

# Commonwealth of Massachusetts

Suffolk, S.S.

Superior Court Civil No. SUCV2010-0802-H

Sanjoy Mahajan, Victor Brogna, Stephanie Hogue, David Kubiak,  
Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli,  
Robert Skole, and Patricia Thiboutot,  
*Plaintiffs*

v.

Massachusetts Department of Environmental Protection  
and  
Boston Redevelopment Authority,  
*Defendants*

## Plaintiffs' Post-hearing Memorandum

A hearing was held in this matter on December 1, 2010. In their memorandum of law dated August 27, 2010, prior to the hearing, the plaintiffs set forth their detailed arguments. This post-hearing memorandum is limited to two general areas:

- A. The issue of waiver, raised for the first time in this case by the State defendant in its Opposition dated November 30, 2010. The plaintiffs contend that they have properly raised in prior proceedings the two arguments to which the State defendant objects, and are furnishing herein appropriate page references to the record (Section A).
- B. The specific issues discussed at the December 1, 2010 hearing. These issues, all relating to Article 97, were as follows:
  1. whether Article 97 applies to takings prior to its enactment.
  2. whether Long Wharf was taken or acquired for Article 97 purposes.
  3. whether Long Wharf has a long-running use as public open space (an Article 97 purpose).
  4. whether Long Wharf is a historic district (an Article 97 purpose).
  5. whether the project will include transfer of control of the site by lease, thereby creating an Article 97 land disposition.

6. whether the project will include a change of use of the site creating an Article 97 land disposition.
7. whether this Court in these proceedings has jurisdiction over Article 97 questions.

To each of the preceding questions the plaintiffs answer yes. The evidentiary basis is set forth in the subsections of Section B.

## **A. Plaintiffs properly raised in prior proceedings the two arguments to which the State defendant objects**

### *1. The EOEA Article 97 Land Disposition Policy*

The State defendant argues (State Defendant’s Opposition, p. 10) that the plaintiffs waived their argument relative to Article 97 and the EOEA Policy by failing to raise it below. On the contrary, this issue was raised several times, as set forth in the following table:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
4, 7–9	Plaintiffs’ Notice of Claim initiating the proceedings before the administrative law judge	“The decision ignores Article 97 of the Mass. constitution.” (p. 4 at para. 11)
280	Plaintiffs’ Memorandum of Law	Project would. . . “damage a historic site, an environmental issue mentioned expressly in MGL c. 214 s. 7A and Article 97” (para. 2), and “damage public open space and parkland, items protected by MGL c. 214 s. 7A and Article 97” (para. 3).
536	Plaintiffs’ Proposed Findings of Fact and Rulings of Law	Citing 310 CMR 9.53(3)(a) requiring the DEP to take account of its parent agency’s Article 97 Land Disposition Policy. (para. 20)
685	EOEA Article 97 Land Disposition Policy	Submitted as part of Victor Brogna’s rebuttal testimony.

## 2. Defendants' noncompliance with the Municipal Harbor Plan

The State defendant argues (State Defendant's Opposition, p. 17) that the plaintiffs waived their argument of the defendants' noncompliance with the Municipal Harbor Plan by failing to raise it below. On the contrary, it was raised several times, as set forth in the following table:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
4	Plaintiffs' Notice of Claim initiating the proceedings before the administrative law judge	"The 1991 Municipal Harbor Plan (MHP) standard of 'promot[ing] public use... in a clearly superior manner' is therefore not met, ..." (para. 9)
277	Plaintiffs' Memorandum of Law	"Furthermore, the project fails to meet the requirements of the MHP because it fails the test of 310 CMR 9.34(2)(a)(2) [regarding variances]." (first para.)
534	Plaintiffs' Proposed Findings of Fact and Law	"The project does not comply with the MHP because of the substantive zoning variances that it required (and received)." (paras. 1-2)

Additionally, the State Defendant's argument incorrectly reverses the burden of proof by stating that a variance is *de minimus* unless the DEP finds otherwise—rather than, as per the regulations, presuming that a variance is *not de minimus* unless DEP finds otherwise. 310 CMR 9.34(2)(a)(2).

### B. Issues raised at the hearing

The following issues were raised during the oral argument on December 1, 2010:

1. whether Article 97 applies to takings prior to its enactment.
2. whether Long Wharf was taken or acquired for Article 97 purposes.
3. whether Long Wharf has a long-running use as public open space (an Article 97 purpose).
4. whether Long Wharf is a historic district (an Article 97 purpose).

5. whether the project will include transfer of control of the site by lease, thereby creating an Article 97 land disposition.
6. whether the project will include a change of use of the site creating an Article 97 land disposition.
7. whether this Court in these proceedings has jurisdiction over Article 97 questions.

To these questions the Plaintiffs answer yes and, in this section, furnish page citations in the record (and an SJC citation) directly relevant to those issues.

***1. Whether Article 97 applies to takings prior to its enactment***

The Plaintiffs contend that Article 97 applies retroactively, to takings prior to its enactment. The Supreme Judicial Court has confirmed this view: *Opinion of the Justices*, 383 Mass. 895, 918 (1981), quoting from Rep.A.G.,Pub.Doc.No.12, at 139, 141 (1973), the Quinn Opinion.

***2. Whether Long Wharf was taken or acquired for Article 97 purposes***

The Plaintiffs contend that Long Wharf was taken or acquired for Article 97 purposes:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
1646	BRA's Order of Taking (1970)	The order of taking incorporates the "findings, determinations and descriptions set forth" in the Downtown Waterfront Faneuil Hall Urban Renewal Area.
1613	BRA's Downtown Waterfront – Faneuil Hall Urban Renewal Plan	"Long Wharf is to retain its historic position as the farthest projection of land into the harbor, and will become an <i>observation platform</i> ." (emphasis supplied, para. f)

(The plaintiffs waive their objection to the inclusion of pp. 1601–1656 in the record. See Plaintiffs' Response to Defendants' Joint Motion to Correct the Administrative Record.)

**3. Whether Long Wharf has a long-running use as public open space (an Article 97 purpose)**

The Plaintiffs contend that Long Wharf has a long-running use as public open space (an Article 97 purpose):

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
1656	City of Boston's planning document entitled <i>Long Wharf</i>	"Long Wharf will be developed as a simple, uncluttered, public open space which will be used in a variety of ways" (but see use restrictions for site A-8 as public open space – no buildings [ <i>Record</i> , p. 1624]).
436	<i>Globe</i> article (1980)	BRA contracted for a design that would "emphasize a public park on Long Wharf in the waterfront renewal project."
678	BRA's Chapter 91 License (1983) for building the shade pavilion	The license plan designates the purpose of renovating and maintaining Long Wharf, including the shade-pavilion site, as "passive recreation," an Article 97 open-space use.
662, 670, 672	Boston Parks Department <i>Open Space Plan 2002–2006</i>	Map designates Long Wharf as protected open space; table designates Long Wharf as protected by Article 97.
452	EOEEA Secretary's Certificate on the ENF	Describes the site as "public waterfront parkland" (third full paragraph).

#### ***4. Whether Long Wharf is a historic district (an Article 97 purpose)***

The Plaintiffs contend that Long Wharf is a historic district (an Article 97 purpose):

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
892	BRA's Environmental Notification Form	"The project site is within the Long Wharf and Custom House District, a historic district in the State Register of Historic Places and the National Register of Historic Places." (para. E)
See also	Quinn Opinion	Natural resources include "seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks or <i>historic districts or sites</i> ." (Emphasis supplied, Quinn Opinion, p. 143.)

#### ***5. Whether the project will include transfer of control of the site by lease, thereby creating an Article 97 land disposition***

The Plaintiffs contend that the project will include transfer of control of the site by lease, thereby creating an Article 97 land disposition:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
39	BRA's Chapter 91 Waterways License Application	"Long Wharf is owned by the BRA who will lease the site to the Eat Drink Laugh Restaurant Group." (last sentence of Section 2.0)
See also p. 8	Quinn Opinion	Article 97 land dispositions include "all means of transfer or change of legal or physical control... without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes." (Quinn Opinion, p. 144.)

**6. Whether the project will include a change of use of the site creating an  
Article 97 land disposition**

The plaintiffs contend that the project will include a change of use of the site creating an Article 97 land disposition:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
662, 670	Boston Parks Department <i>Open Space Plan 2002–2006</i>	Map designates Long Wharf as protected open space.
452	EOEEA Secretary’s Certificate on the ENF	Describes the site as “public waterfront parkland” (third full paragraph).
39	BRA’s Chapter 91 Waterways License Application	“Long Wharf is owned by the BRA who will lease the site to the Eat Drink Laugh Restaurant Group.” (last sentence of Section 2.0)
See also p. 9	Quinn Opinion	“public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion,” on the doctrine of prior public use. (Quinn Opinion, p. 144)
See also p. 9	Quinn Opinion	“As to all such changes in use previously covered by the doctrine of ‘prior public use’ the new Article 97 will only change the requisite vote of the Legislature from majority to two thirds. Article 97 is designed to supplement, not supplant, the doctrine of ‘prior public use.’” (Quinn Opinion, p. 146)

**7. Whether this Court in these proceedings has jurisdiction over Article 97 questions**

The Plaintiffs contend that this Court in these proceedings has jurisdiction over Article 97 questions:

<i>Record</i>	<i>Document</i>	<i>Relevant extract</i>
458	BRA and DEP's Joint Opposition to Petitioners Motion for Summary Decision	"...jurisdiction to interpret and apply Article 97 lies with the courts of the Commonwealth."
685	EOEA Article 97 Land Disposition Policy	"An Article 97 land disposition is defined as ...c) any change in use, in and to Article 97 land or interests in Article 97 land owned or held by the Commonwealth or its political subdivisions, whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance or change." (emphasis supplied, second full paragraph in Section I; see also applicability of the policy to municipalities, <i>Record</i> , p. 687.)
536	Plaintiffs' Proposed Findings of Fact and Rulings of Law	Citing 310 CMR 9.53(3)(a) requiring the DEP to take account of the Article 97 Land Disposition Policy.

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Respectfully submitted,  
Plaintiffs,  
by their attorney,

Victor Brogna  
120 Commercial St Apt 5-3  
Boston, MA 02109-1337  
617.523.7620  
617.523.0403 (fax)  
BBO #058400

*Dated: December 6, 2010*