COMMERCIAL WHARF EAST CONDOMINIUM ASSOCIATION VS. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Docket:	19-P-1676
Dates:	December 10, 2020 - July 7, 2021
Present:	Vuono, Meade, & Lemire, JJ.
County:	Suffolk
Keywords:	Trust, Public trust. Department of Environmental Protection. License. Due Process of Law, Commonwealth's interest in tidelands. Urban Renewal. Redevelopment Authority. Administrative Law, Agency's authority, Regulations. Practice, Civil, Review of administrative action. Real Property, Wharf.

Civil action commenced in the Superior Court Department on September 24, 2015.

Following review by this court, 93 Mass. App. Ct. 425 (2018), motions for judgment on the pleadings were heard by Linda E. Giles, J.

John M. Allen for the plaintiff.

Seth Schofield, Assistant Attorney General, for the defendant.

Peter Shelley, for Conservation Law Foundation, amicus curiae, submitted a brief.

VUONO, J. For nearly half a century the owners of condominium units located within the five-story granite building that sits on Boston's historic Commercial Wharf have used approximately 12,000 square feet to the east of the building (disputed area) for vehicular access and private parking. The questions raised in this appeal are whether such uses are authorized, either by certain legislative acts or by license under G. L. c. 91 (c. 91 or Waterways Act), and whether the plaintiff, Commercial Wharf East Condominium Association (CWECA),[1] was required to obtain a license under c. 91. For the reasons that follow, we conclude that the Department of Environmental Protection (department) properly determined that the uses are unauthorized and a license is required.[2] Accordingly, we affirm the judgment of the Superior Court upholding the department's decision.[3]

Background.[4] 1. Construction and rehabilitation of Commercial Wharf. Commercial Wharf is located between Long and Lewis Wharves on Boston Harbor and has been in existence

for almost 150 years. Boston's waterfront has a rich history, which we will touch on briefly to give context to our discussion.

In 1832, the Legislature authorized the Commercial Wharf Company to construct a wharf and "any buildings, . . . docks, streets or passage ways . . . according to their will and pleasure." St. 1832, c. 51, § 2. Thereafter, a wharf, a five-story granite building, and "streets and passageways" to the east of the building were constructed. Both the building and the "streets and passageways" are located at the landward end of the wharf, but seaward of the historic low water mark, in an area constituting "Commonwealth tidelands" under G. L. c. 91, § 1.[5]

For over a century, Commercial Wharf accommodated merchants from all over the world. However, by the middle of the twentieth century, maritime-related commerce had declined and much of Boston Harbor including Commercial Wharf became economically depressed. In 1964, an effort to revitalize Boston's waterfront emerged. To that end, the Boston Redevelopment Authority (BRA), the Boston city council, and the mayor of Boston formulated a plan, entitled the "Downtown Waterfront-Faneuil Hall Urban Renewal Plan" (renewal plan). The renewal plan provided in pertinent part that the granite building on Commercial Wharf would be used for "residential, office, general business and marine uses and landscaped open areas." The renewal plan required a minimum of one parking space "for each dwelling unit." "Open parking or loading areas [were required to be] paved and landscaped and effectively screened," and the "number of parking spaces" required the BRA's written consent.

Soon thereafter, the Legislature enacted c. 663 of the Acts of 1964 (1964 Act). The 1964 Act authorized the Department of Public Works (DPW)[6] and the BRA "to exercise certain powers in regard to certain tidelands along the Atlantic Avenue and Commercial Street waterfront in the city of Boston." As relevant here, the 1964 Act granted "all right, title and interest of the [C]ommonwealth in and to the tidelands" within the Boston waterfront area, including Commercial Wharf, to the BRA. St. 1964, c. 663, § 2. The 1964 Act also established a modified licensing procedure effective through 1971. Under that procedure, the DPW maintained its authority to issue waterways licenses "to fill or maintain fill or to erect or maintain a structure," but required that an application for a license be approved by the BRA.[7] St. 1964, c. 663, § 3. Following the enactment of the 1964 Act, the trustees of Blue Water Trust (Blue Water Trust), the redeveloper of Commercial Wharf, purchased the wharf, including the area currently used for parking and vehicle access, from the BRA.

In 1972, the Legislature extended the 1964 Act's licensing procedure to 1977. Chapter 310 of the Acts of 1972 (1972 Act) provided that "no license to fill or maintain fill or to erect or maintain a structure in [the designated area including Commercial Wharf] shall be granted by [DPW] unless the application for a license is approved in writing by the [BRA] and the mayor of the city of Boston." St. 1972, c. 310, § 1. The 1972 Act further provided that, with respect to the

work completed pursuant to the renewal plan, public pedestrian access must be provided to the "harbor ends" of the wharves.

In 1974, Blue Water Trust and the BRA entered into a rehabilitation agreement concerning the redevelopment of Commercial Wharf. The rehabilitation agreement provided that the premises to be redeveloped would be devoted "generally to residential, office, general business, marine, marina, restaurant and tavern uses as are not inconsistent with the general objectives of the [renewal plan] (it being hereby acknowledged that the present uses are not inconsistent with the general objectives of the [renewal plan])." The rehabilitation agreement specifically provided for the renovation of the existing granite building, and the related plans showed parking near the building. The rehabilitation agreement also included specific provisions to ensure public access on Commercial Wharf. In addition, the rehabilitation agreement stated that the BRA would "use its best efforts to assist [Blue Water Trust] in obtaining any and all licenses and permits as may be required" to complete the renovation work.

2. Changes to licensing requirements. The Waterways Act governs licensing of work on the tidelands. Historically, a license was required only for filling tidelands and constructing wharves and piers on them. See generally Trio Algarvio, Inc. v. Commissioner of the Dep't of Envtl. Protection, 440 Mass. 94, 99-101 (2003). Once filling and construction were complete, use of the fill or structures did not require a license. This changed after the Supreme Judicial Court issued its decision in Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629 (1979).

In Boston Waterfront Dev. Corp., 378 Mass. at 649, the court defined the nature of the title held by wharfing statute beneficiaries and held that fee simple title to such land "is subject to th[e] same public trust on which the Commonwealth originally held it." "The essential import of this holding is that the land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development." Id. Thus, legislatively granted fee simple title to tidelands is "subject to the condition subsequent that it be used for the public purpose for which" the legislative grant was made. Id.

The wharfing acts of the 1800s, like the one that authorized the construction of Commercial Wharf, served the public purpose of promoting maritime trade and commerce to benefit Boston Harbor. See Boston Waterfront Dev. Corp., 378 Mass. at 647-648. It follows that any use of Commercial Wharf must serve that original public purpose of promoting maritime trade and commerce unless the Legislature exercises its authority to change the public purpose for which a particular area may be used. See id. at 648-649. See also Opinion of the Justices, 383 Mass. 895, 905 (1981).

In 1983, in response to Boston Waterfront Dev. Corp., the Legislature amended the Waterways Act to require licensing for certain uses of the tidelands. See Trio Algarvio, Inc., 440 Mass. at 106 (discussing reason for amendment to c. 91). A new license is required for "[a]ny changes in use . . . of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section." G. L. c. 91, § 18. The Legislature made the department responsible for issuing such licenses, thereby entrusting the department with the authority to determine whether a particular use of tidelands is consistent with the public trust doctrine. See G. L. c. 91, § 2 (requiring that department "act to preserve and protect the rights in tidelands of the inhabitants of the [C]ommonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose").

Thereafter, in 1990, the department changed its regulations to reflect its responsibility for licensing the tidelands for a particular use. See 310 Code Mass. Regs. §§ 9.01-9.56. The regulations that were adopted do not exempt existing unauthorized uses on Commonwealth tidelands. See 310 Code Mass. Regs. § 9.05(l) and (3). In other words, under current regulations, if the use at issue here -- parking and land-based vehicular movement on the disputed area -- is unauthorized, then a license is required. Because parking and land-based vehicular movement are nonwater-dependent uses, a license can be issued only if the department determines that the project serves a proper public purpose that provides "a greater public benefit than public detriment to the rights of the public" in the public trust lands. G. L. c. 91, § 18. See 310 Code Mass. Regs. § 9.31(2). See also 310 Code Mass. Regs. § 9.12 (determination of water-dependency).

3. The present controversy. CWECA is the organization of condominium unit owners at the Commercial Wharf East Condominium located in the granite building adjacent to the disputed area. On August 25, 2011, an abutter, the Boston Boat Basin, LLC (Boston Boat), which owns a marina and inn known as Boston Yacht Haven located at the seaward end of Commercial Wharf, filed "a request for determination of applicability" (RDA) pursuant to 310 Code Mass. Regs. § 9.06, asking the department to determine whether CWECA's existing use of the disputed area for nonwater-dependent uses was authorized under a legislative act or a recorded waterways license under c. 91.[8]

In January 2012, the department's waterways regulation program chief issued a positive determination of applicability, concluding that the disputed area was subject to c. 91 and that its current nonwater-dependent uses were not authorized. CWECA challenged that determination and filed an administrative appeal.[9] Ultimately, the department issued a final summary decision, pursuant to 310 Code Mass. Regs. § 1.01(11)(f) (2004), in which it rejected CWECA's argument that the 1964 and 1972 Acts implicitly authorized the current uses of the disputed area or that the rehabilitation agreement was sufficient to authorize such uses.[10]

As previously noted, a judge of the Superior Court affirmed the department's decision in a comprehensive memorandum and order that adopted the department's reasoning in all material respects. See note 2, supra.

Discussion. 1. Standard of review. We review the department's final decision and order in accordance with the standards set forth in G. L. c. 30A, § 14 (7). Under § 14 (7), we "may modify or set aside an agency's decision only if it is determined that the substantial rights of a party were prejudiced because the contested agency decision was (1) in violation of constitutional provisions, (2) in excess of its statutory authority or jurisdiction, (3) based on an error of law, (4) made upon unlawful procedure, (5) unsupported by substantial evidence, or (6) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." McGovern v. State Ethics Comm'n, 96 Mass. App. Ct. 221, 226–227 (2019).

"Our review . . . is confined to the administrative record." McGovern, 96 Mass. App. Ct. at 227. "The conclusions of the Superior Court judge carry no special weight in our deliberations, although they will, of course, be considered." Smith College v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221, 224 (1978). We do, however, "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." McGovern, supra at 227, quoting G. L. c. 30A, § 14 (7). In particular, because the department is the State agency charged with responsibility for protecting public trust rights in Commonwealth tidelands, it is due "substantial deference in its reasonable interpretation of" the 1964 and 1972 Acts. Sikorski's Case, 455 Mass. 477, 480 (2009). See Peterborough Oil Co. v. Department of Envtl. Protection, 474 Mass. 443, 449 (2016) ("an administrative agency's interpretation of a statute within its charge is accorded weight and deference [and w]here the [agency's] statutory interpretation is reasonable . . . the court should not supplant [its] judgment [citations omitted]").

This does not mean, however, that we abdicate our duty to interpret these statutes. See McGovern, 96 Mass. App. Ct. at 227, quoting Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 75 (2009) ("principles of deference . . . are not principles of abdication"). "An erroneous interpretation of a statute by an administrative agency is not entitled to deference." Herrick v. Essex Regional Retirement Bd., 77 Mass. App. Ct. 645, 648 (2010), S.C., 465 Mass. 801 (2013), quoting Woods v. Executive Office of Communities & Dev., 411 Mass. 599, 606 (1992). Nor is "[t]he deference normally accorded to an administrative agency's decision . . . appropriate when . . . its decision is unsupported by substantial evidence, G. L. c. 30A, § 14 (7) (e)." Herrick, supra, quoting Tabroff v. Contributory Retirement Appeal Bd., 69 Mass. App. Ct. 131, 134 (2007).

These principles apply whether we review a decision made after an evidentiary hearing or a summary decision made without such a hearing. See 310 Code Mass. Regs. § 1.01 (setting forth

department's adjudicatory proceedings rules, including summary decision procedures). That is because G. L. c. 30A, § 14 (7), sets out the standards of review that apply to all "final decision[s] of any agency in an adjudicatory proceeding." Section 14 (7) does not distinguish between decisions made after an evidentiary hearing and those made without. Further, the department's adjudicatory proceedings rules confirm that a summary decision adopted by the commissioner of the department is a "final" decision. See 310 Code Mass. Regs. § 1.01(11)(f) (summary decisions are "subject to 310 [Code. Mass. Regs. §] 1.01[14]," which provides for two categories of decisions: "final decisions" or "tentative decisions," the latter becoming "final" if adopted by the commissioner after consideration of the parties' objections). See also Commercial Wharf E. Condominium Ass'n v. Department of Envtl. Protection, 93 Mass. App. Ct. 425, 431-432 (2018) (c. 30A, § 14 [7], is means for obtaining review of department's decision in this case).

CWECA bears the burden to "demonstrate the invalidity of the [department's decision]." Andrews v. Division of Med. Assistance, 68 Mass. App. Ct. 228, 231 (2007). To prevail, CWECA must establish that a recorded c. 91 license or legislative authorization sanctions parking and vehicular access in the disputed area. It is undisputed that there is no recorded c. 91 license. CWECA instead argues that the department erred in concluding that the uses were not authorized because (1) the 1964 and 1972 Acts provide implicit authorization for the existing uses of the disputed area; and (2) to the extent that the 1964 and 1972 Acts are insufficient to authorize parking and vehicular access on the disputed area, the recorded 1974 rehabilitation agreement provides the necessary authorization.

2. Legislative authorization. CWECA argues that the 1964 Act and the 1972 Act authorized the use of the disputed area for private parking and vehicular access as part of implementing the renewal plan.[11] CWECA points out that the renewal plan designated Commercial Wharf for residential and general business use and required a minimum of one parking space per dwelling unit. CWECA asserts that the 1964 and 1972 Acts subsequently incorporated the renewal plan and thus authorized the uses at issue. The department rejected this argument after concluding that the 1964 Act included no language explicitly or implicitly relinquishing public trust rights in Commercial Wharf or establishing a new public purpose for it that included residential development and related uses.

"'[E]xpress legislative authorization' is required to extinguish the public's rights in submerged lands" (citation omitted). Arno v. Commonwealth, 457 Mass. 434, 450 (2010). "Where the Commonwealth has proposed the transfer of land from one public use to another, the legislation must be explicit concerning the land involved; it must acknowledge the interest being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer." Opinion of Justices, 383 Mass. at 905. Where such express authorization for a change in use is absent, the grantee of the parcel, or its successors, is bound by "an implied condition in

the grant that the [holder of title] could not retain the granted locations without using them for the purpose for which they were granted." Boston Waterfront Dev. Corp., 378 Mass. at 648.

As the department noted, there is no explicit reference in the 1964 Act to a specific public interest being surrendered or to a new public purpose of urban renewal and residential development being established. Neither the 1964 Act nor the 1972 Act speaks to any public purpose that the wharves were meant to serve except, as mentioned in the 1972 Act, continued public access to certain areas including Commercial Wharf. The department thus correctly determined that there exists no explicit legislative statement altering the public purpose of Commercial Wharf or authorizing private parking and vehicular access.

Relying on a provision of the department's regulations concerning circumstances where a c. 91 license is required, CWECA argues that the Legislature can implicitly change the public purpose for which a particular area may be used through a legislative act. See 310 Code Mass. Regs. § 9.05(1)(d) (c. 91 license required for "any change in use of fill or structures from that expressly authorized in a valid grant or license or, if no such use statement was included, from that reasonably determined by the [d]epartment to be implicit therein, whether such authorization was obtained prior to or after January 1, 1984"). The Supreme Judicial Court has suggested that any change in public use must be authorized explicitly by the Legislature. See Opinion of the Justices, 383 Mass. at 905; Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969) ("The rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law"). However, even if we were to assume, without deciding, that a change in public purpose may be effectuated implicitly through legislation, the department expressly found that the 1964 Act did not have an implicit effect on the public purpose of the disputed area.

The department properly rejected the contention that the 1964 Act implicitly changed the public purpose of Commercial Wharf. Under the 1964 Act, the Legislature vested title in the tidelands with the BRA and set up a licensing scheme whereby the DPW continued to issue licenses for work on the wharves but essentially afforded the BRA veto power over those licensing applications. Notably, the 1964 Act explicitly stated that the conveyance of title to tidelands had no effect on "the powers and responsibilities of [the DPW] with respect to [the tidelands]." Given this clear language, nothing in the 1964 Act can be viewed as diminishing or altering the DPW's responsibilities over the tidelands; and, where it was later clarified by the Supreme Judicial Court that the DPW's responsibilities included ensuring that the tidelands were used in a manner consistent with the public purpose of maritime commerce, these responsibilities were necessarily unchanged by the 1964 Act. See Boston Waterfront Dev. Corp., 378 Mass. at 654. Thus, as the department concluded, by expressly preserving the DPW's responsibility, the

Legislature actually affirmed that the use of the tidelands must serve the preexisting public purpose of maritime commerce.

While the 1972 Act did not contain the same preservation language as the 1964 Act, it also did not effectuate the transfer of the Commonwealth's interest in the tidelands. Rather, the 1972 Act merely extended the licensing scheme established under the 1964 Act and required that certain areas be accessible to the public as described in the urban renewal plan. St. 1972, c. 310, § 1. The 1972 Act, read alone or in concert with the 1964 Act, cannot be construed as implicit authorization to use Commercial Wharf for urban renewal and residential development because the 1964 Act, which conveyed the land at issue to the BRA, expressly affirmed, and did not alter, the DPW's rights and responsibilities over the tidelands. Moreover, both Acts recognized the DPW as the licensing authority over the tidelands. Thus, neither Act implicitly changed the public purpose of the area at issue or the department's responsibility to enforce that public purpose through its licensing scheme.[12]

3. The renewal plan. The department also properly concluded that the renewal plan had no effect on the requirement that CWECA obtain a license under c. 91 for the disputed uses. The fact that the renewal plan contemplated that the disputed area could be used for residential parking is of no consequence because a change in public purpose can be authorized only by the Legislature. See Boston Waterfront Dev. Corp., 378 Mass. at 648-649. Moreover, to the extent that CWECA argues that there was legislative authorization because the 1964 Act incorporated the renewal plan, the department correctly found that it did not, given that the 1964 Act mentions only "an urban renewal plan or land assembly and redevelopment plan" without specifically referring to the renewal plan at issue here. While the 1972 Act did explicitly reference the renewal plan, it did so only with respect to maintaining certain public access points. It did not incorporate wholly the renewal plan itself, nor did it authorize any particular use of the property developed pursuant to that plan.

4. The 1974 rehabilitation agreement. CWECA also argues that the uses at issue were authorized in 1974 when the BRA, which held the Commonwealth's "right, title and interest" in the land at issue as a result of the 1964 Act, executed a rehabilitation agreement with Blue Water Trust, the prior owner of Commercial Wharf and its buildings. Relying on the fact that the 1974 rehabilitation agreement included specific provisions to ensure "public access" to Commercial Wharf as required by the 1972 Act, CWECA asserts that the rehabilitation agreement specifically approved a mixed-use residential community with accessory uses, including private parking and vehicular access, on Commercial Wharf. CWECA contends that the inclusion of this mandate demonstrates that both the BRA and DPW approved the disputed uses as consistent with the public trust rights in the area.

This argument fails because, as previously discussed, a particular use can be authorized only by the Legislature or by the department through a c. 91 license. Regardless whether the DPW was involved in drafting and approving the 1974 rehabilitation agreement or whether it was a party, that agreement cannot serve as a substitute for obtaining a license under c. 91. Furthermore, the rehabilitation agreement expressly contemplated that Blue Water Trust would have to obtain licenses for necessary work, demonstrating that it can not be properly construed as a substitute for a duly recorded license issued by the department.

5. Alleged due process violation. After the presiding officer issued the recommended final decision, CWECA filed a motion to reopen discovery focused on the cooperative implementation of the 1964 and 1972 Acts by the BRA and the DPW. The presiding officer denied the motion on the grounds that, even if further discovery produced evidence concerning approval sought or obtained by CWECA or its predecessor for parking, such evidence was not relevant because "this type of correspondence does not constitute actual approval nor would an informal approval substitute for licensing." CWECA claims that the denial of its motion violated its right of due process because the requested discovery was necessary to understand "how each agency construed it[s] role [in implementing the 1964 and 1972 Acts] (i.e., whether any license in light of the mandate of the Special Acts was necessary beyond the [r]ehabilitation [a]greement)." We disagree. As CWECA concedes, no recorded c. 91 license exists. Because the rehabilitation agreement is not a substitute for a recorded license, discovery into the department's historic understanding of the rehabilitation agreement could not have established the necessary approval. Judgment affirmed.

footnotes

[1] CWECA is an association of owners of condominium units located at the landward end of Boston's Commercial Wharf.

[2] This case has been before us previously. After the department issued its decision, CWECA sought review in the Superior Court pursuant to G. L. c. c. 30A, § 14, contending, as it does here, that a c. 91 license is not required in the circumstances presented. However, before that issue was addressed, CWECA filed a motion seeking to present additional evidence pursuant to G. L. c. 30A, § 14 (6). A judge of the Superior Court allowed the motion over the department's objection and entered an order and subsequent judgment remanding the case to the department to permit CWECA to conduct discovery. See Commercial Wharf E. Condominium Ass'n v. Department of Envtl. Protection, 93 Mass. App. Ct. 425, 429 (2018). The department appealed, and after concluding that a remand for the purposes of discovery and the taking of additional evidence was not permissible under G. L. c. 30A, § 14 (6), we vacated the order and judgment. Id. at 436-437. The case then proceeded before a different judge of the Superior

Court who, acting on the parties' cross motions for judgment on the pleadings, affirmed the department's decision.

[3] We acknowledge the amicus brief submitted by Conservation Law Foundation.

[4] The relevant facts and procedural history are drawn from the administrative record.

[5] "Commonwealth tidelands" are "tidelands held by the [C]ommonwealth in trust for the benefit of the public or held by another party by license or grant of the [C]ommonwealth subject to an express or implied condition subsequent that it be used for a public purpose." G. L. c. 91, § 1. See 310 Code Mass. Regs. § 9.02 (2014). The parties agree that, given their location, the tidelands at issue in this case are presumptively Commonwealth tidelands.

[6] The DPW previously had certain responsibilities that now fall within the purview of the department. See Commercial Wharf E. Condominium Ass'n v. Department of Envtl. Protection, 98 Mass. App. Ct. 158, 159 n.3 (2020) ("The [DPW] was then the State agency charged with the tidelands licensing under G. L. c. 91").

[7] The 1964 Act also provided, "Nothing herein shall affect or impair the powers and responsibilities of the [DPW] with respect to tidewaters within any portion of the area covered by such plan which is not subject to a license granted as provided in section three." St. 1964, c. 663, § 5.

[8] CWECA and Boston Boat are not friendly neighbors and both parties have resorted to litigation to settle their disputes. In fact, CWECA maintains that Boston Boat filed the RDA in retaliation for CWECA's attempt to enforce various private property restrictions. See Commercial Wharf E. Condominium Ass'n v. Boston Boat Basin, LLC, 93 Mass. App. Ct. 523 (2018). While the level of acrimony between the parties is unfortunate, Boston Boat's motivation in filing the RDA is of no consequence.

[9] We need not repeat that history here.

[10] The department also rejected CWECA's arguments that (1) the wharfing acts that allowed the Commercial Wharf Company to incorporate and to develop Commercial Wharf also authorized the current uses of the disputed area; (2) the department is estopped from asserting that the current uses of the disputed area are unauthorized based upon prior approvals it issued to Blue Water Trust; or (3) the department is precluded from asserting that the current uses of the disputed area are unauthorized because it breached its duty to maintain public records. CWECA does not advance these arguments on appeal.

[11] During the administrative proceedings and in the Superior Court, CWECA also argued that the uses at issue were authorized by the 1832 Act, see note 10, supra, which conveyed Commercial Wharf to the original developer. CWECA no longer advances this argument.

[12] The parties have not addressed the issue of the applicability of art. 97 of the Amendments to the Massachusetts Constitution in the circumstances of this case, and we do not

reach it. In addition, neither party challenges the validity of the current statutory and regulatory scheme.