

# ANDERSON KREIGER

To: Delia Kaye, Natural Resources Director  
TOWN OF CONCORD

From: Mina S. Makarios & Olympia A. Bowker  
ANDERSON & KREIGER LLP

Re: Warner's Pond, Article 97

Date: January 24, 2024

You asked to analyze whether the approximately 77 acres of land underlying Warner's Pond in the Town of Concord (the "Town") and the adjacent parcels<sup>1</sup> currently under the care, custody, and control of the Natural Resources Commission ("NRC") are, and would remain subject to, Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") and protected from development if the impounding dam on the pond were removed and pond drained. You also asked us to analyze whether that land can be used for passive recreation and remain under Article 97 protection to the extent such recreational use does not degrade conservation values.

As explained in further detail below, it appears that Warner's Pond has been dedicated for conservation purposes, protected under Article 97, and would remain so if the dam is removed. Passive recreation is a use consistent with a parcel dedicated for conservation purposes and is allowed on conservation land.

Any change in use of a parcel from conservation and passive recreation purposes to affordable housing or residential development would, however, require compliance with the Article 97 process, as recently codified in the Public Lands Preservation Act, G.L. c. 3, § 5A (the "PLPA"), including a two-thirds vote of Town Meeting and authorization by a vote of two-thirds of the legislature. In addition, because conservation commissions cannot hold land for affordable housing or residential development purposes, the NRC would need to transfer care, custody, and control of the land to another municipal entity to enable development.

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<sup>1</sup> This analysis is based on the Natural Resources Director's statements that there are parcels abutting Warner's Pond under the care, custody, and control of the Natural Resources Commission and those parcels have been dedicated to conservation purposes. This memorandum assumes that those parcels have been acquired by the Natural Resource Commission in accordance with applicable law and have been designated for conservation purposes consistent with Article 97 requirements.

## I. Background

### A. Brief Evolution of Article 97

Article 97 of the Amendments to the Massachusetts Constitution provides that “[l]ands and easements taken or acquired” for conservation purposes “shall not be used for other purposes or otherwise disposed of” without the approval of a two-thirds roll call vote of each branch of the Legislature. Mass. Const. art. XCVII. Article 97 was approved by the Legislature and ratified by the voters in 1972. However, its reach is retroactive: “lands and easements taken or acquired for purposes described in art. 97 includes property acquired prior to the effective date of the 1972 amendment.” *Opinion of the Justices to the Senate*, 383 Mass. 895 (1981).

Three recent cases have further refined what it means for land to be “taken or acquired” for (i.e. dedicated to) Article 97 purposes. In *Hanson v. Lindsay*, 444 Mass. 502 (2005), the Massachusetts Supreme Judicial Court (“SJC”) established a baseline that dedication may arise explicitly in a deed or recorded instrument. There, the town acquired land for general purposes from a tax taking. Ten years later, a Town Meeting vote purported to dedicate the land for conservation purposes, but no action followed to deed the parcel to the conservation commission or to encumber the land with a conservation restriction. The SJC found that the town’s vote alone did not impose Article 97 protection on the subject land without the recording of an instrument to effectuate the intent of the vote.

In *Mahajan v. DEP*, 464 Mass. 604 (2013), the SJC expanded Article 97’s application and held that land could be taken or acquired for Article 97 purposes without explicit language in a deed or recorded instrument. The Court explained: “the ultimate use to which the land is put may provide the best evidence of the purposes of the taking, notwithstanding the language of the original order of taking... .” *Id.* at. 620. This suggested that the fact specific inquiry in *Lindsay* was just that: specific to its facts. The Court has *not* established a hard and fast rule requiring recording of an instrument.

In *Smith v. Westfield*, 478 Mass. 49 (2017), the SJC went further than *Mahajan* holding that land not originally acquired for Article 97 purposes and not subject to a recorded restriction could later be dedicated to Article 97 purposes. There, the Town of Westfield acquired land through a tax title taking for unspecified purposes. For sixty years, the land was used as a public playground, its control was transferred to the playground commission, the City Council passed an ordinance formally naming the playground, and later the City received federal funding to rehabilitate the playground. The SJC considered the totality of the circumstances and found that acceptance of federal funding was the determining factor in rendering the parcel subject to Article 97 protection. The SJC affirmed its use of this approach just a few weeks ago in *Carroll v. Selectboard of Norwell*, -- Mass. --, 223 N.E.3d 1178 (Jan 5, 2024).

In 2023, the process for releasing land from Article 97 protection was amended and codified into statute by the PLPA. Under the PLPA, the Executive Office of Energy and Environmental

Affairs (“EEA”) must consider and approve requests for release prior to submission to the legislature for approval. While regulations on the specifics of the PLPA are forthcoming, EEA has released several guidance documents informing the public on the new procedures and requirements to “release” (use for another purpose or dispose of) Article 97 land. An overview of this process is provided in the appendix to of this memorandum.

## **B. Conservation Commission Authority to Acquire Land**

In 1957, the Massachusetts Legislature passed Chapter 223 of the Acts of 1957, *An Act Authorizing Cities and Towns to Establish Conservation Commissions to Promote the Development of Natural Resources, and to Appropriate Money Therefore*. This legislation created G.L. c. 40 § 8C, which authorized the creation of conservation commissions.

In March 1959, the Town of Concord voted to accept G.L. c. 40, § 8C, establishing a conservation commission “for the promotion and development of the natural resources and for the protection of watershed resources of the Town.”<sup>2</sup> Under the initial iteration of G.L. c. 40 § 8C, conservation commissions could not purchase land.

That changed on March 21, 1961, when the legislature passed Chapter 258 of the Acts of 1961, *An Act Authorizing Conservation Commissions to Acquire Certain Interests in Land*. This Act amended G.L. c. 40 § 8C to provide that a conservation commission, such as the NRC:

may acquire by gift, purchase, grant, bequest, devise, lease or otherwise the fee in such land or water rights... as may be necessary to acquire, maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces and other land and water areas within their city or town, and shall manage and control the same.

Less than three months later, at the 1961 Town Meeting, the Town of Concord unanimously voted to authorize the Town of Concord Conservation Commission (now the NRC) to purchase land at Warner’s Pond using the Conservation Fund. The deed conveying Warner’s Pond to the Town is dated July 13, 1961, and encompasses the fee interest in the entire pond, excluding an island which was previously conveyed to another party by deed dated June 2, 1944.<sup>3</sup>

## **II. Article 97 and Warner’s Pond**

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<sup>2</sup> Article 50, Concord Town Meeting, March 1959, *available at* <https://concordma.gov/DocumentCenter/View/4168/Conservation-Commission-Bylaw-PDF?bidId=>.

<sup>3</sup> Although Warner’s Pond is greater than ten acres in its current state, it is a man-made pond and not considered a “Great Pond” under state law. *See* <https://www.mass.gov/doc/massachusetts-great-ponds-list/download>.

Warner's Pond<sup>4</sup> is subject to Article 97 protection and will remain under that protection until and unless the land is released pursuant to the PLPA and a two-thirds vote of the legislature. Further, land under Article 97 protection, like the land under Warner's Pond, cannot be used for housing or any other development, even another use by the Town, without being released in accordance with the PLPA or a legislative vote, because those uses conflict with the plain language of Article 97 of the Amendments to the Massachusetts Constitution. *Westfield*, 478 Mass. at 60 (2017) (describing doctrine of prior public use, where land protected under Article 97 cannot be "sold or devoted to another public use without approval of the legislature.").

#### **A. Clear and Unequivocal Intent to Dedicate Warner's Pond**

Clear and unequivocal intent to dedicate land to Article 97 purposes can be manifested in a combination of ways, including explicit deed language, conservation restrictions, prior public use, notations on plans, sales statements, written declarations, use of grant money for specific purposes, and prior public use. *Lindsay*, 444 Mass. at 508; *Mahajan*, 464 Mass. at 620; *Westfield*, 487 Mass. at 401-402; *Attorney General v. Onset Bay Grove Ass'n*, 221 Mass. 342 (1915).

In the case of Warner's Pond, the deed is silent as to the dedicated purpose of the land. However, there are four other factors that indicate the land was acquired for conservation purposes and is still subject to Article 97 protection. First, the 1961 Town Meeting vote authorized the Conservation Commission to acquire the land for conservation purposes, and all evidence suggests that the conservation commission then used commission funds to purchase the land. Second, G.L. c. 40 § 8C limits conservation commissions' purchasing power, so a commission can *only* acquire land to "limit the future use of or otherwise conserve and properly utilize open spaces and other land and water areas within their city or town." If conservation commission funds were used to purchase Warner's Pond, then the use of that land is further encumbered by that innate restriction. Third, it is our understanding that Warner's Pond has been used by the public for conservation and passive recreation since its acquisition in the 1960s. Fourth, it is our understanding that the NRC retains care, custody, and control of Warner's Pond, which is further evidence that the land has been dedicated to conservation purposes. In our opinion, this combination of circumstances shows a clear and unequivocal intent to dedicate Warner's Pond for conservation purposes, which falls squarely under Article 97 protection.

#### **B. No Change In Use of Conservation Land Allowed Without Following the Article 97 Process.**

Article 97 is a constitutional codification of the prior public use doctrine. Under the prior public use doctrine, "land devoted to one public use cannot be diverted to another, inconsistent public use without plan and explicit legislation authorizing the diversion." *Carroll*, 223 N.E.3d at 1184 citing *Sudbury v. Massachusetts Bay Transp. Auth.*, 485 Mass. 774, 783 (2020). There are

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<sup>4</sup> Boundaries of the Warner's Pond parcel are described in a deed located at Middlesex South Registry of Deeds Book 9847, Page 372.

numerous cases illustrating incompatible public uses under the prior public use doctrine. See, e.g., *Carroll* (land held by town for specific purpose of affordable housing could not be diverted to conservation purposes, which is an inconsistent use, without requisite approval); *Westfield*, (2017) (municipality could not use land dedicated as a playground for school purposes); *Selectmen of Braintree v. County Comm's of Norfolk*, 399 Mass. 507, 511 (1987) (use of hospital grounds for prison improper where land was obtained for purpose of constructing hospital); *Bauer v. Mitchell*, 247 Mass. 522, 528 (1924) (County Commissioner's use of land purchased and dedicated for school used as a hospital leaching field was improper). Similarly, once a parcel is subject to Article 97 protection, it cannot be used for non-Article 97 purposes or transferred to another entity without compliance with the new PLPA requirements, followed by a two-thirds roll call vote of the legislature.

In addition, the NRC is only allowed to hold land for conservation purposes under G.L. c. 40 § 8C. It's our understanding that the NRC will continue to hold the land under and surrounding Warner's Pond for conservation purposes even if the impounding dam is removed. However, if the Town of Concord wanted to use Warner's Pond for a purpose other than conservation, the land would need to be transferred from the NRC to another municipal entity (which triggers Article 97 disposition procedures in itself).

### **III. Passive Recreation is Consistent with Conservation Use**

Passive recreation is allowed on land under the care, custody, and control of the NRC without constituting a change in use under Article 97. General Law c. 40, § 8C explicitly authorizes passive recreation on conservation land. In addition, the EEA defines "Conservation Land" as "land owned by a municipality for conservation and passive public outdoor recreation purposes and managed for those purposes under the Conservation Commission consistent with M.G.L. c. 40 § 8C." 301 CMR 5.02 (regulations for the LAND and PARC Grant Programs). Warner's Pond, in its current form, or if modified by removal or modification of the dam, is thus usable for passive recreation purposes.

## **Appendix**

### **Process to Release Land from Article 97 Protection**

If the Town sought to use the Warner's Pond land for a non-Article 97 purpose the Town would need to follow the procedures provided in the PLPA, G.L. c. 3 § 5A before placing the disposal on the Town Meeting Warrant, and before filing a petition with the legislature. The steps to release land from Article 97 protection are somewhat cumbersome, and are described below.

1. Conduct an alternatives analysis “[d]emonstrating that all other options to avoid or minimize ... the change in use have been explored and no feasible or substantially equivalent alternative exists.” G.L. c. 3 § 5A(a)(i)(A).
  - The analysis may be brief, but must be in writing and:
    - Include an explanation of the proposed Art. 97 action and identify the public purpose that it will serve;
    - Identify the alternatives considered, including the purchase of privately held parcels available for the intended use at a price consistent with the current market value;
    - Describe why each alternative not selected is not feasible or substantially equivalent to the proposed Article 97 action;
    - Identify the replacement land selected; and
    - Describe the steps that have been or will be taken to minimize the amount of impact (land area or type/degree of alteration) when changing use or disposing of a parcel of Art. 97 land cannot be avoided. *PLPA Guidance*, p. 3-4.<sup>5</sup>
  - The alternatives considered must be:
    - Commensurate with the type and size of the proposed Article 97 action;
    - Available at the time of the Town notifies EEA about the proposed disposition and can be reasonably obtained; and
    - Within the same Town. *PLPA FAQ*, Question 21.<sup>6</sup>
2. Perform an appraisal of the land to be disposed.
  - Must include fair market value, and value in use. *PLPA Guidance*, p. 5.
  - EEA appraisal standards available at: <https://www.mass.gov/doc/eea-land-acquisition-policy-appraisals-01-06-15/download> .
3. Identify replacement land. G.L. c. 3 § 5A(a)(ii).
  - Qualifying replacement land must meet the following requirements:
    - Is not already subject to Article 97;

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<sup>5</sup> Available at <https://www.mass.gov/doc/guidance-on-public-lands-preservation-act-implementation-january-2023/download>.

<sup>6</sup> Available at <https://www.mass.gov/doc/public-lands-preservation-act-frequently-asked-questions-january-2023/download>.

- In in a comparable location to the impacted area, preferably in the same Town;
  - Is equal or greater than the impacted area with respect to:
    - Acreage;
    - Monetary value as determined by an appraisal of the fair market value or value in use, whichever is greater; and
    - Recreational value, as determined by the EEA Secretary. *PLPA Guidance*, p. 6.
  - Replacement land can be land already owned by a community but not dedicated to Article 97. *PLPA Guidance*, p. 4; *PLPA FAQ*, Question 15.
  - “EEA will utilize available information on natural resources, such as BioMap, to determine whether comparably located replacement land provides equal or greater natural resource value. In the past comparably located land of the same land cover type as that subject to the Art. 97 Action has generally been acceptable. For example, replacing 2 acres of forested land with 3 acres of forested land a ¼ mile away often provides equal or greater resource value.” *PLPA FAQ*, Question 22.
4. Draft legal descriptions of the Article 97 land to be disposed of and the proposed replacement land.
- These descriptions must be specific enough to later be included in legislation, and must include:
    - Acreage;
    - location; and
    - boundaries. *PLPA Guidance*, p. 5.
  - The legal descriptions can be a deed reference, metes and bounds, or reference areas clearly delineated on a provided site plan. *PLPA Guidance*, p. 5.
5. Notify the EEA secretary of the proposed disposition, submit the alternatives analysis, submit a description of the land to be disposed of, and submit the replacement land proposal rationale. G.L. c. 3 § 5A(a)(1)(A).
6. Once approved by EEA, make the alternatives analysis public. G.L. c. 3 § 5A(a)(i)(B).
- The Guidance encourages, but does not require, the Town to solicit, collect, and respond to public comments on the disposition. *PLPA Guidance*, P. 3.
  - The PLPA FAQ provides that the public notice is given “when the responsible public entity considers it for approval”—in this case, this would be when the Town of Concord issues the Town Meeting warrant. *PLPA FAQ*, Question 10.
  - The public notification and the alternatives analysis must provide sufficient information on the current Art. 97 values and uses of the land, the public purpose of the disposition or change in use, and the replacement land for the public to clearly understand the proposed Art. 97 Action. *PLPA Guidance*, p. 3.

7. The Town must also place the proposed replacement land on the Town Meeting Warrant, as dedication of the “replacement land in perpetuity for Article 97 purposes” is required to satisfy the PLPA disposition requirements. G.L. c. 3 § 5A(a)(iii).

Once approved by Town Meeting, the Town, through its local legislator, can move forward with a petition to the general court. The PLPA requires that the petition accompanied by the following:

1. Documentation of public notification. *PLPA Guidance*, p. 8.
2. The alternatives analysis completed pursuant to G.L. c. 3 § 5A(a)(i)(A). G.L. c. 3 § 5A(c)(i).
3. A description of the replacement land to be dedicated. G.L. c. 3 § 5A(c)(ii).
  - “The legislation must include a sufficient legal description of the replacement land to identify the area to be dedicated. Acreage must be indicated, and the location and boundaries of the land described precisely. This description may be done via reference to a deed or areas clearly delineated on a provided or recorded site plan, or via metes and bounds. Additional description 7 may be beneficial, such as a reference to the assessor’s parcel. Plans used for reference do not need to be recorded prior to filing legislation but must be available for review. Information on the replacement land accompanying the bill must include appraised value, an explanation of how the natural and recreational value of the impacted parcel is being replicated, and information on the location of the replacement land to support assessment of whether the land is comparably located.” PLPA FAQ, Question 20.
4. A copy of the appraisal required by section G.L. c. 3 § 5A(a). G.L. c. 3 § 5A(c)(iii).

Once the legislation passes, EEA “expects to receive documentation that the replacement land or interest in land was taken, acquired or dedicated in perpetuity by an instrument properly recorded or registered at the Registry of Deeds or Land Court, as applicable, solely for the same Art. 97 purpose, and improved as needed to provide for comparable use, so that the requirements of the PLPA are met and the constitutional rights of Massachusetts residents are protected and enhanced.” *PLPA Guidance*, p. 5.