

## **Guidance on Public Lands Preservation Act Implementation**

**February 2023**

The enactment of *An Act Preserving Open Space in the Commonwealth* (Ch. 274 of the Acts of 2022, codified at M.G.L. c. 3, § 5A), also known as the Public Lands Preservation Act and referred to herein as the Act or the PLPA, established in statute requirements and a process for submission to the Legislature of petitions to authorize the use for another purpose or disposition of land or an interest in land subject to [Article 97 of the Amendments to the Constitution of the Commonwealth](#) (Art. 97). Under this Act, the Executive Office of Energy and Environmental Affairs (EEA) must receive alternatives analyses and consider requests for waivers or modifications of the replacement land requirement or the payment of money in lieu of providing replacement land.

This document is intended to aid the public in understanding and complying with the new law. However, in doing so, this document is not to be construed as encouraging the use for another purpose or disposition of land protected by Art. 97. EEA and its agencies will not authorize, approve or support a change in use or disposition unless in accordance with the EEA Article 97 Policy. This document is not intended to, may not be relied upon to, and does not create any right, benefit or duty, substantive or procedural, enforceable at law or equity by any party in any matter, civil, criminal or administrative. This guidance shall not be construed to create any right to judicial review involving the compliance or noncompliance of EEA, its agencies, its officers or employees, or any other person with this guidance.

### **Applicability:**

The Act applies to land or interests in land held by public entities for Art. 97 purposes<sup>1</sup> including EEA and other state agencies, municipalities, boards and commissions, quasi-public agencies, and other public instrumentalities and subdivisions of the Commonwealth. Any proponent of a change in use or disposition of land or interests in land subject to Art. 97 must comply with the Act. In some cases, this is the public entity with care and control of the Art. 97 land. However, many proposals to dispose or change the use of Art. 97 land are made by public or private parties other than the public entity with care and control of the land. In such cases, the party seeking the disposition or change in use (the proponent) will be expected to submit required information (including documentation of consultation with the public entity with care and control of the land) and undertake other actions necessary for the disposition or change in use to comply with the PLPA.

---

<sup>1</sup> “Public entity” is defined in the Act as “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.”

The Act applies to any change in use or disposition of land or interests in land subject to Art. 97. A change in use or disposition (referred to herein as an “Art. 97 Action”) means, and the PLPA applies to, any of the following when related to land or interests in land protected by Art. 97:

1. transfer or conveyance of ownership or another property interest, whether by deed, easement, lease or any other instrument effectuating such transfer or conveyance;
2. change in physical or legal control; or
3. change in use of the land.

EEA does not consider the issuance of a revocable permit or license of limited duration a disposition of land subject to Art. 97 or the PLPA, provided that:

1. no interest in land is transferred to the permittee or licensee, and
2. the permit or license does not authorize a change in use of the land.

Key requirements for Art. 97 Actions a proponent must comply with include: (i) notification; (ii) an alternatives analysis; and (iii) identification and dedication of replacement land to Art. 97 purposes. In certain cases, the replacement land requirement may be waived or modified by the Secretary of EEA, or provision of funding may be authorized in lieu of replacement land. Each of these requirements is addressed below in more detail.

### **Submission and Review Process:**

EEA has created a PLPA website and Portal to enable proponents subject to the Act to meet certain obligations under the Act. Proponents must use the PLPA Portal to notify EEA of proposed Art. 97 Actions and to make submissions required under the Act, including: (i) the alternatives analysis, (ii) requests for the Secretary to waive or modify the replacement land requirement, and (iii) requests for the Secretary to make required findings with respect to the provision of funding in lieu of replacement land. Prior to making any submission, proponents must engage in discussions with the public entity with care and control of the involved Art. 97 land.

Submissions via the PLPA Portal also must include information needed for EEA, the public entity that has care and control of the Art. 97 land, and the Legislature to review proposed Art. 97 legislation, such as documentation of the location and ownership of the affected and replacement land. The information required will vary based on the type of project and the materials available to the proponent. The Portal guides users through a series of fields that gather required information. More detail on the information and documentation to be submitted is provided in this guidance below.

EEA will review submissions to determine consistency with the Act and with EEA’s Article 97 Policy. Based on this review, the Secretary will make requested determinations and findings on waivers, modifications, and in lieu funding proposals. EEA will post on the PLPA website all waivers or modifications granted by the Secretary and all findings reported to the Legislature on proposals to provide funding in lieu of replacement land. These determinations or findings shall

not be construed as support for the proposed disposition or change of use by EEA or the public entity with care and control of the Art. 97 land, or such public entity's agreement with the determinations or findings, or the proposed Art. 97 Action.

### **Notification:**

The Act requires proponents of an Art. 97 Action to notify the public and the Secretary of EEA of the Art. 97 Action and to make public the alternatives analysis submitted to the Secretary. 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.

EEA will post the alternatives analysis and other material submitted via the PLPA Portal to the PLPA website in order to facilitate compliance with public notice provisions of the PLPA and provide a centralized location for Art. 97 information. Project proponents are encouraged, and may be legally required under other statutes and regulations, to notify the public of proposed Art. 97 Actions via means other than posting materials on the EEA website. Solicitation and collection of and response to public comment are encouraged of all PLPA proponents and required for those seeking a finding allowing funding in lieu. Public comment is the sole responsibility of proponents and not the responsibility of EEA.

### **Alternatives Analysis:**

The Act requires all proponents of an Art. 97 Action to submit to EEA and make public "an alternatives analysis demonstrating that all other options to avoid or minimize [the Art. 97 Action] have been explored and no feasible or substantially equivalent alternative exists". The purpose of evaluating alternatives is to avoid using or impacting Art. 97 land or interests in land to the extent feasible, to minimize the use of such land or interests in land to the extent impacts are unavoidable, and to protect the public rights afforded by Art. 97.

Alternatives analyses may be brief, but they must be in writing and must make the required demonstrations. A compliant alternatives analysis should: (i) explain the proposed Art. 97 Action and identify the public purpose that it will serve; (ii) identify the alternatives considered; and (iii) describe why each alternative not selected is not feasible or substantially equivalent to the proposed Art. 97 Action. If applicable, the alternatives analysis should also summarize the proponent's discussions with the public entity with care and control of the Art. 97 land and the public entity's stated position and/or comments, if any, on the proposed Art. 97 Action.

Proponents must consider alternatives that are commensurate with the type and size of the proposed Art. 97 Action. Alternative sites for consideration are those that were available at the time the proponent first notified the public entity that holds the land subject to Art. 97 and can be reasonably obtained: (a) within the appropriate market area for private proponents, state and/or regional entities; or (b) within the appropriate city or town for municipal proponents. Proponents

should describe clearly why each alternative that would avoid or reduce Art. 97 impacts is infeasible or not substantially equivalent to the proposed Art. 97 Action. In addition, the analysis should 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 the use or disposing of a parcel of Art. 97 land cannot be avoided.

Alternatives should include privately held parcels available for the intended use at a price consistent with the current market value.

If a submitted analysis is found to be inadequate, EEA will request additional information, which may include a request that the proponent identify and evaluate additional alternatives.

### **Replacement Land:**

In order for an Art. 97 Action to occur the public entity with care and control of the land subject to the Art. 97 Action must take, acquire or dedicate in perpetuity replacement land or an interest in land that meets the requirements set forth in the Act, absent a waiver or modification from the Secretary or approval by the Legislature of in lieu funding (which must be used to purchase replacement land within three years). Where the proponent of an Art. 97 Action is not the public entity with care and control of the Art. 97 land, the proponent must work with the public entity to identify replacement land and must compensate the public entity for its acquisition costs.

Replacement land must meet requirements set out in the PLPA, as follows.

1. Replacement land cannot already be subject to Art. 97 or otherwise protected in perpetuity.
2. Replacement land must be located in a comparable location to the impacted area. This does not require that the parcels be in the same municipality or census block, but locating replacement land in the same municipality is generally preferable and (for projects by municipal entities) easier than conserving land in a different municipality. However, providing replacement land in a nearby community can be appropriate and in keeping with the intent of the PLPA. For example, if an impacted parcel protects a reservoir, the acquisition of replacement land located in a different town but closer to the reservoir might be prudent and result in a net benefit to the public.
3. Replacement land must be equal or greater than the impacted area with respect to: (i) acreage; (ii) monetary value as determined by an appraisal of the fair market value or value in use, whichever is greater; and (iii) natural resource value, as determined by the Secretary of EEA. Additional detail on each of these requirements is provided below.

Identification of land that meets these criteria shall not be construed to mean that EEA approves a proposal or that the replacement land is acceptable to the public entity with care and control of the involved Art. 97 land. The proponent of the Action should be mindful that additional legal requirements, apart from the PLPA, may apply to a public entity for the acquisition or disposition of interests in land.

In order to monitor public entity compliance with the conditions of legislation authorizing an Art. 97 Action and to report to the Legislature on implementation of the Act, 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.

### **Land Descriptions and Acreage:**

Proponents must describe the land subject to the Art. 97 Action and the replacement land. The description of each must be specific enough to be included in legislation. In particular, the acreage, location, and boundaries of the Art. 97 land and the replacement land must be provided. Options for the legal description of land include a deed reference, metes and bounds, or reference to areas clearly delineated on a provided site plan. An assessors' map and parcel reference may also be provided for clarity. However, in most cases these and conceptual plans do not sufficiently delineate property boundaries and they therefore should be viewed as supplemental materials.

### **Appraisals:**

The Act requires all appraisals to include a determination of both fair market value and value in use. Value in use addresses the circumstance where the value is increased by the context and intended use in relation to its surroundings. The appraisals must show that the fair market value or value in use of the replacement land, whichever is greater, exceeds that of the area impacted by the Art. 97 Action. Unless waived, appraisals of the monetary value of both the impacted and the replacement land must be submitted to EEA via the PLPA Portal and to the Legislature with a proposed Art. 97 bill.

Proponents should contact the public entity with care and control of the land or interest in land subject to Art. 97 to determine what type of appraisal is required. Where the public entity determines that an independent appraisal is sufficient, the appraisal should meet EEA's [appraisal standards](#). In other cases, the public entity holding the land subject to the proposed Art. 97 Action may have its own appraisal requirements. For example, an Art. 97 Action affecting land owned by the Commonwealth will generally require the appraisals to be commissioned by the state Division of Capital Asset Management and Maintenance and paid for by the proponent. Disposition or change in the use of land subject to federal restrictions may require the appraisal to be conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book).

### **Natural Resource Value:**

Natural resource value is the benefit that land provides to the public, such as clean air and water, healthy food, climate change mitigation, wildlife habitat, or recreation. EEA will exercise its best judgement, utilizing available natural resource information, to determine whether comparably located land provides equal or greater resource value.

Replacement land should advance the same Art. 97 purpose(s) as the land to be lost. There are many Art. 97 purposes covering a wide range of natural resource and recreational values. Proponents should obtain, and where necessary improve, replacement land that has the same natural resource value and uses as the land that will be impacted. To do so, proponents should clearly identify the Art. 97 purposes for which the parcel is being used and replicate those purposes and uses on the replacement land. For instance, if the land to be disposed is a softball field (active recreation) then the replacement land should be of a sufficient size and configuration to support a similar active recreational use and include the construction of a field and other improvements equivalent to those to be lost. Similarly, should the land to be disposed be important habitat and used for hiking and other passive recreation then the proponent of the Art. 97 Action should provide replacement land of the same habitat type and passive recreation value.

### **Waivers & Modifications:**

The PLPA provides that in two circumstances the Secretary may consider requests to waive or modify the replacement land requirement of the Act. Accordingly, EEA will accept waiver or modification requests via the PLPA Portal for the following two scenarios.

- 1) Transfer of legal control between public entities without a change in use: Entities seeking this type of waiver or modification should explain in their alternatives analysis the reason for the transfer.
- 2) Transfer of a parcel less than 2,500 square feet in area and with insignificant natural resource and recreation value that serves a significant public interest: Entities seeking this type of waiver or modification must explain in their alternatives analysis the significant public interest being advanced and why the land in question has insignificant recreation or natural resource value. EEA cannot waive or modify the replacement land requirement if it determines that the land has any significant recreational or natural resource value.

The Secretary has discretion to determine whether to approve a request for a waiver or modification. Once the Secretary has made a decision, the proponent will be notified and the waiver or modification determination posted on the PLPA website.

### **Funding in Lieu:**

The PLPA allows proponents to provide funding in lieu of replacement land, or a combination of land and funding, only if specific conditions are met. One condition is that the Secretary must report to the Legislature explicit findings that:

1. the Art. 97 Action serves a significant public interest;
2. the Art. 97 Action will have no adverse impact on an environmental justice population<sup>2</sup>;
3. the alternatives analysis has been subjected to public notice and comment and demonstrates that, for specifically stated reasons, no feasible or substantially equivalent alternative exists to avoid or minimize Art. 97 impacts; and
4. it is not feasible to contemporaneously designate replacement land.

In addition, any legislation with a funding in lieu provision must require the proponent to provide to the public entity with care and control of the Art. 97 land not less than 110% of the higher of the appraised fair market value or value in use of the Art. 97 land; and the public entity shall hold the funds in a fund for acquiring Art. 97 land, and use the funds within three years to acquire land that qualifies as replacement land under the Act. The PLPA stipulates that funds shall be deposited by a municipality in the Community Preservation Fund and dedicated solely for the acquisition of land for Art. 97 purposes or another already established municipal account for land preservation purposes or, if the municipality lacks such a fund, in a segregated account and dedicated solely for the acquisition of land for Art. 97 purposes.

In their submission via the PLPA portal, proponents seeking findings allowing them to provide funding in lieu must:

1. Demonstrate that, having considered EEA's [Environmental Justice Policy](#) and analyzed the proposed Art. 97 Action using [the environmental justice map viewer](#), the Art. 97 Action will not have an adverse impact on an environmental justice population<sup>3</sup>;
2. Provide a sufficient alternatives analysis that i) shows that the proposed Art. 97 Action serves a significant public interest, ii) describes efforts made to identify replacement land, including geographic area and means considered, and why they were not feasible or substantially equivalent, and iii) explains how public comment on the alternatives analysis was solicited and collected and provides comments and responses, if any;
3. Specify the account in which funds will be deposited if the request to provide funding in lieu is approved; and
4. Indicate how funds will be used to obtain replacement land within 3 years of the Art. 97 Action.

---

<sup>2</sup> "Environmental justice population" is defined in [M.G.L. c. 30, § 62](#).

<sup>3</sup> Proponents are encouraged to consult EEA's Environmental Justice Director.

The Secretary has discretion as to the content and timing of findings issued in response to a request.

If the Legislature enacts legislation approving in lieu funding, the public entity holding the in lieu funds will be required to submit an annual update to EEA on the status of acquiring replacement land until it confirms in writing to EEA that replacement land has been conserved.

### **Submission of Legislation:**

Pursuant to the PLPA, a petition to file Art. 97 legislation must be accompanied by:

- Documentation of public notification;
- The alternatives analysis;
- A description of the replacement land (if not waived);
- A copy of the required appraisals (if not waived);
- If applicable, a copy of any waiver or modification by the Secretary; and
- If applicable, a copy of the report of findings of the Secretary regarding funding in lieu.

Proponents should work with their legislative delegation to submit a bill to obtain the required two-thirds roll call vote of each branch of the Legislature. As the timely filing deadline for the 2023/2024 session (January 20, 2023) fell before the effective date of the PLPA, EEA recognizes that bills may have been filed that do not conform to PLPA requirements. For these bills, EEA staff stand ready to work with proponents and legislators to address missing documents while bills are being considered. Bills filed after the effective date of the PLPA (February 17, 2023) in the 2023/24 legislative session and those filed in future legislative sessions must be accompanied by the required documents.

### **Approval by Public Entities:**

Proponents of an Art. 97 Action should refer to EEA's Art. 97 Policy regarding approval of proposed projects. In all cases, proponents are encouraged to consult with the public entity with care and control of the land or interest in land subject to Art. 97 well in advance of submitting materials to EEA or filing a bill. In some cases, notably those authorizing an Art. 97 Action by a municipality, one or more formal votes is required by law and/or EEA's Article 97 Policy.

If applicable, drafters should be aware that language approving these votes must be consistent with the language of the subsequent legislation advancing the Art. 97 Action. Because legislative language frequently changes between the time a bill is filed and when it is enacted a new vote may be required where vote language does not authorize necessary changes. For this reason, it is strategic to be clear on what is authorized without being overly limiting. Drafters may benefit by reviewing examples of prior Art. 97 legislation and the [Legislative Research and Drafting Manual](#), consulting counsel, and seeking review by EEA in advance of finalizing vote language.



### **Funding Program Requirements:**

Proponents of an Art. 97 Action should research past federal or state investment in the Art. 97 land in question. If an Art. 97 Action is proposed for land that was acquired or improved with funding from either EEA and its agencies and offices (such as a Self-Help grant) or the federal government (such as the Land and Water Conservation Fund), then approval of the Art. 97 Action and the replacement land by the funding entity is likely required under the terms of a project agreement. In most instances, arrangements that comply with the Act will also meet funding program requirements. However, new project agreements are typically needed, which must be separately negotiated and executed. When federal funding was accepted, and National Park Service (NPS) approval is required, the timeline for obtaining their approval is uncertain but usually lengthy. Proponents should contact the [Division of Conservation Services](#) at EEA as soon as possible after discovering that federal or state funding was provided for the land. DCS staff will assist in determining what actions are required.

### **Compliance:**

EEA will address noncompliance with Art. 97 and the Act following the terms outlined in the Compliance section of the EEA Article 97 Policy.

### **Information on PLPA Implementation:**

Consistent with the intent of the PLPA to make information on Art. 97 Actions available to the public and to assist with implementation of the Act, EEA has created a Public Lands Preservation Act website. Content includes:

- PLPA Portal (Submission of PLPA Documents & Data)
  - Submission of Alternatives Analyses and Waiver, Modification, & Funding in Lieu Requests
- PLPA Tracker (Access to PLPA Submissions & Decisions)
  - Information on Submissions Received (Proposed Art. 97 Actions)
  - Waiver/Modification Determinations & Funding in Lieu Findings
- [Guidance Document](#) (Assistance in Understanding & Complying with the PLPA)
- [Frequently Asked Questions](#)
- [EEA Appraisal Standards](#)
- [Article 97 Policy](#)

- [\*An Act Preserving Open Space in the Commonwealth\*](#) (Chap. 274 of the Acts of 2022, otherwise known as the Public Lands Preservation Act)

**Consultation:**

EEA policy, legal, and legislative staff will collaboratively answer questions regarding Art. 97 Actions. A dedicated email address, [plpa@mass.gov](mailto:plpa@mass.gov), has been established to accept requests for assistance. All PLPA related inquiries are properly directed to this address including:

- Questions on the use of the PLPA Portal, the application itself, the status of a submission, or the availability of information on PLPA submissions;
- Policy oriented or substantive questions about Art. 97; and
- Technical questions around the proper drafting of PLPA legislation