

**Guidance on Implementation of *An Act Preserving Open Space in the Commonwealth***  
**(M.G.L. c. 3, § 5A)**

**November 2024**

The enactment of *An Act Preserving Open Space in the Commonwealth* (Ch. 274 of the Acts of 2022, referred to herein as “the Act”, codified at M.G.L. c. 3, § 5A and sometimes known as the Public Lands Preservation Act or PLPA), established in statute new requirements and a process for submission to the Legislature of petitions to authorize a change in use 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 the Act, the Executive Office of Energy and Environmental Affairs (EEA) must receive alternatives analyses, make determinations of natural resource equivalency, 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, this document shall not be construed as encouraging the change in use or disposition of land or an interest in 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, whenever feasible the party seeking the disposition or change in use (the proponent) will be expected to submit required information (including documentation of approval by 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 M.G.L. c. 3, § 5A.

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<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 Act 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 M.G.L. c. 3, § 5A, 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 [website](#) and [Portal](#) to enable proponents subject to the Act to meet certain obligations under the Act. Proponents must use the 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 are strongly encouraged to engage in discussions with EEA and the public entity with care and control of the involved Art. 97 land.

Submissions via the 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 natural resource equivalency determinations and requested determinations and findings on waivers, modifications, and in lieu funding proposals. EEA will post on the Article 97 website all natural resource equivalency determinations, 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 Portal to the Article 97 website in order to facilitate compliance with public notice provisions of the M.G.L. c. 3, § 5A and provide a centralized location for Art. 97 information. Posting of materials on the EEA website may not be the only or sufficient public notice of a project. Project proponents are therefore encouraged, and may be legally required, to notify the public of proposed Art. 97 Actions via other means. Solicitation and collection of and response to public comment are encouraged of all proponents of Art. 97 Actions 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 an Art. 97 Action to the maximum extent practicable while achieving project goals, to minimize impacts to Article 97 land to the extent impacts are unavoidable, and to ensure no net loss to the public of 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 will: (i) identify the alternatives considered; (ii) describe why each alternative not selected is not feasible or substantially equivalent to the proposed Art. 97 Action; and (iii) identify the public purpose that the Art. 97 Action will serve. 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 minimize 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 extent of impact (land area or type/degree of alteration) when changing the use or disposing of a parcel of Art. 97 land or interest in land cannot be avoided. The analysis should demonstrate that all feasible measures were taken to avoid or minimize impacts to the maximum extent practicable.

Proponents should keep in mind that cost should not be the dispositive factor in dismissing alternatives to avoid or minimize Article 97 impacts, and privately held parcels available for the intended use at a price consistent with the current market value should be considered.

If a submitted analysis is found to be inadequate for review of the proposed Art. 97 Action under EEA's Art. 97 Policy, EEA will request additional information and suggest additional options for evaluation.

Note that this alternatives analysis may be requested as part of other permitting or review programs, such as the Massachusetts Environmental Policy Act (MEPA) program. More information on MEPA review is described below.

### **Replacement Land:**

In order to take an Art. 97 Action, the proponent of the Action must work with the public entity with care and control of the Art. 97 land or interest in land so that the public entity shall, at the proponent's cost, 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). Replacement land must meet minimum standards for approval by EEA.

- Replacement land cannot already be subject to Art. 97 or otherwise protected in perpetuity.
- 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 involving 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 M.G.L. c. 3, § 5A. 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.
- 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 (the benefit the land provides 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 and a GIS tool available [here](#), to determine whether comparably located land provides equal or greater resource value.

EEA's approval shall not be construed to mean that the replacement land is acceptable to the public entity with care and control of the involved Art. 97 land. The proponent of the Art. 97 Action should be mindful that additional legal requirements, apart from M.G.L. c. 3, § 5A, may apply to a public entity for the acquisition or disposition of interests in land.

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.

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 M.G.L. c. 3, § 5A are met and the constitutional rights of Massachusetts residents are protected and enhanced.

### **Appraisals:**

Unless waived, appraisals of the monetary value of both the impacted and the replacement land must be submitted to the Legislature with a proposed Art. 97 bill. To comply with this requirement and address the potential expiration of a more complicated and expensive appraisal type Proponents could complete an opinion of value, market analysis, or other credible attestation as to the value of the property by an accredited professional for submission with proposed legislation. Then, once Art. 97 legislation is enacted complete a full narrative or other appropriate type of valuation or appraisal consistent with EEA's appraisal standards.

Independent appraisals should meet EEA's [appraisal standards](#) and must include a determination of both the fair market value and value in use of the land. Proponents are advised that 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. Value in use addresses the circumstance where the value is increased by the context and intended use in relation to its surroundings. The appraisals are needed to ensure that the replacement land is of equal or greater monetary value as compared to the area impacted by the Art. 97 Action, as required by the Act.

### **Land Descriptions:**

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 land in question 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.

### **Waivers & Modifications:**

M.G.L. c. 3, § 5A provides that in two circumstances the Secretary may consider, and accordingly EEA will accept via the [Portal](#), requests to waive or modify the replacement land requirement of the Act.

- 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 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 EEA's Article 97 website. The Secretary's determination pursuant to M.G.L. c. 3, § 5A may be used to seek an exemption from review under the Massachusetts Environmental Policy Act (MEPA), if applicable, as further described below.

### **Funding in Lieu:**

M.G.L. c. 3, § 5A allows proponents to provide funding in lieu of replacement land, or a combination of land and funding, 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 (EJ) 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 replacement land that meets the same requirements as land conserved contemporaneous with an Art. 97 Action. M.G.L. c. 3, § 5A 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 Portal proponents seeking a finding 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 EJ 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;
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

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<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 EJ Director.

Action.

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 M.G.L. c. 3, § 5A, 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. EEA staff stand ready to work with proponents and legislators to make sure required documents accompany bills, or if a bill is inadvertently admitted without them, address missing documents while bills are being considered.

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

The public entity having care and control of the Art. 97 land will be required to approve the Art. 97 Action. Proponents of an Art. 97 Action should refer to EEA's Art. 97 Policy regarding required approvals.

The language approving these votes must be consistent with the language of the subsequent legislation advancing the Art. 97 Action. For this reason, it is important to be clear on what is authorized without being overly limiting. Reviewing examples of prior Art. 97 legislation and Consulting Counsel, EEA, and the [Legislative Research and Drafting Manual](#) is recommended.

### **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.

### **MEPA Reviews:**

As a general matter, an environmental review of a project under the Massachusetts Environmental Policy Act (MEPA) is required if there is “Agency Action,” and one or more review thresholds in 301 CMR 11.03 are triggered. Agency Action consists of either an Agency<sup>4</sup> directly undertaking a project, or, if the project is undertaken by a private entity, any action that “grants a Permit, provides Financial Assistance, or closes a Land Transfer” from an Agency.

If Agency Action is required, then any Art. 97 Action would trigger the need for MEPA review under 301 CMR 11.03 and require the filing of an Environmental Notification Form (ENF). However, under regulatory amendments effective January 6, 2023, a proponent may seek an exemption from MEPA review, if the Secretary has waived or modified the replacement land requirement under M.G.L. c. 3, § 5A as described above. Note that a project that meets or exceeds additional review thresholds in 301 CMR 11.03 other than those related to Art. 97 Actions (301 CMR 11.03(1)(b)3. & 5.) may still require MEPA review, even a waiver or modification is granted under M.G.L. c. 3, § 5A.

More information on the MEPA review process, including instructions on scheduling a pre-filing consultation with the MEPA office, is available [here](#).

### **Roles and Responsibilities of EEA:**

EEA has been working to ensure “no net loss” of land subject to Art. 97 since adopting its Article 97 Land Disposition Policy in 1998. By collaborating with the legislature and project proponents to ensure that legislation authorizing change in use or disposition of Article 97 land complies with the Policy, EEA has ensured that Article 97 legislation has resulted in a net increase in Article 97 land in the Commonwealth. Passage of the Act did not affect the Policy, which EEA continues to apply by:

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<sup>4</sup> “Agency” is defined in MEPA as “an agency, department, board, commission or authority of the commonwealth, and any authority of any political subdivision which is specifically created as an authority under special or general law.” M.G.L. c. 30, § 62.

- working with public entities, other project proponents, and the legislature in a practical manner to ensure that Article 97 legislation complies with the Policy, with a focus on ensuring that there is no net loss of land subject to Art. 97;
- responding to technical questions and receiving and considering information from all parties while engaging publicly only as specified by the Act;
- advising the Governor as to whether Article 97 legislation adopted by the legislature complies with the Policy and should be approved; and
- reviewing and identifying remedial measures to address noncompliance with the Policy.

These activities are in addition to and complement EEA's undertaking the new roles and responsibilities assigned by the Act.

The Act is designed to inform legislators and the public about proposed Art. 97 Actions. It therefore included new transparency requirements, so that the public may better understand proposed Art. 97 Actions, and new analysis requirements so that the legislature may be informed before taking a vote on Art. 97 bills. The Act assigned EEA new roles and responsibilities in service of these goals. Therefore, EEA is now undertaking the following in addition to maintaining its past practices:

*1. Determination of Equivalent Natural Resource Value of Proposed Replacement Land*

The Act states that replacement land offered as mitigation for an Art. 97 Action must (among other requirements) be of equal or greater natural resource value as the impacted land, as determined by the Secretary. In order to satisfy this requirement, upon receipt of filings required by the Act, EEA will conduct an independent analysis of the involved land and provide to the legislature, the proponent, and the public a written determination of whether or not equivalent or greater natural resource value would be provided. EEA will post these determinations on the online Tracker.

*2. Report of Finding in Response to a Request to Provide Funding in Lieu of Replacement Land*

The Act states that, in some circumstances, an entity proposing an Art. 97 Action may provide funding in lieu of contemporaneous provision of replacement land if the Secretary has reported to the Legislature a finding that the proposal meets the funding in lieu criteria specified in the Act and described in the Funding in Lieu section above. EEA will conduct an independent analysis of the proposal and provide to the legislature, the proponent and the public a written report if it determines that the criteria have been met. Such report will be posted on the online Tracker.

*3. Determination in Response to a Request to Waive or Modify the Replacement Land Requirement*

The Act states that, in some circumstances, an entity proposing an Art. 97 Action may request a waiver or modification of the replacement land requirement, if the Art. 97 Action meets one of the criteria specified in the Act and described in the Waiver or Modification section above. When the Secretary grants a request for waiver or modification, EEA will provide to the legislature, the proponent, and the public a written waiver or modification determination. EEA will post these determinations on the online Tracker.

4. *Annual Report on Instances in which Funding was provided in Lieu of Replacement Land*

The Act states that the Secretary shall issue an annual report on all instances in which funding was provided in lieu of replacement land, including amount of funds provided, the account into which the funds were deposited, whether the funds were expended to acquire replacement land, and a description of any land acquired. EEA will provide this report to the Legislature and post it on the Article 97 website.

5. *Promulgation of Regulations*

The Act states that the Secretary is responsible for promulgating regulations to implement subsections (a) and (b) of the Act.

**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 Implementation of M.G.L. c. 3, § 5A:**

Consistent with the intent of *An Act Preserving Open Space in the Commonwealth* to make information on Art. 97 Actions available to the public and to assist with implementation of the Act, EEA has created an Article 97 website. Content includes:

- [Portal](#) (Submission of Documents & Data to comply with M.G.L. c. 3, § 5A)
  - Submission of Alternatives Analyses and Waiver, Modification, & Funding in Lieu Requests
- [Tracker](#) (Access to Submissions & Decisions)
  - Information on Submissions Received (Proposed Art. 97 Actions)
  - Waiver/Modification Determinations, Natural Resource Determinations, & Funding in Lieu Findings

- [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, [Article97@mass.gov](mailto:Article97@mass.gov), has been established to accept requests for assistance. All Art. 97 related inquiries are properly directed to this address including:

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