

## **Public Lands Preservation Act: Frequently Asked Questions**

**February 2023**

### **1. Where can I find the *Act to Preserve Open Space in the Commonwealth*, otherwise known as the Public Lands Protection Act?**

The Act can be viewed [here](#), and will be 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”) owned by a public entity. More detail can be found in the Applicability section of the PLPA [Guidance](#).

### **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 or contact EEA.

### **4. What is Article 97? How does it relate to the PLPA?**

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 a 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, these requirements 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 decision of finding regarding a request to use funding in lieu.

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

The Act requires 4 basic steps before a bill can be filed:

1. Notify the public and EEA of the proposed action.
2. Draft an alternatives analysis 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 sufficient, 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 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” or “value in proposed 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 requirements of the Act can be waived or modified only under specific circumstances provided in the Act and when approved by the Secretary in writing. Waivers or modifications of the replacement land requirement can be granted for:

- the exchange of land between eligible public entities without a change in use or other change, and
- projects that serve a significant public interest and impact less than 2,500 square feet in area of land of insignificant natural resource or recreational value.

Those seeking a waiver or modification should submit a request to the Secretary via the relevant section of the PLPA Portal.

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

In the rare case that it is not possible 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.

## **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
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 the PLPA 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. 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. EEA also suggests additional notification of a project and provision of access to associated materials (like the alternatives analysis and a description of the replacement land) by posting on a website or other means. EEA will post alternatives analyses and other information it receives on its PLPA webpage, helping to notify the public and provide a central place to go for information.

## **11. EEA previously reviewed proposed Art. 97 Actions under its (now superseded) Art. 97 Policy. What is different about review under the PLPA as compared to the Policy?**

The main difference between the prior process and the process under the Act is that the process now is more formal and public. 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 differences are:

- **Notice:** In the past, proponents did not always publicize a project before submitting a bill to the Legislature. Public notice and notice to EEA are now required.
- **Alternatives analysis:** In the past EEA staff would discuss alternatives examined with proponents and work with them to ensure that any impact was properly mitigated. Now

all proponents must also provide a written analysis of the alternatives to the Article 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 a waiver or modification makes explicit the specific, limited situations when a waiver or modification may be considered and requires a request for approval by the Secretary and the Secretary's approval before it can occur. The Secretary's 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 specific written findings 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. When providing replacement land can we change one type of active recreation to another if that other type is more needed?**

In general, EEA's Article 97 policy 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.

## **13. There is a waiver provision that allows transfers of protected land between conservation entities 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, the land does not leave Article 97 protection, and its use does not change.

**14. There is a provision allowing waivers or modification for impacts under 2,500 square feet. Can you provide some examples illustrating how EEA will consider 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. Thus, 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 of 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 under 2,500 square feet but in an area of Priority Habitat, of very high recreational value, 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.

**15. 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 held land 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.

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

Replacement land must protect a parcel that is not already 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 subject to a conservation restriction precluding development in perpetuity, land held by a land trust or other non-profit for conservation purposes, or 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).

**17. 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 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.

**18. Is there any consequence for lack of compliance with the PLPA?**

The Act requires the Secretary to report 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.

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 the PLPA, or if it fails to perform any of the conditions required by legislation enacted pursuant to Article 97.

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

Solicitation, collection, written response to, and submission of public comment is encouraged of all PLPA proponents and required of those seeking a finding allowing funding in lieu of replacement land. 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. However, EEA will receive and post alternatives analyses, which may include public comment.

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

The legislation must include a sufficient legal description of the replacement land to identify the area to be dedicated. Acreage must be indicated, and the location and boundaries of the land described precisely. This description may be done via reference to a deed or areas clearly delineated on a provided or recorded site plan, or via metes and bounds. Additional description

may be beneficial, such as a reference to the assessor's parcel. Plans used for reference do not need to be recorded prior to filing legislation but must be available for review.

Information on the replacement land accompanying the bill must include appraised value, an explanation of how the natural and recreational value of the impacted parcel is being replicated, and information on the location of the replacement land to support assessment of whether the land is comparably located.

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

The scope of alternatives considered must be commensurate with the type and size of the proposed disposition or change in use of Article 97 land or interest in land. 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](#).

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

EEA will utilize available information on natural resources, such as BioMap, to determine whether comparably located replacement land provides equal or greater natural resource value. In the past comparably located land of the same land cover type as that subject to the Art. 97 Action has generally been acceptable. For example, replacing 2 acres of forested land with 3 acres of forested land a ¼ mile away often provides equal or greater resource value.

**23. EEA posted an alternatives analysis on its PLPA website. Does this mean that EEA supports the project?**

No. EEA posts all materials submitted via the PLPA Portal 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 the PLPA and EEA's Art. 97 Policy.