COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT DEPARTMENT**
Civil Action No. SUCV2010-0802-H

SANJOY MAHAJAN, et al.,
Plaintiffs

V.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
BOSTON REDEVELOPMENT AUTHORITY, and
Defendants

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS

The Plaintiffs' complaint against the Department of Environmental Protection ("DEP") seeks G.L. c. 30A review of the DEP's final adjudicatory decision to issue a Chapter 91 waterways license to the Boston Redevelopment Authority ("BRA"). The Plaintiff's complaint also seeks declaratory relief pursuant to G.L. c. 231A §§ 1-5 and relief in the nature of mandamus pursuant to G.L. c. 249, section 5. The Plaintiffs allege that the DEP acted in excess of its statutory authority and unconstitutionally in violation of Article 49 of the Massachusetts Constitution, as amended by Article 97 of the Amendments ("Article 97") and of Article 30 of the Massachusetts Declaration or 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. Plaintiffs' complaint, paragraph 22(a). The plaintiffs request that the Court declare that the DEP failed to follow the proper procedure for changes in a park, violated Article 97 of the

Amendments to the Massachusetts Constitution and that the DEP's final decision to issue a license to the BRA is, therefore, null and void. Plaintiffs' Complaint, paragraphs 24 and 25.

DEP asserts that the Plaintiffs' claims pursuant to G. L. c. 30A and G. L. c. 231A are duplicative and for this reason, the Plaintiffs' claims pursuant to G. L. c. 231A should be dismissed. The Massachusetts Rules of Civil Procedure governing claims for relief recognizes that "[r]elief in the alternative or of several different types may be demanded." Mass. R. Civ. P. 8 (a). A party may set forth as many separate claims as he has regardless of the consistency of the claims or whether they are claimed alternatively. Mass. R. Civ. P. 8 (e).

Furthermore, the relief available pursuant to G.L. c. 231A is different from the relief available pursuant to G.L. c. 30A. G. L. c. 30A allows a Judge to affirm the agency decision, remand for further proceedings, set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed. G. L. c. 30A, section 14 (7). The 30A claim is specific to the adjudicatory decision and its' deficiencies. G.L. c. 231A provides the procedure to obtain a determination of the legality of the practices and procedures of any state agency which are alleged to be in violation of the Massachusetts Constitution. G.L. c. 231A, section 2. The court may decide "binding declarations of right, duty, status and other legal relations." G. L. c. 231A, section 1.

The two cases cited by the DEP to support dismissal of the claim for declaratory relief as duplicative involved cases where a decision on the merits of a 30A claim had been made and had already substantially provided a declaration of rights *in those specific cases*. See Lily Transporation Corp. v. Board of Assessors of Medford, 427 Mass. 228 (1998); Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 754 (2005). In this matter, no

decision has been made on any claim and it is not clear if a decision on the Plaintiffs' 30A claim would substantially provide a declaration of rights in this particular case.

DEP has also moved to dismiss the Plaintiffs' claim for declaratory relief pursuant to Mass. R. Civ. P. 12(b) (6) for failure to state a claim.

In deciding a motion brought pursuant to *Rule 12(b)(6)*, the court must accept as true the factual allegations in the plaintiffs' complaint and any reasonable inferences in the plaintiffs' favor that may be drawn from those allegations. Sullivan v. Chief Justice for Administration and Management of the Trial Court, 448 Mass. 15, 20-21 (2006); Fairneny v. Savogran Co., 422 Mass. 469, 470, (1996). A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98, (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957); See also Spinner v. Nutt, 417 Mass. 549, 550, (1994); Flattery v. Gregory, 397 Mass. 143, 145-146, (1986)."[A] complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate." Nader v. Citron, 372 Mass. at 104.

In Toro v. Mayor of Revere, 9 Mass. App. Ct. 871, 872 (1980), the Plaintiffs filed a claim in the nature of mandamus alleging that the City of Revere had violated Article 97 among other statutes. The appeals court found that the plaintiffs had stated a claim for relief and that the lower court erred in dismissing the claim.

The Plaintiffs' complaint alleges the following facts:

1. The BRA sought a Chapter 91 license in order to enclose and expand a shade structure located at the seaward end of Long Wharf in Boston in order to construct a late-night restaurant and bar. Plaintiffs' complaint paragraph 11.
2. The shade structure is located in a park that is subject to Article 97 and Chapter 91. Plaintiffs' complaint, paragraph 10.
3. On September 17, 2008, DEP granted the BRA a Chapter 91 waterways license to construct the restaurant and bar without properly following the Executive Office of Environmental Affairs ("EOEA") Article 97 Land Disposition Policy. The DEP affirmed the grant of the Chapter 91 license and issued a final decision following an adjudicatory hearing on January 29, 2010. Plaintiffs' complaint, paragraphs 12 , 14, 20 and 22 (a).
4. The proposed change in the control (by lease) and in the use of the park was not approved by the Legislature. Plaintiffs' complaint paragraph 13.
5. DEP's issuance of the license allowed a change in use and control (by lease) without the required two-thirds vote of the Legislature in violation of Article 97 and Article 30 of the Massachusetts Declaration of Rights. Plaintiffs' complaint, paragraphs 12-14.

DEP alleges in its Motion to Dismiss that the Plaintiffs' have failed to state a claim for declaratory relief because DEP's grant of a license to the BRA is not a "disposition" under Article 97. Article 97 establishes "the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment." Public lands, easements and interests therein "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." Mass. Const. Art. XLIX (*amended by* Mass. Const. Art. XCVII).

The Plaintiffs' contend that the grant of the Chapter 91 license in this case satisfies the "used for other purposes" and "disposition" requirements of Article 97. The Chapter 91 license granted by the DEP allows the BRA to use the long wharf park for "other purposes," i.e., a commercial establishment of a bar and restaurant. The commercial establishment of a restaurant and bar is not a "public purpose" enumerated in Article 97. In fact, the noise pollution, trash and bustle generated by a restaurant and bar is directly opposed to the right to "freedom from excessive and unnecessary noise" and the right to "the natural, scenic, historic, and esthetic qualities" of the Long Wharf park.

The Attorney General noted that Article 97 effectively codified the doctrine of "prior public use" which held that "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." Op. Atty. P. 144-146, citing Robbins v. Department of Public Works, 355 Mass. 328, 330 (1969). The prior use doctrine had been applied to the following changes of use: Sacco v. Department of Public Works, 352 Mass. 670 (filling a portion of a Great Pond); Higginson v. Treasurer and School House Commissioners of Boston, 212 Mass. 583 (erecting a building on a public park); Bauer v. Mitchell, 247 Mass. 522 (discharging sewage upon school land); Pilgrim Real Estate Inc. v. Superintendent of Police of Boston, 330 Mass. 250 (1953) (parking of cars on park area); Abbot v. Commissioners of the County of Dukes County, 357 Mass. &84 (grant of avigation easement); Gould v. Greylock Reservation Committee, 350 Mass. 410 (1966) (lease of portions of Mount Greylock). Id. at 145-146. Under the "other purposes" prong alone, the DEP should

not have granted the Chapter 91 license allowing the BRA to proceed with a change in purpose on filled tidelands without fulfilling the requirements of Article 97.

In addition, even if there were no change in purpose, the grant of the Chapter 91 license is a "disposition" under Article 97 requiring legislative approval. A "disposition" is defined as a "transfer[] of legal or physical control between agencies …." Op.Atty.Gen., June 6, 1973, p. 144 (attached as Exhibit C to the DEP's Memorandum in Support of its Motion to Dismiss). The Attorney General opined that this would include, "…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." Id.

A license under Chapter 91 constitutes an easement, a lease and/or a "transfer of legal control." DEP controls the rights to certain waterways pursuant to Chapter 91 and by granting the BRA a license it transferred the legal right to control the property to the BRA. Without the license, the BRA would not have the legal right to develop a restaurant and bar on the property and to enter into a lease with a restaurant for the commercial use of the public park. In effect, the DEP granted the BRA an easement to use filled tidelands and the right to enter into a lease.

In a letter from the DEP to the BRA approving the Chapter 91 license, the DEP acknowledges that "[i]n this proposal, the BRA requests authorization to enclose and construct a small addition to the shade structure, which will then be **leased** for restaurant use." See DEP Approval Letter to BRA dated September 17, 2008 (Emphasis Added) (attached as Exhibit B to the DEP's Memorandum in Support of its Motion to Dismiss). Lease of the public space to a private company was a foreseeable and direct result of the Chapter 91 license.

The DEP's final decision, likewise acknowledged that the BRA's proposed project involved the redevelopment of the existing structure which the BRA had leased for restaurant use. See Final Decision, page 3 (attached as Exhibit A to DEP's Memorandum in Support of its Motion to Dismiss). The DEP's final decision is replete with references to the restaurant development proposed for the site and the details of its size, purpose and configuration. Id.

The DEP contends that the Chapter 91 license is not subject to Article 97 because it is a "revocable" license that does not amount to an Article 97 disposition. The question of whether or not the Chapter 91 license in this case is subject to Article 97 is a question of law and fact. The plaintiffs have alleged that the license constitutes a change in use or control and by implication, a change in legal use or control that amounts to a disposition under Article 97. The fact that a license may be revocable is not the dispositive characteristic that would render the license exempt from Article 97. The only case cited by DEP in support of this argument does not involve a Chapter 91 license, it involves a one year permit that is revocable *at will*. See Miller v. Commissioner of Department of Environmental Mangement, 23 Mass. App. Ct. 968, 970 (1987). The Miller case involved a permit issued to a ski company to maintain trails owned by the agency and to conduct a ski program. In effect, the agency entered into a management/ maintenance contract that did not change the legal control or use of the property. The department supervised all aspects of the operation and had the right to approve any fees charged. This is very different from a license to allow a commercial restaurant to develop and lease land in a public park.

DEP also relies upon the EOEA Article 97 Land Disposition Policy (Land Disposition Policy) to support its claim that a "revocable" license is not subject to Article 97. First, the Land Disposition Policy is not binding law. DEP cannot credibly argue that its interpretation of its

policy can never be subject to legal or judicial review. Moreover, the Land Disposition Policy acknowledges that a "revocable" license may be considered a disposition under Article 97 if an interest in real property is transferred or if the change or control in use conflicts with the DEP's mission to protect the environment. See EOEA Land Disposition Policy attached as Exhibit D to the DEP's Memorandum in Support of its Motion to Dismiss. The Plaintiffs' have alleged in the complaint that the grant of the license amounts to a transfer of a legal right to lease the property or, by implication, an easement, i.e, a transfer of an interest in real property. See Plaintiffs' complaint, paragraph 13. The Plaintiffs' have also alleged that the grant of the license has caused damage to the environment. See Plaintiffs' complaint, paragraph 18. Therefore, even under the Land Disposition Policy, the revocable Chapter 91 license in this case may constitute a disposition under Article 97.

Furthermore, the issue of whether or not the DEP's Chapter 91 license to the BRA was a "revocable" license is an issue in dispute. DEP states that the license is "revocable by [DEP] for noncompliance with the conditions set forth therein." See DEP's Memorandum in Support of Motion to Dismiss, page 8 citing G.L. c. 91, section 18. DEP admits that one of the conditions set forth in the license is that it is "granted subject to all applicable Federal, State, County, and Municipal laws, ordinances, and regulations[.]" See DEP's Memorandum in Support of Motion to Dismiss, page 8 citing License at p. 9 (Standard Condition #7). Therefore, because the BRA has not complied with Article 97, a State law, the DEP should have revoked the Chapter 91 license. Since it did not, it appears that the license granted to the BRA was not in fact a "revocable" license.

STANDING

In footnote 7 of its Memorandum in Support of the Motion to Dismiss, the DEP states that it does not take a position on whether or not the Plaintiffs' have standing to bring an action under Article 97 against the BRA, but that even if such action in mandamus could be maintained, it would lie against the BRA and not the DEP. The Plaintiffs take the position that they have standing to bring an action in mandamus to enforce Article 97 against both the BRA and the DEP. The Plaintiffs' complaint requests relief in the nature of mandamus. Plaintiffs' Complaint, paragraph 6.

In Toro v. Mayor of Revere, 9 Mass. App. Ct. 871, 872 (1980), the court allowed the plaintiffs to bring a claim in the nature of mandamus alleging that the City violated Article 97. In Pilgrim Real Estate, Inc. v. Superintendent of Police of Boston, 330 Mass. 250, 251 (1953), the Supreme Judicial Court held that, "where the object of a petition is to procure the enforcement of a law, a petitioner []without special interest in the subject matter independent of the rights of the public has a standing by reason of his citizenship to maintain a petition for a writ of mandamus. []" See Douglas v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth, 366 Mass. 459, 461 (1974); Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969); Gould v. Greylock Reservation Comm'n, 350 Mass. 410 (1966).

In Pratt v. City of Boston, 396 Mass. 37 (1985), Justice Wilkins noted that the plaintiffs in that case lacked standing under the procedural theories upon which they relied, but that they would have satisfied the requirement of standing if they had brought a claim in the nature of mandamus. "It is not clear that standing to obtain relief in the nature of mandamus would be denied to persons in the plaintiffs' position." Id. Wilkins, J. Concurrence.

Article 97 was approved at the ballot in November of 1972 by the citizens of Massachusetts. The Amendment clearly states, "[t]he people shall have the right…." The language of the amendment and its approval by the citizenry is consistent with the right of citizens to obtain relief in the nature of mandamus to ensure the operation of the law.

By definition, there are no inhabitants and few direct abutters of public parks, conservation areas, seashores, dunes, marine resources, wetlands or historic sites. The enforcement of Article 97 depends upon a group of citizens bringing an action in mandamus on behalf of the rights of the public. A restrictive view of standing that requires a showing of an injury personal to each of the plaintiffs individually as a prerequisite for any action under Article 97 would eviscerate the purpose of Article 97 by rendering it un-enforceable.

In footnote 3, the DEP also makes the argument that appellate courts have rejected attempts by plaintiffs to seek standing to bring declaratory judgment actions under Article 97. The cases cited by the DEP narrowly apply to the circumstances of the cases cited and are not controlling here. In Enos v. Secretary of the Environmental Affairs, 432 Mass. 135 (2000), the plaintiffs sought to challenge a certification of compliance issued by the Secretary of Environmental Affairs to the town for the construction of a treatment plant. The plaintiffs alleged deficiencies in the Environmental Impact Report (EIR). The Court found that the plaintiffs did not have standing under the MEPA statute, G.L. c. 30, sections 61-62H because they did not show an injury or protected interest that fell within the ambit of the statute. Consequently, the Court found that they could not satisfy the standing requirements of Article 97.

However, the Court acknowledged that plaintiffs had standing to seek declaratory relief to challenge the scope of an EIR and compliance with the MEPA Statute in two other cases. Enos v. Secretary of the Environmental Affairs, 432 Mass. At 141, discussing,Villages Dev. Co.

v. Secretary of the Executive Office of Envtl. Affairs, 410 Mass. 100, 106 (1991); Walpole v. Secretary of Executive Office of Envtl. Affairs, 405 Mass. 67, 70-71 (1989).

In Animal Legal Defense Fund, Inc. v. Fisheries and Wildlife Bd., 416 Mass. 635, 641 (1993), the plaintiffs sought declaratory judgment that G. L. c. 21, section 7 governing the criteria for membership on the State Fisheries and Wildlife Board was unconstitutional on its face. The Court found that the plaintiffs did not have standing to challenge the statute and that they had not demonstrated that the board membership criteria harmed any rights under Article 97.

What these cases demonstrate is that the standing to bring an action for declaratory relief is dependent upon the facts of the particular case, the various statutes involved and the interests sought to be protected by Article 97. In this case, ten citizens have alleged sufficient facts to demonstrate that they would suffer noise pollution and other environmental harms as a result of the defendant's actions.

WHEREFORE, the plaintiffs request that the defendant DEP's motion to dismiss be denied and request a hearing on said motion.

Respectfully submitted,

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