

## **MEMORANDUM**

To: Town of Lexington

From: Mina S. Makarious  
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Re: Process for Article 97 Land Disposition, With Pending Regulatory Changes

Date: December 5, 2024

### **I. Background**

This memorandum distills and summarizes the steps the Town of Lexington should follow to release Article 97 land pursuant to the Public Land Protection Act (“PLPA”), G.L. c. 3 § 5A (in effect as of February 2023) and the proposed regulations, 310 CMR XX.00, which were released in draft form in November 2024.

The Town of Lexington has a high school adjacent to existing playing fields. The playing fields are protected under Article 97, while the land with the school is not. Lexington wishes to build a new high school on the fields and later demolish the existing high school to re-create the fields on that parcel, effectively swapping the Article 97 land. To do this, the Town must comply with the process provided in the Public Land Protection Act (“PLPA”), G.L. c. 3 § 5A to “release” the fields from Article 97 protection and designate replacement land.

The PLPA was signed into law on November 17, 2022, and went into effect on February 15, 2023. The PLPA codified the process for submitting legislative petitions disposing of or authorizing alternate uses for Article 97 land. On November 22, 2024, the Executive Office of Energy and Environmental Affairs (“EEA”) issued draft regulations to aid public entities with the statutory requirements, 310 CMR XX.00 (“Draft Regulations”).<sup>1</sup> Public comments on the Draft Regulations are due to EEA by 5pm on December 23, 2024.

EEA has also issued a series of tools and guidance documents on the new PLPA administration. These include:

- November 2024 *Guidance on Implementation of An Act Preserving Open Space in the Commonwealth, M.G.L. c. 3, § 5A* (“PLPA Guidance”). PLPA Guidance available at: <https://www.mass.gov/doc/guidance-on-public-lands-preservation-act-implementation-november-2024/download>.<sup>2</sup>

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<sup>1</sup> <https://www.mass.gov/doc/draft-open-space-act-regulations-301-cmr-5200-112224/download>

<sup>2</sup> The November 2024 guidance replaced previously issued February 2023 interim guidance.

- August 2024 *Frequently Asked Questions Regarding M.G.L. c. 3, § 5A* (“PLPA FAQ”).<sup>3</sup> PLPA FAQ available at <https://www.mass.gov/doc/public-lands-preservation-act-frequently-asked-questions-august-2024/download>.
- Article 97 “Natural Resource Site Evaluation Tool”.
- The EEA Portal for submissions to the EEA Secretary.

The 1998 Article 97 Policy remains in effect, although the EEA website notes that a new draft is forthcoming.

## **II. Applicable Statutory Requirements**

The fundamental requirement in the PLPA is that an entity proposing an Article 97 disposition must package up certain materials and submit them to EEA before seeking legislative approval. Only once EEA has reviewed those materials and issued its concurrence on the disposition, can a proponent file its legislative petition. All materials shall be submitted to the EEA through the PLPA website and Portal, available at <https://www.mass.gov/forms/online-submittal-to-comply-with-mgl-c-3-ss-5a>.

While Lexington must authorize the disposition at Town Meeting prior to submitting its legislative petition, there is no requirement that this authorization occur after alternatives are analyzed, or prior to submitting materials to EEA for approval. *See* PLPA FAQ, p. 8; EEA Portal. We recommend reviewing the filing prerequisites and discussing the timing of the Town Meeting vote with counsel.

### **A. Prerequisites to Submitting Materials to EEA for Approval**

The PLPA Statute, Regulations, and Guidance do not mandate that the below steps occur before authorizing a disposition by Town Meeting (or other municipal) vote, so we strongly recommend the Town of Lexington discuss the timing of these steps with counsel prior to proceeding.

The following tasks are necessary for Lexington to complete its EEA submittal.

1. Conduct an alternatives analysis “[d]emonstrating that all other options to avoid or minimize ... the change in use have been explored and no feasible or substantially equivalent alternative exists.” G.L. c. 3 § 5A(a)(i)(A); 301 CMR XX.04(2); 301 CMR XX.06.
  - The analysis may be brief, but must be in writing and:
    - Include an explanation of the proposed Art. 97 action and identify the public purpose that it will serve;
    - Identify each alternative considered and describe why they were infeasible or not substantially equivalent to the proposed disposition (cost difference between land owned by the Town and privately held land cannot be the sole basis for infeasibility);
    - Describe all efforts to avoid or minimize the impacts of the proposed Article 97 Action, including by minimizing land area, type, and degree of alteration required; and

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<sup>3</sup> The August 2024 FAQ replaced a February 2023 “Frequently Asked Questions” document.

- Describe the Article 97 interest and proposed replacement land, including acreage, location, and boundaries of the land. 301 CMR XX.06(2)(a)-(d).
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- The alternatives considered must be:
  - Owned by the Town of Lexington, or other public or private owner;
  - Appropriate for the intended use;
  - Reasonably available for acquisition at the time of the Town first considered the Article 97 Actions; and
  - Within the Lexington. 301 CMR XX.06(3)(a)-(d).

2. Identify replacement land. G.L. c. 3 § 5A(a)(ii); 301 CMR XX.07.

- With limited exception not applicable here, the Town of Lexington must identify Replacement Land to mitigate the impact of an Article 97 disposition.
- Qualifying replacement land must:
  - Not already be subject to Article 97;
  - Be in a comparable location to the impacted area;
  - Of the same Article 97 interest; and
  - Be equal or greater than the impacted area with respect to:
    - Acreage;
    - Monetary value as determined by an appraisal of the fair market value or value in use, whichever is greater; and
    - Natural Resource Value as determined by the Secretary pursuant to 310 CMR XX.08. (The benefit the land provides the public such as clean air and water, healthy food, climate change mitigation, wildlife habitat, or recreation). PLPA Guidance p. 5.

3. Perform an appraisal of the land to be disposed, and an appraisal of the replacement land.

- Must include both fair market value, and value in use. 301 CMR XX.07(3).
- An appraisal conducted in accordance with the EEA Appraisal Guidelines, commissioned by the Division of Capital Asset Management and Maintenance, or conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book) shall presumptively be valid for the purposes of 301 CMR XX.00.
  - EEA appraisal standards available at: <https://www.mass.gov/doc/eea-land-acquisition-policy-appraisals-01-06-15/download> .

4. Notice the proposed disposition and publish the alternatives analysis. 301 CMR XX.05.

- Post notice of the proposed disposition on the Town's website.
  - Notification must provide "sufficient information on the current Art. 97 values and uses of the land, the public purpose of the disposition or change in was, and the replacement land for the public to clearly understand the proposed Art. 97 action." PLPA Guidance, at 3.
- Post the alternatives analysis of the proposed disposition on the Town's website.
- Public comment on the notice and alternatives analysis is encouraged, but not required in this circumstance. PLPA Guidance, p. 3.

5. Draft legal descriptions of the Article 97 land to be disposed of and the proposed replacement land.

- These descriptions must be specific enough to later be included in legislation, and must include:
  - Acreage;
  - location; and
  - boundaries. PLPA Guidance, p. 6.
- The legal descriptions can be a deed reference, metes and bounds, or reference areas clearly delineated on a provided site plan. PLPA Guidance, p. 6.
- Assemble base maps of the 97 land to be disposed of and the proposed replacement land.

6. Consult with EEA, draft proposed legislation for the Article 97 land swap and also draft text of proposed municipal votes needed for the disposition, like a draft Warrant Article.

- The language of the legislation advancing the Art. 97 Action must be consistent with any Town vote to release the land. “Reviewing examples of prior Art. 97 legislation and Consulting Counsel, EEA, and the Legislative Research and Drafting Manual is recommended.” PLPA Guidance p. 8.
- EEA policy, legal, and legislative staff will collaboratively answer questions regarding Art. 97 Actions, including legislative drafting.
  - A dedicated email address, Article97@mass.gov, has been established to accept requests for assistance.

7. Submit the following to EEA via the online portal:

- Contact information for the Applying entity;
- A PDF of draft legislation for the disposition and replacement land;
- A PDF of the alternatives analysis and public comment (if applicable);
- A list of entities that must approve the Article 97 action;
- A PDF of the text of the vote or proposed vote allowing the disposition—this can be in draft form if Town Meeting has not yet approved the disposition;
- A PDF of the local approval language, approving the disposition—this can be in draft;
- narrative information on the Replacement Land;
- Base maps of the Article 97 land and proposed replacement land;
- PDFs of the appraisals;
- PDFs of the legal descriptions of the Article 97 land and proposed replacement land;
- A PDF of the public notice of the disposition; and
- A PDF map of the proposed use of the replacement land.

8. The Town must also place the proposed replacement land on the Town Meeting Warrant, as dedication of the “replacement land in perpetuity for Article 97 purposes” is required to satisfy the PLPA disposition requirements. G.L. c. 3 § 5A(a)(iii).

- “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.” PLPA Guidance p. 8.

**B. Legislative Petition Requirements**

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. PLPA Guidance, p. 2.

Once the EEA submittal is complete and the Town has voted to dispose of the land, the Town can move forward with a petition to the general court. The PLPA requires that the petition be accompanied by the following:

1. Documentation of public notification. PLPA Guidance, p. 8.
2. The alternatives analysis completed pursuant to G.L. c. 3 § 5A(a)(i)(A). G.L. c. 3 § 5A(c)(i); PLPA Guidance, p. 8.
3. A description of the replacement land to be dedicated. G.L. c. 3 § 5A(c)(ii); and
4. A copy of the appraisal required by section G.L. c. 3 § 5A(a). G.L. c. 3 § 5A(c)(iii).

**C. Post-Legislative Approval Requirements**

Once the Legislation passes, 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." PLPA Guidance, p. 5.