

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 Defendant BRA's Supplemental Filing To Dismiss Plaintiffs' Article 97 Claims

In its 15-page Supplemental Filing dated January 7, 2011, Defendant BRA argues at length that Article 97 does not apply to the project site. Their argument has two prongs:

- A. The BRA took Long Wharf for urban renewal purposes, not Article 97 purposes.
- B. Because the BRA took Long Wharf for urban renewal purposes, it may change the use to anything consistent with urban renewal, without requiring legislative authorization.

As detailed in the following sections, neither part of the argument is correct.

A. The BRA's taking for urban renewal purposes included

Article 97 purposes

The BRA's Supplemental Filing repeatedly emphasizes that Long Wharf was taken for "urban renewal, not Article 97 purposes" (p. 9) and that Article 97 comes into play when the land is "taken or acquired" for "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resource" (quoting *Newburyport Redevelopment Authority v. Commonwealth*, 401 N.E.2d 118, 137 (Mass.App.Ct. 1980)).

Defendant BRA incorrectly assumes that these purposes, urban renewal and Article 97, are mutually exclusive. In fact, a purpose of an urban renewal taking can well be an Article 97 purpose. Here, the end of Long Wharf (the site at issue) was explicitly designated to be an observation platform, an Article 97 purpose (BRA's Supplemental Filing, p. 3). Second, the entire seaward end is designated as public open space, also an Article 97 purpose (Record, p. 1624¹). Third, an additional urban renewal purpose was to promote the "preservation and enhancement of buildings in the project area, which have . . . historical significance," also an Article 97 purpose (BRA's Supplemental Filing, p. 2; see Quinn Opinion, Rep.A.G.,Pub.Doc.No.12 at 143). Thus, in the present case, the urban renewal taking encompassed several Article 97 purposes applicable to Long Wharf.

¹ The plaintiffs have waived their objection to the inclusion of pp. 1601-1656 in the record. See Plaintiffs' Post-hearing Memorandum, p. 4.

B. The urban renewal process does not confer carte blanche on the BRA

The BRA's Supplemental Filing (p. 4) states: "Amendments and changes to urban renewal plans do not require the approval of the legislature," citing *Commissioner of Department of Community Affairs v. Boston Redevelopment Authority*, 362 Mass. 602 (1972) [the DCA case]. However, this case is inapposite to Long Wharf's Article 97 protection.

First, the DCA case was heard prior to the adoption of Article 97 by the voters, and Article 97 was not raised as an issue by either side. Second, and related to the first point, the case had nothing to do with Article 97 issues. Rather, it involved a parcel designated for use as a school—not an Article 97 purpose—being changed to multi-family residential use. Third, the agency determined not to have a say over the change, the DCA, never had statutory authority over subsequent plan changes, only over the initial plan, and this fact was merely confirmed by the court.

The site at issue on Long Wharf, however, was, as part of the urban renewal plan, taken for Article 97 purposes: namely, as an observation platform, as public open space, and for its historic significance. Furthermore, the site's current use is for Article 97 purposes, as a park—as stated on the plaque under the flagpole erected in 1989 by the BRA. Therefore, there is an explicit constitutional basis, namely Article 97, for requiring legislative approval for the contemplated change of use.

This requirement is hardly the "administrative morass" specter mentioned in the BRA's Supplemental Filing (p. 6) for "every change in an urban renewal plan." Rather, it is a constitutional requirement that, before the rights of the citizens in a natural resource are irrevocably disposed of by a conversion, the Legislature give its express one-time approval.

Respectfully submitted,
Plaintiffs,
by their attorney,

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