permit, the Chapter 91 License is revocable. Compare id. at 969 with G.L. c. 91 §§ 15, 18; see also Arno, 457 Mass. at 450 (Chapter 91 "licenses are - and always have been - revocable"); Comm'r of Pub. Works, 308 Mass. at 355 (noting that since 1869, any authority to alter tidelands granted under Chapter 91 "should be construed as a revocable license").

Second, the 1973 advisory opinion relied on by the trial judge further undermines her legal conclusion. Decision at 8-9. In that opinion, Attorney General Quinn interpreted the words "disposed of" in Article 97 to mean "transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government" of lands, easements, and interests taken or acquired for Article 97 purposes, and transfers from public ownership to private." Op. Atty. Gen. at 144. The opinion lists "outright conveyance, takings

⁶ That DEM issued a permit regarding DEM-controlled land might have made a stronger case for the application of Article 97's vote requirement than here, where DEP conditioned an activity on land that it does not own.

by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements" as "covered" under Article 97. Id. Consistent with Miller, however, Attorney General Quinn did not include licenses or permits in his list of what constitutes a transfer of legal or physical control. Op. Atty. Gen. at 144. The trial judge should not have grafted them onto General Quinn's well-reasoned Opinion, which this Court in 1981 cited with approval in Opinion I and Opinion II.

Third, EOEEA, the parent agency of DEP and DCR, interprets Article 97 similarly. In its Article 97 Land Disposition Policy (Policy) (reproduced in Addendum, Tab 7), EEA⁷ directed its agencies to not "sell, transfer, lease, relinquish, release, alienate, or change the control or use" of any "right or interest of the Commonwealth in and to Article 97 land" unless certain conditions are met. Policy ¶¶ 1,2. EEA defined "disposition" to include a "any change in use, in and to Article 97 land or interests . . . whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance, or change," as well as "any transfer or conveyance of ownership or other interests," and "any change of

⁷At the time, EOEEA was known as the Executive Office of Environmental Affairs.

physical or legal control." Policy ¶1. Significantly, EEA stated that "[a] revocable permit or license is not considered a disposition as long as no interest in real property is transferred to the permittee or licensee and no change in control or use that is in conflict with the controlling agency's mission ... occurs thereby." Id. (emphasis added). A contrary interpretation is inconsistent with Article 97's text and purposes and would make the most routine regulatory approvals subject to potential Article 97 review - a result surely not intended or even contemplated by Article 97's drafters.

E. It would be inefficient to require BRA to obtain Legislative approval before it can seek the various other approvals it needs for its project.

The trial judge's conclusion that Article 97's vote requirement applies to the Chapter 91 License would lead to inefficiency. Generally, the various approvals that a proponent needs for its project are obtained separately. Cf. Alliance, 457 Mass. at 663 (noting that although the defendant agency approved a petition for a project, "[a]ctual construction . . . requires additional permits, licenses, and approvals from a number of different State and local authorities"). In most circumstances, it would be inefficient for a project proponent to have to wait for one approval to issue before applying for other

ones, especially where, as here, the approvals concern distinct issues.

For example, consider a project that requires both a Chapter 91 license and a curb-cut permit from DCR. The proponent applies separately for each approval. Each approval is independent of the other and involves the application of different statutes and regulations. That the project cannot proceed without both approvals does not mean that an inability to qualify for the Chapter 91 license invalidates an otherwise properly issued DCR curb-cut permit. Further, an initial failure to obtain the Chapter 91 license would not even moot the DCR permitting proceedings because the proponent can always revise its project and submit a new application in an effort to comply with Chapter 91 and obtain a license.

In this case, BRA needed a Chapter 91 license because the land it wanted to redevelop is on filled tidelands. It also may or may not need Legislative approval if it is determined that the Article 97 vote requirement applies to Long Wharf or to BRA's proposed project. But whether the vote requirement applies here does not depend on the fact that BRA needs a Chapter 91 license for its proposed project. It instead depends on the purposes for which BRA took Long Wharf in 1970 and whether the proposed project will change the use or dispose of Article 97 land. As even the

trial judge recognized, DEP cannot decide that question. Decision at 3-4. Whether BRA's project can proceed under Chapter 91 is instead completely independent of the question of whether BRA's project needs Legislative approval under Article 97.

Taken to its logical conclusion, and assuming that she is correct that Article 97 applies to BRA's land, the trial judge's reasoning would require BRA to seek Legislative approval for its project before knowing whether that project can be built under other laws. Project proponents often use the licensing and permitting process to determine the contours of their project - i.e., what they can and cannot do under applicable regulatory schemes. It would be inefficient to require BRA to ask the Legislature to vote on a yet-to-be-approved project when not even BRA knows if the project is viable from a regulatory standpoint or, if it is, what it will look like when it emerges from licensing and permitting.

III. The trial judge incorrectly vacated DEP's decision and voided the Chapter 91 License through declaratory and mandamus relief.

- A. A writ of mandamus did not lie here where DEP acted, its action involved the exercise of discretion, and the Residents had an alternative remedy.**

A writ of mandamus remedies administrative inaction and does not lie where an agency has already acted. Doherty v. Ret. Bd. of Medford, 425 Mass. 130,

134-35 (1997) (citations omitted).⁸ The writ also does not lie if any other effective remedy exists. Id. at 135. This Court has declined to expand the use of the writ of mandamus in such cases and should not reverse course here. Id. at 134-35.

Here, mandamus against DEP should not have entered for several reasons. First, DEP's Waterways Program and its Commissioner were carrying out their responsibility to administer their licensing authority under Chapter 91. Second, as the trial judge acknowledged, DEP did not have a duty to apply or enforce Article 97 with respect to the License. Decision at 3-4. As explained in Argument Part II, DEP had no duty under Article 97 to seek Legislative approval before issuing the License. Third, the Legislature has provided an exclusive mode of judicial review for DEP's issuance of the Chapter 91 License through G.L. c. 30A, § 14.

The trial judge's use of mandamus here reflects precisely the type of inappropriate expansion of the doctrine consistently avoided by this Court. Doherty, 425 Mass. at 135 (affirming trial court's order to amend pleadings to require plaintiff seeking to overturn retirement board decision to request

⁸ See also Town of Reading v. Atty. Gen., 362 Mass. 266, 269 (1972); Rines v. Justices of the Superior Court, 330 Mass. 368, 373 (1953).

certiorari rather than mandamus relief); Town of Reading, 362 Mass. at 269 (refusing to expand mandamus and holding that certiorari is appropriate method to review town bylaw disapproval). To vacate DEP's decision and void the Chapter 91 License, the trial judge needed to have found that DEP erred as a matter of law in issuing it.⁹ But she declined to analyze that question. Decision at 11-12.

In any event, because the Chapter 91 License did not offend the Massachusetts Declaration of Rights, see Argument Part II, the trial judge could not have vacated it as unconstitutional under G.L. c. 30A, § 14. She cannot rely on mandamus to obtain a result unavailable under G.L. c. 30A, § 14.

Mandamus relief against DEP was also incorrectly entered because its action under Chapter 91 to review the application for a license involves discretion and judgment. "Relief in the nature of mandamus is not appropriate where the acts in question are discretionary rather than ministerial." Town of Boxford v. Massachusetts Hwy Dep't & another, 458 Mass. 596, 606 (2010) (Boxford) (affirming denial of

⁹ Because they did not choose to include the hearing transcript in the Administrative Record, the Residents could not make any substantial evidence-based arguments in the judicial forum. Superior Court Standing Order 1-96, ¶ 4; Covell v. Dep't of Soc. Servs., 439 Mass. 766, 782 (2003).

mandamus relief against DEP where DEP had broad discretion to take enforcement action). Stated another way, "if an act is discretionary there is by definition no official duty to perform it." Channel Fish Co., Inc. et al. v. Boston Fish Market Corp., 359 Mass. 185, 187 (1971). This rule of law derives from separation of powers; a court has "no right to substitute [its] judgment for that of an official upon whom the Legislature has imposed the duty of making a decision." Id. at 188 (citations and additional quotation marks omitted). See Alliance AFSCME/SEIU, AFL-CIO, 427 Mass. at 548 (citing doctrine to explain reluctance of court to order mandamus). Accordingly, "it is well settled that the relief provided in the nature of mandamus does not lie to compel [a public officer] to exercise his or her judgment or discretion in a particular way." Roslindale Motor Sales, Inc. v. Police Comm'r of Boston, 405 Mass. 79, 85 (1989) (internal quotations and brackets removed); see id. (reversing grant of mandamus relief regarding commissioner's decision before concluding that the trial court decision was correct for other reasons).

Here, DEP's authority to issue licenses under Chapter 91 involves the exercise of discretion and judgment. DEP "may license and prescribe the terms for "activities on tidelands[.]" G.L. c. 91, § 14. Review of the DEP Waterways Program's grant or denial of a

Chapter 91 license application occurs through an adjudicatory proceeding in which the Presiding Officer assumes a quasi-judicial role. G.L. c. 91, § 18; 310 Code Mass. Regs. §§ 1.01(1)&(5)(a) (defining the Presiding Officer's role and duties).

Further, the "requirement of a [license] is a traditional method of regulation." Bd. of Health of Woburn v. Sousa, 338 Mass. 547, 552 (1959) (affirming dismissal of petition asking that board be enjoined from requiring a permit). By authorizing it to issue licenses, the Legislature invested DEP, "the licensing authority 'with quasi judicial authority to determine the facts and to pass upon the application [for a license] in each instance under the serious sense of responsibility imposed upon [it] . . . and the delicate character of the duty entrusted to [it].'"

Id.

By voiding the License, the trial judge reversed DEP's decision to issue it. To the extent she used a writ of mandamus to do so, she erred. The invalidation of a discretionary agency decision is simply "a result not available by mandamus." Sabree v. Commonwealth, 437 Mass. 1015, 1016 (2002) (citations omitted).

B. The Residents failed to state a claim "plausibly suggesting entitlement" to declaratory relief where they alleged no direct violation of Article 97 by DEP.

Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure "permit[s] prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." Harvard Crimson, Inc. v. Presidents & Fellows of Harvard College, 445 Mass. 745, 748 (2006). To survive a motion to dismiss under Rule 12(b)(6), the Residents' factual allegations had to raise a right to relief above the speculative level based on the assumption that all the allegations in the Complaint are true (even if doubtful in fact). Iannacchino v. Ford Motor Co, 451 Mass. 623, 636 (2008). The Complaint here failed that test.

Below, the Residents sought a declaration that DEP "failed to follow proper procedures for changes in a park, usurped Legislative authority, and violated Article 97[.]" RA 2018 (Compl. ¶ 25). However, they did not allege that DEP owns the land at issue. See RA 2015-18. Nor could they, as BRA owns Long Wharf. RFD at 11. Further, the actions attributed to DEP in the Complaint (i.e., issuing a revocable license to BRA), are not, as explained above, dispositions that require Legislative approval under Article 97. See Argument Part II supra. Thus, the Residents simply did not

allege a factual basis upon which the trial judge could have declared that DEP violated Article 97.

C. The Residents' request for declaratory judgment against DEP was misplaced.

The trial judge also should not have allowed the Residents to seek a declaration that DEP, in issuing the Chapter 91 License, violated their constitutional rights. That claim, in the context of a G.L. c. 30A, § 14, challenge, is duplicative, because the "decision on the merits of the appeal [would] substantially provide[] a declaration of rights on [their] request for declaratory relief." Lily Transport Corp. v. Bd. of Assessors of Medford, 427 Mass. 228, 229 n.2 (1998); see Higgins, 64 Mass. App. Ct. at 759 n.13 (2005). As DEP argued below, the Residents had the right to argue that their "substantial rights . . . [were] prejudiced because [DEP's] decision [was] in violation of constitutional provisions" in their merits brief under G.L. c. 30A, § 14. Id. § 14(7)(a).

Conclusion

The Court should reverse the Superior Court's decision to vacate DEP's decision and void the Chapter 91 License and declare that the Residents failed to state a claim against DEP for declaratory relief.

Respectfully submitted,

DEPARTMENT OF ENVIRONMENTAL
PROTECTION

By its attorney,

MARTHA COAKLEY
ATTORNEY GENERAL



Annapurna Balakrishna
Assistant Attorney General
Government Bureau
One Ashburton Place 20th Floor
Boston, Massachusetts 02108
(617) 963-2678 BBO# 655051
annapurna.balakrishna@state.ma.us

CERTIFICATION PURSUANT TO MASS. R. APP. 16(K)

I, Annapurna Balakrishna, hereby certify that the foregoing brief complies with all the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.



Annapurna Balakrishna
Assistant Attorney General