# 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' Response to Supplemental Filing to Defendant BRA's Opposition to Plaintiffs' Motion for Judgment on the Pleadings

The case cited by Defendant BRA, *Gettens v. Building Inspector of Sterling*, 2011 WL 488727 *1 (Mass.App.Ct. 2011), which is rendered pursuant to rule 1:28, is not relevant to the instant appeal, for the following reasons:

1. The cited case is a private land use controversy between the plaintiff and the owner of 55 Lakeshore Drive in Sterling, in which the plaintiff sought to bring in the building inspector by mandamus.

   In contrast, the instant case results from an administrative appeal of a Chapter 91 written determination concerning publicly held parkland (the seaward end of Long Wharf). Although Article 97 is prominent among the issues, not least because the parcel is listed as protected by Article 97 and the Chapter 91 regulations explicitly list Article 97 among their "general purposes," plaintiffs do not seek a private right of action to enforce its provisions. Record, p. 831, 847, 1358; 310 CMR 9.01(2)(e).

   Rather, plaintiffs have statutory standing as a ten-citizen group where damage to the environment is at issue. Record, p. 1; GL c. 30A s. 10A. In contrast, in the case cited by the BRA, Gettens did not claim to be a party with "presumptive standing." *Gettens*.

2. Defendants admit that "jurisdiction to interpret and apply Article 97 lies with the courts of the Commonwealth." BRA and DEP's Joint Opposition to Petitioners Motion for Summary Decision, Record, p. 458.

3. Gettens claimed standing under the public right doctrine; and Defendant BRA's Supplemental Filing (p. 2) focuses on this doctrine. In the instant case, plaintiffs cite a different doctrine, of prior public use.

4. When disposition of public land is at issue, which it was not in *Gettens*, the courts of the Commonwealth have already decided that citizen groups have standing. In *Walter S. Robbins & others vs. Department of Public Works & another* 355 Mass. 328 (1969), the SJC held that a group of residents known as the "Committee for Safety & Conservation, Interstate 95" were entitled to a writ of mandamus under the prior public use doctrine, holding that:

   > The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law." Id. at 330.

   This case was decided before the passage of Article 97. The Quinn Opinion states that Article 97 only strengthens the prior public use doctrine:

   > 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." Rep.A.G.,Pub.Doc.No.12 at 146 (1973).

Respectfully submitted,
Plaintiffs,
by their attorney,

Mary McGee
McGee & Schiavoni
37 Friend Street, Box 311
Lynn, MA 01903
781-596-1090
781-599-4310 (fax)
mslawfirm@aol.com
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