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To : Ian Bowles, Secretary of Energy and Environmental Affairs  
MEPA Review Unit, 100 Cambridge Street Room 900  
Attention : Anne Canaday

From : Stephen H. Kaiser, Massachusetts Stewardship Initiative

## Draft Environmental Impact Report for Proposed Blue Hills Parkland Transfer, Article 97, Randolph EOE #14115

The Draft EIR is presented as being in compliance with the requirements of MEPA and of the scope issued by EOEEA on December 17, 2007. It implies that it is in compliance with the statute and case law for transfer of state parkland and the inherent public rights associated with such land. My comments will deal with the extent to which the DEIR is or is not in compliance with the MEPA regulations, with the MEPA scope, with DEP regulations for stormwater runoff and flooding mitigation, and with case law on Article 97 cases and related court opinions on practices and public trust rights associated with Commonwealth tidelands.

### **GENERAL COMFORMANCE WITH MEPA REQUIREMENTS**

In general, the report follows the requirements and format of EIRs as specified in 301 CMR 11.07. The report is fairly well written and well organized, but does contain certain gaps or missing information relative to stormwater standards and mitigation, mitigation of off-site flooding impacts, compliance with the MEPA guidelines for traffic studies and with alternatives analysis.

The 2003 Management and Use Agreement between the MDC and the proponent is premature because it specified the plan current in 2003, and did not consider the possibility of alternatives, as required in the scope. This agreement is outdated, and useful only for the purpose of crafting of a new agreement in the event the EIR process is completed successfully and a land swap plan is agreed to. The original agreement should be a possible outcome of the process and not an input to the EIR. Otherwise there is an inherent prejudgment of alternatives and thus a threat to the fairness of the MEPA process.

It is also my understanding that because their project involves Article 97 state lands, there is full subject matter jurisdiction under MEPA scoping. Issues of traffic and safety, as specified in the MEPA Guidelines, would apply to the description of the existing access problem (traffic and safety) which triggers the goal of transferring the DCR parkland. Traffic and safety analysis should also be applied to the assessment of alternatives.

### **STORMWATER STANDARDS AND MITIGATION**

Section 5.3 on stormwater management claims that various methods will be employed “to control peak rates related to the increase in impervious areas...” The applicable stormwater standard (SMS #2) specifies no increase in peak flow rates from the site. However, the Policy includes the additional guidance that “The 100-year 24-hour storm event must be evaluated to demonstrate that there will not be increased flooding offsite.” This wording is contained in DEP's original 1996 Stormwater Policy, as well as draft versions of the proposed changes to the Stormwater Management Standards in 2007. Unfortunately, the published version of the final document released in Spring 2008 has deleted the reference to demonstrating that there must be no flooding offsite.

The Final EIR should document the change in wording with respect to the 100-year storm and its flooding impacts and should identify which version of the Stormwater Standards are applicable to this EIR. My understanding is that the ENF was filed on October 9, 2007 and the effective date for the new DEP stormwater regulations was January 2, 2008.

I may have been looking in the wrong place, but I could find nothing in the DEIR which showed any calculations for existing runoff and future runoff from the parking lot, with and without stormwater mitigation. It would seem that these calculations would be essential in providing the information needed by DEP and others to assess site drainage and compliance with the stormwater standards.

### **MEPA GUIDELINES AND TRAFFIC ACCIDENT DATA**

I have include the still-applicable MEPA Guidelines as Attachment A to these comments. These guidelines specify which types of traffic data must be assembled, including vehicle

volumes and three-years of accident data. The Draft EIR does include an appendix with data on vehicle counts and sampled vehicle speeds, but there is no data on accidents.

All DEIR claims concerning safety appear to be unsubstantiated in terms of actual accident experience. The Final EIR should include a comparison of accident frequency and rates in comparison with local and/or state averages.

### **TRAFFIC ANALYSIS OF ALTERNATIVES**

The alternative analysis is contained in Section 4.0. The pedestrian overpass option is correctly assessed as undesirable for pedestrians. It requires extensive fencing to force pedestrians to go up and over.

Traffic signal alternative would be a relatively inexpensive and minimal-impact alternative. The EIR indicates that two-way traffic volumes are about 8,200 ADT, with a morning peak hour of about 900 vph and 600 cars in the afternoon. This volume suggests an average peak hour gap between vehicles of four-to-six seconds, which is short for a pedestrian crossing. The vehicle flow rate could accommodate a pedestrian stop light without significant congestion. Speeds might be further reduced by installing a small (low height) speed table at the intersection of Scanlon Drive and High Street, with an extension to the crosswalk on Scanlon Drive.

Section 4.3 discusses the MUTCD requirements for pedestrian signals : at least 100 pedestrians an hour for four hours or 190 for a single hour. The report provides no pedestrian counts for the existing Lantana site, either for average day conditions or peak periods of peak days. The EIR identifies that there must be less than 60 gaps per hour in the traffic stream to justify a traffic signal. What would that gap be or how many gaps are available in the existing traffic flow? I would estimate that the necessary gap would be about 10 seconds of two-way traffic, and that this condition might be exceeded by current peak hour volumes during the morning. The DEIR should have included this analysis but did not.

The safety evaluation by the planning consultant contained in the last paragraph of Section 4.3 should be entirely revised to be less primitively speculative and more founded on data and actual safety experience. Is the logic intended to suggest that if we speeded up the traffic the result would be fewer accidents because pedestrians would be very scared and would cross the road more carefully?

At the beginning of Section 4.3, the DEIR considers speed humps and raised crosswalks as elements of a “traffic calming” strategy. This analysis unduly limits traffic calming to “local residential roadways” without recognizing that conflicts between pedestrians and speeding vehicles occur on both local residential streets and on higher speed arterials. There is even a case to be made for specialized traffic calming for Storrow Drive and Memorial Drive. Simply because roads carry high volumes at high speeds does not mean this condition should be automatically found to be acceptable.

As an example of traffic calming on a busy urban arterial, the consultant should consider the example of Third Street in Cambridge, which includes a wide range of traffic calming techniques on a busy urban street. Such an effort represents an experiment, with some features more successful than others, but the effort in no way should allow us to fall back into presumptions that cars should travel anarchically on our streets at high rates of speed. This presumption is wrong generally and is especially inapplicable when parklands are involved.

A key solution not considered in the DEIR is to construct a median island (similar to the zebra crosswalk used for decades in England) to slow the vehicles and allow a center refuge for pedestrians. Pedestrian lights could be an option.

MEPA regulations require a consideration of all feasible alternatives, not just those specified in the scope. A new alternative would be a combination of the alternatives proposed, which is to construct a median island with options traffic signals and with traffic calming at the intersection of Scanlon Drive and High Streets.

### **IMPLICATIONS OF ADDITIONAL TRAFFIC GROWTH**

Section 3.5 discusses the effects of developing the existing Lantana overflow parking lot into new office space, with about 775 additional vehicles per day on Scanlon Drive, an increase of about 9%. Traffic impacts are usually assessed for peak hour conditions. The DEIR did not discuss peak hour conditions, yet still claimed that “no capacity issues are anticipated on roadways and intersections” in the vicinity. No evidence is presented to support such a conclusion.

I estimate that in the morning the traffic increase would be 11% and 22% in the afternoon. The types of traffic movement are important as well, because of the numerous left turns at driveways and the tendency for vehicles turning left into a driveway to block cars behind. The Final EIR should include an unsignalized T-intersection capacity analysis of the driveways for the new development scenario.

New development could create pedestrian traffic to and from the Lantana restaurant, at a lesser volume than occurs today for major functions. However, pedestrians could be introduced into crossing Scanlon Drive -- a road situation which the developer and the town contend is dangerous.

Section 6.3 (Planning for Growth) is listed in the Table of Contents but is missing from the text of the DEIR.

### **REQUIREMENTS OF ARTICLE 97**

Article 97 states that "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 ... of forest, water, air and other natural resources is hereby declared to be a public purpose."

There is a public right to the conservation of natural resources such as parklands. To engage in the disposition of such natural resources, there is an interference with both the use of the land and the public rights associated with the land. The Legislature must not only deal with the title to resource lands but with the inherent public rights in those lands. Identifying Article 97 by reference to a 2/3 vote of the Legislature is at best minimal and more accurately incomplete. Article 97 does not specify how these rights are to be disposed of. It does not define the obligations of the Legislature in voting to make the necessary findings. The full legal protections in any Article 97 vote remain somewhat elusive.

I am not aware of any case law on the disposition of rights associated with Article 97. The issue of rights is central to valuation of parklands and assessment of the impacts of any changes.

The DEIR illustrates a procedure that highlights the narrowness of parks valuation. The common method is to assign a monetary value to parkland based on "highest and best use" in common economics parlance. Such tactics fail to provide true valuation of parkland benefits,

## REQUIREMENTS OF EOEA ARTICLE 97 DISPOSITION POLICY

The 1998 EOEEA disposition policy is most unusual in that its first sentence states unequivocally that the state's policy is to "protect, preserve and enhance" all open space covered by Article 97. The remainder of the policy deals with violations or exceptions to this policy. In essence, we have one sentence which states what the policy is ... then the remainder of the policy is an effort to create a loophole to circumvent the policy.

A clarification of the EOEEA policy is needed to make it evident from the very first sentence that in general the policy is to provide complete protection of Article 97 lands, but there are exceptions which are subject to very close control and scrutiny. This problem is not a flaw in the DEIR but in the EOEEA formulation of its policy.

The second sentence of the policy gets to the heart of the matter : "As a general rule, EOEA and its agencies shall not ... relinquish ... or change the control or use of any right or interest of the Commonwealth" in Article 97 lands. Here is the clear identification of "right or interest" in the land. Sadly, this matter is substantially ignored in the remainder of the policy and in the DEIR.

Only the market value of the land is recognized in the EIR. This omission of public trust rights is the single greatest failure of the DEIR. The report is unable to provide a full and complete assessment of the value of the land involved in the proposed transfer.

The EOEA Policy errs in defining any Article 97 land disposition as "any transfer or conveyance of ownership or other interests." The definition should have made clear that when there is an attempt to change either land ownership or the status of public interests/public rights, both concerns must be addressed simultaneously to the maximum extent possible.

The DEIR summarizes the EOEA Policy as specifying six requirements -- for which all must be met to qualify as an "exceptional circumstance" to warrant disposition of land.

1. There is no feasible or substantially equivalent alternative.

The proponent performs the initial evaluation of alternatives in the EIR. The presumption is that for an acceptable Final EIR the evaluation must be performed "to the satisfaction of EOEA and its agencies." My conclusion at the end of this assessment is that the best solution to the

crossing problem is a pedestrian crossing island, with or without a traffic signal, but with traffic calming. It obviates the need for any parkland transfer.

## 2. The disposition does not destroy or threaten ... a significant resource.

The DEIR effectively concludes that the 3.2 acres of DCR parkland is not a significant resource. Unfortunately, in its policy EOEEA fails to define "significant resource" and opens up the risk of defining the 3.2 acres of DCR parkland as insignificant. Any such judgment sets an unfortunate precedent whereby any desired DCR parkland can be labeled as "not significant" for the purposes of this policy.

Clearly a good definition of a "significant resource" is any parkland currently being used for active recreation, parking, or serving as greenspace. In this manner DCR land which has been scarred beyond any potential for restoration to parkland could be designated as surplus, but any green parkland with active park uses would be protected. The land in Randolph should be considered as protected parkland under a proper EOEEA policy. The land would be considered to be significant, and thus not subject to disposition.

In 6.1.2, the EIR asserts that the DCR parcel is just as significant as the Hart parcel. This judgment is not pertinent because the policy is directed solely at the "resource value" of the parcel being disposed of.

## 3. Equal fair market value is achieved in a land swap.

The EOEEA policy is also flawed by its dependence on the "fair market value or value in use of proposed use." This definition is much too restricted a method to identify the value of parkland. Concepts such as "resource value" similarly fail to recognize open space and recreational values, as well as Article 97 rights inherent in the land. These rights have value to society and in the law, even if they cannot be reduced to quantified values according to monetary values.

EOEEA policy properly seeks to protect "the constitutional rights of the citizens of Massachusetts." Again this goal cannot be achieved by a bare-bones assessment of market value.

#### 4. Minimum acreage is proposed for transfer, with protection of site resources

The minimum acreage of land to be transferred in this instance is zero, if a traffic island and calming plan is adopted as the solution.

In 6.1.4, the DEIR properly quotes the policy as stating "to the maximum extent possible the resource of the parcel proposed for disposition should continue to be protected." If there is a land transfer, this goal can be achieved for the Lantana parcel by assuring that all trees, landforms and other features remain undisturbed after the sale. Yet all trees will be removed, landforms changed and a paved parking lot built instead. Such action does not represent the maximum possible protection of the resource value of the parcel.

#### 5. The disposition does not detract from EOEEA goals.

The disposition would set an unfortunate precedent and could encourage many similar transfers. It would indeed detract from EOEEA goals and the basic policy of avoiding any transfer of state parkland.

#### 6. The disposition is not contrary to the express wishes of any past donor.

Based on the analysis in the DEIR, this condition appears to have been met.

Therefore out of six required conditions to establish "exceptional circumstances" the DEIR establishes that only one of them can legitimately be met.

### **LEGAL IMPLICATIONS OF EOEEA DISPOSITION POLICY**

The proponent is free to make any claims he wishes, subject to public review in the MEPA process. EOEEA, with its Disposition Policy, must remain in compliance with the statute and the Constitution. It does appear that the Commonwealth, as the executive branch, may be in violation of the stipulations set down in February 2007 by the Supreme Judicial Court in the case of Moot vs. DEP.

The Supreme Judicial Court determined that this case turned "on a straightforward application of principle of statutory construction. Because we conclude that the regulatory

exemption promulgated by the department exceeded its authority, we reverse the decision of the trial court.” In this instance, it was the Department of Environmental Protection which exceed its powers, because its tidelands exemptions had not been authorized by the Legislature.

In the matter of Article 97 lands and related public trust rights, the Legislature has delegated no rights to the EOEEA or to the Department of Conservation and Recreation to exempt any of its parklands from the protections of Article 97. EOEEA should re-evaluate its stance in light of Moot vs. DEP.

### **PUBLIC TRUST RIGHTS IN ARTICLE 97 CASES**

With respect to Article 97 public rights, the Attorney General in 1973 stated that “the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in 'public purpose', changed from 'public uses' appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.” (p. 7)

As reflected by the improper treatment in this EIR, the rights of the people do not include trading or selling of land. What is protected by Article 97, claimed the Attorney General, 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' as these terms are broadly construed.”

I recognize the concept of the 2/3 vote as a necessary component but insufficient in itself to meet the requirements of Article 97. Nothing in the Constitution allows for the renunciation of parkland, except for the negative provision that no public parkland shall suffer a change of use without a two thirds vote of the Legislature. By inference, any such decision must include a consideration of public rights, as well as any monetary fee associated with a land transfer. By practical experience, legislative efforts to transfer lands by Article 97 typically fail to include any mention of rights, and allow only for the transfer of fee ownership.

One attempt at defining or protecting public rights in parklands is most instructive. Some communities and agencies have established noise limits on the basis of land use, the most remarkable of which was promulgated by the Federal Highway Administration in 1972 (Policy and Procedural Memorandum 90-2) which stated that land areas such as parks were subject to the

strictest noise criteria. Its quietest zone was restricted to "Tracts of land in which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose."

While this Federal noise standard exists to the present day, established by a highway agency, it is remarkable that no EOEEA agency, neither DCR nor DEP has adopted any policy recognizing the important serenity values of parkland. The EOEEA Article 97 disposition policy is silent on the concept. A sound awareness of the value of serenity would assist policy makers in setting the proper value of parkland, without narrow monetary restrictions, and could result in a better appreciation of the need to preserve such lands.

At the state level some progress has been made. The Supreme Judicial Court has recognized that parks have a special importance beyond monetary value :

"The healthful and civilizing influence of parks in or near congested areas of population is of more than local interest, and becomes a concern of the state under modern conditions. It relates not only to the public health in its narrow sense, but to broader considerations of exercise, refreshment and enjoyment." Higginson v. Treasurer and School House Commissioners of Boston 212 Mass 583, 590

The Attorney General notes that "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." (1973, p. 6)

### **THE ANALOGY TO TIDELANDS CASES**

We can gain further guidance in understanding the importance of public trust rights by looking at the legal experience with tidelands issues and resulting case law. Both tidelands and parklands are contained within the definitions of Natural Resources cited by the Attorney General (1973, p. 8), MGL Ch. 12, Section 11D and Ch. 214 Section 10A -- the citizen-suit statute.

Many tidelands cases can involve a transfer of fee title without any action to change or extinguish the public trust rights means that those rights remain intact and in force. Tidelands rights have traditionally been limited to "fishing, fowling and navigation" with modern variations to allow for public use of the land and for public access to waterfronts.

The Supreme Judicial Court decision in Moot vs. DEP represents one of several court cases attempting to identify the value and degree of protection needed for tidelands generally. Several cases, such as the Boston Waterfront case in 1979, have stressed the importance of state-owned Commonwealth tidelands and the need to provide special protections for such lands. In that case and as interpreted since by DEP, a change of use from a previously allowed use on tidelands can result in the rights to such land being terminated and forfeited.

I am not aware of similar approaches to the transfer and controlled use of parklands. It would seem that the Lantana land as now conceived would retain all public rights for use as parkland, because such rights are not being proposed for transfer or termination. This situation makes for a most complex legal situation for Lantana or any other purchaser of fee title to DCR land.

Chapter 240 of 2002 provided for a bloodless transfer of property (presumably fee title) with no mention of public rights. As such the legislation is incomplete and cannot allow for the full subsequent transfer of the land to Lantana as they may wish to use it.

The issue of residual rights in land has also been investigated more extensively in tidelands cases. Public rights cannot simply be ignored or claimed to remain. As with tidelands, the practicality of the continued existence of these rights is in conflict with developers plans to change the use of the lands they acquire. In the oral arguments for Moot vs. DEP (October 3, 2006) the following interchange occurred between Chief Justice Margaret Marshall and the attorney for the North Point developers :

COURT : .... if you are not subjecting it to a licensing procedure how does the Commonwealth -- how does the people reassert their public trust rights?

ATTY : The Commonwealth retains the privilege -- and that's the word you used -- to reassert those rights at some future time .... I'm saying I'm not asking for any relinquishment of public trust rights, which means I'm necessarily saying that if the Commonwealth wants to change its regulatory scheme five years from now and assert those public trust rights, we've got to figure out what those are and then we have to deal with those.

COURT : ..... All I'm trying to look at is how do we hold our government accountable in this sense -- we haven't relinquished [the rights] ...

ATTY : The Commonwealth itself can always make the determination, to itself assert those rights -- those public trust rights again. Now there is a different body of rights - which have been set up by Chapter 91 dealing with when do you need to get a license -- when does the agency have the authority to exempt certain properties from licensing. That's actually a separate system. ...

COURT : What does the term 'impressed with the public trust' mean to you, as a developer?

ATTY : A property that is impressed with the public trust means that absent the specific steps that this court said the Legislature takes or delegates -- absent those steps being taken that property in perpetuity until those steps are taken, is impressed with the public trust.

COURT : Now what does that mean? As a practical matter what does that mean?

ATTY : As a practical matter it differs in terms of what land you are talking about. ... Theoretically, those rights are still there. Let me give you two examples. I am not the Boston Waterfront developer asking the court to register titles, clear titles declare that there are no public trust rights. I'm willing to proceed with those rights preserved. That's one example. I'm not the Trio plaintiff coming and saying impose these occupancy or displacement fees on me. I'm saying if those fees exist, if there are public trust rights that exist I'm going to develop them and ... I think its very important to say that we're going to reserve them and in fact we believe that if they were to reassert them they would not be in here arguing that they could not exist. but rather than our project met them.

Even the developers in tidelands cases are admitting in court that public trust rights exist, are important and can be invoked by governments. The obvious question is : can governments invoke parkland rights at any time they wish, if land has simply been transferred monetarily?

## **CONCLUSIONS**

There is much to be gained by considering the experience with tidelands rights, ownership and legal decisions. To some degree Chapter 91 reinforces Article 97 and Article 97 reinforces Chapter 91. With the guidance of Chapter 91 experience, Article 97 protections can reflect the public interests and rights in parkland by including conservation values.

The most logical solution to the situation of traffic versus parks in Randolph is to consider a traffic island in the median of Scanlon Drive, with traffic calming features and the option for a traffic signal. There should be no parkland disposition and transfer.

If the transfer were to move ahead, the best legal strategy to avoid further complications with the Supreme Judicial Court would be for the Governor or the Legislature to request an Opinion of the Justice as to the propriety of Chapter 240 of 2002 in terms of providing for the necessary protection of public rights in parklands.

Finally, we should be reminded of the ultimate purpose of Article 97 as enunciated by Attorney General Robert Quinn thirty-five years ago :

“In short, Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests for conservation, development or utilization of natural resources. If 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.”

Attachments :

- A]. Text of Article 97
- B]. Attorney General Opinion on Article 97, 1973
- C]. Supreme Judicial Court decision in Boston Waterfront Case, 1979
- D]. Supreme Judicial Court decision in Trio-Algarvio Case, 2003

cc. Steve Davis, Rachedmann Environmental  
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