

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 07-0675-E

THE ARBORWAY COMMITTEE, et al.,

Plaintiffs,

v.

THE EXECUTIVE OFFICE OF
TRANSPORTATION AND CONSTRUCTION,
a/k/a THE EXECUTIVE OFFICE OF
TRANSPORTATION, THE MASSACHUSETTS
DEPARTMENT OF PUBLIC WORKS, n/k/a THE
DEPARTMENT OF HIGHWAYS, and THE
CONSERVATION LAW FOUNDATION, INC.,

Defendants.

STATE DEFENDANTS' ANSWER

The State Defendants¹ answer the allegations of the Complaint as follows:

FIRST DEFENSE

1. The allegations contained in Paragraph 1 constitute an overview of the plaintiffs' purported cause of action to which no response is required; to the extent a response is required, those allegations are denied.
2. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 (including all subparts thereof).
- 3.1 The State Defendants admit that in or around 1991 the Department of Public Works became known as the Department of Highways. The remaining allegations contained in

¹ The State Defendants are the Executive Office of Transportation, now known as the Executive Office of Transportation and Public Works ("EOTPW"), and the Department of Highways ("Mass Highway").

Paragraph 3.1 constitute conclusions of law and/or legal argument to which no response is required.

3.2 The State Defendants admit that the following state agencies are within the EOTPW: the Department of Highways, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, and the Massachusetts Turnpike Authority. The remaining allegations contained in Paragraph 3.2 constitute conclusions of law and/or legal argument to which no response is required.

3.3 The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3.3.

4. The allegations contained in Paragraph 4 constitute conclusions of law and/or legal argument to which no response is required.

5. The allegations contained in Paragraph 5 constitute conclusions of law and/or legal argument to which no response is required.

6. The allegations contained in Paragraph 6 constitute conclusions of law and/or legal argument to which no response is required.

7. The State Defendants lack knowledge or information sufficient to form an opinion as to which constituencies are best served by the CA/T Project. In further answering, the State Defendants state that the CA/T Project is a highway project that replaced the former six-lane elevated highway (the Central Artery) with an eight-to-ten-lane underground expressway directly beneath the existing road and extended I-90 (the Massachusetts Turnpike) from its former

terminus south of downtown Boston through a tunnel beneath South Boston and Boston Harbor to Logan Airport.

8. Denied.

9. Denied, except that it is admitted that the Memorandum of Understanding: Traffic and Air Quality Mitigation for the Central Artery/Third Harbor Tunnel Project ("MOU") is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

10. Denied, except that it is admitted that the MOU is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

11. Denied, except that it is admitted that the MOU is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

12. Denied, except that it is admitted that the MOU is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

13. Denied, except that it is admitted that the MOU is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

14. Denied, except that it is admitted that the MOU is a written document that speaks for itself and that a true and accurate copy of the MOU is attached as Exhibit "A" to the Complaint. Answering further, the MOU contains no indication that the signatory parties intended that Plaintiffs be third-party beneficiaries. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

15. Denied, except that it is admitted that the MOU is a written document that speaks for itself. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

16. Denied, except that it is admitted that the MOU is a written document that speaks for itself. Answering further, the MOU itself contains no indication that the signatory parties intended that Plaintiffs be third-party beneficiaries. Furthermore, characterizations as to the purpose or intent of the MOU constitute conclusions of law and/or legal argument to which no response is required.

17. The State Defendants admit the allegations contained in Paragraph 17.

18. The State Defendants admit that in December, 1985, the MBTA (a non-party) temporarily discontinued LRV service on that portion of the Arborway Line between Heath

Street, at South Huntington Avenue, and Arborway Station, but lack knowledge or information sufficient to form a belief as to whether the temporary discontinuance was due to reconstruction of the Huntington Avenue Green Line incline and road reconstruction on Huntington Avenue.

19. The State Defendants admit that since 1985, the MBTA has been operating the Route 39 bus service as a substitute for LRV service on the Arborway Line, but deny that such bus service is an “interim” substitute.

20. Denied, except that it is admitted that a December, 1987 study entitled “Arborway Transit Study” exists and is a written document that speaks for itself.

21. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21, particularly given the inherent ambiguity and vagueness of the terms “results of the 1988 MBTA study” and “subsequent events.”

22. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22.

23. The State Defendants admit the allegations contained in Paragraph 23, except they lack knowledge or information sufficient to form a belief as to whether the LRV service described therein would “directly impact[] the quality of life of the Plaintiffs.”

24. The MOU is a written document that speaks for itself.

25. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25, particularly given the passage of time

since the Agreement's execution and the inherent ambiguity and vagueness of the terms "substantial period of time" and "significant community involvement."

26. The State Defendants admit that the highway portion of the CA/T Project has been or shortly will be completed, deny that the CA/T Project is increasing emissions in the Metropolitan Boston Air Pollution Control District, and admit that some of the transit projects described in the MOU, including the Green Line Arborway Restoration Project, have not been completed.

27. The State Defendants admit that EOTPW has not completed the Green Line Arborway Rail Restoration Project and has not provided the Massachusetts Department of Environmental Protection ("MassDEP") with a schedule for completion of the Green Line Arborway Rail Restoration Project. The allegation that EOTPW is in breach of the MOU constitutes a conclusion of law and/or legal argument to which no response is required.

Answering further, the State Defendants, including EOTPW, intend to comply with the terms of the amended State Implementation Plan (SIP), which has been promulgated as a final MassDEP regulation as a matter of state law and which is presently being reviewed by the Environmental Protection Agency.

28. The State Defendants lack knowledge or information sufficient to form a belief as to whether EOTPW "intend[s] to implement many of the ... projects" described in the MOU because the term "many" is not defined in the Complaint, is inherently vague, and is susceptible to numerous and different interpretations. In addition, the allegation that EOTPW has a legal and equitable obligation to implement such projects constitutes a conclusion of law and/or legal

argument to which no response is required. Answering further, the State Defendants, including EOTPW, intend to comply with the terms of the amended SIP, which has been promulgated as a final MassDEP regulation as a matter of state law and which is presently being reviewed by the Environmental Protection Agency.

29. Denied.

30. Denied, except that it is admitted that the MBTA's Environmental Notification Form is a written document that speaks for itself.

31. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31.

32. The State Defendants restate and incorporate by reference Paragraphs 1 through 31 of this Answer as if fully set forth herein.

33. The allegations contained in Paragraph 33 constitute conclusions of law and/or legal argument to which no response is required.

34. The allegations contained in Paragraph 34 constitute a description of the plaintiffs' purported cause of action to which no response is required.

35. The State Defendants restate and incorporate by reference Paragraphs 1 through 34 of this Answer as if fully set forth herein.

36. The allegations contained in Paragraph 36 constitute conclusions of law and/or legal argument to which no response is required.

37. The allegations contained in Paragraph 37 constitute conclusions of law and/or legal argument to which no response is required.

38. The allegations contained in Paragraph 38 constitute conclusions of law and/or legal argument to which no response is required.

39. The allegations contained in Paragraph 39 constitute conclusions of law and/or legal argument to which no response is required.

40. The State Defendants restate and incorporate by reference Paragraphs 1 through 39 of this Answer as if fully set forth herein.

41. Denied.

42. Denied.

43. The allegations contained in Paragraph 43 constitute conclusions of law and/or legal argument to which no response is required.

44. The State Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44.

45. The allegations contained in Paragraph 45 constitute conclusions of law and/or legal argument to which no response is required.

46. The allegation contained in the first clause of Paragraph 46 (i.e., "Defendants failed to fulfill their promises") is denied. The allegation contained in the second clause of Paragraph 46 (i.e., "injustice can be avoided only by enforcement of the promises") constitutes a conclusion of law and/or legal argument to which no response is required.

47. Denied.

48. The allegations contained in Paragraph 48 constitute conclusions of law and/or legal argument to which no response is required.

SECOND DEFENSE

49. The Plaintiffs lack standing to assert this action.

THIRD DEFENSE

50. The Plaintiffs' action is barred by the applicable statute(s) of limitations. See G.L. c. 260, §§ 2 (six-year statute of limitations for contract actions); 3A (three-year statute of limitations for actions against Commonwealth).

FOURTH DEFENSE

51. The Plaintiffs' action is barred by the doctrine of laches.

FIFTH DEFENSE

52. The Plaintiffs are not intended third-party beneficiaries of the MOU.

SIXTH DEFENSE

53. The Plaintiffs have failed to join all necessary parties.

SEVENTH DEFENSE

54. The Plaintiffs' action is barred on the grounds of accord and satisfaction and estoppel as a result of a settlement agreement entered into in 2006 by, among others, the parties to the MOU. In support thereof, the State Defendants state that in 2005, Conservation Law Foundation (CLF), a signatory to the MOU, filed an action in Federal District Court against several state entities and officials, including the State Defendants, seeking to compel the construction of various transportation projects, including the Arborway Line. See Conservation Law Foundation v. Romney, et al., C.A. No. 05-10487-NG. In 2006, the parties to that action entered into a settlement agreement in which CLF "agree[d] to support" a revision to the State

Implementation Plan, which, among other things, eliminated the requirement that the Arborway Line be restored. In lieu of the restoration of the Arborway Line, the parties agreed to “work in good faith with the City of Boston and other relevant parties to develop and agree upon recommended public transportation improvements to the Arborway corridor over the course of the next year.” Even if the Plaintiffs were third-party beneficiaries of the MOU, they would be bound by this settlement agreement that was entered into by the actual signatories to the MOU.

EIGHTH DEFENSE

55. The Plaintiffs’ action is barred on the grounds of substituted contract as a result of a settlement agreement entered into in 2006 by, among others, the parties to the MOU. For further description of the settlement agreement, see Paragraph 54, *supra*. The settlement agreement constituted a “substituted contract” in that it was accepted by CLF in satisfaction of any and all existing obligations of the State Defendants under the MOU.

NINTH DEFENSE

56. The Plaintiffs’ action is barred on the grounds of novation as a result of a settlement agreement entered into in 2006 by, among others, the parties to the MOU. For further description of the settlement agreement, see Paragraph 54, *supra*. The settlement agreement constituted a “novation” in that it (1) was accepted by CLF in satisfaction of any and all existing obligations of the State Defendants under the MOU, and (2) included as parties certain entities and officials, *e.g.*, then-Governor Mitt Romney, that were not parties to the MOU.

TENTH DEFENSE

57. The Plaintiffs cannot maintain a breach-of-contract action against the State Defendants because CLF, an actual signatory to the MOU, materially breached that agreement when it filed suit in Federal District Court in 1991 against several state entities and officials, including the State Defendants, seeking to enjoin construction of the CA/T Project. See Conservation Law Foundation of New England, Inc. v. Federal Highway Administration, et al., C.A. No. 91-12222-K. The filing of that action was a material breach of CLF's obligations contained in the MOU, including its obligations "not to commence, maintain or participate in any action or legal proceeding challenging the adequacy of the environmental documentation for the Artery/Tunnel Project, including the Central Artery North Area Project," and "to support actively and in good faith the Artery/Tunnel Project." This material breach discharged any obligations the other parties to the MOU may have had at that time. As a result, even if the Plaintiffs were third-party beneficiaries of the MOU, they cannot maintain a breach-of-contract action against the State Defendants because the MOU has been materially breached by CLF, an actual signatory to the MOU.

ELEVENTH DEFENSE

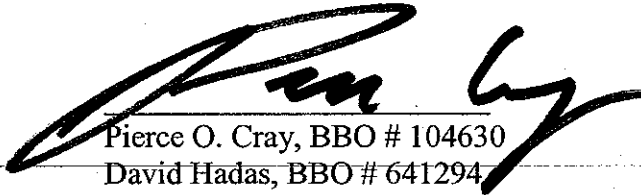
58. The Plaintiffs cannot maintain this breach-of-contract action because the actual signatories to the MOU lacked statutory authority to enter into a binding agreement regarding the specific obligations purportedly set forth in the MOU.

WHEREFORE, the State Defendants respectfully pray that this Court:

1. Enter judgment for the State Defendants and award them their costs and disbursements in defending against this action; and
2. Order such other and further relief as this Court may determine to be just and proper.

Respectfully submitted,

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Date: July 10, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand)

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