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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Docket No. SJC-11134

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SANJOY MAHAJAN & others,

Plaintiffs/Appellees

vs.

MASSACHUSETTS DEPARTMENT OF

ENVIRONMENTAL PROTECTION & another,

Defendants/Appellants

* * * * *

TAPE TRANSCRIPTION

BEFORE: The Honorable Francis X. Spina
The Honorable Robert J. Cordy
The Honorable Margot Botsford
The Honorable Ralph D. Gants

DATE: November 5, 2012

LOCATION: John Adams Courthouse
One Pemberton Square
Boston, Massachusetts 02108

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SHEA COURT REPORTING SERVICES

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P R O C E E D I N G S

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2
3 THE CLERK: SJC-11134, Mahajan vs.
4 Mass. Department of Environmental Protection.

5 MS. CHICOINE: Good morning. May it
6 please the Court --

7 JUDGE GANTS: Wait a minute, hold up
8 for a minute.

9 JUDGE BOTSFORD: Hold on for one
10 second.

11 JUDGE GANTS: Going to set the clock.
12 Okay.

13 MS. CHICOINE: Yes. May it please the
14 Court, my name is Denise Chicoine for the Boston
15 Redevelopment Authority. I will be splitting my
16 time this morning with counsel for the Department
17 of Environmental Protection.

18 This case is about the vital role
19 urban renewal serves in the public interest. This
20 case is not about urban renewal redevelopment
21 versus environmental protection. These are both
22 important land-use initiatives, but they are not
23 in conflict; they are different objectives.

24 Urban renewal is to eliminate blight

1 through redevelopment of land. The constitutional
2 amendment known as Article 97 is to protect
3 natural resources from development.

4 JUDGE BOTSFORD: If you had -- if the
5 City, not Long Wharf, with all its multiple uses,
6 but just -- I don't know how this happened, but
7 let's just say you've got Christopher Columbus
8 Park, and the City, back in 1980, takes that under
9 its urban renewal powers under 121 and says, "This
10 is going to be used for a park, that's what we're
11 -- we're taking it, it's urban blight, but we're
12 going to use it only for a park, and it's a
13 discreet parcel, no other use," and then, ten
14 years later, decides to sell it to somebody who's
15 going to make a parking lot there because it needs
16 the money, would Article 97 come in?

17 I guess what I'm trying to get at is,
18 is there a difference in your mind between a
19 parcel taken originally using the urban renewal
20 powers of the city, but for a very precise
21 purpose, only one purpose, which was to make park
22 land out of it as part of a plan, is that
23 different than Long Wharf, which has multiple
24 uses, and this is one piece of a much larger

1 parcel that has lots of different uses?

2 MS. CHICOINE: Yes. Well, the BRA
3 often creates parkland as part of any urban
4 renewal plan, and Christopher Columbus Park itself
5 was that; it was taken under the BRA's urban
6 renewal powers and then turned into a park. And
7 because it was permanently to be used as a park,
8 it was conveyed to the Parks and Recreation
9 Department.

10 So the BRA is not the keeper of
11 parkland. It is when there is a further
12 disposition that it becomes a park. And any land
13 that is still held by the BRA under its urban
14 renewal powers is subject to continuing
15 modification to meet the City's changing needs, as
16 with Long Wharf.

17 JUDGE BOTSFORD: Okay. So it was that
18 second step that distinguishes them in that case,
19 in Christopher Columbus, and --

20 MS. CHICOINE: Yes. And that is true
21 also of City Hall, which is cited in some of the
22 amicus briefs. The distinction there is that it
23 was urban renewal land that then was conveyed to
24 the City of Boston, with a deed restriction that

1 it be used specifically for open space.

2 JUDGE GANTS: Now, the plan says that
3 it may be modified, but if there is to be
4 modification, the modification must be approved by
5 the Boston City Council and the State Division of
6 Urban and Industrial Renewal.

7 Do you agree that you must get those
8 approvals before you build?

9 MS. CHICOINE: Well, that was the
10 language, I believe, in the 1964 urban renewal
11 plan itself. In 1996, there were new regulations
12 that required only substantial plan changes to go
13 through regulatory approval, and that was the case
14 that this court decided, the *Central Steel* case,
15 confirmed that.

16 So, for the change of a particular
17 piece of an urban renewal plan, one parcel, that
18 is not typically considered a substantial
19 modification that requires other approvals.

20 However, in this Long Wharf project,
21 there was an array of agencies which did, in fact,
22 weigh in, most notably the DEP by issuing the
23 Chapter 91 license. There was also Coastal Zone
24 Management, the Massachusetts Historic Commission,

1 Boston Zoning was involved.

2 So these things do not happen in a
3 vacuum. The BRA determined that there was a need
4 for redevelopment of one small piece of Long
5 Wharf, which was a building that was created as a
6 vent shaft, an emergency access to the MBTA Blue
7 Line. And the reason for the new development is
8 to meet the changing needs of Long Wharf, which
9 is, among other things, an exponential increase in
10 the number of water-transit users; over three
11 million people a year go off the end of Long Wharf
12 for commuter ferries and to tour the harbor
13 islands, and because it is also an active marina,
14 the BRA determined that the open pavilion that is
15 there would be better utilized by being winterized
16 and becoming a place of public accommodation, with
17 public restrooms.

18 JUDGE GANTS: So why is that not a
19 substantial change, at least with respect to that
20 rather important piece of land?

21 MS. CHICOINE: It is not a substantial
22 change, Your Honor, because the vast majority of
23 Long Wharf at the seaward end will remain open
24 space. The pavilion area itself is an open

1 structure that is about 2,900 square feet, and the
2 proposed winterization and restaurant use will add
3 only an additional 1,200 square feet, leaving over
4 29,000 square feet as open space.

5 The Harbor Walk, which is a recognized
6 park on Long Wharf, and the Compass Rose area,
7 which is adjacent to this project site, both will
8 be entirely unaffected by this proposed reuse.
9 Therefore, within the BRA's discretion, that is
10 determined not a substantial modification.

11 The goals of the BRA are not in
12 conflict with land conservation as outlined by
13 Article 97 of the Mass. Constitution, but just
14 because an urban renewal plan states a proposed
15 use to be open space or a pedestrian walkway or a
16 plaza does not then transform that land to being
17 covered by Article 97. The initial taking is
18 under the urban renewal statute, and the urban
19 renewal statute defines the BRA's powers, and the
20 power of eminent domain is predicated solely on
21 the BRA's finding that land is blighted,
22 substandard or decadent.

23 JUDGE GANTS: Okay, but what I thought
24 you had conceded in your answer to Justice

1 Botsford, that if you had taken -- if you take
2 land for the purpose of redevelopment and then
3 convey it to a conservation commission or parks
4 and recreation, then that land becomes protected
5 under Article 97. Do you agree with that?

6 MS. CHICOINE: Yes, Your Honor,
7 absolutely.

8 JUDGE GANTS: Okay. So if there were
9 to be -- now here, of course, there was a -- it's
10 declared to be a park. You put a plaque on it.
11 Should that be viewed as the equivalent of a
12 conveyance in terms of the intention of the BRA to
13 have that land be parkland?

14 MS. CHICOINE: It is not a conveyance,
15 and it is, though, a park. So a portion of Long
16 Wharf is protected by Article 97, and that is the
17 Compass Rose area that is adjacent to this project
18 site.

19 JUDGE BOTSFORD: Is that --

20 JUDGE GANTS: And it's protected
21 because --

22 JUDGE BOTSFORD: Yeah.

23 MS. CHICOINE: And the Compass Rose
24 area is protected specifically in that scenario

1 because of the acceptance of federal funds, under
2 the Land and Water Conservation Fund, to create
3 the Compass Rose. So that area is impressed with
4 a special status, as is the Harbor Walk. And that
5 is what the plaque, Long Wharf Park, refers to
6 is --

7 JUDGE GANTS: So it's become -- is it
8 within Article 97 or simply that you risk federal
9 funding if you were to depart from what was a
10 commitment to the federal government?

11 MS. CHICOINE: Well, there has not
12 previously been really any statement of when urban
13 renewal land and what uses become subject to
14 Article 97, but it is classified that way by the
15 Parks and Recreation Commission of the City of
16 Boston that one protection, which does apply to
17 one portion of Long Wharf, is Article 97.

18 JUDGE GANTS: Okay. So, now, BRA --
19 so, land conveyed for urban development can become
20 Article 97 land if, one, it's conveyed to the
21 Parks and Recreation, or second, if you accept
22 federal funding with the commitment that it remain
23 parkland? Is that sort of another addendum to
24 when it can become Article 97 land?

1 MS. CHICOINE: I would say that it is,
2 yes, a condition that would then alter its status
3 as urban renewal land that can be modified.

4 JUDGE GANTS: Okay. Now, they will, I
5 assume, come up and say there's a third addendum,
6 which is when you put a plaque on it and say it is
7 part of a park and you've declared it to be such.
8 Why should there not be this third addendum?

9 MS. CHICOINE: Because the plaque does
10 not define the boundaries of the area that is a
11 park. And Long Wharf, you must recall, was built
12 over three hundred years ago and has been the site
13 of an array of commercial uses. There were
14 deteriorating warehouses and fish-processing
15 plants on Long Wharf until the BRA took
16 stewardship of it.

17 And it was through the BRA's vision
18 that it became a gem of the Boston waterfront,
19 with pedestrian access and a bustling marina. And
20 the ability to modify urban renewal land is what
21 the BRA is charged with, under the urban renewal
22 statute, to meet the city's evolving needs.

23 And I would say, just in closing, also
24 that the Superior Court erred in this circumstance

1 by granting mandamus. Mandamus is a broad and
2 dangerous precedent to use when it is not tied to
3 any individual harm, which the Superior Court did
4 hear, and it would undermine the goals of urban
5 renewal if this decision is allowed to stand.

6 JUDGE BOTSFORD: Is there a -- just as
7 a procedural matter, is there a mandamus judgment?
8 All I saw was a judgment affirming a motion for
9 judgment on the pleadings, which I really took to
10 be the 30A decision.

11 MS. CHICOINE: It is a bit confused,
12 how the Superior Court decision is written, but
13 there was no other basis for standing, since
14 Article 97 itself clearly does not grant an
15 individual a right for standing, and the Court
16 acknowledged the *Enos* and *Hertz* cases, which
17 confirmed *Chase*, that there's no right to
18 standing.

19 So she used the public-duty doctrine,
20 but even that must still have a showing of
21 individualized harm, which the plaintiffs here,
22 who live over a mile away and can neither see nor
23 hear the project site, do not have.

24 Therefore, the Superior Court judgment

1 should be overturned. Thank you.

2 JUDGE GANTS: Thank you.

3 MS. BALAKRISHNA: Good morning, Your
4 Honor. Annapurna Balakrishna for the Department
5 of Environmental Protection.

6 Regardless of whether Article 97
7 applies to the land at issue here, this court
8 should reverse the portion of the trial court's
9 decision to issue a writ of mandamus to invalidate
10 a discretionary decision of the Department of
11 Environmental Protection.

12 Under the authorities that have
13 interpreted Article 97, it is a transfer of legal
14 or physical control that triggers the vote
15 requirement in that constitutional provision, but
16 the Commissioner's decision here did not cede any
17 -- or transfer any physical or legal control, nor
18 does BRA's authority to lease this parcel derive
19 from the Chapter 91 license.

20 In concluding otherwise, the Superior
21 Court mischaracterized the nature of a Chapter 91
22 license; it is a certification that legitimizes
23 what would otherwise be an unlawful use under
24 Chapter 91, but no other law.

1 Upholding the decision to invalidate
2 the Chapter 91 license for reasons that have
3 absolutely nothing to do with Chapter 91 is going
4 to have grave consequences for DEP permitting in
5 general and administrative law.

6 As for DEP, DEP will not know when it
7 can act on a Chapter 91 license. Does it have to
8 wait until all other approvals have been required?
9 Can it manage its docket or schedule hearings?
10 When can it do these things? Does it have to
11 wait?

12 Another consequence of upholding the
13 trial court on the DEP's license invalidation
14 would be that proceedings before DEP will be
15 hijacked by issues that DEP has no power to, let
16 alone a duty to, decide.

17 JUDGE BOTSFORD: Is the -- I wasn't
18 clear about this, but was the judge saying that
19 before DEP could issue the Chapter 91 license,
20 even though she agreed that the DEP didn't have
21 power to really look at Article 97, but before it
22 could issue that license, it had to go to the
23 legislature? Is that --

24 MS. BALAKRISHNA: It's not clear how

1 she got to where -- to her decision. She said
2 that DEP violated Article 97 by issuing its
3 license, but she agreed that DEP couldn't decide
4 the issue of whether Article 97 applied.

5 So it's not clear how she got there,
6 but one of the consequences of this decision is
7 that the DEP license could be invalidated for a
8 reason that it had no power to decide. So it's
9 not clear whether they would have to wait for
10 Article 97 to -- or --

11 JUDGE BOTSFORD: I read it as saying
12 that you would have to -- before you could issue
13 the license, you would have to go to the
14 legislature yourself; you, I mean DEP would --

15 MS. BALAKRISHNA: That's one reading
16 of what is in the trial court's decision, that DEP
17 would have to go to the legislature under Article
18 97 because of the fact that the land happens to be
19 tidelands.

20 But DEP -- and that is why we argued
21 that DEP doesn't cede any legal or physical
22 control, and therefore the vote requirement for
23 its action would not be triggered.

24 JUDGE GANTS: So let's take land which

1 the BRA concedes is Article 97 land, so we'll use
2 Christopher Columbus Park.

3 MS. BALAKRISHNA: Okay.

4 JUDGE GANTS: And if there were to be
5 a proposal to change that park into a parking lot,
6 to take paradise, make it a parking lot, then you
7 would say the DEP would have the ability to
8 determine whether or not the public benefits would
9 exceed the public detriment, and if it were
10 approved, nothing could happen until then, you'd
11 go to the legislature and get Article 97 approval.

12 MS. BALAKRISHNA: Assuming, yes, that
13 Christopher Columbus Park was tidelands and DEP
14 has a -- which I believe it is, probably, that
15 Christopher Columbus Park was tidelands, DEP could
16 determine whether or not, for purposes of Chapter
17 91, that particular use had greater public benefit
18 than detriment, but the license could not be used
19 until all other approvals had been acquired.

20 And if the entity who has the license,
21 the licensee, decided to go forward with its
22 project despite not -- even violating another law,
23 not getting the approvals it needed, an
24 enforcement action, someone with standing could go

1 to DEP and ask DEP to enforce its license with a
2 court order or some other indication that an
3 authority -- sorry, an entity with the authority
4 to decide that question had decided it.

5 JUDGE CORDY: So you could -- wait a
6 second. So you could stop the project because it
7 would be a violation of the Chapter 91 license
8 that they hadn't received the other approvals that
9 they needed?

10 MS. BALAKRISHNA: Well, general
11 condition number 2 of the license says that you
12 need to -- you cannot use this license unless you
13 have all --

14 JUDGE CORDY: The answer is yes --

15 MS. BALAKRISHNA: Yes, Your Honor.

16 JUDGE CORDY: -- DEP could use its
17 enforcement powers to stop the hypothetical
18 project --

19 MS. BALAKRISHNA: The answer is yes.

20 JUDGE CORDY: -- because the City or
21 the BRA had not gotten Article 97 approval.

22 MS. BALAKRISHNA: Yes. Your answer is
23 yes on that question.

24 JUDGE CORDY: Okay. And that's not

1 what the judge did here?

2 MS. BALAKRISHNA: No. The judge
3 invalidated the DEP license using a writ of
4 mandamus and citing *Robbins*, which also had to do
5 with a conveyance --

6 JUDGE CORDY: She didn't order you to
7 stop the project, in other words.

8 JUDGE BOTSFORD: Surprised she hasn't
9 done that --

10 MS. BALAKRISHNA: She invalidated our
11 license, and upholding that decision may not have
12 much effect here, depending on whether or not the
13 BRA needs to go to the legislature for its
14 project, but it will have unintended effects on
15 permitting and administrative law in general,
16 because --

17 JUDGE CORDY: If you can stop the
18 project because the land is Article 97 and there
19 hasn't been approval, then to a certain extent,
20 you have the power to determine whether Article 97
21 applies.

22 MS. BALAKRISHNA: Well, in that
23 situation, Your Honor, DEP cannot decide whether
24 Article 97 applies. Someone would have to get a

1 court order or somebody with -- or maybe an
2 opinion of the attorney general, somebody with
3 some enforcement authority has decided that
4 Article 97 applies.

5 DEP cannot decide whether Article 97
6 applies to a land. They don't have the power to
7 do that.

8 JUDGE BOTSFORD: But in the
9 hypothetical with the Christopher Columbus Park, I
10 think the City concedes that Article 97 applies.
11 So you're starting from that proposition --

12 MS. BALAKRISHNA: Well, if you start
13 from that proposition, then DEP would say, "You
14 haven't" -- DEP has discretion to enforce its
15 license and say, "You haven't complied with
16 condition number 2, which requires all of your
17 approvals to have been in order. We can revoke
18 your license, or please comply in order to use
19 your license."

20 JUDGE CORDY: Thank you.

21 MS. BALAKRISHNA: Thank you, Your
22 Honors.

23 JUDGE GANTS: Thank you.

24 MR. MCGREGOR: May it please the

1 Court, good morning. My name is Gregor McGregor
2 for the plaintiffs, who are the appellees.

3 This record is not only long, it's
4 complete by having the entire administrative
5 record of a three-day hearing before DEP and then
6 supplemental materials offered by both parties,
7 accepted by the Superior Court. And in it, we
8 find the documents that Your Honors have asked
9 about, so that Judge Fahey had before her the
10 actual taking documents, Justice Gants, that you
11 are well aware of, going back to 1964 with the
12 urban renewal plan, including Long Wharf, and the
13 urban renewal taking in '65, including Long Wharf,
14 and the 1970 taking adopting the plans for the
15 earlier takings, all of which do take the end of
16 Long Wharf for public open space.

17 JUDGE GANTS: Right. But what do you
18 say about the fact that the plan also provides for
19 the possibility of modification of the plan?

20 MR. MCGREGOR: Yes, there are
21 procedures for modification, and you identified,
22 through questioning, both the old procedures and
23 the relatively-relaxed new procedures, but this
24 case is about whether there is such a change of

1 use or disposition or both by virtue of the
2 Chapter 91 license or the lease to a restaurateur
3 or both --

4 JUDGE BOTSFORD: But we haven't -- we
5 don't --

6 MR. MCGREGOR: -- to need the ultimate
7 okay of the legislature approval.

8 JUDGE BOTSFORD: The lease -- but the
9 lease is not before us.

10 MR. MCGREGOR: That's right.

11 JUDGE BOTSFORD: What's before us is a
12 vacating of the Chapter 91 license. So we're not
13 dealing with the restaurant, right?

14 MR. MCGREGOR: I see this as a 30A, 14
15 review on the eight grounds, which can include is
16 the --

17 JUDGE BOTSFORD: Yeah, but the only
18 thing that was before the judge, it came up in the
19 process, through the administrative process of the
20 Chapter 91 license, that's it, right?

21 MR. MCGREGOR: Yes, but there are
22 three bases for jurisdiction of the Superior
23 Court. The suit is not only 30A, 14; it's also
24 under the mandamus statute and declaratory

1 judgment for declarations about the lease and the
2 license and mandamus-type relief against the
3 agencies, most notably the BRA, and we've been
4 focusing mostly in the questioning on whether that
5 relief is also to be available against DEP.

6 So that we know that the taking
7 statute empowers the agency to take land for park
8 and open space and recreation as well as historic
9 purposes, but we have the agency saying those are
10 merely incidental. We have a lease which is
11 approved by the DEP license which also approves a
12 change of use of part of the end of Long Wharf
13 into a commercial establishment. And that lease
14 is to the same restaurateur for the entire end of
15 Long Wharf for thirty years, which is one-third
16 the whole history of Long Wharf. And it's
17 extendable for another thirty years to a total of
18 sixty, which is twenty percent of the entire
19 history of Long Wharf.

20 So, in effect, DEP has delegated to
21 BRA the illegal control over the end of Long Wharf
22 and approved the agency to, in turn, delegate the
23 legal control for thirty or sixty years to a
24 private commercial restaurateur, and through

1 moving some lines with fourteen variances and
2 relaxations of city and state rules, as long as
3 the seats and the chain segregating the seats is a
4 little off the Compass Rose, it's willing to say
5 not only that it will change the Chapter 91
6 license for these historic filled tidelands, it
7 will approve a lease for someone else other than
8 the Commonwealth, indeed, other than the city, to
9 be in charge, day-to-day, week-to-week, year-to-
10 year, of the end of Long Wharf, three-quarters of
11 an acre of the filled tidelands that stick the
12 farthest out into Boston Harbor, and my last
13 thought on that, and, of course, contradicting the
14 purpose for which this was taken.

15 Now, all that's in dispute, however,
16 is whether they need a vote of the legislature.
17 When the Committee on Local Affairs, in a document
18 cited in our brief, studied the passage of Article
19 97 legislation in the House and Senate and signed
20 by the governor for over a period of five years,
21 those bills were about twenty a year. And when
22 they -- a follow-up study looked at five years of
23 such bills, the rate had increased because more
24 agencies of the state and more cities and towns

1 and regional bodies were aware of Article 97 and
2 it was being enforced more vigorously by the
3 Secretary of Environmental Affairs. So that
4 roughly seventy-five a year can be put before the
5 legislature, and most pass.

6 That's all we're talking about, not a
7 prohibition, because when the Legislative Research
8 Council was asked by the House way back before
9 1970 to fashion a bill to put before the voters as
10 a change of the constitution, they looked at the
11 various models for protecting public open space
12 along the shore and other places around the nation
13 and selected the super-majority-vote model.
14 That's all that's triggered.

15 Had this been done in this case --
16 that is, had the city, like it does all the time,
17 put a bill to the legislature about a page and a
18 half long, which it does all the time, to change a
19 park to a commercial restaurant or a facility in a
20 park to a commercial restaurant, that would have
21 passed in about six months and the lease would
22 have been signed, sealed, delivered and the
23 sandwiches would be for sale within six months.

24 That's what happened to the Pink

1 Palace on Boston Common. A simple bill authorized
2 by the city council that, in its minutes,
3 acknowledges two-thirds vote is necessary. It's
4 put before local affairs. It passes on two-
5 thirds. The governor signs it, all with great
6 fanfare about rehabilitating an old, dilapidated
7 structure --

8 JUDGE GANTS: But help us --

9 MR. MCGREGOR: -- and lo and behold,
10 we wouldn't have this legislation --

11 JUDGE GANTS: Let's go back --

12 MR. MCGREGOR: -- the DEP has a chance
13 to catch this --

14 JUDGE GANTS: -- I mean, I know that
15 one can go to the legislature, and that they do,
16 with regard to land that is Article 97 land, and
17 the issue here is, when does land become Article
18 97 land? And is it your -- what is the trigger?

19 I mean, your sister says conveyance to
20 a conservation or parks and recreation, a
21 limitation on its use that's recorded, even a
22 commitment to the federal government, those make
23 it land that's Article 97 land.

24 We don't have any of those here, so

1 what here makes this Article 97 land?

2 MR. MCGREGOR: We know from the area
3 of cases before Article 97 was ever adopted by the
4 voters in 1972 that dedication can make it
5 necessary to get a vote of the legislature later.

6 JUDGE GANTS: Now, when you say
7 dedication, the cases that I've looked at involved
8 transfer or conveyance to conservation or some
9 recorded limitation on use. Are you --

10 MR. MCGREGOR: Actually, those are
11 either the cases involving the deed and trust or
12 the restrictive covenant that the government
13 accepts upon gift or puts on afterwards, that --

14 JUDGE GANTS: Which cases have
15 dedication without any of those?

16 MR. MCGREGOR: Oh, like the Boston
17 Common cases.

18 JUDGE BOTSFORD: Well --

19 JUDGE GANTS: But the Boston Common, I
20 think, would be --

21 JUDGE BOTSFORD: Unique.

22 JUDGE GANTS: Unique. I mean --

23 MR. MCGREGOR: Well, nonetheless --

24 JUDGE BOTSFORD: I mean, it's --

1 MR. MCGREGOR: -- there's a whole line
2 of cases under the public-trust doctrine that
3 dedication or the doctrine of prior public use
4 and --

5 JUDGE BOTSFORD: But -- but --

6 MR. MCGREGOR: -- restrictions that
7 are recorded or otherwise accepted can trigger
8 votes of the legislature --

9 JUDGE GANTS: Okay, but one
10 difference, one problem you have is that the
11 Boston Common historically has been used as a
12 public common -- thus, its name -- and the Long
13 Wharf has historically been used as a wharf --
14 thus, its name. So you don't have the --

15 MR. MCGREGOR: But the justice --

16 JUDGE GANTS: -- you don't have the
17 same history here.

18 MR. MCGREGOR: Here, the justice of
19 the Superior Court had before her the record back
20 to 1964, which she did, indicating that
21 notwithstanding that history, it was taken --

22 JUDGE BOTSFORD: But it's --

23 MR. MCGREGOR: -- for a park and open
24 space --

1 JUDGE BOTSFORD: But it was taken as
2 part of -- as a -- it's taken maybe for a park and
3 open space, but it is part of a larger urban-
4 renewal plan. It wasn't taken -- right?

5 MR. MCGREGOR: Well, by -- yes,
6 Justice Botsford --

7 JUDGE BOTSFORD: Aren't we back to --

8 MR. MCGREGOR: -- it's all planned --

9 JUDGE BOTSFORD: Aren't we back to the
10 question about whether there can -- whether part
11 of the urban renewal powers that the BRA has is to
12 make changes? And if so -- I mean, but you --
13 where do you draw the line between what the BRA
14 can do with respect to making changes to an urban
15 renewal -- use of urban renewal land and where it
16 can't?

17 MR. MCGREGOR: Justice Botsford, we
18 definitely do not draw the line at the word
19 "blight"; just because the original taking was for
20 the underlying fundamental urban-renewal purpose
21 of alleviating blight, does not mean that all
22 parks that are taken as parks by virtue of urban
23 renewal will never have Article 97 protection
24 for --

1 JUDGE BOTSFORD: No.

2 MR. MCGREGOR: -- fifty or a hundred
3 or a thousand years. It is the look at the plan
4 and at the taking documents of the agency,
5 identifying as it being created as a park, that
6 then triggers Article 97.

7 And hence, the record here in front of
8 Judge Fahey laying that out from 1964 through all
9 the documents I just mentioned nails it that this
10 is the Long Wharf Park. That's what it was going
11 to be called. That was the purpose of it being
12 taken, the end of it; that is, the part beyond the
13 Customs House building, which is the land in
14 dispute here, just as you walk past the Customs
15 House building.

16 And so that is dispositive; we didn't
17 need to rely on --

18 JUDGE GANTS: Well, but you do have --

19 MR. MCGREGOR: -- dedication, but we
20 also have dedication here by virtue of the City of
21 Boston declaring it protected by Article 97 in all
22 of its documents and the BRA acknowledging in all
23 of its documents, including the RFP to developers
24 for this, that it's protected open space.

1 JUDGE BOTSFORD: This particular piece
2 of land --

3 MR. MCGREGOR: Yes.

4 JUDGE BOTSFORD: -- the BRA has
5 acknowledged is covered by Article 97?

6 MR. MCGREGOR: The City has listed it
7 as protected by Article 97 in the documents and
8 the record. The BRA has acknowledged that when it
9 went for its PR -- for its Request for Proposals
10 and in its developer kit, described in detail in
11 the Conservation Law Foundation briefed before you
12 as an amicus, that this was protected open space.

13 What they're saying today is that,
14 "Well, there's enough left that we didn't need to
15 go to the legislature. The pavilion is going to
16 be a year-round restaurant, glassed-in and
17 privatized. The bathrooms will be available to
18 the public when the restaurant is open. The trash
19 cans will be picked up by the restaurateur.
20 He'll maintain the binoculars on the public space.
21 And we've just moved the seats of the outdoor
22 seating far enough away off the Compass Rose, the
23 actual installed rose in the pavement, that we
24 don't need an Article 97 bill in the legislature."

1 So, yes, Justice Botsford, they did.

2 JUSTICE BOTSFORD: So your position --
3 I missed this, obviously -- is that they have just
4 totally gone a hundred and eighty degrees, changed
5 their mind, changed their position?

6 MR. MCGREGOR: Yes, yes, that's right,
7 and in their brief, when they use the word
8 "flexibility," that's the flexibility they want;
9 when they say in their brief, the BRA, that they
10 want flexibility to deal with changed
11 circumstances, that's exactly what they say; they
12 would like to be able to move things around on
13 urban renewal properties of all kinds like a chess
14 board.

15 Here, the purpose of this lease --

16 JUDGE BOTSFORD: No, no, I'm just
17 talking about the Article 97 designation. What I
18 thought I heard you just say is, the City has
19 treated this explicitly as Article-97-designated
20 land.

21 MR. MCGREGOR: Yes, Park and
22 Recreation, in its database listing of the chart
23 in the record, lists this as protected by Art. 97,
24 along with the Wetlands Protection Act and other

1 laws; namely, the federal law of the Land and
2 Water Conservation Fund.

3 This waterfront park called Long Wharf
4 Park --

5 JUDGE BOTSFORD: Well, that's -- no,
6 but --

7 MR. MCGREGOR: -- is listed and
8 designated --

9 JUDGE BOTSFORD: -- Ms. Chicoine is
10 saying that Long Wharf Park doesn't include this
11 land; at least that's what I thought she said is
12 that Long Wharf Park is designating the Harbor
13 Walk and Compass Rose.

14 MR. MCGREGOR: That's not supported by
15 the record, nor is it supported by the oral
16 statements made about the use of the federal Land
17 and Water Conservation Fund was just the Compass
18 Rose area. You will find in the record that the
19 Land and Water Conservation Fund was used for the
20 planning of this entire three-quarter acre, not
21 just installing some architect or artist's concept
22 of a compass rose and binoculars and some benches.

23 JUDGE GANTS: Now, it --

24 MR. MCGREGOR: That's why it was so

1 serious when the state spoke up and said, "You've
2 got commercial use on Land and Water Conservation
3 Land." You'll see a record, in the record, a plan
4 where that line runs right across the wharf, and
5 they had to change the license in order to stay
6 out of that federal land for the consequences
7 you've already discussed in questioning.

8 Your Honor, did you have a question?

9 JUDGE GANTS: *Muir v. City of*
10 *Leominster*, City establishes a playground. Turns
11 out it's not working out; the playground is
12 becoming littered with glass. They decide it's no
13 longer being effective as use as a playground.
14 It's city-owned land, and they agree to have it be
15 transferred for some other purpose.

16 Challenged, but court says, no, the
17 town owned it, it was used as a playground, it was
18 used, essentially, as a park, but the town had not
19 conveyed it to the Conservation Commission, the
20 town could do with it what it will.

21 How do you -- is that case wrongly
22 decided, or is there a way to distinguish it from
23 the case here?

24 MR. MCGREGOR: There is a way to

1 understand it, sir. First of all, playgrounds,
2 under the laws of Massachusetts, are not protected
3 nearly as much as parks and open space and
4 historic sites and forests and the like. That's a
5 reality of statutory law. Towns and cities and
6 other agencies are free to get rid of playgrounds
7 if they are underutilized. The city council and
8 town council association addresses that all the
9 time in its frequently-asked questions.

10 The answer to that particular case or
11 a similar case would be, is there a deed in trust;
12 that is, a permanent restriction the municipality
13 agreed to that that was the single use? If not,
14 is that a prior public use that cannot be changed
15 without a vote of the legislature? And I've told
16 you, under the statutory laws codifying the
17 doctrine, the answer is no, they're free to move
18 playgrounds around. Is it part of a larger park?
19 That is, is it a centerpiece of a park? And the
20 answer in the cases I've come up against is,
21 usually not.

22 So I think a playground is very much
23 distinguishable, and I think you'd agree with me
24 in looking at the many cases where playgrounds

1 have been changed into even parking lots; indeed,
2 parking for the larger park.

3 JUDGE SPINA: Thank you.

4 MR. MCGREGOR: And thank you for your
5 consideration.

6 (Whereupon the proceedings were
7 concluded.)

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C E R T I F I C A T E

This is to certify the foregoing is a true and accurate transcript, to the best of my skill and ability, of the proceedings in the matter of Sanjoy Mahajan & others, Plaintiffs/Appellees, vs. Massachusetts Department of Environmental Protection & another, Defendants/Appellants, Docket No. SJC-11134, heard on November 5, 2012 at the Commonwealth of Massachusetts Supreme Judicial Court before The Honorable Francis X. Spina, The Honorable Robert J. Cordy, The Honorable Margot Botsford, and The Honorable Ralph D. Gants.

Lisa M. Cimmino
Notary Public

Date

My commission expires
January 12, 2019