



TOWN OF BARNSTABLE

OFFICE OF TOWN ATTORNEY

367 Main Street
Hyannis, Massachusetts 02601-3907
Phone 508-862-4620
FAX 508-862-4782

KAREN L. NOBER, Town Attorney
THOMAS J. LaROSA, First Assistant Town Attorney
KATHLEEN CONNOLLY, Assistant Town Attorney
ALLISON M. COGLIANO, Assistant Town Attorney

karen.nober@town.barnstable.ma.us
thomas.larosa@town.barnstable.ma.us
kathleen.connolly@town.barnstable.ma.us
allison.cogliano@town.barnstable.ma.us

January 22, 2025

Via Electronic Mail to Michael.gendron2@mass.gov

Executive Office of Energy and Environmental Affairs
Attn: Michael Gendron
100 Cambridge Street, Suite 900
Boston, Massachusetts 02114

Re: Written comments on proposed EEA regulations, 301 CMR 52.00

Dear Mr. Gendron:

I write on behalf of the Town of Barnstable (“Town”) to submit written comments to the Executive Office of Energy and Environmental Affairs (“EEA”) regarding the proposed regulations, 301 CMR 52.00, which would implement the so-called Public Lands Preservation Act (a/k/a Open Space Act) codified at G.L. c. 3, § 5A. The Town appreciates the opportunity to attend the public hearings, testify and comment on the proposed regulations.

Before commenting on the proposed regulations, we respectfully suggest that EEA consider the notification process for future rulemakings. The Town did not hear of the proposed rulemaking directly from EEA. When we learned of the scheduled December 17, 2024 public hearing, we could not identify a press release from EEA or any other information concerning the proposed regulations other than the draft regulations included among various guidance documents that were located on a web page three levels down from EEA’s homepage. Even today, the EEA webpage notifying the public of the public hearing and how to submit comments on the proposed regulation does not appear linked to the EEA “Article 97 & An Act Preserving Open Space in the Commonwealth (M.G.L. c. 3, § 5A)” webpage.¹ It is only the draft regulations that can be found there. Instead, we needed to turn to Google to find the unlinked EEA webpage to confirm the updated January 22 comment deadline.² We found the public hearings to be professional and well run. However, given the importance of these regulations, we think a more robust notification process would have been appropriate for these regulations and for any future proposed regulations to better inform cities and towns and their residents, so that they may

¹ <https://www.mass.gov/info-details/article-97-an-act-preserving-open-space-in-the-commonwealth-mgl-c-3-ss-5a>

² <https://www.mass.gov/event/december-17-2024-notice-of-public-hearing-opportunity-to-submit-comments-12-17-2024>

effectively participate in any public hearing and the process for commenting on a proposed rulemaking.

As part of the Town's written comments, attached please find suggested edits to the proposed regulations shown in redline format. Companion to these suggested edits, the Town offers the following comments on specific sections of the proposed regulations:

Section 2.

We proposed an edit to the definition of Proponent to clarify and confirm that the term includes any private entity and also proposed removing duplicative language concerning public entities that appears already in the definition of Public Entity. The proposed edits to the definition of Public Entity are intended to confirm that the term includes any potential non-federal public entity. The proposed edit to the definition of Replacement Land would make explicit that the term includes a conservation restriction with the benefit of section 32 of Chapter 184 of the General Laws. We used the word "benefit" because that nomenclature is used in other sections of Chapter 184, such as sections 23 and 26.

Sections 3 and 4.

Section 3 of the draft regulations addresses pre-submission consultation to ensure that such consultation is required to take place with the public entity that holds the Article 97 Interest. Section 4 addresses specific requirements that the proponent must take, such as notification, conducting the alternatives analysis and mitigating the Article 97 Action with replacement land or in lieu funding. The draft regulations specify that these actions only need to occur prior to taking an Article 97 Action. However, that seems far too late in the process. As you know, and as enshrined in the State Constitution, the Article 97 Action cannot be taken until the Legislature has authorized such action through legislation receiving a two-thirds roll-call vote of both branches of the Legislature. Accordingly, pre-submission consultation and requirements under sections 3 and 4 should take place before any bill is filed with the Legislature, and we proposed edits that address that concern. That way, the Legislature can be informed by the consultation that occurred with EEA and the public entity that owns or controls the Article 97 Interest, including whether the public entity supports the proposed Article 97 Action and whether it believes the bill should move forward. Likewise, the Legislature will be able to address the alternatives analysis and the replacement land or in lieu funding in the bill that would authorize the Article 97 Action.

Section 5.

Section 5 requires notification to the public and the Secretary of the proposed Article 97 Action. However, notification to the public entity that owns or controls the Article 97 Interest is not specifically required. This oversight needs to be corrected. Section 5 seems to be written as if the proponent and public entity are one and the same, and very often that is not the case. A public entity that owns or controls the involved Article 97 Interest, such as the Town, needs to be informed and consulted throughout the process. If a Town's Article 97 Interest is part of a

proposal for an Article 97 Action, the Town, as the owner of that property, more than any other involved party, must be at the table for discussions and decisions involving its land.

Subsection 1 of section 5, as proposed, would have the public entity, such as the Town, host and make available the proponent's public notice and alternatives analysis. The regulations do not describe other options for notice, other than posting on the public entity's website. The Town believes this is entirely inappropriate, particularly when the Town is not the proponent or does not support the proposed Article 97 Action. Further, the public would be far better served with a single location for searching and inspecting all project information, rather than having the information fragmented among hundreds of state, regional and local websites. The Town believes this would be accomplished best by EEA establishing a single portal on its website for access and review by the public of the most current project information. The Town's proposed redline would address these concerns.

Section 6.

Among the requirements in section 6 for the alternatives analysis, the proponent, if not the public entity with care and control of the land, would need to summarize the proponent's discussions with the public entity. The Town believes the proponent also should be required to share their proposed submission, including the summary and alternatives analysis, with the public entity for its review prior to submission to the Secretary, so that the public entity can choose whether to provide comment before submission to the Secretary. Further, the public entity's position on the alternatives analysis, in addition to its position on the Article 97 Action, should be included in the proponent's submission.

Subsection 3, as proposed, would require the proponent to include within the alternatives analysis parcels that are owned by the public entity. For a proposed Article 97 Action involving municipal land, the Town believes that this requirement would be appropriate only if the Town is the proponent. If the Town is not the proponent, then the proponent should not be presumptuous and include the Town's property for consideration as replacement land where either the Town has not agreed to its property being a candidate for the proponent's mitigation or if the Town opposes the proponent's project. The Town also proposed an edit to the "affirmative vote" requirement where, for a municipality, the required vote must come from the local legislative body.

Section 7.

In our redline we propose two technical edits in subsection 2(d), one of which recommends using the word "benefit" for the same reason as covered in our comment above in section 2.

We also proposed several edits to subsection 3. We have no concern with an appraisal prepared by the Division of Capital Asset Management and Maintenance being considered presumptively valid for state-owned property, but that should not be the case for municipal property. Further, when it comes to municipal property, the Town's consent should be required for the preparation

of an appraisal involving its land. It would be inappropriate for an appraiser to access Town property without the Town's consent or to prepare an appraisal without consulting the Town.

Subsection 4 of section 7 proposes that certain easements, including some subsurface easements, would be deemed to affect zero acres and not require replacement land. We believe this proposal is not permitted under the statute. Whether a temporary or subsurface easement should be the subject of a replacement land requirement seems to be fair game for a policy discussion. But that is a decision for the Legislature, and implementing the proposal would require the Legislature to amend the statute. The statute requires either replacement land or in lieu funding where the Secretary makes specific findings and files those with the Legislature. The statute makes no exception other than in G.L. c. 3, § 5(a), where the Secretary is allowed to waive or modify the replacement land requirement in 2 specific instances:

First, where the disposition involves only the transfer of legal control between public entities and does not involve any other change of use; or

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

The waiver of replacement land, as proposed, is inconsistent with the statute because it goes beyond these two exceptions and does not limit transfers involving a private entity to only those that are less than 2,500 square feet in area and serve a significant public interest. The Town did not propose any redline that fully corresponds with these comments but instead inserted a proposed subsection 4(e) that would at least make the section consistent with the statute.

Section 9.

Subsections 1 and 2 of section 9 seem to assume that the proponent and the public entity are the same. As noted above, that often is not the case. If a proponent plans on proposing in lieu funding, the public entity that holds the Article 97 Interest, if not the proponent, should be the gatekeeper of the in lieu funding request to the Secretary. If the public entity does not support the project or will not agree to meeting the conditions for in lieu funding, the proponent should not be permitted to propose in lieu funding to EEA. Likewise, the proponent, if not the public entity, should not be speaking for the public entity regarding the account in which the public entity will deposit funds or how those funds will be used by the public entity. The proposed redline edits address these concerns.

In subsection 3, the proposed regulation requires that the alternatives analysis be the subject of a public notice and comment. We agree with that proposal; however, the regulations do not address who is responsible for public notice and comment. We do not believe it would be appropriate if only the proponent is responsible for that process, especially if the proponent is not a public entity. The Town proposes to address this concern by affirmatively stating a minimum requirement that EEA subject the alternatives analysis to public notice and comment.

In subsection 4, we agree that the in lieu funding should not be less than 110% of the fair market value or value in use. The Town believes that entire sum should be spent on replacement land. However, a public entity will have due diligence costs associated with acquiring the replacement, including a title examination, an appraisal and, in some cases, a survey and/or an environmental site assessment. These costs should not be deducted from the in lieu funding, nor should the public entity be expected to cover these costs from the public treasury. Accordingly, the Town proposes in its redline that the proponent also provide to the public entity the actual or reasonably anticipated due diligence costs.

Finally, the Town believes that the regulations should have specific timelines for action by EEA. As currently drafted, the regulations contain no timeframes in which actions must be taken. Seeking the Legislature's approval of an Article 97 Action involves a significant investment of time and resources. The Town would not pursue such action unless it involved an important public project and was thoroughly considered by Town departments and the Town legislative body.

Municipalities need certainty in the process so that proper planning, permitting, local appropriations, contracting and expenditures may timely occur. It is important for a municipality to understand the timing of the process under the regulations and, after that has occurred, when a Home Rule petition may be filed with the Legislature to authorize the Article 97 Action. Likewise, if in-lieu funding is involved, the Town will need dependable timing under the regulations in connection with securing replacement land. The local legislative body must approve any replacement land transaction and appropriate the involved funding from the account in which the in lieu funding is held. These local actions take time. Further, sellers of replacement land will most likely seek assurances on a closing deadline. The Town believes timeframes in the regulations are needed to avoid the challenges with open-ended uncertainty in land protection transactions. Accordingly, in subsection 4(c), the Town proposes in its redline a requirement that the Secretary make a determination and provide a final decision on the proposed replacement land within 30 days from receipt of a reasonably complete request from the public entity. Absent certainty under the regulations, it will be a daunting task for municipalities to successfully close replacement land transactions.

Section 10.

Regarding the waiver process, the Town proposes the same edits here that it proposed for section 5 with the proponent providing a copy to the public entity at the same time it files its request for a waiver with the Secretary, and that EEA post the request on its website.

Finally, separate from specific comments on the draft regulation, we note that there was much comment during the first public hearing regarding the need for enforcement and consequences for a lack of compliance with the regulations. Several commenters stressed the need for a municipality to be held accountable for any noncompliance with an Article 97 Action in their city or town. We believe compliance is important for all public entities, not just municipalities. And, it is worth mentioning again that often the municipality is not the proponent. Fairness requires that the municipality should only be responsible for a lack of compliance where the municipality is either the proponent or has accepted and not properly expended in lieu funding.

Apart from that, the municipality should not be responsible for the proponent's failure to comply with the regulations.

The Town appreciates the opportunity to comment on the draft regulations and looks forward to EEA's response to this and the other public comment it has received.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. LaRosa". The signature is fluid and cursive, with the first name being the most prominent.

Thomas J. LaRosa
First Assistant Town Attorney

cc: Mark S. Ells, Town Manager
Karen L. Nober, Town Attorney

Attachment

301 CMR XX.00: Change in Use or Disposition of Article 97 Interests

Section

- XX.01: Purpose and Applicability
- XX.02: Definitions
- XX.03: Pre-submission Consultation
- XX.04: Requirements
- XX.05: Notification
- XX.06: Alternatives Analysis
- XX.07: Replacement Land
- XX.08: Determination of Natural Resource Value
- XX.09: Funding In Lieu of Replacement Land
- XX.10: Waiver or Modification
- XX.11: Severability

XX.01: Purpose and Applicability

1. Purpose. Article 97 of the Amendments to the Massachusetts Constitution provides that any Article 97 Action must be approved by a two-thirds, roll call vote of each branch of the General Court. The General Court enacted requirements for Article 97 legislation in An Act Preserving Open Space in the Commonwealth, Chapter 274 of the Acts of 2022, M.G.L. c. 3, § 5A, which authorized the Secretary to issue regulations to implement the Act. 301 CMR XX.00 provides for administration and implementation of the Act by the Secretary and establishes a process and requirements for Public Entities and Proponents to satisfy the requirements of M.G.L. c. 3, § 5A.
2. Applicability. 301 CMR XX.00 is applicable to a Public Entity seeking legislative authorization for a Disposition or change in use of an Article 97 Interest subject to M.G.L. c. 3, § 5A and to Proponents seeking such authorization for an Article 97 Interest held by a Public Entity.

XX.02: Definitions.

The following words shall have the following meanings in 301 CMR XX.00 unless the content clearly indicates otherwise.

Alternatives Analysis means an analysis meeting the requirements of 301 CMR XX.06.

Article 97 means Article XCVII of the Amendments to the Constitution of the Commonwealth.

Article 97 Action means a Disposition or a change in use, of an Article 97 Interest subject to M.G.L. c. 3, § 5A and requiring legislative approval pursuant to Article 97.

1. The following are Article 97 Actions:
 - a. transfer or conveyance of an Article 97 Interest;
 - b. change in physical or legal control of ~~land~~ an Article 97 Interest, including care, custody and control, of an Article 97 Interest; or
 - c. change in use of land subject to Article 97.
2. An Article 97 Action does not include the issuance of a revocable permit or license of limited duration, provided that no interest in land is transferred to the permittee or licensee and the permit or license does not authorize a change in use or change in physical or legal control of the land.

Article 97 Interest means fee ownership, an easement, conservation restriction, agricultural preservation restriction or another ~~real property~~ interest in land that is held by a ~~p~~Public entity and is subject to Article 97.

Comparable Location means in the same geographic area, including where reasonably feasible, in the same census block or municipality, and serving substantially the same population as the land that is subject to the Article 97 Action.

Disposition means any conveyance, sale, lease, alienation, transfer, assignment, settlement, delivery, or other change in physical or legal control.

Environmental Justice Population has the meaning provided in M.G.L. c. 30, § 62.

In Lieu Funding means funding provided to acquire Replacement Land to mitigate for an Article 97 Action pursuant to 301 CMR XX.09.

Natural Resource Value means the benefit that land provides to the public for Article 97 purposes, including but not limited to clean air and water, agriculture, climate change mitigation, wildlife habitat, and recreation.

Proponent means the Public Entity or ~~party~~ person proposing an Article 97 Action. A proponent ~~may~~ shall include any individual, partnership, trust, firm, corporation, association and any other private entity, ~~commission, district, department, board, municipality, public or quasi-public agency or authority~~.

Public Entity means the Commonwealth, any agency, body politic and corporate, political subdivision, authority, board, bureau, commission, committee, council, county, department, division, institution, municipality, officer, quasi-public agency, public instrumentality or any subdivision thereof.

Replacement Land means a fee interest in land, an easement, a conservation restriction with the benefit of section 32 of Chapter 184 of the General Laws, or another real

property interest within the scope of Article 97 that is not already subject to Article 97 and is proposed to be taken for, acquired for, or dedicated to such purposes in perpetuity, and improved as necessary to provide for comparable use, as mitigation for an Article 97 Action.

Secretary means the Secretary of Energy and Environmental Affairs.

Value in Use means a method of valuation where the value of a property interest is established assuming a specific use, including, but not limited to, a method of valuation where the value of a property interest is increased by the intended use in relation to its surroundings by requiring an appraiser to consider a property's value not standing alone, but in the context of the land in question, the use to which the Proponent plans to put the Article 97 property, and the degree of advantage to the party benefiting from the Article 97 Action.

XX.03: Pre-submission consultation

1. Prior to the filing of any bill with the Legislature to authorize an Article 97 Action~~taking any Article 97 Action~~, a Proponent other than the ~~p~~Public ~~e~~Entity holding the Article 97 Interest, shall consult that ~~p~~Public ~~e~~Entity.
2. Prior to the filing of any bill with the Legislature to authorize~~taking any Article 97 Action~~, any Proponent may consult with the Secretary on any issues where clarification may be needed, including but not limited to:
 - a. whether land is subject to Article 97 and 301 CMR ~~XX.00~~;
 - b. whether a proposed project constitutes an Article 97 Action;
 - c. whether the Proponent's proposal ~~has-avoid~~~~sed~~ and ~~minimize~~~~s~~ a proposed Article 97 Action;
 - d. whether the Alternatives Analysis is adequate;
 - e. whether the Replacement Land provides at least equivalent Natural Resource Value as the Article 97 Interest and otherwise meets the requirements of 301 CMR XX.07(2);
 - f. qualification of a proposed project for a Waiver or Modification pursuant to 301 CMR XX.10 or Report of Finding by the Secretary pursuant to 301 CMR XX.09; or
 - g. if the Proponent is a municipality, the adequacy of draft municipal authorization or legislation.

XX.04: Requirements

Prior to ~~taking~~ the filing of any bill with the Legislature to authorize an Article 97 Action, the Proponent shall:

1. Notify the public, the holder of the Article 97 Interest, if not the ~~p~~Proponent, and the Secretary pursuant to 301 CMR XX.05;

2. Conduct an Alternatives Analysis as required by 301 CMR XX.06, submit the Alternatives Analysis to the Secretary and to the Public Entity that holds the Article 97 Interest, if not the Proponent, and make it public; and
3. Unless otherwise authorized by a waiver or modification by the Secretary pursuant to 301 CMR XX.10, mitigate the Article 97 Action by:
 - a. identifying Replacement Land pursuant to 301 CMR XX.07 and taking, acquiring or dedicating that Replacement Land to Article 97 purposes so that it is protected in perpetuity as an Article 97 Interest; or
 - b. providing In Lieu Funding instead of Replacement Land pursuant to 301 CMR XX.09.

XX.05: Notification

The Proponent of an Article 97 Action shall notify the public, the Public Entity that holds the Article 97 Interest, and the Secretary of the proposed Article 97 Action.

This notification shall include:

1. posting notice and the Alternatives Analysis prepared pursuant to 301 CMR XX.06 on the website of the Executive Office of Energy and Environmental Affairs and any additional notification as reasonably determined by the Secretary~~the Public Entity with care and control of an Article 97 Interest subject to the Article 97 Action or by other appropriate means, or posting on the website of the Public Entity a link to such public notice and Alternatives Analysis;~~
2. for any Article 97 Action for which the Proponent is proposing to provide In Lieu Funding, providing the public with a public comment period of at least 21 days in which the public has an opportunity to review and comment to the Secretary, with a copy to the Public Entity that holds the Article 97 Interest, if not the Proponent, on the proposed Article 97 Action and Alternatives Analysis; and
3. submission to the Secretary, in such form as the Secretary may require, with a copy to the Public Entity that holds the Article 97 Interest, if not the Proponent, of:
 - a. the Alternatives Analysis prepared pursuant to 302 CMR XX.06;
 - b. ~~a description of~~ the public notice and comment opportunities provided as required by M.G.L. c. 3, § 5A and the comments and response thereto, if not included in the Alternatives Analysis;
 - c. any supporting materials necessary or appropriate for evaluation of the proposed Article 97 Action and Replacement Land; and

- d. any additional materials as the Secretary may require.

XX.06: Alternatives Analysis

1. A Proponent shall consider all other options to avoid and minimize an Article 97 Action. If, following such consideration, the Proponent determines that no feasible or substantially equivalent alternative exists, it shall create an Alternatives Analysis documenting its consideration of alternatives to avoid and minimize the Article 97 Action.
2. Contents of Alternatives Analysis. The Alternatives Analysis shall be in writing, shall be commensurate with the type and size of the proposed Article 97 Action, and shall, at a minimum:
 - a. explain the proposed Article 97 Action and identify the public purpose that the Article 97 Action will serve;
 - b. identify each alternative to the Article 97 Action that was considered and describe why each alternative not selected is not feasible or substantially equivalent to the proposed Article 97 Action. Cost differences between land owned by the Public Entity and equivalent private land shall not be the sole basis for infeasibility;
 - c. describe all efforts to avoid or minimize the impacts of the proposed Article 97 Action, including by minimizing the land area, type, and degree of alteration required for the proposal; and
 - d. include a sufficient description of the Article 97 Interest and proposed Replacement Land, including the acreage, location, and boundaries of the land or interest in land;
 - e. if applicable, contain information sufficient to support a finding by the Secretary pursuant to 301 CMR XX.09 or to evaluate a request for waiver or modification pursuant to 301 CMR XX.10;
 - f. if the Proponent is not the Public Entity with care and control of the Article 97 Interest, the Proponent shall provide a draft of the Alternative Analysis to the Public Entity for review and comment prior to filing with the Secretary, and such Alternatives Analysis shall summarize the Proponent's discussions with the Public Entity and ~~include~~provide written documentation of the Public Entity's stated position on the proposed Article 97 Action and the Alternatives Analysis, and an affirmative vote by the Public Entity, if applicable, and, if a municipality, is made by the local legislative body.

3. Alternatives. Alternatives to the proposed Article 97 Action shall include parcels that:
 - a. are owned by the Public Entity if the Proponent, the Proponent, or another public or private owner;
 - b. are appropriate for the intended use;
 - c. are reasonably available for acquisition or use at the time the Public Entity or Proponent first considered the Article 97 Action; and
 - d. are within the appropriate market area for private Proponents, state and/or regional entities, or are within the appropriate city or town for municipal Proponents.

XX.07 Replacement Land

1. A Proponent shall identify Replacement Land to mitigate the impact of an Article 97 Action, except as otherwise provided in 301 CMR XX.09 or 301 CMR XX.10.
2. The Replacement Land shall be:
 - a. in a Comparable Location to the Article 97 Interest;
 - b. of equal or greater Natural Resource Value as the Article 97 Interest, as determined by the Secretary pursuant to 301 CMR XX.08;
 - c. of equal or greater acreage as the Article 97 Interest, as determined by a survey, or if a survey is not available, by another method that sufficiently delineates the boundaries of the affected parcels to enable accurate and reliable determination of acreage;
 - d. not already subject to Article 97 or a perpetual restriction ~~consistent with~~ the benefit of G.L. c. 184, §§ ~~31-32~~33, or required or presently offered to be protected as a condition of any permit or other approval;
 - e. consistent with the requirements of any state or federal programs applicable to the impacted Art. 97 Interest;
 - f. not contrary to an enforceable restriction or enforceable condition of a gift to the Public Entity;
 - g. of equal or greater monetary value as the Article 97 Interest, as determined pursuant to 301 CMR XX.07(3); and
 - h. dedicated to the same Article 97 purpose as the Article 97 Interest, and improved to provide equivalent use as that provided by the Article 97 Interest, unless dedication to another Article 97 purpose is determined by the Public Entity to provide a greater public benefit and the Secretary concurs in a Determination of Natural Resource Value pursuant to 301 CMR XX.08.

3. Monetary Value. The monetary value of the Article 97 Interest and the Replacement Land shall be the fair market value or Value in Use as if said interest was not restricted by Article 97, whichever is greater, as determined by an appraisal. The appraisal shall include a determination of both fair market value and Value in Use. An appraisal ~~conducted~~ prepared for the Proponent in accordance with the EEA Appraisal Guidelines, commissioned by the Division of Capital Asset Management and Maintenance for state-owned property, 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, provided the Public Entity that holds the Article 97 Interest has consented to the preparation of the appraisal and has been consulted in the appraisal process under Yellow Book or the Uniform Standards of Professional Appraisal Practice.

4. Certain Easements. A temporary easement, subsurface or air rights easement, or other non-fee simple interest in land that is an Article 97 Interest will be deemed to affect zero acres and therefore not require Replacement Land, provided that:
 - a. any anticipated disturbance of the surface will be temporary; and
 - b. the land surface will be returned to conditions and function existing prior to disturbance, or better, within 24 months of the initial impact to land subject to Article 97; and
 - c. the Proponent provides monetary value in an amount equal or greater to the value of the easement, as determined pursuant to 301 CMR XX.07(3); and
 - d. all other applicable requirements of 301 CMR XX.07(2) are met; and
 - e. (i) the disposition involves only the transfer of legal control between public entities and does not involve any other change, including, but not limited to, a change allowing the land to be used for another purpose; or (ii) the Secretary finds the transfer is of insignificant natural resource and recreation value and is less than 2,500 square feet in area and the transfer serves a significant public interest.

XX.08: Determination of Natural Resource Value

1. Upon receipt of an Alternatives Analysis proposing Replacement Land or request by a ~~Public Entity~~ Proponent proposing Replacement Land to comply with 301 CMR XX.09(4)(c), the Secretary shall make a Determination of Natural Resource Value.

2. A Determination of Natural Resource Value will ~~consider~~ address with a detailed explanation:

- a. whether the Replacement Land advances substantially the same Article 97 purposes and uses as the Article 97 Interest impacted by the proposed Article 97 Action; and
 - b. whether the Replacement Land meets the requirements of 301 CMR XX.07(2) and is of equal or greater Natural Resource Value as the impacted Article 97 Interest.
3. In making a Determination, the Secretary may consider any information that may be useful in making such Determination and may require the Proponent to submit additional information.
4. Prior to making the Determination, the Secretary shall request that the Public Entity, if not the Proponent, state its position on the Determination, and the Secretary shall give due consideration to the position of the Public Entity.
45. The Secretary reserves the sole discretion to determine whether the Replacement Land is of equal or greater Natural Resource Value than the impacted Article 97 Interest.

XX.09 Funding in Lieu of Replacement Land

1. Notwithstanding 301 CMR XX.07, the Proponent of an Article 97 Action may provide funding in lieu of Replacement Land, or a combination of In Lieu Funding and Replacement Land, if:
 - a. the Proponent, with the approval of the Public Entity, if not the Proponent, requests a finding by the Secretary pursuant to 301 CMR XX.09(2);
 - b. the Secretary has reported to the legislature a finding pursuant to 301 CMR XX.09(3) that In Lieu Funding is justified; and
 - c. the Public Entity represents in writing to the Secretary that it will meet the conditions set forth in 301 CMR XX.09(4).
2. Request for In Lieu Funding. A ~~Proponent~~ Public Entity may request that the Secretary make a finding that it is appropriate to provide In Lieu Funding instead of or in addition to Replacement Land to mitigate for a ~~an~~ proposed Article 97 Action. Such a request shall be made on the form required by the Secretary and shall:
 - a. include an Alternatives Analysis that, in addition to the contents required by 301 CMR XX.06(2), demonstrates that:
 - i. the proposed Article 97 Action serves a significant public interest;

- ii. it is not feasible to contemporaneously provide Replacement Land;
 - iii. public comment on the Alternatives Analysis was sought and a response provided to comments received; and
 - iv. the Article 97 Action will not have an adverse impact on an Environmental Justice Population;
 - b. provide a map showing the location of the Article 97 Interest and surrounding area using the EEA Environmental Justice Maps Viewer.
 - c. [if the Proponent is a Public Entity](#), specify the account into which funds will be deposited if the request to provide In Lieu Funding is approved;
 - d. [if the Proponent is a Public Entity](#), describe the Public Entity's plan to utilize the In Lieu Funding to obtain Replacement Land within 3 years of the Article 97 Action;
 - e. include a certification by the Public Entity that the Public Entity will comply with the conditions set forth in 301 CMRXX.09(4) and 301 CMR XX.09(6); and
 - f. include such other information or materials as the Secretary may require.
- 3. Report of Finding by Secretary. Upon a request by a Public Entity pursuant to 301 CMR XX.09(2), the Secretary may report to the Legislature a finding that In Lieu Funding is justified if, in the sole discretion of the Secretary:
 - a. the proposed Article 97 Action serves a significant public interest;
 - b. the proposed Article 97 Action will have no adverse impact on an Environmental Justice Population;
 - c. the Alternatives Analysis has been submitted to the Secretary and subjected to public notice and comment, [including by the Secretary](#), and the Alternatives Analysis demonstrates that all other options to avoid or minimize the Article 97 Action have been explored and no feasible or substantially equivalent alternative exists for reasons specifically stated; and
 - d. it is not feasible to contemporaneously designate Replacement Land that satisfies the requirements of 301 CMR XX.07.
- 4. Conditions. A Public Entity receiving In Lieu Funding, alone or in combination with providing Replacement Land, shall:
 - a. accept not less than 110% of the fair market value or Value in Use, whichever is greater, of the portion of the Article 97 Interest not mitigated by the provision of Replacement Land, as determined by the Secretary after an independent appraisal conducted pursuant to 301 CMR XX.09(5).

plus the actual or reasonably anticipated due diligence costs of the Public Entity, including the cost of title examinations, appraisals, surveys and environmental site assessments.

- b. hold the In Lieu Funding:
 - i. if a Municipality:
 1. in the municipality's Community Preservation Fund and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; or
 2. in another already-established municipal account for land preservation purposes; or
 3. if the municipality lacks such a fund, in a segregated account and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; or
 - ii. if the Commonwealth, in a fund for acquisition of land or interests in land for Article 97 purposes; or
 - iii. if neither a Municipality nor the Commonwealth, in a segregated account and dedicated solely for the acquisition of land or interests in land for Article 97 purposes; and
 - c. within 3 years of the Article 97 Action, use the In Lieu Funding to acquire Replacement Land in a Comparable Location and dedicate the Replacement Land in perpetuity for Article 97 purposes. The Public Entity taking or acquiring or dedicating Replacement Land ~~acquired~~ with In Lieu Funding shall satisfy the requirements of 301CMR XX.07(2), provided the Secretary will make any determination under 301 CMR XX.08 and provide a final decision on the Replacement Land within 30 days from delivery of a reasonably complete request from the Public Entity. Failure to make such determination within such 30-day period shall result in constructive approval of the request.
5. Appraisal. The amount of In Lieu Funding shall be based on the fair market value or Value in Use, whichever is greater, of the Article 97 Interest, as if said interest was not restricted by Article 97, as determined by an appraisal. The appraisal shall include a determination of both fair market value and Value in Use. An appraisal conducted in accordance with the EEA Appraisal Guidelines, commissioned by the Division of Capital Asset Management and Maintenance for state-owned property, or conducted in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Yellow Book) shall presumptively be valid, provided the Public Entity that holds the Article 97 Interest has consented to the preparation of the appraisal and has been consulted in the appraisal process under Yellow Book or Uniform Standards of Professional Appraisal Practice.

6. Reporting. Any Public Entity that receives In Lieu Funding instead of or in combination with Replacement Land shall report to the Secretary annually, by November 1 each year, on the use of such In Lieu Funding until all such funding has been fully expended for the acquisition of Replacement Land and such land has been dedicated to Article 97 purposes. The report shall include:
 - a. the amount of In Lieu Funding received and the date of the Article 97 Action;
 - b. the account into which the In Lieu Funding was deposited;
 - c. whether the In Lieu Funding was expended to acquire replacement land and, if so, a description of the land that was acquired, including:
 - i. the deed, order of taking, or other legal instrument by which the Replacement Land was acquired and the instrument by which it was dedicated to Article 97 purposes;
 - ii. the basis for the determination that the Replacement Land is in a Comparable Location as the Article 97 Interest;
 - iii. the Secretary's Determination of Natural Resource Value pursuant to 301 CMR XX.08;
 - iv. the Survey or other mechanism demonstrating the acreage as required by 301 CMR XX.07.4.; and
 - v. the appraisal meeting the requirements of 301 CMR XX.09(5); and
 - d. the remaining balance of In Lieu Funding.

XX.10: Waiver or Modification

1. The Secretary may waive or modify the Replacement Land requirements of 301 CMR XX.04(3)(a) and 301 CMR XX.07 upon request by a Proponent where:
 - a. the proposed Article 97 Action involves solely the transfer of legal control of an Article 97 Interest from one Public Entity to another Public Entity and no other change, including, but not limited to, a change allowing the land to be used for another purpose; or
 - b. the transfer or change in use of an Article 97 Interest of insignificant natural resource and recreation value that is less than 2,500 square feet in area and the transfer serves a significant public interest.
2. Process. To request a waiver or modification, the Proponent shall request such waiver or modification, in writing, in the form and providing the information required by the Secretary, [with a copy to the Public Entity that holds the Article 97 Interest, if not the Proponent](#), and shall notify the public of such request for

waiver or modification by posting the request on the website of the [Executive Office of Energy and Environmental Affairs](#) and providing any additional notification as may be reasonably determined by the Secretary ~~Public Entity with care and control of the Article 97 Interest subject to the Article 97 Action or by other appropriate means~~. The Secretary may request additional information from the Proponent. The Secretary may waive or modify a requirement of 301 CMR XX.04(3)(a) or 301 CMR XX.07 upon a determination that such waiver or modification meets the requirements of 301 CMR XX.10(1) and is in the public interest.

3. Determinations by Secretary. The Secretary reserves sole discretion to determine whether to waive or modify any requirement pursuant to Section XX.10.

XX.11: Severability

The provisions of 301 CMR XX.00 are severable. If any provision or application thereof is held to be invalid by a court of competent jurisdiction, such invalidity will be severed and will not affect the remainder of 301 CMR XX.00 or any application thereof that can be given effect without the invalid provision or application.

REGULATORY AUTHORITY

301 CMR XX.00: M.G.L. c. 3, § 5A; Acts 2022 c. 274, § 2