COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
for the Commonwealth

No. SJC-11134

SUFFOLK, ss. SITTING, 2012

SANJOY MAHAJAN, et al.

Plaintiffs-Appellees

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

Defendants-Appellants

ON DIRECT APPELLATE REVIEW FROM JUDGMENT
OF THE SUPERIOR COURT

BRIEF of *AMICUS CURIAE* THE SIERRA CLUB in support of SANJOY MAHAJAN, ET AL.

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Corporate Disclosure Statement

Pursuant to SJC Rule 1:21, the Sierra Club hereby states that it is a non-profit corporation under Section 501(c)(4) of the Internal Revenue Code, organized under the laws of the State of California, that does not issue stocks or shares to the public and that (1) it has no parent corporation, and (2) there is no publicly held corporation with a ten percent (10%) or greater ownership share.

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Statement of Interest of the Sierra Club

The Sierra Club is the nation's largest non-profit, grassroots environmental organization incorporated in 1892 by John Muir and others. It was organized for the purpose of preserving the natural resources and human environment of the United States and currently has more than one million members. The Club's specific purposes include protecting the wild places of the earth, educating the public in practices to promote the responsible use of the earth's ecosystems and resources; enlisting all persons to protect and restore the quality of the natural and human environment; facilitating the public's use and enjoyment of these resources; and using all lawful means to carry out these objectives.

The Club's principal offices are in San Francisco, California. It currently has 57 Chapters. The Massachusetts Chapter has approximately 16,000 members, and its headquarters are in Boston. The Massachusetts Chapter has long been engaged in efforts to ensure that the planned development of the Boston Harbor waterfront is consistent with the preservation and enhancement of open space and parklands. These efforts have included involvement in the Third Harbor Tunnel / Depressed Artery project in which the Chapter sued in the Federal

District Court to incorporate measures to prevent deterioration of air quality and pollution and participated in the appeal to the First Circuit Court of Appeals. The Sierra Club also sought to have a North-South Rail link between North and South Stations installed in alignment with the Artery if the highway project were to be built. The Massachusetts Chapter has a particular interest in the creation of public open space for passive uses in the development of Long Wharf that was part of the Boston Redevelopment Authority's ("BRA") Redevelopment Plan. The Chapter has also participated in other proceedings involving the issues raised in this case, including Chapter 91 licenses and Article 97's applicability to land that the BRA acquired for urban renewal purposes.

Statement of Issues

The Court's Amicus Brief Announcement stated the issue as follows:

1. "[W]hether certain land on the eastern end of Long Wharf in Boston dedicated to public use as open space is protected under Article 97 of the Massachusetts Constitution, requiring a two-thirds vote of the Legislature to effect a disposition or change in use of the land."

Subissues

2. Whether a Chapter 91 license allowing the BRA to change the use of the subject land is legally effective without receiving a two-thirds vote of the Legislature as provided in Article 97 of the Massachusetts Constitution.
3. Whether land acquired by the BRA under the authority of urban renew statutes is subject to the protection of Article 97.

ARGUMENT

1. A Chapter 91 license allowing the BRA to change the use of the subject land is subject to Article 97 of the Massachusetts Constitution.

The Public Waterfront Act, G.L. Chapter 91 ("the Act") protects the public's interest in "tidelands." Section 1 of Chapter 91 defines "tidelands" to mean "present and former submerged lands and tidal flats lying below the mean high water mark." "Commonwealth tidelands" are defined as "tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose." This Court has defined Commonwealth tidelands as land lying below the mean low water mark and the furthest

jurisdictional line of the Commonwealth. Long Wharf is on filled Commonwealth tidelands, being seaward of the mean low water mark, and the proposed project is non-water dependent.

Section 2 of the Act, second paragraph, provides:

> In carrying out its duties under the provisions of this chapter, the department shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.

Section 14 provides:

> Except as provided in section eighteen, no structures or fill may be licensed on private tidelands or commonwealth tidelands unless such structures or fill are necessary to accommodate a water-dependent use.

With respect to nonwater-dependent uses, such as the Boston Redevelopment Authority's ("BRA") proposed project on Long Wharf, Section 18, sixth paragraph, of the Act provides:

> No structures or fill for nonwater dependent uses of tidelands may be licensed unless a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and consistent with the policies of the Massachusetts coastal zone management program.

Section 18, third paragraph, also provides:

> Any changes in use or structural alteration of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by the department of a new license in accordance with the provisions and procedures established in this chapter. Any unauthorized substantial change in use or unauthorized substantial structural alteration shall render the license void.
>
> * * *
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> The department may promulgate regulations for implementation for [sic] its authority under this chapter.

The Department of Environmental Protection ("department" or "DEP" herein) promulgated Waterways Regulations for implementing Chapter 91 that are set forth at 310 CMR 9.00.

a. This Court has determined the public trust doctrine protects the public's interest in Commonwealth tidelands, filled, flowing and landlocked.

In Moot v. Department of Environmental Protection, 448 Mass. 340 (2007) ("Moot I"), this Court addressed a citizens group's challenge to a DEP regulation that purported to exempt "landlocked" filled tidelands[1] from

[1] "Landlocked tidelands" were defined in the proposed regulation (310 CMR 9.04(2)) to mean: "filled tidelands, which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for any portion of such filled tidelands that are presently located: (a) within 250 feet of the high water mark of flowed tidelands; or (b) within any designated port area under the Massachusetts coastal zone management program. For the purposes of

the licensing requirement. Chief Justice Marshall, writing for a unanimous Court, explained the history and purpose of Chapter 91 as follows at 342:

> Chapter 91 finds its history in the public trust doctrine, 'an age-old concept with ancient roots...expressed as the government's obligation to protect the public's interest in...the Commonwealth's waterways.' Trio Algarvio, Inc. v. Commissioner of the Dep't. of Envtl. Protection, 440 Mass. 94, 97 (2003), citing Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 631, 645 (1979). Under the public trust doctrine, the Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation. Farfard v. Conservation Comm'n. of Barnstable, 432 Mass. 194, 198 (2000), and cases cited. To the extend that nonwater-dependent use – that is nontraditional use – is to be made of tidelands, the Legislature has now expressly mandated that any such nonwater-dependent use 'shall serve a proper public purpose' (emphasis added). See G.L. c. 91, §18, as amended by St. 1983, c. 589, §26.

This Court referred to its 1981 Opinions of the Justices, 383 Mass. 895, 905 (1981) as setting forth the necessary requirements that the Legislature must follow to relinquish the public's trust rights:[2]

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this definition, a public way may also be a landlocked tideland, except for any portion thereof which is presently within 250 feet of the high water mark of flowed tidelands."

[2] In a well-reasoned separate opinion, Justices Liacos and Abrams indicated that they disagreed with the majority that the Legislature may surrender or destroy the public's rights in submerged lands even on the terms they set forth.

> ...Where the Commonwealth has proposed the transfer of land from one public use to another, [1] the legislation must be explicit concerning the land involved; [2] it must acknowledge the interest being surrendered; and [3] it must recognize the public use to which the land is to be put as a result of the transfer.
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> * * *
>
> A further and significant limitation on legislative action in the disposition of a public asset is [4] the action must be for a valid public purpose, and, [5] where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.

This Court said in Moot I that items [4] and [5] above have particular relevance to Commonwealth tidelands and held that the DEP exceeded its authority in issuing a regulation that purported to exempt "landlocked filled tidelands from the licensing procedure, since only the Legislature has this authority."

After Moot I, the Legislature adopted Chapter 168 of the Acts of 2007 ("2007 Act") that purports to relinquish the public's rights in so-called "landlocked tidelands." The Plaintiffs in Moot I challenged the 2007 Act claiming it did not properly relinquish the public's rights because the requisite requirements enunciated in the 1981 Opinions of the Justices were not met. This Court agreed in Moot v. Department of Environmental

Protection, 456 Mass. 309 ("Moot II"), holding that the 2007 Act did not relinquish the public's rights in landlocked tidelands because the Legislature did not use the explicit language this Court has held is necessary to relinquish the public's rights. Although this Court observed that the 2007 Act expressed no intention to relinquish the public's rights, the Court held that the 2007 Act properly exempted landlocked tidelands from Chapter 91's licensing requirement. However, after so holding, the Moot II decision states at 314:

> This does not, however, entirely dispose of the public's rights in landlocked tidelands, which G.L. c. 91 continues to require the department to 'preserve and protect.' G.L. c. 91, §2.

This Court explained in Moot I at 343:

> The obligation to preserve the public trust and to protect the public's interest (as mentioned in note 5, supra (the two are not coterminous) has been delegated by the Legislature to the department, which, as charged in G.L. c. 91, §2, 'shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose' (emphasis added).

Therefore, DEP remains obligated to protect and preserve the public's trust rights in landlocked filled tidelands under Section 2.

In Moot I, this Court cited its decision in Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629 (1979), which involved development of Lewis Wharf, two wharfs north of Long Wharf, stating that "land below low water mark...has traditionally been held to be inviolably committed to the public domain." Boston Waterfront at 646. This Court held that while the petitioners held title to the tidelands in question, the title was subject to the condition subsequent that it be used for the public purposes for which it was granted.

The DEP's Waterways Regulations at 310 CMR 9.03(2) explain the Boston Waterfront decision:

> In accordance with the Boston Waterfront decision...grants by the legislature of tidelands below the historic low water mark are subject to a condition subsequent that such tidelands be used for the public purpose for which they were granted, and the rights of the grantee to those tidelands are ended when that purpose is extinguished. If the present use of such tidelands has changed form the public purpose for which they were granted, authorization shall be obtained from the Department, in the form of a license...in order to establish that such change of use serves a proper public purpose.

Arno v. Commonwealth, 457 Mass. 434 (2010), further affirmed this Court's holdings in Moot I and II and Boston Waterfront. In a unanimous decision, Justice

Cordy states that the "public trust doctrine" is so embedded in the historical development of tidelands law in Massachusetts as to independently require the Legislature and the DEP to protect the public's rights in all tidelands, notwithstanding the issuance by the Land Court of original certificates of fee simple title to the tidelands which certificates the Land Court had held superceded any rights under the "Waterways Act." Justice Cordy expanded upon Chief Justice Marshall's explanation of the history of the public trust doctrine, as follows at 449 and 454:

> a. The power to relinquish public rights in tidelands. The history of the law of Massachusetts tidelands is familiar, see Boston Waterfront, supra at 631-639, and we will limit our discussion to its most relevant features. "Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property." Id. at 631. Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters. See id. at 632.
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> * * *
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> The Waterways Act 'generally is viewed as an encapsulation of the Commonwealth's public trust authority and obligations.' Farfard v. Conservation Comm'n. of Barnstable, supra. See Trio Algarvio, Inc. v. Commissioner of the Dep't. of Envlt. Protection, 440 Mass. 94, 97 (2003) ('Echos of the [public trust] doctrine can be traced throughout the development of

> Massachusetts tidelands law in, for example, the Legislature's regulation of waterways beginning in 1866').

This Court concluded that the public's rights in Commonwealth tidelands were paramount to private rights in filled tidelands of the Nantucket Harbor, even though the private interest in the filled land was registered in the Land Court and the owner held certificates of fee simple title to the land. Thus, in Moot I and II, Boston Waterfront and Arno, this Court has made clear that the public's historic trust rights in tidelands, including filled tidelands, remain in full force and effect.

b. Article 97 includes tidelands used for public purposes specified therein.

Article 97 reinforces the public's trust rights by requiring a two-thirds vote of the Legislature to change the use of tidelands to another use that will serve a public purpose. Article 97 specifically includes the public's rights in tidelands by providing that (emphasis added):

> ...the people shall have the right to clean air and water...and the natural scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of ... water, air ... and other natural resources is recognized as a public purpose.

Article 97 further provides:

> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by two-thirds vote...of each branch of the general court.

The 1981 Opinions of the Justices at 918 (emphasis added) recognized that Article 97 includes the public trust rights in tidelands by stating that:

> The two-thirds voting requirement applies to the disposition of all lands and easements taken or acquired for the stated purposes, regardless of when they were taken or acquired. We would include, within the word 'acquired,' interests of the Commonwealth acquired by the sovereign pursuant to colonial charter and the adoption of the Constitution of the Commonwealth.

Moreover, the term "natural resources" as used in Article 97 is defined in several Massachusetts General Laws to include "subsurface water resources." See G.L. c. 12, §11D and c. 21, §1.

The protection afforded by both the public trust and Article 97 is embodied in the purposes section of the Commonwealth's Waterways Regulations, which provide at 310 CMR 9.01:

> (2) Purpose. 310 CMR 9.00 is promulgated by the Department to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands, as defined in 310 CMR 9.02. The general purposes served by 310 CMR 9.00 are to:

* * *

> (e) foster 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 under Article XCVII of the Massachusetts Constitution.

Article 97 also embodies the "prior public use" rule. In addition to the public's trust rights in tidelands, this Court has long recognized that a change of use of land held for public purposes requires legislative approval. In Robbins v. Department of Public Works, 355 Mass. 328, 331 (1969), this Court considered the proposed transfer of conservation land by the MDC to the DPW for highway purposes as lacking adequate legislative authority and stated:

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

This Court found that there was no explicit legislation authorizing the transfer, stating at 331:

> Indeed the statute does not identify the land to be transferred. We think it is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use.

This Court has also applied the "prior public use" rule in Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502, 503 and fn. 1 (2005) and Town of Brookline v. Metropolitan District Commission, 357 Mass. 435, 439 (1970). See also, Sacco v. Department of Public Works, 352 Mass. 670, 672 (1967) quoting from Higgins v. Treasurer and School House Commissioners of Boston, 212 Mass. 583, 591 (1912); Greylock v. Reservation Commission, 350 Mass. 410, 419 (1969).

In reliance on this Court's decisions, Attorney General Quinn in his 1973 opinion letter, 1972/73 Op. Atty. Gen. No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 143 (June 6, 1973) (Add. A), to the Speaker of the House of Representatives stated that:

> A second major purpose of Article 97 is 'the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources.' Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.
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> * * *
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> Thus, all land, easements and interests therein are covered by Article 97 if 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 resources' as these terms are broadly construed.

Turning now to the Long Wharf project, the Chapter 91 license issued by DEP to the BRA in 1983 allowed passive public uses of the seaward (eastern) end of Long Wharf. These uses include benches and tables with seats in and around an open-air shade pavilion available for the public to use and enjoy the urban environment and views of the Boston Harbor in a quiet setting, with a walkway around the pavilion connecting to the Harbor Walk from Boston's Beacon Hill to the sea.

The proposed change of use of the open-air public shade pavilion to a private restaurant and bar that will enclose the open structure is indisputably not only a "change of use" under Chapter 91 that requires a new license, but also a change in the purpose for which the BRA acquired the land that thereby triggers a two-thirds vote of the Legislature to effectuate the change. However, the DEP in its brief ignores the "change in purpose" language of the fourth paragraph of Article 97 and relies instead on the phrase "or otherwise disposed of" which DEP claims means conveyance of a property interest, which DEP contends Chapter 91 does not do. However, DEP's contention is contrary to §15 of Chapter

91 which clearly assumes that Chapter 91 licenses do convey a property interest by providing that "[r]evocation by the general court of licenses issued after January first, nineteen hundred and eighty-four shall be treated as a taking of real property requiring payment of just compensation..." Section 15 then specifically provides that "a license issued pursuant to this chapter is hereby made a mortgageable interest..." This is followed by a sentence providing the exception that, "Except as provided herein, the grant of a license pursuant to this chapter shall not convey a property right, nor authorize any injury to property or invasion of rights of others." The except clause plainly applies to a "mortgageable interest" and to the property interest involved upon license revocation proceedings by the General Court, that are provided for in preceding clauses. Therefore, the purpose of this sentence is to make clear that the licensee may not cause damage to the property or allow others to obtain rights therein. However, in its brief (p. 27), DEP ignores the "except" clause altogether and misconstrues this sentence to be an unqualified statement that, "The grant of a license under G.L. c. 91 shall not convey a property right[.]"

Such a reading by DEP blatantly distorts the plain meaning of the sentence read as a whole.

Any confusion was clarified in Attorney General Bellotti's May 16, 1980 letter to the Commissioner of the Department of Environmental Management in which he stated that there is a "disposition" under Article 97 "whenever there is any transfer, without limitation of the legal interest in the acquired land or physical control over it." 1979/80 Op. Atty. Gen. No. 15, Rep. A.G., Pub. Doc. No. 14 at 129, 132 (May 16, 1980). (Add. B) The Opinion continued: "Any relinquishment of physical control over the land would be a disposition and would require a vote of two-thirds of both Legislative branches."[3] (emphasis added) Op. Atty. Gen., May 16, 1980, p. 133. (Add. B)

In his March 26, 1981 opinion letter to the new Commissioner, 1980/81 Op. Atty. Gen. No. 16, Rep. A.G., Pub. Doc. No. 12 at 143, 146 (March 26, 1981) (Add. C), Attorney General Bellotti confirmed both Attorney General Quinn's opinion in his 1973 letter and his own 1980 opinion, stating:

[3] The Attorney General repeated this advise in his March 26, 1981 letter to the Commissioner's successor. Op. Atty. Gen., March 26, 1981, p. 146. (Add. C)

> My predecessor has concluded that 'dispositions' for which two-thirds roll-call vote of each branch of the General Court is required include 'transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, of land, easements and interests therein originally taken or acquired for the purposes stated in Article 97...' 1972/73 Op. Atty. Gen. No. 45, Rep. A.G., Pub. Doc. No. 12 at 139, 144 (1973). In further construing the requirements of Article 97, I have earlier given my opinion to your predecessor that '[a]ny relinquishment of physical control over [land held by the Department] would be a disposition and would require a vote of two-thirds of both Legislative branches. The Department cannot, therefore, ...surrender its duty to police, conserve, preserve, and care for [such land].'[4]

Consistent with these Attorney General opinions, this Court indicated in Moot I that a Chapter 91 license constitutes "control" over the licensed property and accordingly is a disposition thereof. Specifically, in Moot I this Court explained that the license required under Chapter 91, §18 is the mechanism the Legislature created to give the DEP control over tidelands sufficient to ensure that they be used for a proper

[4] Relying on the 1973 Opinion of the Attorney General (Add. A), the First Assistant Attorney General Thomas Green under Attorney General Scott Harshbarger in a December 16, 1997 letter to the BRA Director, concluded that City Hall Plaza in Boston was protected by Article 49 (Article 97) as public open space and BRA's proposal to construct a hotel and garage on City Hall Plaza required Article 49 approval. (Add. D)

public purpose and that the DEP's proposed regulation exempting "landlocked" tidelands from the statue's licensing requirement "is relinquishing all control over the use of filled land." Accordingly, the Court held the DEP's regulation to be invalid. Moot I, supra at 350. Such control over licensed tidelands plainly is at least as great an interest in the subject land as a financial institution's mortgage interest in the property, which G.L. c. 91, §15 specifies is a property interest.

The defendants' may be relying on the doctrine of ejusdem generis in asserting in their briefs that the words "otherwise disposed of" in Article 97, fourth paragraph, are limited to real property rights such as ownership and easements. However, such an application of ejusdem generis ignores the Appeals Court's rejection of a similar contention in Aaron v. Boston Redevelopment Authority, 66 Mass. App. Ct. 804, 810 (2006) where the Court stated:

> That canon of construction [ejusdem generis] is not to be applied mechanistically whenever [and simply because] a string of terms is separated by commas . . . . Rather, it is designed to narrow broad language when the literal meaning of that language does 'not fairly come within [a statute's] spirit and intent.' " Perlera v. Vining Disposal Serv., Inc., 47 Mass. App. Ct. 491 , 496 (1999),

> quoting from Kenney v. Building Commr. of Melrose, 315 Mass. 291 , 295 (1943).

Here, the phrase "or otherwise disposed of" after the specific words "lands and easements" reasonably should be interpreted to include other lawful means of "disposal" of property interests, including licenses.

The only case the defendants cite in their briefs as remotely supporting the argument that a Chapter 91 license does not constitute a "disposition" of land is Miller v. Department of Environmental Management, 23 Mass. App. Ct. 968 (1987), in which the plaintiffs sought to enjoin the Commissioner of the Department of Environmental Management ("DEM") from entering into a one-year revocable permit for the use of land under DEM management for cross-country skiing by a private operator in the Harold Parker State Forest. The Court found that the proposed use was within the discretionary authority of the DEM Commissioner, and that the award of the permit did not violate any statute, noting at 970 that:

> Nor do we regard the grant of a one-year seasonal permit, which is revocable by the Commissioner at will and which is for the purpose of conducting a program to be carried out under the supervision of the department, to be such a disposition of 'lands or easements' as to require, pursuant to art. 49 of the Articles of Amendment to the

> Massachusetts Constitution, a two-thirds vote of each branch of the Legislature.

This statement in Miller appears to be dictum, since it is not necessary to the Court's holding, and it should be given no precedential weight, especially since it is inconsistent with this Court's application of the "prior public use" rule and Article 97. See Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502, 509 (2005), in which this Court stated: "Article 97 mandates that the disposal of land designated for conservation purposes be approved by two-thirds of the Legislature." The BRA's assertion in its brief that this Court held in Hanson that Article 97 applies only to land held expressly for conservation purposes, is patently untrue (p. 23). This Court's statement that Article 97 mandates that the disposal of land held for conservation purposes is subject to the two-thirds vote requirement can fairly be applied to other purposes specified in Article 97, including parkland and open space as well as conservation. However, in Hanson, this Court held that the conservation restriction was unenforceable because it had not been recorded. Indeed, the recording issue is not a problem with respect to tidelands used for Article 97 purposes because Chapter 91 licenses are

required to be recorded. See also, Brookline, supra at 440, in which this court applied the "prior public use" rule, stating:

> The principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislature to that end has been well established in our decisions.

While recognizing that the Miller case provides only a terse statement to support the defendants' position, the DEP in its brief (at pp. 24-25) goes on to place great emphasis on language in the 1981 Opinions of the Justices which the brief misstates. Specifically, the DEP's brief (p. 24) asserts that the Justices advised that "the Commonwealth's relinquishment of anything other than ownership or an easement in tidelands would not trigger Article 97's vote requirement." The Justices made no such statement. In the 1981 Opinions, the Justices were responding to questions raised by the Senate concerning Bill No. 1001, which would have relinquished the public's rights in Commonwealth tidelands lying seaward of the "1980 Line" that generally followed roadways near the Harbor and the Charles River. 1981 Opinions, supra, 901. The Justices stated that the Senate raised six questions, one of which was (supra at 917):

> Question five asks whether art. 97 of the Articles of Amendment to the Massachusetts Constitution would require a two-thirds vote of both branches of the General Court in order to enact Senate No. 1001.

The Justices responded:

> We believe that lands and easements taken or acquired for purposes described in art. 97 includes property acquired prior to the effective date of the 1972 amendment. See Rep. A.G., Pub. Doc. No. 12, at 139, 141 (1973). 'To claim that new Article 97 does not give the same care and protection for all these existing public lands as for lands acquired by the foresight of future legislators or the generosity of future citizens would ignore public purposes deemed important in our laws since the beginning of our Commonwealth. Moreover, if this amendment were only prospective in effect, it would be virtually meaningless. Id.'

Thus, in response to the Senate's Question No. 5, the Justices addressed only the issue of the bill's retroactivity. They did not state that any type of property interest less than ownership or an easement therein acquired for Article 97 purposes would not require a two-thirds vote of the Legislature to change the purpose. A 30-year Chapter 91 license, that is revocable only upon a vote of the Legislature or upon a determination by the DEP that the terms of the license are not being met, provides control over the property that is akin to easement and mortgage interests, which are recognized by this Court and Chapter 91 as interests

in property for Article 97 purposes. The trial judge properly equated a Chapter 91 license to an easement.

The DEP also contends incorrectly that any Legislative approval under Article 97 is not required before a Chapter 91 license is issued. However, this contention is contrary to the Chapter 91 Regulations that specifically provide that a license application is not complete until all other State and local approvals have been obtained. Specifically, 310 CMR 9.11(3)(c) provides that:

> The Department shall determine an application to be complete only if the following information has been submitted:
>
> * * *
>
> 3. [F]inal documentation relative to other state and local approvals which must be obtained by the project...

Article 97 is such an "other" State approval, which approval is not specifically listed in 310 CMR 9.11(3)(c).

The DEP's argument that Article 97 approval by the General Court in advance of the issuance of a Chapter 91 license is "inefficient" is to no avail. This Court dismissed DEP's argument of "administrative efficiency" as warranting its regulation exempting "landlocked"

tidelands from licensing which this Court held was invalid. Moot I, supra at 352.

Finally, the DEP brief (p. 19) makes the nonsensical contention that the proposed change is not a change in use or purpose since the public still can obtain a view of the Harbor by peeking through the windows of the new restaurant. This argument so defies common sense that it concedes the point. An obscured and interrupted view of the Harbor through the windows, when the curtains are not closed during the day, and otherwise at night, from a busy commercial establishment filled with patrons, wait staff, bartenders and bussers moving about is hardly the same as an uninterrupted peaceful view while seated on a bench looking through the open-air shade pavilion that currently exists.

2. Land acquired by BRA under urban renewal statutes used for public purposes specified therein is subject to Article 97.

The Redevelopment Plan for Boston included creating a "public waterfront parkland" at the seaward (eastern) end of Long Wharf. This land was acquired by the BRA for this specific purpose among others. This area is approximately 33,000 sf surrounded on three sides by the Boston Harbor. The Plan provided for an open-air pavilion with a roof supported by columns with no

sidewalls which has been referred to as the "shade pavilion." There are park benches and tables both under the roof of the pavilion and outside. A plaque at the base of the flagpole near the pavilion designates the area as "Long Wharf Park" with the year 1989 and lists its sponsors, which include, ironically, the BRA and the City of Boston. The parkland designated in the Redevelopment Plan has been developed in accordance with the Plan. Thus, there can be no doubt that the land in question was taken for a public purpose to be dedicated to use as public parkland. Article 97 provides no exemption from its protective provisions even as to land specifically taken for urban renewal purposes.

The 1981 Opinions of the Justices makes clear that disposing of land and easements taken for Article 97 purposes are subject to the two-thirds voting requirement, when taken under an urban renewal statute or some other authority. After reciting the purpose of Article 97 to include the public's rights in conservation, water and other natural resources, this Court said at 918:

> The two-thirds voting requirement applies to the disposition of all lands and easements taken or acquired for the stated purposes, regardless of when they were taken or acquired.

Thus, this Court has stated plainly that land taken by the BRA under an urban renewal statute that is to be used for public purposes identified in Article 97 is subject to the two-thirds vote when there is a change of use or other disposition of the property. The defendants rely on the Appeals Court decision in Aaron, supra, for their contrary claim that the BRA's urban renewal activities are exempt from Article 97, even when land taken is specifically within the purposes protected by Article 97. However, the Court said in Aaron that urban renewal plans include among their objectives some of the same public purposes as Article 97, including "parks, recreational areas and other open spaces." Id. at 810 and fn. 10.

Similarly, Attorney General Quinn gave the same opinion in his June 6, 1973 Opinion letter, Op. Atty. Gen., June 6, 1973, 139 (Add. A), responding to questions raised by the House of Representatives regarding Article 97, including:

> Do the provisions of the fourth paragraph of Article XCVII of the Articles of the Amendments to the Constitution apply to any or all of the following means of disposition or change in use of land held for a public purpose: conveyance of land; long-term lease for inconsistent use; short-term lease, two years or less, for an inconsistent use; the granting or giving of an easement for an

> inconsistent use; or any agency action with regard to land under its control if an inconsistent use?

The Attorney General Quinn responded that (supra at 142-43):

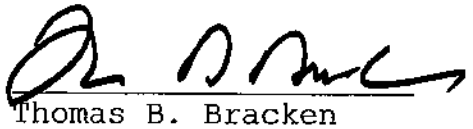
> A second major purpose of Article 97 is 'the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources.' Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.
>
> * * *
>
> Thus, all land, easements and interests therein are covered by Article 97 if 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 resources' as these terms are broadly construed.

Thus, this Court and the Opinions of the Attorneys' General dated June 6, 1973, May 16, 1980 and March 26, 1981 all make clear that land acquired by the BRA and other urban renewal agencies, for parkland, open space, conservation, recreation and other Article 97 purposes are subject to the two-thirds voting requirement.

CONCLUSION

For the foregoing reasons, the Sierra Club urges this Court to uphold the decision of the Superior Court in this matter.

Respectfully Submitted
the Sierra Club,
by its attorney



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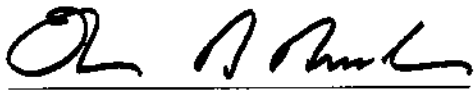
Certification Pursuant to Rule 16(k) of Rules of Appellate Procedure

Comes now Thomas B. Bracken, attorney for the Sierra Club, and certifies that the foregoing Brief complies with:

> "the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers)."



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ADDENDUM