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From : Stephen H. Kaiser, PhD

***Article 97 Parkland "Swap" Blue Hills Reservation
EOEA # 14115***

I have recently been involved in extensive research into the origins and interpretations of Article 97 and the provisions for protection offered by the Supreme Judicial Court and the Attorney General. In this process we have discovered that Article 97 protections apply to a wide range of "natural resources" and not just to parkland. Moreover, there is a required format for the Article 97 vote, with determinations that are legally required to be made before there is a transfer or other land disposition. The Attorney General has also provided us with extensive guidance on interpreting the requirements of Article 97. His Opinion covered the scope of the constitutional language and the associated protections which must be addressed by government officials and legislators.

The Attorney General advised that the format of any Article 97 determination should guarantee that "the very highest standard of specificity should be required of the draftsmen to assure that legislation clearly identifies the locus, the present public uses of the land, the new uses contemplated, if any, and the parties to any contemplated 'disposition' of the land." In practice, many Article 97 bills have been enacted with considerably less compliance with these requirements, and the completeness of any Article 97 legislation must be assured.

With the goals of Article 97, the Attorney General concluded that "Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development or utilization of natural resources. If the land is misused, a portion of the public's natural resources may be forever lost, and no less so than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond existing law and much to the benefit of our natural resources and to the credit of our citizens."

A key determination is the existence of public trust rights in the land by statute or in common law. The purpose of the original taking determines the proper and appropriate actual uses for the land, and Article 97 requires that these uses be specified.

Article 97 identified that "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 is hereby declared to be a public purpose." The Attorney General has identified "natural resources" to include :

air, water, wetlands, rivers, streams, lakes,, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, seas and fresh water fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites."

I have attached a copy of the Attorney General's Opinion and my assessment of it. In recent years, the full impact and implications of Article 97 protections have not been fully grasped by leading state officials, as well as by private advocates of alternate uses for public parkland and other natural resources.

The proper path for MEPA is to offer the fullest respect for the law and the original purposes of the parkland taking in the Blue Hills and to require the preparation of an Environmental Impact Report, scoped for the consideration of a wide range of alternatives, to be performed in full compliance with the requirements of Chapter 30, Section 61. The aesthetic impact of the parking garage, for example, should be evaluated against the aesthetic impact of the loss of three acres of parkland and replacement by a paved parking lot.

Protection of public lands has been a challenge for human societies for centuries. At the founding of the Massachusetts colonies, a frequent innovation brought over from Europe by the colonists was the concept of common land, agricultural or other land shared by the community, often surrounded by individually owned plots owned by resident farmers. This dream died quickly.

The goal of shared agricultural lands was shattered by the realization that most abutters would abuse the common land through overgrazing -- thereby shifting the damage to the community, rather than the individual farmers who were at fault. The moral of the story is that private lands with private responsibility offer a practical way for the new society to survive, but there are still community functions which require common land -- and these typically take the form of the town common or parkland.

Boston's cow common became Boston Common, and the streets, sewers, playgrounds, schools, and municipal buildings all became governmental properties which needed a responsible superintendence to ensure their proper use for all and to avoid misuse or abuse of power. Our constitution form of government with its checks and balances offered a way for this system to succeed.

Creating new forms of public lands and trying to maintain the system will present a major challenge to any government. From the beginning, opportunities will open up for poachers, squatters and thieves to help themselves to the public assets. Such a condition occurred with the formation of the National Parks after the Civil War. For the first fifteen years of Yellowstone Park, it was run by a civilian administration with little power and great political interference, while a private development company was trying to build hotels and other operations. The Yellowstone National Park Improvement Company obtained a political monopoly and gradually sought to expand its leases from an initial seven acres to a hoped-for 4,400 acres. Poaching with indiscriminate killing of game was a major problem. After a dozen years, Congress had had enough and authorized the Secretary of War to send in the Army Cavalry to establish control of public lands. The ineffective civilian control was abolished, and the military control stayed for 32 years, right up to World War I.

The Army Cavalry marched in, rounded up the poachers and squatters and sent them packing. It ultimately got rid of the entrepreneurial "Improvement Company" as well. Today we can still see some of the results in the existence of the National Park rangers, who combine service and assistance with a tough control policy to protect against abuse of the public parks.

The interesting message from this experience is that if you wish to maintain and operate a "public commons" it is vital to operate with a firm hand. This includes highways, sewers, waterways, historic sites, parks, and coastal lands. For these functions, operating "at the speed of business" is a policy for complete misunderstanding of the essential requirements for protecting public lands. Such an approach could result in an acceleration of those forces who are naturally inclined to take advantage of government pliability and any decline in vigilance.

I am not sufficiently familiar with the history of the Metropolitan Park Commission and its operations, but I do know that right up to 1969, the MDC Police were in charge of the parks maintenance employees (but not the engineers) so that the full operation of the parks system was under the control of the police. Picking up trash, sweeping streets, and throwing trucks off the parkways was all under the managerial control of the MDC Police. Was the placement of MDC police in control of parks maintenance a Massachusetts copy of the success of the Army Cavalry in managing the National Parks? The question is a fascinating one, and I would love to know the answer.

The lesson for the current project in the Blue Hills of Randolph is that anyone seeking to obtain use of public lands should expect to find government and public vigilance against any usurpation of land, and that such resistance is a vital element in the protect of all public lands and functions. The proper outlet for MEPA is to apply that scrutiny to the Blue Hills proposal by requiring an Environmental Impact Report for this project.

cc. Tom Palmer, Friends of the Blue Hills
Mike Ryan, Friends of the Middlesex Fells