

Frequently Asked Questions Regarding M.G.L. c. 3, § 5A

August 2024

1. Where can I find *An Act Preserving Open Space in the Commonwealth*, sometimes called the Public Lands Preservation Act?

The Act can be viewed [here](#), and is codified at M.G.L. c. 3, § 5A.

2. What types of activities are subject to the Act?

The Act applies to changes in use or dispositions of land or interests in land subject to Article 97 (otherwise referred to as an “Art. 97 Action”) that are owned by a public entity. More detail can be found in the Applicability section of the [Guidance](#) provided by EEA.

3. What is a public entity under the Act?

The Act defines public entities to include a wide range of state, municipal, quasi-governmental, and other entities. These include but are not limited to EEA agencies, other agencies of the commonwealth, cities and towns, conservation commissions, water and fire districts, quasi-public agencies, and conservation districts. If in doubt about whether an entity is a “public entity”, refer to the statute.

4. What is Article 97? How does it relate to *An Act Preserving Open Space in the Commonwealth*?

Article 97 is an amendment to the Constitution of the Commonwealth of Massachusetts. It provides, in part, that “Lands and easements taken or acquired for [Article 97] purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by two thirds vote, taken by yeas and nays, of each branch of the general court.” Article 97 purposes include dedication of public land to open space, conservation, natural resources, or other related purposes.

The Act provides that, in order to use for another purpose or dispose of Article 97 land, proponents must notify the public and the Secretary of Energy and Environmental Affairs, conduct an alternatives analysis and submit it to the Secretary and make it public, and provide replacement land of equal or greater natural resource value, acreage, and monetary value. In specific limited circumstances, the replacement land requirement may be waived or modified or funding may be provided in lieu of replacement land. The Act also states that the legislation required by Art. 97 must be accompanied by the alternatives analysis, a description of the replacement land, an appraisal, and a copy of any applicable waiver or modification decision or finding regarding a request to use funding in lieu of replacement land.

5. What steps do I need to take before filing a bill?

The Act requires 4 basic steps prior to bill filing:

1. Notify the public and EEA of the proposed action.
2. Draft an alternatives analysis, make it public, and submit it to EEA. EEA has provided [guidance](#) to assist with drafting. The alternatives analysis must be submitted, and EEA will post it on its website.
3. Describe the land to be affected and identify replacement land with an equivalent or greater acreage, monetary value, and natural resource value. EEA will determine whether the natural resource value of the replacement land is equal to or greater than the Article 97 land or interest in land, as described in the [guidance](#). In some cases, the Act allows the Secretary to determine that the replacement land requirement may be waived or modified. Contact EEA if you believe your project may be eligible for a waiver or modification or if you intend to seek approval to mitigate for the loss of Article 97 land via funding in lieu of replacement land.
4. Draft legislation and obtain authorization for the filing of a bill. For municipalities, this requires approval at Town Meeting or City Council. EEA can assist by reviewing draft legislation and local vote language, which can make the bill approval process smoother.

6. The Act requires appraisal of the Article 97 land and the replacement land. Regarding the required appraisals, what is “value in use”?

“Value in use” is a method of valuation that requires an appraiser to consider a property’s value not standing alone, but in the context of the land in question. For example, disposition of a small area of Article 97 land could enable access to a much larger, landlocked parcel, allowing development of the landlocked parcel. In this case, the Article 97 land would have a much higher "value in use" than would be the case if it was appraised in isolation. Similarly, a small parcel of land can often be combined with adjacent land holdings to enable development that might not otherwise have been possible. In these instances, the Act requires proponents to compensate the people of the Commonwealth for the full appraised amount of the value in use.

7. When is a waiver or modification allowed, and what is needed?

The replacement land requirement of the Act, and only that requirement, can be waived or modified only under specific circumstances provided in the Act and when approved by the Secretary in writing. By law, waivers or modifications of the replacement land requirement can only be granted for:

- the exchange of land between eligible public entities without a change in use or other change, and

- transfer of a parcel that is less than 2,500 square feet in area and of insignificant natural resource and recreation value, as determined by the Secretary, where the transfer serves a significant public interest.

Those seeking a waiver or modification should submit a request to the Secretary via the relevant section of the [Portal](#) provided by EEA.

8. When is funding in lieu of replacement land allowed, and what is needed?

In the rare case that it is not feasible to provide replacement land to fully mitigate for the loss of Article 97 land, the Act allows mitigation in the form of funding. The Secretary must make specific findings, after a public process, for funding to be used to mitigate impacts to Article 97 land. Proponents seeking to use in lieu funding should contact EEA early in the project development process to better understand whether a project may be appropriate for consideration of in lieu funding and to understand the process and requirements.

9. What materials need to be submitted to the legislature with an Article 97 bill?

1. An alternatives analysis;
2. A description of the replacement land or interest in land to be dedicated;
3. A copy of the appraisal of the land to be disposed and of the replacement land;
4. If applicable, a copy of any waiver or modification granted by the Secretary; and
5. If applicable, a copy of the report of the findings of the Secretary for in lieu funding

10. How can the public notification requirement of M.G.L. c. 3, § 5A be met?

The Act requires that a project proponent notify the public about the project and make the alternatives analysis public.

The public will be notified about a potential project when the responsible public entity considers it for approval, if not before. The Commonwealth's Open Meeting Law requires public bodies to notify the public about all meetings, including those at which a body will consider an Art. 97 Action. Earlier notification of a project and provision of access to associated materials (like the alternatives analysis and a description of the replacement land) can enable a more transparent process and can be accomplished by posting on the website of the proponent and public entity or other means. EEA will post alternatives analyses and other information it receives on its Article 97 webpage, which may help to notify the public, but should not replace the public entity's notification process.

11. What is different about review under M.G.L. C. 3, section 5A as compared to the EEA Art. 97 (“No Net Loss”) Policy?

EEA has long assessed proposals for Art. 97 Actions for conformance with the No Net Loss Policy. EEA’s internal assessment has not changed. However, the Act created a complementary review process that directly engages the public and includes written documentation. In addition, the Legislature has provided certain specific substantive requirements that every bill seeking a waiver or modification, or the use of in lieu funding, must meet. Key elements of the new process are:

- **Notice:** In the past, proponents did not always publicize a project before submitting a bill to the Legislature. The Act requires public notice and notice to EEA.
- **Alternatives analysis:** In the past, proponents did not need to provide any written document showing that alternatives to the impacts were explored and that the Art. 97 Action would be properly mitigated. Now, all proponents must provide a written analysis of the alternatives to the Art. 97 Action and make it available to the public.
- **Waiver or modification:** In the past, an Art. 97 bill might be enacted without providing an equal amount of replacement land, if the proponent demonstrated, in consultation with EEA and legislative staff, that waiver or modification was appropriate. Now, the waiver or modification provision of the Act makes explicit the specific, limited situations where the Secretary may consider a waiver or modification, requires the submission of a written request for approval by the Secretary, and the Secretary’s approval before it can occur. The Secretary’s approval of a waiver or modification must be submitted with a proposed bill.
- **In lieu funding:** In the past, an Art. 97 bill might be enacted allowing partial or full funding in lieu of replacement land if the proponent demonstrated, after consultation with EEA and legislative staff, that the project complied with EEA’s Art. 97 Policy. Now, proponents seeking to use in lieu funding must submit a formal request to EEA, the alternatives analysis must be subjected to public notice and comment, the project must meet substantive criteria (such as no adverse impact on an environmental justice population), and the Secretary must report a specific written finding on each funding in lieu request to the Legislature. If approved, proponents are also subject to specific requirements governing the handling of funds and when replacement land must be acquired.

12. How will EEA determine that replacement land is of equal or greater natural resource value?

EEA will utilize GIS and 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.

13. When providing replacement land can we change one type of active recreation to another if that other type is more needed?

The Act calls for EEA to determine if replacement land is of equal or greater natural resource value, which encompasses recreational uses. This determination will consider EEA's Article 97 policy which in general requires that the replacement land be dedicated to the same Article 97 purpose as the land being lost. For example, land used for active recreation should be replaced with land dedicated to active recreation. Occasionally, legislation may be more specific as to the type of active recreation occurring. In such cases, EEA has supported legislation providing a slightly different but comparable Art. 97 use within the same category of Art. 97 purpose. For example, data from a community's Open Space and Recreation Plan or records of field use could show that an underutilized softball field should be replaced by a soccer field. Contact EEA to discuss questions about specific parcels of land under consideration.

14. There is a waiver provision that allows transfers of protected land between public entities eligible to hold land for Article 97 purposes so long as the use does not change. Why would that happen?

This provision describes a "land swap" and is generally done to facilitate more effective management of the property in question. For example, a state agency may transfer a playground to a municipal parks department, or a municipal conservation commission may transfer a parcel of land that protects a public water supply to the water department. In such cases, there is a change in control but the land does not lose its protection under Article 97 and its use does not change.

15. There is a provision allowing waivers or modification for certain impacts under 2,500 square feet. Can you provide some examples illustrating how EEA will determine if a project qualifies for this waiver?

The replacement land requirement can be waived or modified for small projects that serve a significant public interest and impact land with insignificant natural resource and recreation value. Public infrastructure projects are expected to be the primary projects that qualify for this provision. Roads and bridges, gas and electric lines, water and sewer pipes, and other public infrastructure frequently traverse Art. 97 land. Projects to repair and replace this infrastructure often have limited ability to avoid and minimize impacts to Article 97 land. For example, a proposal to repair a bridge abutment or to replace a utility pole next to a roadway could reasonably argue that the project serves the significant public purpose of public safety and welfare, and EEA may determine that the land affected has insignificant environmental or recreational value. Land that might qualify as having insignificant value could include parking lots or roadways that are protected by Art. 97 because of their presence on or association with public park land. Conversely, a public interest project involving under 2,500 square feet but in an area of Priority Habitat, that is actively used for recreation, or in an environmental justice

population may not qualify. The Secretary will determine whether to grant a waiver or modification request based on the facts of each case.

16. Can land already owned by a community, but not dedicated for an Art. 97 purpose, be used as replacement land?

Yes. While already protected land cannot be used to meet the replacement land requirement, this does not mean that other land held by a public entity for other purposes cannot be conserved and provided as mitigation. For instance, many communities hold land in general municipal ownership or have tax title parcels that may be used for replacement.

17. Can you provide some examples of protected land that would not qualify for use as replacement?

To qualify as replacement land a parcel must not already be protected in perpetuity. Land already held for conservation and recreation purposes by a parks department or conservation commission is already subject to Article 97 and does not qualify as replacement land. Other lands that EEA will not view as acceptable replacement land include privately owned land that is already subject to a conservation restriction precluding development in perpetuity, land held by a land trust or other non-profit for conservation purposes, and land required to be protected as a condition of any permit or other approval (e.g., open space required as a condition of a cluster subdivision permit).

18. Must replacement land be in the same community as the land subject to the Art. 97 Action?

Replacement land must be in a “comparable location” to the land subject to the Article 97 Action. This does not require that the parcels be in the same municipality or census block, but proponents should seek replacement land that is as nearby as feasible. Locating replacement land in the same municipality is generally preferable and (for 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 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.

19. Does the Act specify penalties for failure to comply? Is there any other consequence for lack of compliance with Art. 97 or M.G.L. c. 3, § 5A ?

The Act requires the Secretary to report annually on instances where funding in lieu of replacement land is authorized by legislation. In this report, EEA will identify any municipality

or other public entity that fails to comply with the requirements for handling the in lieu funds or acquiring replacement land

Separate from M.G.L. c. 3, § 5A, consistent with EEA's Article 97 Policy, the Secretary may determine that a municipality or other public entity will be ineligible for grants from EEA and its agencies and offices if that municipality or entity changes the use or disposes of land in violation of Article 97 or M.G.L. c. 3, § 5A, or if it fails to perform any of the conditions required by legislation enacted pursuant to Article 97.

20. What is expected regarding solicitation, collection, and response to public comments?

EEA encourages all proponents to engage in a robust public process to identify and consider alternatives to an Art. 97 Action. Solicitation, collection, written response to, and submission of public comment, during project development and/or on an alternatives analysis, may be components of such a process. For projects seeking a finding allowing funding in lieu of replacement land, the law requires that the alternatives analysis be subjected to public notice and comment.

The project proponent is responsible for soliciting, accepting, and responding to public comment. Comments should be submitted to the proponent. EEA will not directly accept or post public comments on projects.

21. What are the standards for the required “description of the replacement land” that must accompany legislation?

While it is ultimately up to the Legislature to decide what it will accept when a bill is filed, established practice is that legislation includes a sufficient legal description of the replacement land to identify the area to be dedicated. Acreage is 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 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 should be available for review.

M.G.L. c. 3, § 5A states that an appraisal of the value of the replacement land must accompany the bill, and 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 would typically be included in the required alternatives analysis.

22. What is the range of alternatives to a proposed Art. 97 Action that must be considered?

The Act does not specify. It states that the alternatives analysis must demonstrate that all other options to avoid or minimize the Article 97 Action have been explored and no feasible or substantially equivalent alternative exists.

While the Act does not provide for EEA approval of alternatives analyses, EEA uses them to make its determinations and findings and in the application of its Article 97 Policy. In that context the agency expects the scope of alternatives considered to be commensurate with the type and size of the proposed disposition or change in use of Article 97 land or interest in land. As stated in EEA's Art. 97 Policy, the expected scope of alternatives extends to any sites that were available at the time the proponent first notified the controlling public entity, and which 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. Additional information on the alternatives analysis is available in EEA's [guidance](#).

23. Does the posting of an Alternatives Analysis, Waiver Determination, Report of Findings, or a Determination of Natural Resource Value on EEA's Art. 97 website mean that the agency supports the project?

No. EEA posts all materials submitted via the Portal, as well as the Determinations and Reports it issues pursuant to M.G.L. c. 3, § 5A, to make them available to the public, and their posting does not mean that EEA supports or does not support a project. EEA works with all proponents to ensure that legislation authorizing an Art. 97 Action complies with M.G.L. c. 3, § 5A and EEA's Art. 97 Policy.

24. Must an Alternatives Analysis be finished and made available before a vote can be taken on a proposed Art. 97 Action? For example, can a conservation commission vote on a proposed disposition of land over which it has care and control before it has been provided with an alternatives analysis?

M.G.L. c. 3, § 5A does not specify that an alternatives analysis must be completed or made public before a Conservation Commission or any other entity can vote to advance a proposed Art. 97 Action. Public entities proposing or participating in a project are responsible for determining the process for project development and approval at the local level, including providing opportunities for public participation where appropriate, and addressing compliance with that process. EEA does not conduct public notice or comment on behalf of proponents.

25. Does M.G.L. c. 3, § 5A specify a particular sequence for the public notification of a proposed Article 97 Action, the completion of an alternatives analysis, the submission of the analysis to the Secretary of Energy and Environmental Affairs, the provision of the analysis to the public, or other steps in the process of obtaining needed approvals?

No, the law doesn't specify the order or timing of required steps, except that a petition to the General Court to authorize a disposition or change in use of land subject to Article 97 must be accompanied by an alternatives analysis, a description of the replacement land or interest in land (or waiver or modification where applicable), appraisal, and findings of the Secretary (where applicable). The legislature will determine whether to accept a petition.

Transparency and public awareness and engagement are important benefits of the requirements to conduct an alternatives analysis and provide it to the public. Public notice when beginning development and consideration of alternatives is consistent with these benefits and may result in a more thorough review. An alternatives analysis cannot be completed until review of alternatives is complete and a project proposal has been developed. Instead, an alternatives analysis will ideally reflect the results of a robust public engagement process rather than serve to initiate such a process.

It is instructive to think of the process of developing an alternatives analysis as a means of informing and engaging the public, not just as a technical step to enable public review of a completed project proposal. The work of considering alternatives and analyzing their benefits and drawbacks often involves engagement, including at public meetings, with a variety of public entities and their boards and commissions. Evaluating the need for a project, siting options, means of avoiding and minimizing impacts to Article 97 land, and alternative parcels that might serve as replacement land can all be part of a robust public process that informs the completion of an alternatives analysis that is submitted at the end of the process, and is much better and more convincing as a result, than it would be if submitted at the outset.

26. Does every Art. 97 Action require the filing of an Environmental Notification Form (ENF) with the Massachusetts Environmental Policy Act (MEPA) Office?

No. Under MEPA regulations at 301 CMR 11.00, an ENF filing is required only if the project requires an “Agency Action.” Agency Action consists of either an Agency¹ 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 and require an ENF filing, unless the Secretary has waived or modified the replacement land requirement under M.G.L. c. 3, § 5A. The process for obtaining such waiver or modification is described above in FAQ #7. 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.

27. If an Art. 97 Action is subject to MEPA review, does an ENF have to be filed with the MEPA Office before the procedures under M.G.L. c. 3, § 5A are followed?

No. Under MEPA regulations, if a project is subject to MEPA review, Agency Action may not be taken until MEPA review is complete. The actions required of EEA or the Secretary of EEA

¹ “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.

under M.G.L. c. 3, § 5A do not qualify as “Agency Action,” and, therefore, may be taken ahead of MEPA review. However, it is highly preferable for MEPA review to be undertaken either prior to, or concurrently with, the procedures set out in M.G.L. c. 3, § 5A. This would promote consistency in the alternatives analyses and mitigation disclosed as part of the M.G.L. c. 3, § 5A and MEPA review processes, and ensure that environmental assessments are completed in advance of any required Agency Actions for the project. To the extent analysis of environmental justice (EJ) impacts are required as part of the M.G.L. c. 3, § 5A process, early completion of MEPA review will also ensure consistency with new EJ related regulations and protocols issued by the MEPA Office pursuant to *An Act Creating a Next-Generation Roadmap Act for Massachusetts Climate Policy*, St. 2021, c. 8, §§ 57-60. The exception to this preference is where a project: (i) meets the conditions under which the Secretary may grant a waiver or modification of the replacement land requirement; and (ii) will not require a MEPA filing if the waiver or modification is granted. In such cases, it is appropriate for proponents to submit materials and request the waiver or modification under M.G.L. c. 3, § 5A prior to filing under MEPA.