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To : Ian Bowles, Secretary of Environmental Affairs
MEPA Review Unit, 100 Cambridge Street Room 900
Attention : Anne Canaday & Bill Gage, MEPA reviewers

From : Stephen H. Kaiser, PhD

Environmental Notification form for Proposed Article 97 Land Swap in Randolph EOE #14115

On October 29, 2007, I submitted an early comment on the proposal for the Article 97 transfer/land-swap of DCR parkland in Randolph. In that comment I reviewed the elements of Article 97, the definition of "natural resource" lands, and the necessary protections under MEPA and Chapter 30, Section 61. I concluded that an Environmental Impact Report should be required.

In the intervening weeks, I have come across another Article 97 case involving MEPA and DCR, as well as other municipal and state agencies : the Fall River Executive Park in Fall River and Freetown, with its proposal to transfer 293 acres of Freetown State Forest to the city of Fall River for development purposes, including a new highway interchange. This project (EOEA #12902) originally included local commitments to pay for road improvements, but the current plan as I understand it is to seek highway funds from Mass Highway and have them prepare an EIR, while the City of Fall River would pay \$2.45 million to the Trustees of Reservations to help in additional open space acquisition.

The environmental promise from the City of Fall River was that 4,300 acres of city-owned water supply lands would be preserved in perpetuity as environmental land. However, Fall River should be obligated to protect its water supply lands regardless, so the public benefits of the plan appeared particularly dubious. The public would lose 293 acres of Article 97 land.

My sense in reading through the MEPA files on the Fall River project is that the experience has been rather grim. It would have been better to declare a simple public policy of protection of Article 97 land and not get involved in development transfer, memoranda of understanding, and contributions to private entities. The Fall River project is a classic example of bad public policy in action.

The Randolph proposal appears to have similar pitfalls, at a smaller scale in terms of acreage, but much larger in terms of setting precedents for private abutters seeking to acquire the use of public parkland. The Randolph land was given to the Metropolitan District Commission in 1937 as a donation to keep the land in trust as parkland. Any change in use is not only an Article 97 issue but a contravention of the public trust associated with the original donation.

The primary source for Article 97 protections is the referendum of 1972 which included several elements, two of which are especially relevant to the proposal Randolph land swap. The conservation of natural resources is declared to be a public purpose, which suggests that the failure to conserve natural resources is not a public purpose. The key element of Article 97 is the requirement for any change of use or disposition of land shall require "laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court."

According to the Senate Journal of July 31, 2002, the Senate began its deliberations shortly before 2:30 PM and concluded shortly after 2 AM on the following morning, August 1, 2002. Senate Bill 2443 was one of ten Article 97 bills handled by one Senate vote, at ten minutes before 2 AM, of 33 to 0 with six voting present. Four other Article 97 bills were heard individually before this vote, resulting in fourteen Article 97 land parcels approved in the space of 33 minutes during the early morning hours of August 1. The Randolph bill was the only bill of fourteen which directed the sale of land, as opposed merely an authorization of sale.

One can question the legality of a bill directing an agency to act, regardless of the implications of Chapter 30, Section 61, the MEPA act and regulations, the EOE policy on Article 97 lands and Article 97 itself. However, one element is sure : the Senate violated its own rules when it approved the Randolph bill,

Senate 2443. After several more of these early morning votes, the Senate Minority Leader rose on a point of order to assert that "the Senate was considering formal business beyond the hour of twelve o'clock midnight in violation of the rules." The Senate President then ruled that "the point of order was well taken" and proceeded to the next motion for adjournment. Thus the Senate vote was in clear violation of its own rules and should be considered legally suspect.

The Attorney General's Opinion of 1973 (submitted with my October 29 comment) specified the protection of parkland, forests, and other related natural resource features of parks. It also required a format for indicating the exact locus of the land, the present uses of the land and those contemplated for future use. The goal indicated by the Attorney General was 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 ..."

Nothing in the legislation or the Environmental Notification Form addresses the issue of public trust rights and the loss thereof by this transaction. Given the fact that the lands were donated to the state explicitly for public parklands use, it is an entirely valid question to ask : where is the state in serving as trustee of the public parklands -- the protector and defender of that public trust? Who is there to prevent the land from being ripped off by private interests?

We have a private organization called the Trustees of Reservations, which is involved in the Fall River case, but we do not seem to have public trustees as part of state government, protecting parklands. If DCR is too timid to take on this role, where is EOEEA and MPA? Or do they think that the protection can be provided by the august members of our Legislature?

Additional protections are offered by EOEEA's own policy on Article 97 land disposition. It is the stated policy of EOEEA and its agencies (including DCR) "to protect, preserve and enhance all open space areas covered by Article 97" and "as a general rule, EOEA and its agencies shall not sell, transfer, lease, relinquish, release, alienate or change the control or use of any right or interest of the Commonwealth" in Article 97 lands.

EOEA must make a determination that "exceptional circumstances" exist to permit an Article 97 disposition. A series of conditions must all be met in order to qualify as an "exceptional circumstance." The issue of alternatives is of primary importance, to assure that "all options to avoid Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist." The language here is similar to the protections of riverfront area land in the wetlands regulations, 310 CMR 10.58. The executive policy states that "the scope of alternatives under consideration shall be commensurate with the type and size of the proposed disposition of Article 97 land" and this evaluation must be performed to the satisfaction of EOEEA and its agencies. It would appear that MEPA is the proper forum for this consideration of alternatives.

Another stated goal of EOEA policy -- similar to Senate bill 542 -- is "no net loss of Article 97 lands." The Policy does identify differences in real estate value but makes no reference to the environmental quality of the land. Clearly, one cannot give up three acres of virgin parklands and replace them with three acres of brownfields. The loss of parklands must consider the element of quality in the land, its value as parkland and to society generally.

The ENF on page 1 claims that the "proponent will transfer a parcel of equal value and acreage owned within the Blue Hills Reservation to the DCR." However, this parcel is not now within the Reservation and is not owned by DCR, so this statement is false. The claim of equal value of the land in a swap is most dubious because of the difference of terrain, and the fact that one parcel is not landlocked while another one is. Any real estate assessor would realize that a landlocked parcel cannot be equated in value with a non-landlocked parcel, even if we restrict ourselves to the methods of real estate valuation. EOEEA policy states that as part of the disposition, "real estate of equal or greater fair market value or value in use of proposed use" will be granted to DCR. The Randolph swap site fails to meet this criterion.

EOEA Article 97 policy also requires that "the disposition of a parcel is not contrary to the express wishes of the person(s) who donated or sold the parcel or interests therein to the Commonwealth." On this last policy element alone, the Randolph proposal is dead in the water.

The options for the Secretary of EOEEA are several. He could send the matter back to the Senate for a new vote to correct for the violation on August 1, 2002 of Senate rules. He could certify that an EIR is required and issue a scope for the report. Or he could decide against an EIR and take no further action on this controversial project. This last option is simply beyond reason and justification and would be fully contrary to EOE policies on dispositions of Article 97 land.

Should the Secretary require an EIR for this project, the scope of the report ought to emphasize the history of the project, anticipate the uses of all parcels of land involved, include the development impacts of the vadated parking lot parcel, consider the possible alternatives with associated mitigation for environmental and traffic impacts, and evaluate compliance with Article 97, EOEEA policies and public trust doctrine. Justifications/alternatives include a traffic and parking analysis, consideration of the use of traffic signals and police officers, a full review of safety issues as they may be claimed by the proponent, and the aesthetic impact of leaving the existing restaurant within an even larger sea of asphalt that currently exists. Higher quality trades of parkland would appear to be essential in the consideration of alternatives.

Independent of the EIR, EOEEA must consider the implication of precedent for the continued loss of public parkland if this project moves forward. Any abutter in the Commonwealth who wishes to expand into state parkland can file for Article 97 and propose a trade for isolated, less valuable or damaged land. There would be no end to the raids on public lands, and we would have our own equivalent of Teapot Dome.

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- cc. Thomas Palmer, Friends of the Blue Hills
- Michael Ryan, Friends of the Fells
- Peter F. Jackson
- Peter Shelley, Conservation law Foundation
- Richard Sullivan, Commissioner, DCR
- Ken Kimmell, General Counsel, EOEEA
- Gary Davis, General Counsel, DCR