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June 4, 2016

Mr. Peter Berry  
Chair  
Acton Board of Selectmen  
472 Main Street  
Acton, MA 01720

Subject: Important Issues To Consider and Address Prior to the July 18<sup>th</sup>  
Concord Water Plant Public Hearing

Dear Chairman Berry:

We would like to call your attention to five important issues in advance of the scheduled July 18, 2016 Selectmen Public Hearing on the Concord Water Plant proposal. We urge you to review and take action on these issues. After listing the five issues, we provide detailed background information for each one.

1. Because it lacks a severability clause, Chapter 201 of the Acts of 1884 becomes invalid if any provisions of the law are deemed unenforceable. Concord is not complying with two provisions of that law, and they should be required to do so.
2. An Attorney General's ruling should be sought on several matters which are issues of first impression with regard to Article 97 of the Constitution of the Commonwealth of Massachusetts. These issues are:
  - a. What is the proper remedy for the ozone treatment plant's having been built without compliance with Article 97 of the Commonwealth of Massachusetts Constitution?
  - b. The Secretary of the Executive Office of Energy and Environmental Affairs ruled in February that Article 97 applies to Concord's lands around Nagog Pond. Which town is required to hold the town meeting on a change in use of these lands and approve a home rule petition to the state legislature? Is it the applicant's town (i.e., Concord), or the host town (i.e., Acton), or possibly both?
  - c. Does the change in use from a simple ozone disinfection plant (i.e., the present site usage) to a full-scale multi-phase water treatment plant that involves many stages of chemical treatment on the presently cleared site also require Article 97 approval?

3. Any further clearing beyond the present facility and driveway borders requires Article 97 compliance, which must occur before Acton can act on special permit requests.
4. Until Concord completes the Environmental Impact Report needed to satisfy state requirements, the Acton Selectmen should request an extension by Concord for the July 18<sup>th</sup> hearing, and
5. A modified variance from the Acton Zoning Board of Appeals is the proper first step that must be taken before the Selectmen can act on the special permit applications before them.

#### Chapter 201 of the Acts of 1884

Chapter 201 of the Acts of 1884, which grants Concord the rights to the water in Nagog Pond, does not contain a severability clause. As you know, a severability clause is a standard provision in laws (and contracts) which specifies that if any provision of a law is deemed unenforceable, the remainder of the law is still valid and enforceable. **Under U.S. law, if a law (or contract) lacks a severability clause, the entire law becomes invalid when a portion of the law is deemed unenforceable.** This is critical regarding Chapter 201 of the Acts of 1884 because several provisions in the law are currently not being followed by Concord. The provisions of the Act that Concord is not or has not complied with are the following:

1. With regard to withdrawing water from Nagog Pond, Concord may borrow money or issue notes in “an amount not exceeding fifty thousand dollars...” (which, in today’s dollars according to the Federal Reserve Bank is approximately \$1.3 million). (Ch. 201 of the Laws of 1884, Section 8).
2. When Concord wants to increase its withdrawals from Nagog Pond, “each successive election” to increase water withdrawals must “be made by a vote of said town declaring the additional quantity or proportion of said waters to be so taken, and upon each such successive election, and within ninety days thereafter said town shall file in said registry of deeds a description, statement, and copy of the vote...” (Chapter 201 of the Laws of 1884, Section 5).

Concord received town meeting approval on Tuesday, April 6<sup>th</sup> for a debt authorization of \$16.5 million, which is well in excess of the amount (in today’s dollars) authorized under the Acts of 1884. In addition, Concord town meetings have not authorized increased water withdrawals from Nagog Pond in recent memory. Such votes were supposed to be followed by recording in the registry of deeds; that, too, has not happened.

Why is this important? There has been much discussion regarding how Acton might start to assert more control over Nagog Pond’s water. If Acton requires Concord to live by the provisions of Chapter 201 of the Acts of 1884, and requires town meeting approval of each increased water withdrawal, and limits the borrowing available for

a proposed new facility to \$1.3 million, then Concord will likely take Acton to court. A judge is likely to rule that these provisions are unenforceable, and, without a severability clause, the entirety of Chapter 201 of the Acts of 1884 is invalid. While Acton will not be able to summarily stop Concord from withdrawing water from Nagog Pond, Acton will have much more control over Concord's actions.

Article 97 of the Constitution of the Commonwealth of Massachusetts<sup>1</sup>

The Secretary of the Executive Office of Energy and Environmental Affairs ruled in February that Article 97 applies to Concord's lands around Nagog Pond. There are three issues associated with Article 97 of the Massachusetts Constitution that are issues of first impression with regard to Article 97. These issues are as follows:

1. What is the remedy for Concord's clearing land and constructing its present ozone treatment facility on the lands surrounding Nagog Pond without having undertaken the steps required under Article 97 of the state Constitution?
2. Which town is required to hold the town meeting on a change in use of these lands and approve a home rule petition to the state legislature? Is it the applicant's town (i.e., Concord), or the host town (i.e., Acton), or possibly both?
3. Does the change in use from a simple ozone disinfection plant (i.e., the present site usage) to a full-scale multi-phase water treatment plant that involves many phases of chemical treatment on the presently cleared site (excluding further clearing) also require Article 97 approval?

In addition, there is also the issue of implementing Article 97 for the presently-proposed project that is scheduled to occur outside of the clearing at the site.

Article 97, which was added to the Commonwealth's Constitution in 1972, states that "the people shall have the right to clean air and water," and that "the conservation, development and utilization of the ... water, air and other natural resources is hereby declared to be a public purpose." It further specifies that open space lands "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." A 1974 Attorney General Advisory Opinion held that Article 97 applies to lands acquired before the passage of Article 97. This opinion means that Article 97 applies to Concord's land-holdings around Nagog Pond that were acquired before 1972, when Article 97 became part of the Massachusetts Constitution.

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<sup>1</sup> While reviewing Concord's Environmental Notification Form, the Secretary of the Executive Office of Energy and Environmental Affairs ruled, in its February 12, 2016 Certificate, that "Supplemental information provided during MEPA review indicates that **the land is protected by Article 97 of the Amendments to the Constitution of the Commonwealth.**" (p. 5)

It should first be noted that Concord claims that they acquired lands around Nagog Pond for protection of a public water supply, and that the full-service water treatment plant is consistent with that purpose and is therefore exempt from Article 97. However, the 1974 Attorney General ruling expressly prevents that interpretation of Article 97. The Attorney General stated as follows:

“It may be helpful to note how Article 97 is to be read with the so-called doctrine of ‘prior public use,’ application of which also turns on changes in use. That doctrine holds that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion. ... however, in circumstances which cannot be characterized as a disposition – that is, when a transfer or change in physical or legal control does not occur. A change in use within a governmental agency or within a political subdivision would serve as an apt example. Within any agency or political subdivision any land, easement or interest therein, **if originally taken or acquired for the purposes stated in Article 97, may not be ‘used for other purposes’ without the requisite two-thirds role-call vote of each branch of the Legislature.**” (Note: The entirety of the Attorney General opinion is attached).<sup>2</sup>

Concord changed the use of the land around Nagog Pond between 1994 and 1996 when they constructed the ozone treatment plant at the site. This is in direct violation of the Attorney General interpretation of Article 97 as it applies to a change in use of open space to another use. The open space land, which protected Nagog Pond, was cleared, with blasting to remove ledge, and a driveway, parking lot, fenced-in area, and an ozone disinfection plant built – all without Article 97 being complied with. These activities were serious violations not just of a law – but of the Commonwealth’s Constitution.

It is not relevant that Acton did not know about Article 97 at that time, and inadvertently approved the project. Concord has consistently had highly paid counsel and, as shown through the statements in the 2013 Nagog Pond Watershed and Solar Feasibility Study, has known for a long time that Article 97 applies to the treatment plant work being performed at the Nagog Pond site. In fact, Concord’s own Feasibility Study cautioned that compliance with Article 97 was time-consuming and lengthy, and encouraged Concord to begin Article 97 proceedings early because it “could take several years.” Concord has chosen to disregard this recommendation – made by its present Special Environmental Counsel’s very reputable law firm.

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<sup>2</sup> Boston College Environmental Affairs Law Review, Volume 3, Issue 3, Article 6, Page 504 (1/1/1974).

Other issues of first impression are which town needs to hold, and pass by a two-thirds majority, the town meeting vote to approve this project – the host community (Acton) or the applicant's community (Concord), or possibly both communities. In addition, the issue of whether the change in use from a simple ozone treatment facility to a full-scale water treatment plant with many chemical treatment processes also necessitates Article 97 approval. **We urge you to request an Attorney General ruling for each of these issues.**

With regard to the proposal that the Selectmen will consider on July 18<sup>th</sup> (in whatever form that is – we are waiting for Concord's revised proposal), any newly proposed clearing – even if it encompasses cutting down one single tree – must first be approved in accordance with the provisions of Article 97 of the Commonwealth's Constitution. Concord's Feasibility Study states as follows: "Concord's watershed holdings are public lands presumably acquired for protection of the Nagog Pond water resource ... As such, the ... alteration of the lands requires analysis and compliance" with Article 97. It is our position that even widening the driveway to the site is expanding its size, and therefore requires compliance with Article 97. Any expansion of the site, no matter how limited in scope, requires application of Article 97. Therefore, before Acton's Board of Selectmen act on any proposal from Concord that expands the present facility in any way, we urge you to first require that Concord comply with Article 97.

#### Environmental Impact Report Requirement

On February 12, 2016, the Secretary of the Executive Office of Energy and Environmental Affairs issued a Certificate that mandated that Concord prepare a mandatory Environmental Impact Report (EIR). This process includes preparation of a Draft EIR (DEIR), followed by a 30-day public comment period, after which the state weighs in. Based on information currently available, Concord has not yet submitted its DEIR to the state. Given the late date, the required period for public comment, and the time that may be needed for the state to finalize its actions, holding a hearing on July 18<sup>th</sup> may be problematic. If such a hearing were held, Acton's Selectman would be reviewing a project that could well change when it takes into account public comments and the state review of Concord's DEIR. We urge Acton's Selectmen to contact Concord and request an extension until the DEIR has been submitted, commented upon, and reviewed/approved by the Massachusetts Environmental Policy Act (MEPA) Office.

#### Variance

In February of this year, Carolyn Kiely submitted a written recommendation to you indicating that a variance is needed before the Selectmen act upon the special permit requests for Nagog Pond. This letter reiterates those recommendations. When Concord was going through the permitting process for the original ozone disinfection facility, they started by obtaining a variance from the Acton Zoning

Board of Appeals. In order for the variance to be effective, it had to be recorded with the Registry of Deeds. The recording of this variance is in question, and therefore the original variance could possibly not have become legally effective. Because a variance was issued for this project, any change in use at the site requires a modification of the existing variance – which necessitates that this project be reviewed first by the Zoning Board of Appeals before Acton’s Selectmen act upon the request for special permits. In this case, Concord seeks to bypass the process for obtaining a variance.

For your convenience, here is the information that Carolyn Kiely provided to you in a letter dated February 4, 2016:

“Case law establishes clearly that, when a building is originally permitted under a variance, it can not then only use the special permit process for future expansion. The leading case on this issue<sup>3</sup> decides as follows:

“The statutory criteria for a variance set out in GL c. 40A, Section 10, are demanding, and variances are difficult to obtain...By comparison, the special permit power presupposes the allowance of certain uses, but only with the action of the local permit granting authority...In view of the different approaches to the grant of a variance and a special permit, the former grudging and restricted, the latter anticipated and flexible, we do not think the Legislature intended in G.L. c. 40A, Section 6, to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit.”

AND

“..it would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use.”

Given established case law, I believe that the proper legal method of permitting the proposed Nagog Pond facilities is through the variance process initially. The facility exists at the site because of a variance, and therefore the variance should be legally amended before the special permits are acted upon by the Board of Selectmen. I urge you to obtain special counsel fluent in zoning law and have this issue thoroughly examined before you proceed on February 22<sup>nd</sup>.”

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<sup>3</sup> Cesar A. Mendes v. Board of Appeals of Barnstable & Others, 28 Mass. App. Ct. 527 (1990) – referencing other cases that decided the issue the same way.

In our opinion, these arguments hold true today. We urge you to require that Concord first go through the variance amendment process with the Zoning Board of Appeals, just as they did when seeking permits for the original ozone facility. And Concord should be required to prove that they properly recorded the original variance with the Registry of Deeds, as required under state law, in order for the original variance to become effective. An after-the-fact recording (i.e., in 2016) should be ruled ineffective to perfect the variance granted in 1994.

Conclusion

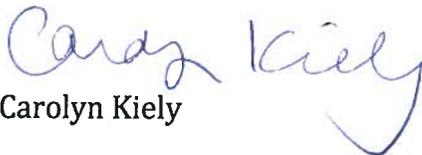
The July 18<sup>th</sup> public hearing encompasses many complex, legal issues that should be fully examined and implemented prior to the Selectmen acting on the special permit applications before them. We urge you and the Selectmen to actively investigate and act upon each of the issues that we have raised in advance of the July 18<sup>th</sup> public hearing on the Concord Water Plant proposal before you. Thank you for considering these comments.

Sincerely,

On Behalf of the Quail Ridge Residents:



Barry Elkin



Carolyn Kiely



Robert Sekuler

cc: Senator James Eldridge

Attachment: Opinion of the Attorney General Regarding the Disposition of Public Lands Under the "Clean Environment" Amendment to the Constitution of Massachusetts

1-1-1974

## Opinion of the Attorney General Regarding the Disposition of Public Lands Under the “Clean Environment” Amendment to the Constitution of Massachusetts

Robert H. Quinn

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OPINION OF THE ATTORNEY GENERAL REGARDING  
THE DISPOSITION OF PUBLIC LANDS UNDER THE  
"CLEAN ENVIRONMENT" AMENDMENT TO THE  
CONSTITUTION OF MASSACHUSETTS

*By Robert H. Quinn\**

In November, 1972, the voters of Massachusetts approved an amendment to the state constitution which established the right to a clean environment for every citizen.<sup>1</sup> Subsequently, the Massachusetts House of Representatives addressed several questions to me, as Attorney General, regarding those provisions in the amendment (Article 97) requiring that acts concerning the disposition of, or certain changes in, the use of public lands be approved by a two-thirds roll call vote of each branch of the Legislature.<sup>2</sup>

The questions were as follows.

1. Do the provisions of the last paragraph of Article XCVII of the Articles of the Amendments to the Constitution requiring a two-thirds vote by each branch of the general court, before a change can be made in the use or disposition of land and easements acquired for a purpose described in said Article, apply to all land and easements held for such a purpose regardless of the date of acquisition or, in the alternative, do they apply only to land and easements acquired for such purposes after the effective date of said Article of Amendments?

2. Does the disposition or change of use of land held for park purposes requires a two thirds vote, to be taken by the yeas and nays of each branch of the general court, as provided in Article XCVII of the Articles of the Amendments to the Constitution, or would a majority vote of each branch be sufficient for approval?

3. Do the words "natural resources" as used in the first paragraph of Article XCVII of the Articles of the Amendments to the Constitution include ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds; wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits, as formerly set out in the definition of

the words "natural resources" in paragraph two of section one of chapter twenty-one of the General Laws (of Massachusetts)?

4. Do the provisions of the fourth paragraph of Article XCVII of the Articles of the Amendments to the Constitution apply to any or all of the following means of disposition or change in use of land held for a public purpose: conveyance of land; long-term lease for inconsistent use; short-term lease, two years or less, for an inconsistent use; the granting or giving of an easement for an inconsistent use; or any agency action with regard to land under its control if an inconsistent use?

The proposed amendment to the Constitution was agreed to by the majority of the members of the Senate and the House of Representatives, in joint session, on August 5, 1969 and again on May 12, 1971, and became part of the Constitution by approval by the voters at the state election next following, on November 7, 1972. The full text of Article 97 is as follows:

ART. XCVII. Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof:—The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such 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.

#### I. QUESTION ONE

The first question of the House of Representatives asks, in effect, whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97, November 7, 1972. For the reasons below, I answer in the affirmative.

The Legislature did not propose this Amendment nor was it approved by the voting public without a sense of history nor void of a

purpose worthy of a constitutional amendment. Examination of our constitutional history firmly establishes that the two-thirds roll-call vote requirement applies to public lands wherever taken or acquired.

Specifically, Article 97 annuls Article 49, in effect since November 5, 1918. Under that Article the Legislature was empowered to provide for the taking or acquisition of lands, easements and interests therein "for the purpose of securing and promoting the proper conservation, development, utilization and control" [of] "agricultural, mineral, forest, water and other natural resources of the commonwealth." Although inclusion of the word "air" in this catalogue as it appears in Article 97 may make this new article slightly broader than the supplanted Article 49 as to purposes for which the Legislature may provide for the taking or acquisition of land, it is clear that land taken or acquired under the earlier Article over nearly fifty years is now to be subjected to the two-thirds vote requirement for changes in use or other dispositions. Indeed all land whenever taken or acquired is now subject to the new voting requirement. The original draftsmen of the Massachusetts Constitution prudently included in Article 10 of the Declaration of Rights a broad constitutional basis for the taking of private land to be applied to public uses, without limitation on what are "public uses." By way of acts of the Legislature as well as through generous gifts of many citizens, the Commonwealth and Massachusetts cities and towns have acquired parkland and reservations. To claim that new Article 97 does not give the same care and protection for all these existing public lands as for lands acquired by the foresight of future legislators or the generosity of future citizens would ignore public purposes deemed important in Massachusetts laws since the beginning of the Commonwealth.

Moreover, if this amendment were only prospective in effect, it would be virtually meaningless. In Massachusetts, with a life commencing in the early 1600s and already cramped for land, it is most unlikely that the Legislature and the voters would choose to protect only those acres hereafter added to the many thousands already held for public purposes. The comment of the Massachusetts Supreme Judicial Court concerning the earlier Article 49 is applicable here: "It must be presumed that the convention proposed and the people approved and ratified the Forty-ninth Amendment with reference to the practical affairs of mankind and not as a mere theoretical announcement."<sup>3</sup>

## II. QUESTION TWO

In its second question the House asks, in effect, whether the two-thirds roll-call vote requirement applies to land held for park purposes, as the term "park" is generally understood. My answer is in the affirmative, for the reasons below.

One major purpose of Article 97 is to ensure that the people shall have "the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment." The fulfillment of these rights is uniquely carried out by parkland acquisition. As the Supreme Judicial Court has declared:

The healthful and civilizing influence of parks in or near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to the public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment.<sup>4</sup>

A second major purpose of Article 97 is "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.

This question as to parks raises a further practical matter in regard to implementing Article 97 which warrants further discussion. The reasons the Legislature employs to explain its actions can be of countless levels of specificity or generality and land might conceivably be acquired for general recreation purposes or for very explicit uses such as the playing of baseball, the flying of kites, for evening strolls or for Sunday afternoon concerts. Undoubtedly, to the average man, such land would serve as a park but at even a more legalistic level it clearly can also be observed that such land was acquired, in the language of Article 97, because it was a "resource" which could best be "utilized" and "developed" by being "conserved" within a park. But it is not surprising that most land taken or acquired for public use is acquired under the specific terms of statutes which may not match verbatim the more general terms found in Article 10 of the Declaration of Rights of the Constitution or in Articles 39, 43, 49, 51 and 97 of the Amendments. Land originally acquired for limited or specific public purposes is thus not to

be excluded from the operation of the two-thirds roll-call vote requirement for lack of express invocation of the more general purposes of Article 97. Rather the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in "public purpose", changed from "public uses" appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.

Thus, all land, easements and interests therein are covered by Article 97 if taken or acquired for "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources" as these terms are broadly construed. While small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify. Given the spirit of the Amendment and the duty of the Legislature, it would seem prudent to classify lands and easements taken or acquired for specific purposes not found verbatim in Article 97 as nevertheless subject to Article 97 if reasonable doubt exists concerning their actual status.

### III. QUESTION THREE

The third question of the House asks, in effect, how the words "natural resources", as appearing in Article 97, are to be defined.

Several statutes offer assistance to the Legislature, all without limiting what are "natural resources". Massachusetts General Laws (M.G.L.) ch. 21, §1 defines "natural resources", for the purposes of Department of Natural Resources jurisdiction, as including:

ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds, wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits.

In addition, M.G.L. ch. 12, §11D, establishing a Division of Environmental Protection under the Attorney General, uses the words "natural resources" in such a way as to include air, water, "rivers, streams, flood plains, lakes, ponds or other surface or subsurface water resources" and "seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks or historic districts or sites." M.G.L. ch. 214, §10A, the so-called citizen-suit statute, con-

tains a recitation substantially identical. To these lists Article 97 would add only "agricultural" resources.

It is safe to say, as a consequence, that the term "natural resources" should be taken to signify *at least* these catalogued items. Public lands taken or acquired to conserve, develop or utilize any of these resources are thus subject to Article 97.

It is apparent that the Legislature has never sought to apply any limitation to the term "natural resources" but instead has viewed the term as an evolving one which should be expanded according to the needs of the time and the term was originally inserted in our Constitution for just that reason.<sup>5</sup> The resources enumerated above should, therefore, be regarded as examples of and not delimiting what are "natural resources."

#### IV. QUESTION FOUR

The fourth question of the House requires a determination of the scope of activities which is intended by the words: "shall not be used for other purposes or otherwise disposed of."

The term "disposed" has never developed a precise legal meaning. As the Supreme Court has noted, "The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical signification."<sup>6</sup> The Supreme Court has indicated however, that "disposition" may include a lease.<sup>7</sup> Other cases on unrelated subjects suggest that in Massachusetts the word "dispose" can include all forms of transfer no matter how complete or incomplete.<sup>8</sup>

In this absence of precise legal meaning, *Webster's Third New International Dictionary* is helpful. "Dispose of" is defined as "to transfer into new hands or to the control of someone else." A change in physical or legal control would thus prove to be determinative.

I therefore conclude that the "dispositions" for which a two-thirds roll-call vote of each branch of the General Court is required include: transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, of lands, easements and interests therein originally taken or acquired for the purposes stated in Article 97, and transfers from public ownership to private. Outright conveyance, takings by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements and all means of transfer or change of legal or physical control are thereby covered, without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.

This interpretation affords a more objective test, and is more

easily applied, than "used for other purposes." Under Article 97 that standard must be applied by the Legislature, however, in circumstances which cannot be characterized as a disposition—that is, when a transfer or change in physical or legal control does not occur. A change of use within a governmental agency or within a political subdivision would serve as an apt example. Within any agency or political subdivision any land, easement or interest therein, if originally taken or acquired for the purposes stated in Article 97, may not be "used for other purposes" without the requisite two-thirds roll-call vote of each branch of the Legislature.

It may be helpful to note how Article 97 is to be read with the so-called doctrine of "prior public use," application of which also turns on changes in use. That doctrine holds that

public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion.<sup>9</sup>

The doctrine of "prior public use" is derived from many early cases which establish its applicability to transfers between corporations granted limited powers of the Commonwealth, such as eminent domain, and authority over water and railroad easements.<sup>10</sup> The doctrine was also applied at an early date to transfers between such corporations and municipalities and counties.<sup>11</sup>

The doctrine of "prior public use" has in more modern times been applied to the following transfers between governmental agencies or political subdivisions: (1) a transfer between state agencies;<sup>12</sup> (2) transfers between a state agency and a special state authority;<sup>13</sup> (3) a transfer between a special state commission and special state authority;<sup>14</sup> (4) transfers between municipalities;<sup>15</sup> (5) transfers between state agencies and municipalities;<sup>16</sup> (6) a transfer between a special state authority and a municipality;<sup>17</sup> (7) a transfer between a state agency and a county;<sup>18</sup> and (8) transfers between counties and municipalities.<sup>19</sup>

The doctrine has also been applied to the following changes of use of public lands within governmental agencies or within political subdivisions: (1) intra-agency uses;<sup>20</sup> (2) intramunicipality uses;<sup>21</sup> and (3) intracounty uses.<sup>22</sup> The doctrine may also possibly reach *de facto* changes in use,<sup>23</sup> and may be available to protect reservation land held by charitable corporations.<sup>24</sup> In addition to these extensions of the doctrine, special statutory protections, codifying the doctrine of "prior public use", are afforded local parkland and commons<sup>25</sup> and public cemeteries.<sup>26</sup>

This is the background against which Article 97 was approved.

The doctrine of "prior public use" requires legislative action, by majority vote, to divert land from one public use to another inconsistent public use. As the scope of the doctrine discussed above indicates, the doctrine requires an act of the Legislature regardless of whether the land in question is held by the Commonwealth, its agencies, special authorities and commissions, political subdivisions or by certain corporations granted powers of the sovereign. And the doctrine applies regardless of whether the public use for which the land in question is held in a conservation purpose.

As to all such changes in use previously covered by the doctrine of "prior public use" the new Article 97 will only change the requisite vote of the Legislature from majority to two-thirds. Article 97 is designed to supplement, not supplant, the doctrine of "prior public use."

Article 97 will be of special significance, though, where the doctrine of "prior public use" has not yet been applied. For instance, legislation and a two-thirds roll-call vote of the Legislature will now, for the first time, be required even where a transfer of land or easement between governmental agencies, between political subdivisions, or between levels of government is made with no change in the use of the land, and even where a transfer is from public control to private.

Whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, it is recommended that the legislation meet the high standard of specificity set by the Supreme Judicial Court in a case involving the doctrine of "prior public use":

We think it is essential to the expression of plain and explicit authority to divert [public lands] to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use.<sup>27</sup>

Each piece of legislation which may be subject to Article 97 should, in addition, be drawn so as to identify the parties to any planned disposition of the land.

#### CONCLUSIONS

Article 97 of the Amendments to the Massachusetts Constitution establishes the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, his-

toric and esthetic qualities of their environment. The protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is declared to be a public purpose. Lands, easements and interests therein taken or acquired for such public purposes are not to be disposed of or used for other purposes except by two-thirds roll-call vote of both the Massachusetts Senate and House of Representatives.

Answering the questions of the House of Representatives, I advise that the two-thirds roll-call vote requirement of Article 97 applies to all lands, easements and interests therein *whenever* taken or acquired for Article 97 conservation, development or utilization purposes, even prior to the effective date of Article 97, November 7, 1972. The Amendment applies to land, easements and interests therein held by the Commonwealth, or any of its agencies or political subdivisions, such as cities, towns and counties.

I advise that "natural resources" given protection under Article 97 would include at the very least, without limitation: air, water, wetlands, rivers, streams, lakes, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, sea and fresh water fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites.

I advise that Article 97 requires a two-thirds roll-call vote of the Massachusetts Senate and House of Representatives for all transfers between agencies of government and between political subdivisions of lands, easements or interests therein originally taken or acquired for Article 97 purposes, and transfers of such land, easements or interests therein from one level of government to another, or from public ownership to private. This is so without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes. I so advise because such transfers are "dispositions" under the terms of the new Amendment, and because "disposition" includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting or taking of easements.

I also advise that *intra*-agency changes in uses of land from Article 97 purposes, although they are not "dispositions", are similarly

subject to the two-thirds roll-call vote requirement.

Read against the background of the existing doctrine of "prior public use", Article 97 will thus for the first time require legislation and a special vote of the Legislature even where a transfer of land between governmental agencies, between political subdivisions or between levels of government results in no change in the use of land, and even where a transfer is made from public control to private. I suggest that whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use", or both, the very highest standard of specificity should be required of the draftsmen to assure that legislation clearly identifies the locus, the present public uses of the land, the new uses contemplated, if any, and the parties to any contemplated "disposition" of the land.

In short, Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development or utilization of natural resources. If land is misused a portion of the public's natural resources may be forever lost, and no less so than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond existing law and much to the benefit of our natural resources and to the credit of our citizens.

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FOOTNOTES

\*Attorney General, Commonwealth of Massachusetts.

<sup>1</sup>Article 97 of the Articles of Amendment, Constitution of Massachusetts.

<sup>2</sup>Mass. H. 6085 (1973); this article is an edited version of the letter which I sent to Hon. David M. Bartley, Speaker of the House of Representatives, on June 6, 1973, in response to those questions.

<sup>3</sup>Opinion of the Justices, 237 Mass. 598, 608 (1921).

<sup>4</sup>Higginson v. Treasurer and School House Commissioners of Boston, 212 Mass. 583, 590 (1912); *see also*, Higginson v. Inhabitants of Nahant, 11 Allen 530, 536 (Mass. 1866).

<sup>5</sup>*See*, DEBATE OF THE CONSTITUTIONAL CONVENTION 1917-1918, at 595.

<sup>6</sup>Phelps v. Harris, 101 U.S. 370, 381 (1880).

<sup>7</sup>U.S. v. Gratiot, 39 U.S. 526 (1840).

<sup>8</sup>Rogers v. Goodwin, 2 Mass. 475 (1807); Woodbridge v. Jones, 183 Mass. 549 (1903); Lord v. Smith, 293 Mass. 555 (1936).

<sup>9</sup>Robbins v. Department of Public Works, 355 Mass. 328, 330 (1969), and cases there cited.

<sup>10</sup>See, e.g., *Old Colony Railroad Company v. Framingham Water Company*, 153 Mass. 561 (1891); *Boston Water Power Company v. Boston and Worcester Railroad Corporation*, 23 Pick. 360 (Mass. 1839); *Boston and Maine Railroad v. Lowell and Lawrence Railroad Company*, 124 Mass. 368 (1877); *Eastern Railroad Company v. Boston and Maine Railroad*, 111 Mass. 125 (1872); and *Housatonic Railroad Company v. Lee and Hudson Railroad Company*, 118 Mass. 391 (1875).

<sup>11</sup>See, e.g., *Boston and Albany Railroad Company v. City Council of Cambridge*, 166 Mass. 224 (1896) (eminent domain taking of railroad land); *Eldredge v. County Commissioners of Norfolk*, 185 Mass. 186 (1904) (eminent domain taking of railroad easement); *West Boston Bridge v. County Commissioners of Middlesex*, 10 Pick. 270 (Mass. 1830) (eminent domain taking of turnpike land); and *Inhabitants of Springfield v. Connecticut River Railroad Co.*, 4 Cush. 63 (1849) (eminent domain taking of a public way).

<sup>12</sup>*Robbins v. Department of Public Works*, 355 Mass. 328 (1969) (eminent domain taking of Metropolitan District Commission (MDC) wetlands).

<sup>13</sup>*Commonwealth v. Massachusetts Turnpike Authority*, 346 Mass. 250 (1963) (eminent domain taking of MDC land); see *Loschi v. Massachusetts Port Authority*, 354 Mass. 53 (1968) (eminent domain taking of parkland).

<sup>14</sup>*Gould v. Greylock Reservation Commission*, 350 Mass. 410 (1966) (lease of portions of Mount Greylock).

<sup>15</sup>*City of Boston v. Inhabitants of Brookline*, 156 Mass. 172 (1892) (eminent domain taking of a water easement); *Inhabitants of Quincy v. City of Boston*, 148 Mass. 389 (1889) (eminent domain taking of a public way).

<sup>16</sup>*Town of Brookline v. Metropolitan District Commission*, 357 Mass. 435 (1970) (eminent domain taking of parkland); *City of Boston v. Massachusetts Port Authority*, 356 Mass. 741 (1970) (eminent domain taking of a park).

<sup>17</sup>*Appleton v. Massachusetts Parking Authority*, 340 Mass. 303 (1960) (eminent domain, Boston Common).

<sup>18</sup>*Abbott v. Commissioners of Dukes County*, 357 Mass. 784 (1970) (Department of Natural Resources grant of navigation easement).

<sup>19</sup>*Town of Needham v. County Commissioners of Norfolk*, 324 Mass. 293 (1949) (eminent domain taking of common and park lands); *Inhabitants of Easthampton v. County Commissioners of Hampshire*, 154 Mass. 424 (1891) (eminent domain taking of school lot).

<sup>20</sup>*Sacco v. Department of Public Works*, 352 Mass. 670 (1967) (filling of a portion of a Great Pond).

<sup>21</sup>*Higginson v. Treasurer and School House Commissioners of Boston*, 212 Mass. 583 (1912) (erecting a building on a public park); *see*, *Kean v. Stetson*, 5 Pick. 492 (1827) (road built adjoining a river).

<sup>22</sup>*Bauer v. Mitchell*, 247 Mass. 522 (1924) (discharging sewage upon school land).

<sup>23</sup>*See, e.g., Pilgrim Real Estate Inc. v. Superintendent of Police of Boston*, 330 Mass. 250 (1953) (parking of cars on park area).

<sup>24</sup>*See, e.g., Trustees of Reservations v. Town of Stockbridge*, 348 Mass. 511 (1965) (eminent domain).

<sup>25</sup>M.G.L. ch. 45.

<sup>26</sup>M.G.L. ch. 114, §§17, 41; as to changes in use of public lands held by municipalities or counties generally *see*, M.G.L. ch. 40 §15A; ch. 214, §3(11).

<sup>27</sup>*Robbins v. Department of Public Works*, 355 Mass. 328, 331 (1969).