



This Land was Your Land *What Will it Cost to Get it Back?*

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1 Brief History

After WWII, public park agencies disposed of many acres of the public open spaces that had been assembled since the end of the 19th century. Some dispositions were for public purposes such as highways, hospitals and schools; others were for private use, such as parking lots, private yacht clubs, housing and commercial development. Many of the dispositions were along riverbanks; others nibbled away at the edges of the Metropolitan Park System. Public concern over the loss of clean water and open space led to environmental legislation in the early 1970's. The passage of the 97th amendment to the Massachusetts Constitution was an important local response. Its enforcement in 1973 by then Attorney General Robert Quinn (*see Ribbs v. Robbins*) halted construction of the Southwest Expressway through the Fowl Meadow in Milton. It was about to commence via a temporary easement from the MDC to the Massachusetts Department of Public Works (MHD.)



Case study from Milton in the Blue Hills

Trying to do the wrong thing in the right way.



The Above Illustrates a Proposed Land Swap Between Lantanas and the MDC.

2 Article 97 Briefly Explained

Article 97, adopted in 1972, is the 97th Amendment to the Massachusetts Constitution. It guarantees Massachusetts residents basic environmental rights and outlines how those rights are to be protected: The people shall have:

- The right to clean air and water,
- Freedom from excessive and unnecessary noise,
- and the natural, scenic, historic, and esthetic qualities of their environment;
- and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other resources is hereby declared to be a public purpose.
- The general court shall have the power to enact legislation necessary or expedient to protect such rights.
- In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or for the acquisition by purchase of otherwise, of lands and easements or other such interests therein as may be deemed necessary to accomplish these purposes.
- 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 a two thirds vote, taken by yeas and nays, of each branch of the general court. Former Attorney General Robert Quinn's 1973 opinion regarding Article 97 interpreted this to mean that clearly states that if a municipality, county, or the state wishes to change the intended use of such land – whether by conveying the land to a private citizen or corporation or transferring the parcel to another branch or agency within the government or to another municipality – the filed legislation must be approved by a two-thirds majority of both the House of Representatives and the Senate of the General Court of Massachusetts. The authors of the amendment decided on a two-thirds majority in order to provide adequate protection for Article 97 land.

A number of recent publications conclude that Article 97 protection mechanisms are outdated and inadequate. A study conducted by MASSPIRG in 2001 listed the number of successful Article 97 bills. The charts from that study on their website in the publication entitled "*This Land's not Your Land.*"

"Two figures are particularly important to highlight: • In addition to the 33% of all land transfers that converted open space into privately developed land, another 22% of land transfers are used for road and water supply construction, clearly the result of development. • The number of land transfers benefiting private development has steadily increased in the past 12 years. Whereas in 1989 only 1 land transfer accounted for private development, in the past three years (1999-2001) the Legislature transferred 40 parcels of land to private developers via Article 97 land transfers; that is an average of over 13 per year."

Appendix A to the above report contains an Article 97 Land Transfer Chart (1989-2002) from Representative Ruth Balser's report entitled "*New School Construction and the Loss of Article 97 Land.*"

According to the Environmental Lobby of Massachusetts (ELM) a list of Article 97 land transfer bills in a study by the Joint Committee on Local Affairs and Regional Government, showed that in the period, 1999-2004, seventy-five bills for transfer of title to municipal land came before that committee and were approved by the legislature. In the great majority, transfer involved loss of forest, park, wetland, field, playground, open space, conservation, well field, or recreational land. *In many cases the new use was not public but private.*

3 Laws & Regulations to Protect Article 97 Land

Certain policies and laws attempt to ensure the execution of Article 97. These include the Executive Office of Environmental Affairs' land disposition policy, the Massachusetts Environmental Policy Act, and Executive Order 385, and use of the Governor's veto.

① ***Executive Office of Environmental Affairs' Article 97 Land Disposition Policy*** One of the responsibilities of the Executive Office of Environmental Affairs (EOEA) is to protect, preserve, and enhance all open space areas covered by Article 97. The EOEA furthermore aims to ensure no loss in the quantity of Article 97 lands under the ownership of the State and its political subdivisions. As such, the EOEA requires any sponsor of an Article 97 land disposition to demonstrate that "all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist." This policy seems at first glance to be reasonable and adequate. Unfortunately, no process currently exists to ensure that Article 97 land transfer bills are referred to EOEA. Furthermore, even if the EOEA reviews an Article 97 land transfer bill, the Legislature is not required to adhere to or even consider the EOEA's recommendation. Thus, the Legislature can pass Article 97 land transfer legislation that has not been evaluated by the EOEA, or that does not meet EOEA standards. (From "*This Land Is Not Your Land*" MASSPIRG Report, July 2001)

② ***Massachusetts Environmental Policy Act.*** Another system devised to ensure Article 97 rights to Massachusetts residents is the Massachusetts Environmental Policy Act (MEPA) process. This process compels any city or town requesting a transfer of protected Article 97 land for projects involving state funds to submit an Environmental Notification Form (ENF) to the Secretary of Environmental Affairs. The Secretary replies to the municipality with a set of questions and concerns about the land transfer: the Secretary may for instance request a description of proposed replacement land, proof that all other options to avoid the Article 97 disposition have been explored, and evidence that no feasible alternative to the land transfer exists. It is then the responsibility of the municipality to answer these questions in their Environmental Impact Report (EIR). If the EIR adequately resolves the Secretary's concerns, the project receives MEPA approval. Again, this policy seems at first glance to ensure responsible transferring of Article 97 land. However, two important loopholes makes the MEPA process almost powerless. First, the policy of MEPA requiring an EIR is discretionary and thus subject to changes under different administrations. Another problem with the MEPA review is that it is disconnected from the legislative process. When a land transfer bill comes before the Joint Committee on Local Affairs for a hearing, neither the ENF nor the EIR needs to be presented to the Committee. In fact, a land transfer bill may be up for a hearing even before the ENF has even been submitted. The Joint Committee on Local Affairs can thus give a favorable report to an Article 97 land transfer bill be passed into law by the Legislature even if the municipality has not yet submitted an EIR or ENF to MEPA.

③ ***Executive Order No. 385 – "Planning for Growth."*** In 1996, former Governor William Weld signed Executive Order No. 385. Section 5 of the order instructs state agencies to adopt a more environmentally friendly development policy. Specifically, this section urges agencies to rehabilitate and renovate structures rather than construct new facilities whenever possible. This executive order was a clear signal that the Weld-Cellucci team was committed to conservation. There is no assurance however, that future administrations will adopt this same strategy.

④ ***Governor Romney has acted*** to curtail the diversion of publicly protected lands through a more stringent review of Article 97 bills once they reach his desk. While his veto threat is a welcome short-term deterrent, it does not remove the need for a clear and consistent disposition process. (ELM)

4 The Solution is to Pass Legislation that Strengthens Article 97

Senate Bill 539: This legislation declares that it is the policy of the Commonwealth that there should be no-net loss of lands or easements protected under Article 97. The bill establishes the statutory framework, pursuant to the constitution, to guide legislators' decisions on whether to approve bills that would transfer state- or municipal-owned Article 97 lands or easements to a new but inconsistent public use, to a different public management authority, or from public to private ownership:

- All dispositions and changes in use of lands or easements taken or acquired for natural resource purposes must be appropriately mitigated to ensure that the disposition or change in use does not result in a net loss of lands and easements;
- Compensation must be paid in terms of acreage and value, either fair market value or value in proposed use, whichever is greater;
- Any deed, or other instrument conveying interest in lands or easements for natural resource purposes must contain a statement identifying those purposes.

The bill requires that each land transfer petition must provide a description and the acreage of the subject lands or easements, as well as a statement of the present public uses and the proposed new uses. In addition:

- Each petition must disclose whether the transfer is under review of the Massachusetts Environmental Policy Act (MEPA), and whether the lands or easements are eligible for listing on the state register of historic places;
- Additional documentation must accompany each land transfer petition demonstrating and certifying the alternative locations that were considered, and how any lands or easements taken or acquired for mitigation are consistent with local open space and master plans. Densely populated cities would be allowed flexibility in conducting an alternatives analysis and providing mitigation for proposed school construction projects on Article 97 lands, in recognition of the shortage of available replacement lands and increased costs for construction and renovation in these areas.

Status: Reported favorably out of the Joint Committee on Environment and Natural Resources on June 9, 2005. Reported favorably out of the Joint Committee on Bonding, Capital Expenditures and State Assets on October 7, 2005 and is currently pending action by the Senate's Ways and Means Committee. It has been merged with H1277, filed by Representative Anne Gobi. Shannon Ames from Senator Resor's office suggests calling Senator Murray to urge passage of the bill (☎(617) 722-1330 / Therese.Murray@state.ma.us). Similar bills have passed in the Senate but have not made it to the house floor. Some of its house supporters are now in leadership positions, so it may have a better chance this year.



5 Topics for Future Discussion

- ① How can Land Trusts Work Learn of Pending Article 97 Bills in Time to Intervene?
Should We Partner with Conservation Commissions?
- ② Under what Circumstances Should Environmentalists Support Article 97 Legislation?
Should we Begin to Discuss this Process?

References:

1. Shannon Ames, Director of Environmental Legislation
Office of Senator Pam Resor, ☎671-722-1120
2. Jen Baker, Environmental Associate 617-747-4313 jen.baker@masspirg.org
3. Chris Hardy, Mass Audubon
4. Jay Kuhlow, Senator Brewer's Office
5. ELM
6. Anne Gobi, State Rep., Worcester County