

## **301 CMR XX.00: Disposition or Change in Use of Article 97 Interests**

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### XX.01: Purpose and Applicability

1. Purpose. Article 97 of the Amendments to the Massachusetts Constitution provides that any Article 97 Action must be approved by a two-thirds, roll call vote of each branch of the General Court. The General Court enacted requirements for Article 97 legislation in An Act Preserving Open Space in the Commonwealth, Chapter 274 of the Acts of 2022, M.G.L. c. 3, § 5A, which authorized the Secretary to issue regulations to implement the Act. 301 CMR XX.00 provides for administration and implementation of the Act by the Secretary and establishes a process and requirements for Public Entities and Proponents to satisfy the requirements of M.G.L. c. 3, § 5A.
2. Applicability. 301 CMR XX.00 is applicable to a Public Entity seeking legislative authorization for a Disposition or change in use of an Article 97 Interest subject to M.G.L. c. 3, § 5A and to Proponents seeking such authorization for an Article 97 Interest held by a Public Entity.

### XX.02: Definitions.

The following words shall have the following meanings in 301 CMR XX.00 unless the content clearly indicates otherwise.

Alternatives Analysis means an analysis meeting the requirements of 301 CMR XX.06.

Article 97 means Article XCVII of the Amendments to the Constitution of the Commonwealth.

Article 97 Action means a Disposition or a change in use, of an Article 97 Interest subject to M.G.L. c. 3, § 5A and requiring legislative approval pursuant to Article 97.

1. The following are Article 97 Actions:
  - a. transfer or conveyance of an Article 97 Interest;
  - b. change in physical or legal control of land, including care, custody and control, of an Article 97 Interest; or
  - c. change in use of land subject to Article 97.
2. An Article 97 Action does not include the issuance of a revocable permit or license of limited duration, provided that no interest in land is transferred to the permittee or licensee and the permit or license does not authorize a change in use or change in physical or legal control of the land.

Article 97 Interest means fee ownership, an easement, or another real property interest in land that is held by a public entity and is subject to Article 97.

Comparable Location means in the same geographic area, including where reasonably feasible, in the same census block or municipality, and serving substantially the same population as the land that is subject to the Article 97 Action.

Disposition means any conveyance, sale, lease, alienation, transfer, assignment, settlement, delivery, or other change in physical or legal control.

Environmental Justice Population has the meaning provided in M.G.L. c. 30, § 62.

In Lieu Funding means funding provided to acquire Replacement Land to mitigate for an Article 97 Action pursuant to 301 CMR XX.09.

Natural Resource Value means the benefit that land provides to the public for Article 97 purposes, including but not limited to clean air and water, agriculture, climate change mitigation, wildlife habitat, and recreation.

Proponent means the Public Entity or party proposing an Article 97 Action. A proponent may include any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.

Public Entity means the Commonwealth, any agency, authority, board, bureau, commission, committee, council, county, department, division, institution, municipality, officer, quasi-public agency, public instrumentality or any subdivision thereof.

Replacement Land means a fee interest in land, an easement, or another real property interest within the scope of Article 97 that is not already subject to Article 97 and is proposed to be taken for, acquired for, or dedicated to such purposes in perpetuity, and

improved as necessary to provide for comparable use, as mitigation for an Article 97 Action.

Secretary means the Secretary of Energy and Environmental Affairs.

Value in Use means a method of valuation where the value of a property interest is established assuming a specific use, including, but not limited to, a method of valuation where the value of a property interest is increased by the intended use in relation to its surroundings by requiring an appraiser to consider a property's value not standing alone, but in the context of the land in question, the use to which the Proponent plans to put the Article 97 property, and the degree of advantage to the party benefiting from the Article 97 Action.

#### XX.03: Pre-submission consultation

1. Prior to taking any Article 97 Action, a Proponent other than the public entity holding the Article 97 Interest, shall consult that public entity.
2. Prior to taking any Article 97 Action, any Proponent may consult with the Secretary on any issues where clarification may be needed, including but not limited to:
  - a. whether land is subject to Article 97 and 301 CMR XX.00;
  - b. whether a project constitutes an Article 97 Action;
  - c. whether the Proponent has avoided and minimized a proposed Article 97 Action;
  - d. whether the Alternatives Analysis is adequate;
  - e. whether the Replacement Land provides at least equivalent Natural Resource Value as the Article 97 Interest and otherwise meets the requirements of 301 CMR XX.07(2);
  - f. qualification of a proposed project for a Waiver or Modification pursuant to 301 CMR XX.10 or Report of Finding by the Secretary pursuant to 301 CMR XX.09; or
  - g. the adequacy of draft municipal authorization or legislation.

#### XX.04: Requirements

Prior to taking an Article 97 Action, the Proponent shall:

1. Notify the public, the holder of the Article 97 Interest if not the proponent, and the Secretary pursuant to 301 CMR XX.05;
2. Conduct an Alternatives Analysis as required by 301 CMR XX.06, submit the Alternatives Analysis to the Secretary, and make it public; and

3. Unless otherwise authorized by a waiver or modification by the Secretary pursuant to 301 CMR XX.10, mitigate the Article 97 Action by:
  - a. identifying Replacement Land pursuant to 301 CMR XX.07 and taking, acquiring or dedicating that Replacement Land to Article 97 purposes so that it is protected in perpetuity as an Article 97 Interest; or
  - b. providing In Lieu Funding instead of Replacement Land pursuant to 301 CMR XX.09.

#### XX.05:Notification

The Proponent of an Article 97 Action shall notify the public and the Secretary of the proposed Article 97 Action. This notification shall include:

1. posting notice and the Alternatives Analysis prepared pursuant to 301 CMR XX.06 on the website of the Public Entity with care and control of an Article 97 Interest subject to the Article 97 Action or by other appropriate means, or posting on the website of the Public Entity a link to such public notice and Alternatives Analysis;
2. for any Article 97 Action for which the Proponent is proposing to provide In Lieu Funding, providing the public with a public comment period of at least 21 days in which the public has an opportunity to review and comment on the proposed Article 97 Action and Alternatives Analysis; and
3. submission to the Secretary, in such form as the Secretary may require, of:
  - a. the Alternatives Analysis prepared pursuant to 302 CMR XX.06;
  - b. a description of the public notice and comment opportunities provided as required by M.G.L. c. 3, § 5A and the comments and response thereto, if not included in the Alternatives Analysis;
  - c. any supporting materials necessary or appropriate for evaluation of the proposed Article 97 Action and Replacement Land; and
  - d. any additional materials as the Secretary may require.

#### XX.06:Alternatives Analysis

1. A Proponent shall consider all other options to avoid and minimize an Article 97 Action. If, following such consideration, the Proponent determines that no feasible or substantially equivalent alternative exists, it shall create an

Alternatives Analysis documenting its consideration of alternatives to avoid and minimize the Article 97 Action.

2. Contents of Alternatives Analysis. The Alternatives Analysis shall be in writing, shall be commensurate with the type and size of the proposed Article 97 Action, and shall, at a minimum:
  - a. explain the proposed Article 97 Action and identify the public purpose that the Article 97 Action will serve;
  - b. identify each alternative to the Article 97 Action that was considered and describe why each alternative not selected is not feasible or substantially equivalent to the proposed Article 97 Action. Cost differences between land owned by the Public Entity and equivalent private land shall not be the sole basis for infeasibility;
  - c. describe all efforts to avoid or minimize the impacts of the proposed Article 97 Action, including by minimizing the land area, type, and degree of alteration required for the proposal; and
  - d. include a sufficient description of the Article 97 Interest and proposed Replacement Land, including the acreage, location, and boundaries of the land or interest in land;
  - e. if applicable, contain information sufficient to support a finding by the Secretary pursuant to 301 CMR XX.09 or to evaluate a request for waiver or modification pursuant to 301 CMR XX.10;
  - f. if the Proponent is not the Public Entity with care and control of the Article 97 Interest, summarize the Proponent's discussions with the Public Entity and provide written documentation of the Public Entity's stated position on the proposed Article 97 Action, and an affirmative vote by the Public Entity, if applicable.
3. Alternatives. Alternatives to the proposed Article 97 Action shall include parcels that:
  - a. are owned by the Public Entity, Proponent, or another public or private owner;
  - b. are appropriate for the intended use;
  - c. are reasonably available for acquisition or use at the time the Public Entity or Proponent first considered the Article 97 Action; and
  - d. are within the appropriate market area for private Proponents, state and/or regional entities, or are within the appropriate city or town for municipal Proponents.

## XX.07 Replacement Land

1. A Proponent shall identify Replacement Land to mitigate the impact of an Article 97 Action, except as otherwise provided in 301 CMR XX.09 or 301 CMR XX.10.
2. The Replacement Land shall be:
  - a. in a Comparable Location to the Article 97 Interest;
  - b. of equal or greater Natural Resource Value as the Article 97 Interest, as determined by the Secretary pursuant to 301 CMR XX.08;
  - c. of equal or greater acreage as the Article 97 Interest, as determined by a survey, or if a survey is not available, by another method that sufficiently delineates the boundaries of the affected parcels to enable accurate and reliable determination of acreage;
  - d. not already subject to Article 97 or a perpetual restriction consistent with G.L. c. 184, §§ 31-33, or required to be protected as a condition of any permit or other approval;
  - e. consistent with the requirements of any state or federal programs applicable to the impacted Art. 97 Interest;
  - f. not contrary to an enforceable restriction or enforceable condition of a gift to the Public Entity;
  - g. of equal or greater monetary value as the Article 97 Interest, as determined pursuant to 301 CMR XX.07(3); and
  - h. dedicated to the same Article 97 purpose as the Article 97 Interest, and improved to provide equivalent use as that provided by the Article 97 Interest, unless dedication to another Article 97 purpose is determined by the Public Entity to provide a greater public benefit and the Secretary concurs in a Determination of Natural Resource Value pursuant to 301 CMR XX.08.
3. Monetary Value. The monetary value of the Article 97 Interest and the Replacement Land shall be the fair market value or Value in Use as if said interest was not restricted by Article 97, whichever is greater, as determined by an appraisal. The appraisal shall include a determination of both fair market value and Value in Use. An appraisal conducted in accordance with the EEA Appraisal Guidelines, commissioned by the Division of Capital Asset Management and Maintenance, or conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book) shall presumptively be valid for the purposes of 301 CMR XX.00.

4. Certain Easements. A temporary easement, subsurface or air rights easement, or other non-fee simple interest in land that is an Article 97 Interest will be deemed to affect zero acres and therefore not require Replacement Land, provided that:
  - a. any anticipated disturbance of the surface will be temporary;
  - b. the land surface will be returned to conditions and function existing prior to disturbance, or better, within 24 months of the initial impact to land subject to Article 97;
  - c. the Proponent provides monetary value in an amount equal or greater to the value of the easement, as determined pursuant to 301 CMR XX.07(3); and
  - d. all other applicable requirements of 301 CMR XX.07(2) are met.

#### XX.08: Determination of Natural Resource Value

1. Upon receipt of an Alternatives Analysis proposing Replacement Land or request by a Public Entity proposing Replacement Land to comply with 301 CMR XX.09(4)(c), the Secretary shall make a Determination of Natural Resource Value.
2. A Determination of Natural Resource Value will consider:
  - a. whether the Replacement Land advances substantially the same Article 97 purposes and uses as the Article 97 Interest impacted by the proposed Article 97 Action; and
  - b. whether the Replacement Land meets the requirements of 301 CMR XX.07(2) and is of equal or greater Natural Resource Value as the impacted Article 97 Interest.
3. In making a Determination, the Secretary may consider any information that may be useful in making such Determination and may require the Proponent to submit additional information.
4. The Secretary reserves the sole discretion to determine whether the Replacement Land is of equal or greater Natural Resource Value than the impacted Article 97 Interest.

#### XX.09 Funding in Lieu of Replacement Land

1. Notwithstanding 301 CMR XX.07, the Proponent of an Article 97 Action may provide funding in lieu of Replacement Land, or a combination of In Lieu Funding and Replacement Land, if:

- a. the Proponent requests a finding by the Secretary pursuant to 301 CMR XX.09(2);
  - b. the Secretary has reported to the legislature a finding pursuant to 301 CMR XX.09(3) that In Lieu Funding is justified; and
  - c. the Public Entity meets the conditions set forth in 301 CMR XX.09(4).
2. Request for In Lieu Funding. A Proponent may request that the Secretary make a finding that it is appropriate to provide In Lieu Funding instead of or in addition to Replacement Land to mitigate for an Article 97 Action. Such a request shall be made on the form required by the Secretary and shall:
- a. include an Alternatives Analysis that, in addition to the contents required by 301 CMR XX.06(2), demonstrates that:
    - i. the proposed Article 97 Action serves a significant public interest;
    - ii. it is not feasible to contemporaneously provide Replacement Land;
    - iii. public comment on the Alternatives Analysis was sought and a response provided to comments received; and
    - iv. the Article 97 Action will not have an adverse impact on an Environmental Justice Population;
  - b. provide a map showing the location of the Article 97 Interest and surrounding area using the EEA Environmental Justice Maps Viewer.
  - c. specify the account into which funds will be deposited if the request to provide In Lieu Funding is approved;
  - d. describe the Public Entity's plan to utilize the In Lieu Funding to obtain Replacement Land within 3 years of the Article 97 Action;
  - e. include a certification by the Public Entity that the Public Entity will comply with the conditions set forth in 301 CMRXX.09(4) and 301 CMR XX.09(6); and
  - f. include such other information or materials as the Secretary may require.
3. Report of Finding by Secretary. Upon a request by a Public Entity pursuant to 301 CMR XX.09(2), the Secretary may report to the Legislature a finding that In Lieu Funding is justified if, in the sole discretion of the Secretary:
- a. the proposed Article 97 Action serves a significant public interest;
  - b. the proposed Article 97 Action will have no adverse impact on an Environmental Justice Population;



- c. the Alternatives Analysis has been submitted to the Secretary and subjected to public notice and comment and the Alternatives Analysis demonstrates that all other options to avoid or minimize the Article 97 Action have been explored and no feasible or substantially equivalent alternative exists for reasons specifically stated; and
  - d. it is not feasible to contemporaneously designate Replacement Land that satisfies the requirements of 301 CMR XX.07.
4. Conditions. A Public Entity receiving In Lieu Funding, alone or in combination with providing Replacement Land, shall:
- a. accept not less than 110% of the fair market value or Value in Use, whichever is greater, of the portion of the Article 97 Interest not mitigated by the provision of Replacement Land, as determined by the Secretary after an independent appraisal conducted pursuant to 301 CMR XX.09(5).
  - b. hold the In Lieu Funding:
    - i. if a Municipality:
      - 1. in the municipality's Community Preservation Fund and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; or
      - 2. in another already-established municipal account for land preservation purposes; or
      - 3. if the municipality lacks such a fund, in a segregated account and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; or
    - ii. if the Commonwealth, in a fund for acquisition of land or interests in land for Article 97 purposes; or
    - iii. if neither a Municipality nor the Commonwealth, in a segregated account and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; and
  - c. within 3 years of the Article 97 Action, use the In Lieu Funding to acquire Replacement Land in a Comparable Location and dedicate the Replacement Land in perpetuity for Article 97 purposes. Replacement Land acquired with In Lieu Funding shall satisfy the requirements of 301 CMR XX.07(2).
5. Appraisal. The amount of In Lieu Funding shall be based on the fair market value or Value in Use, whichever is greater, of the Article 97 Interest, as if said interest was not restricted by Article 97, as determined by an appraisal. The appraisal shall include a determination of both fair market value and Value in Use. An appraisal conducted in accordance with the EEA Appraisal Guidelines, commissioned by

the Division of Capital Asset Management and Maintenance, or conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book) shall presumptively be valid.

6. Reporting. Any Public Entity that receives In Lieu Funding instead of or in combination with Replacement Land shall report to the Secretary annually, by November 1 each year, on the use of such In Lieu Funding until all such funding has been fully expended for the acquisition of Replacement Land and such land has been dedicated to Article 97 purposes. The report shall include:
  - a. the amount of In Lieu Funding received and the date of the Article 97 Action;
  - b. the account into which the In Lieu Funding was deposited;
  - c. whether the In Lieu Funding was expended to acquire replacement land and, if so, a description of the land that was acquired, including:
    - i. the deed, order of taking, or other legal instrument by which the Replacement Land was acquired and the instrument by which it was dedicated to Article 97 purposes;
    - ii. the basis for the determination that the Replacement Land is in a Comparable Location as the Article 97 Interest;
    - iii. the Secretary's Determination of Natural Resource Value pursuant to 301 CMR XX.08;
    - iv. the Survey or other mechanism demonstrating the acreage as required by 301 CMR XX.07.4.; and
    - v. the appraisal meeting the requirements of 301 CMR XX.09(5); and
  - d. the remaining balance of In Lieu Funding.

#### XX.10: Waiver or Modification

1. The Secretary may waive or modify the Replacement Land requirements of 301 CMR XX.04(3)(a) and 301 CMR XX.07 upon request by a Proponent where:
  - a. the proposed Article 97 Action involves solely the transfer of legal control of an Article 97 Interest from one Public Entity to another Public Entity and no other change, including, but not limited to, a change allowing the land to be used for another purpose; or
  - b. the transfer or change in use of an Article 97 Interest of insignificant natural resource and recreation value that is less than 2,500 square feet in area and the transfer serves a significant public interest.

2. Process. To request a waiver or modification, the Proponent shall request such waiver or modification, in writing, in the form and providing the information required by the Secretary, and shall notify the public of such request for waiver or modification by posting the request on the website of the Public Entity with care and control of the Article 97 Interest subject to the Article 97 Action or by other appropriate means. The Secretary may request additional information from the Proponent. The Secretary may waive or modify a requirement of 301 CMR XX.04(3)(a) or 301 CMR XX.07 upon a determination that such waiver or modification meets the requirements of 301 CMR XX.10(1) and is in the public interest.
3. Determinations by Secretary. The Secretary reserves sole discretion to determine whether to waive or modify any requirement pursuant to Section XX.10.

#### XX.11: Severability

The provisions of 301 CMR XX.00 are severable. If any provision or application thereof is held to be invalid by a court of competent jurisdiction, such invalidity will be severed and will not affect the remainder of 301 CMR XX.00 or any application thereof that can be given effect without the invalid provision or application.

#### REGULATORY AUTHORITY

301 CMR XX.00: M.G.L. c. 3, § 5A; Acts 2022 c. 274, § 2