COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2584-CV-00039-BLS2

BOSTON SEAPORT M1&2 LAND, LLC

vs.

COMMISSIONER OF REVENUE

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Boston Seaport M1&2 Land LLC (Boston Seaport or Plaintiff) sued the Commissioner of Revenue after the Department of Revenue (DOR) refused to issue Boston Seaport a $15.3 million tax credit pursuant to the Brownfields Act and Tax-Credit Statute (Brownfields Act), equaling fifty percent of the costs Boston Seaport incurred to remediate three and one-quarter acres located at 145 Seaport Boulevard in Boston (the Site). The DOR approved only a partial credit relying on a Licensed Site Professional (LSP) the DOR hired, years after the remediation and development, to evaluate what work was necessary to achieve a "permanent solution" pursuant to G. L. c. 21E (Chapter 21E).

Boston Seaport asserts two claims – for declaratory relief and certiorari review pursuant to G. L. c. 249, § 4. It argues that it is entitled to a tax credit of fifty percent of the entire net costs it incurred in its Chapter 21E cleanup efforts, and that the DOR may not impose its judgment of the remediation work necessary to achieve a permanent solution in contravention of the Brownfields Act which places that judgment on Boston Seaport's LSP-of-Record and the Department of Environmental Protection (DEP).

Before me are cross-motions for judgment on the pleadings. See Super. Ct. Standing Order 1-96. After hearing and review, and for the reasons that follow, Plaintiff's Motion for Judgment on the Pleadings is **ALLOWED**. Defendant's Cross-Motion for Judgment on the Pleadings is **DENIED**.

## BACKGROUND

### I. Governing Statutes and Regulations

#### A. Brownfields Act

In 1998, the Legislature enacted the Brownfields Act, entitled "An Act Relative to Environmental Cleanup and Promoting the Redevelopment of Contaminated Property." St. 1998, c. 206. The Act is codified in two statutes, G. L. c. 62, § 6(j) and G. L. c. 63, § 38Q,[1] which allow a tax credit for the costs of remediating environmental hazards in connection with development in economically distressed areas. The language governing the tax credit is substantively the same in both statutes.[2]

Both statutes provide, in relevant part, as follows:

> A [taxpayer or nonprofit organization / business corporation] which commences and diligently pursues *an environmental response action* on or before August 5, 2028, and [who / which] achieves and maintains a *permanent solution* or remedy operation status in compliance with chapter 21E and the regulations [promulgated pursuant thereto / adopted under that chapter] which includes *an activity and use limitation* shall, at the time such permanent solution or remedy operation status is achieved, be allowed a base credit of 25 per cent of the net response and removal costs incurred between August 1, 1998, and January 1, 2029[,] for any property it owns or leases for business purposes and which is located within an economically[-]distressed area as defined in section 2 of chapter 21E . . . . A credit of 50 per cent of [such / these] costs shall be allowed for [any such taxpayer or nonprofit organization / a corporation] which achieves and maintains a *permanent solution* or remedy operation status in compliance with [said] chapter 21E and the Massachusetts Contingency Plan at 310 CMR

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[1] Chapters 62 and 63 govern income taxes and corporate taxes, respectively.

[2] To the extent the language varies between the two statutes, the alternative terms are set forth in brackets [ / ].

40.0000[, as amended,] which does not include an *activity and use limitation*.

Any credit allowed under this subsection may be taken only after a *response action outcome statement* or remedy operation status submittal has been filed with the department of environmental protection as set forth in said Massachusetts Contingency Plan.

. . .

For the purposes of this section, net response and removal costs shall be expenses paid by the taxpayer for the purpose of achieving a *permanent solution* or remedy operation status in compliance with chapter 21E.

G. L. c. 62, § 6(j)(1), (4) and G. L. c. 63, § 38Q(a), (d) (emphasis added) (hereinafter, the tax credit statutes). The italicized terms in the tax credit statutes are defined in Chapter 21E and the Massachusetts Contingency Plan (MCP), discussed *infra*.

**B. Chapter 21E and the MCP**

"[Chapter] 21E was drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties." Taygeta Corp. v. Varian Assocs., 436 Mass. 217, 223 (2002). The DEP has "promulgated extensive regulations, known collectively as the Massachusetts Contingency Plan (MCP) . . . for purposes of implementing, administering, and enforcing G. L. c. 21E." Id. "The purpose of the MCP is, among other things, to 'provide for the protection of health, safety, public welfare and the environment' by encouraging 'persons responsible for releases . . . of . . . hazardous material to undertake necessary and appropriate response actions in a timely way.'" Bank v. Thermo Elemental Inc., 451 Mass. 638, 653 (2008), quoting 310 Code Mass. Regs. (CMR) § 40.0002. Other purposes of the MCP include "the implementation of appropriate remedial actions" and / or the "evaluation of alternatives for remedial actions" "to abate, prevent, remedy or otherwise respond to a release or threat of release of oil and/or hazardous material[.]" 310 CMR § 40.0002.

The MCP requires that any party responsible for an environmental remediation retain an LSP. 310 CMR § 40.0169(1). LSPs are required to "render Opinions only in

accordance with M. G. L. c. 21A, §§ 19 through 19J, 309 CMR § 4.00: *Rules of Professional Conduct* and 6.00: *Design and Use of Licensed Site Professional's Seal*, M. G. L. c. 21E, 310 CMR [§] 40.0000 and other applicable laws." 310 CMR § 40.0169(3).

Pursuant to the MCP, a "Response Action" is "a broad term used to refer to assessments, containments and/or removals." 310 CMR § 40.0006(2)(a). Under Chapter 21E:

> a "permanent solution" shall mean a measure or combination of measures that, at a minimum, shall ensure the attainment of "no significant risk." For purposes of this chapter, "no significant risk'" shall mean a level of control of each identified substance of concern at a site or in the surrounding environment such that no such substance of concern shall present a significant risk of damage to health, safety, public welfare, or the environment during any foreseeable period of time.

G. L. c. 21E, § 3A(g). The DEP is charged with determining whether a permanent solution has been achieved based on its assessment of "existing public health or environmental standards where applicable or suitably analogous, and any current or reasonably foreseeable uses of the site and the surrounding environment that may be affected by the oil or hazardous materials at the site or in the surrounding environment." Id.

The MCP, in turn, defines a "[p]ermanent [s]olution" as "a measure or combination of measures which will, when implemented, ensure attainment of a level of control of each identified substance of concern at a disposal site or in the surrounding environment such that no substance of concern will present a significant risk of damage to health, safety, public welfare, or the environment during any foreseeable period of time." 310 CMR § 40.0006(12). When a permanent solution is achieved, an LSP submits a Permanent Solution Statement, an LSP Opinion, to the DEP to "document the achievement of a Permanent Solution in accordance with 310 CMR [§] 40.1000." Id.

## II. Factual Background[3]

Boston Seaport acquired the Site in 2015. At that time, the Site consisted of 3.27 acres "which [we]re developed as an active surface grade parking area operated by LAZ parking[.]" A.R. at 5516. The Site had previously been owned by the Massachusetts Bay Transportation Authority which constructed the Silver Line including through a tunnel that "roughly bisects the [S]ite." Id. Prior to any development, the Site was a tidal flat, which was filled in the mid-1860s to the 1880s and became a "a center for railroad and shipping commerce for the remainder of the 1800s through the early 1900s[.]" Id. In the 1880s and 1890s, the Site was owned by the New York & New England Railroad, which filled the property with "gravel, ash, and refuse [and] developed the Site as a terminal ground." Id. at 5517. The terminal was "decommissioned" in the late 1970s / early 1980s. Id. In the late 1980s and 1990s, a seafood warehouse stood on the property which "was later demolished for the Silver Line Tunnel construction." Id.

The Site had been out of compliance with Chapter 21E and the MCP for some period. Id. at 210. Boston Scientific hired Haley & Aldrich (H&A) as the LSP-of-Record[4] for the Site. In February 2016, H&A filed with the DEP a "Re-establishment of

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[3] For the most part, the parties do not dispute the governing facts, only the conclusions to be drawn therefrom. Certain facts are reserved for discussion below.

[4] No other area of the law relies as heavily on the use of acronyms as environmental law in the Commonwealth. An LSP is a Licensed Site Professional defined by the MCP as a "hazardous waste site cleanup professional, as defined in M.G.L. c. 21A, § 19, holding a valid license issued by the Board of Registration of Hazardous Waste Site Cleanup Professionals pursuant to M.G.L. c. 21A, §§ 19 through 19J." 310 CMR § 40.0006(12) An "LSP-of-record" is each LSP who "has rendered an LSP Opinion submitted to the Department [of Environmental Protection] with respect to a specific site[.]" Id. "LSP Opinion" or "Opinion" "means a 'waste site cleanup activity opinion,' as that phrase is defined in M.G.L. c. 21A, § 19, that has been submitted to the Department [of Environmental Protection]." Id.

Response Action Deadlines" submittal with an MCP Phase 1 report to get the Site back into compliance with the MCP. A.R. at 218. H&A concluded that "[n]o Immediate Response Actions are required at the Site" and therefore, H&A did not "[a]nticipate that Comprehensive Response Actions will be necessary at the Site." A.R. at 5334. Instead, soil management "associated with upcoming construction will be conducted in accordance with a R[elease] A[batement] M[easure] Plan." Id.

On August 15, 2016, H&A filed with the DEP its Release Abatement Measure Plan (RAM Plan) in accordance with 310 CMR § 40.0444.[5] The RAM Plan described the proposed development as the construction of three residential towers with two underground garages on either side of the Silver Line tunnel. The RAM Plan also described the remediation activities necessary to achieve a permanent solution. A.R. at 1007.

The RAM Plan described historical subsurface investigations conducted at the Site as well as three subsurface characterization programs H&A conducted in 2015 and 2016 which consisted of the collection of "approximately 381 soil samples." Id. at 5434. The soil sample testing detected PAHs (Polycyclic Aromatic Hydrocarbons), TPH (total petroleum hydrocarbons),VOCs (volatile organic compounds) and metals "exceeding

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[5] RAM Plans are subject to extensive regulations in subpart D of the MCP which sets forth the "requirements and procedures for Preliminary Response Actions and risk reduction measures." 310 CMR § 40.0400. Notwithstanding the extensive regulations governing response actions, including RAM Plans, the MCP makes clear that the DEP retains final authority over *all* remediation actions. 310 CMR § 40.0402 ("No provision of 310 CMR [§] 40.0400 shall limit the authority of the Department to initiate, oversee or order the performance of any response action deemed necessary by the Department to protect health, safety, public welfare or the environment.").

Here, the DOR concedes that RAM Plans are "often filed when construction of a building is proposed at a MassDEP-listed disposal site," and agreed at the hearing of this matter that many developments subject to the Brownfields Act proceed with environmental remediation pursuant to RAM Plans.

MCP RCS-1 Reportable Concentrations in soil in granular fill, cohesive fill and marine sand." Id. at 5435. H&A could not attribute the materials detected to a specific release. It concluded that "the soil constituents are attributable to the presence of urban fill, which is ubiquitous and consistently present in urban areas, and to historic Site use." Id. at 5437. The RAM Plan also described the soil and bedrock conditions encountered at the Site as including sixteen to twenty four feet of fill over cohesive fill, organic deposits, marine sand, marine clay, and glacial deposits in various amounts. Id. at 5436.

H&A's proposed remediation plan called for the excavation of "up to approximately 32,300 c[ubic] y[ards] (55,000 tons) of Remediation Waste[6] (greater than applicable MCP RCS-1) and up to approximately 190,200 cy (323,500 tons) of 'Similar Soils' including cohesive fill materials, organic soils and natural soils below RCS-1 for the building foundations and below grade levels." Id. at 5439. The RAM Plan concluded that "the requirements for a Permanent Solution which does not rely on an AUL [Activity Use Limitation] and will be considered to be met upon the completion of RAM activities. Accordingly, no future remediation will be necessary to achieve and/or maintain a condition of No Significant Risk at the Site." Id. at 5446.

The LSP submitted his seal and signature confirming that the RAM Plan:

> [C]ontains material facts, data, and other information that support the LSP Opinion that, to the best of the LSP's knowledge, information and belief, the response actions that are the subject of this submittal (i) have been developed in accordance with the applicable provisions of [G. L. c.] 21E and 310 CMR 40.0000, (ii) are appropriate and reasonable to accomplish the purposes of such response actions as set forth in the applicable provisions of [ G. L. c.] 21E and 310 CMR 40.0000, and (iii) comply with the identified provisions of all orders, permits, and approvals identified in this submittal.

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[6] Remediation waste "means any Uncontainerized Waste, Contaminated Media and/or Contaminated Debris that is managed pursuant to 310 CMR [§] 40.0030." 310 CMR § 40.0006(12). Such waste is further defined in 310 CMR § 30.100 to include the waste listed in 310 CMR §§ 30.130 through 30.136.

Id. at 5447.

Boston Seaport conducted remediation activities and, in February 2019, completed its release abatement measures. Boston Seaport achieved a permanent solution that did not require or include an activity or use limitation. Id. at 1333. In March 2019, H&A filed with the DEP a RAM Completion Report and a Permanent Solution Statement with No Conditions (Permanent Solution Statement), id. at 1423, certifying that the remedial activities included the excavation of 37,674 cubic yards (cy) of Remediation Waste, which was approximately 17% more than had been estimated in the RAM Plan.[7]

## III. Procedural Background

In April 2020, Boston Seaport filed a tax credit application with the DOR for fifty percent of its net response and removal costs. A large part of the claimed costs included approximately sixty-seven percent of the cost of thirty-inch thick, steel reinforced concrete slurry walls that Boston Seaport built on the perimeter of the excavation. More than two years later, on December 15, 2022, the DOR's Business Income Audit Bureau (the Bureau) preliminarily denied the application asserting that much of the response and removal costs – chiefly the slurry wall costs – related to construction, not remediation. A.R. at 5309. Boston Seaport responded, arguing to the DOR – as it argues here – that the DEP filings by the LSP-of-Record controlled the determination of the costs that were incurred to achieve a permanent solution.[8] On February 3, 2023, the Bureau again denied the tax credit in its entirety.

In March 2023, Boston Seaport appealed pursuant to the DOR's Administrative Procedure. Although it reduced the credit it sought by approximately $6.2 million,

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[7] I have no reason to believe the DEP did not accept the conclusions in that Permanent Solution Statement.

[8] During this period, in further communications with the DOR, Boston Seaport amended its claimed costs until reaching its ultimate total claimed costs of $30.7 million.

most of the costs still stemmed from the concrete slurry walls that "served ultimately as the permanent foundation walls for constriction" of the underground parking garages. Id. at 5335-5336.[9] No decision had been reached by June 2024.

The DOR retained an independent consulting LSP from Verdantas LLC (Verdantas) to assist the DOR's evaluation of Boston Seaport's appeal. In the fall of 2024, the DOR provided Boston Seaport with two memoranda written by Verdantas which concluded that only 25,708 cy of soil needed to be removed to achieve a permanent solution. That was based on Verdantas' determination that "Historic Fill" needed to be remediated only to "Anthropogenic Background" and not "Natural Background" to achieve a permanent solution.[10] Applying that conclusion, Verdantas decided that the total cost of excavation, earth support, transportation and disposal plus a fifteen percent contingency – i.e., the "appropriate" total net response and removal costs "necessary" to achieve a permanent solution in compliance with chapter 21E – would be $5.7 million. Id. at 2359-2366.

Additional discussions took place which included H&A and Boston Seaport providing additional information to the DOR. An administrative conference took place on April 17, 2025. Thereafter, on July 17, 2025, the DOR issued its final decision.

## IV. DOR Final Decision

The DOR correctly viewed the issue before it to be whether the costs for which Boston Seaport seeks a "Brownfields Credit constitute net response and removal costs within the meaning of G.L. c. 63, § 38Q." A.R. at 5332. The DOR concluded, however, that "certain expenses" sought by Boston Seaport "were not incurred for the purposes

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[9] Boston Seaport ultimately sought eighty-seven percent of the costs of the slurry wall.

[10] "Anthropogenic background" means "those levels of oil and hazardous material that would exist in the absence of the disposal site of concern and which are" attributable to, among other things, "Historic Fill" which is itself defined in the MCP. 310 CMR § 40.0006(12).

of achieving a Permanent Solution[.]" Id. at 5333.

First, based on its consulting LSP, the DOR found that the "fill" located at the site constituted "Historic Fill" as defined in the MCP which made it "automatically eligible for a Permanent Solution." Id. at 5343. The DOR, therefore, allowed a tax credit for the removal of non-historic fill, but declined to allow a tax credit for the removal of fill that its LSP concluded constituted Historic Fill. Id. at 5348. The DOR relied, in part, on statements in Boston Seaport's DEP reports which, the DOR concluded, "contain language that is functionally equivalent to the MCP definitions of Historic Fill and Anthropogenic Background." Id. at 5344.[11] The DOR also relied upon Verdantas' review of historical information about the Site and the soil sample descriptions in Boston Seaport's DEP submittals. See Id. at 5345-5348. "As a result, the [DOR's] conclusion is that the majority of the soil at the Site was Historic Fill / Anthropogenic soil from the historic filling of the Seaport area in the mid-1860s through the 1880s." Id. at 5348. Essentially, relying on its LSP, the DOR disagreed with H&A's conclusions, which were reported to and accepted by the DEP at the time of remediation, about the nature of the fill at the Site and the amount of Remediation Waste that was required to be excavated.[12]

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[11] Throughout its submissions to the DOR on behalf of Boston Scientific, H&A acknowledged it used the term "historic urban fill" in its DEP submissions but has consistently argued that such language was not intended to meet the MCP definition of "Historic Fill" but "has been used for a number of years in the local environmental profession as a term of art or engineering jargon . . . to describe the generic fill . . . in the Boston area . . . ." A.R. at 5273. H&A and other LSPs concluded the fill at the Site was not Historic Fill as defined by the MCP.

[12] The DOR also relied on the fact that H&A, in connection with separate reports for other nearby sites in the Seaport for which H&A was the LSP-of-Record for other developers, had concluded the fill soil was "Historic Fill," writing, "the fill encountered at the site is consistent with the MCP definition of historic fill and is consistent with the conceptual site model." Those reports, however, do not support the inference the DOR draws. That H&A expressly referenced the MCP definition of Historic Fill in

In summary, although H&A had concluded that excavation to Natural Background was required to achieve a permanent solution for the Site, the DOR relied on its LSP to find that remediation needed only be conducted to levels of Anthropogenic Background and not Natural Background. Id. at 5349.

Because it reached a different conclusion about the activities it considered necessary to achieve a permanent solution, the DOR was forced to estimate – years later – the costs for those more limited remediation activities. Verdantas "estimate[d] the volume of soil required to be removed to achieve a Permanent Solution." A.R. 5353-5354. Based on that estimate of a significantly smaller volume of soil, Verdantas evaluated the "earth support methods" necessary to support excavation and concluded that construction of the slurry walls was not necessary, rather, a "single purpose, temporary earth support system that would have provided temporary shoring to remediate the estimated soil volumes" was all that was necessary. Id. at 2360-2362. Verdantas then estimated the costs for such a temporary support system and concluded the total estimated cost to achieve a permanent solution is $5,711,227. Id. at 2365.

## DISCUSSION

### I. Standard of Review

As noted, Boston Seaport challenges the DOR's denial of its requested tax credit in a Complaint brought in the nature of certiorari pursuant to G. L. c. 249. § 4. That statute "establishes limited judicial review . . . to correct errors in proceedings which are not according to the course of the common law . . . otherwise reviewable[.]" Sheriff of Plymouth Cnty. v. Plymouth Cnty. Pers. Bd., 440 Mass. 708, 710 (2004) (quotations omitted). See Langan v. Board of Registration in Med., 477 Mass. 1023, 1025 (2017) ("Certiorari is a 'limited procedure reserved for correction of substantial errors of law

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connection with those sites, but *not* in connection with the Site at issue here, establishes that H&A was able to and did discern when soil met the MCP definition and supports its conclusion that the soil at the Site did not.

apparent on the record created before a judicial or quasi judicial tribunal.'"), quoting Indeck v. Clients' Sec. Bd., 450 Mass. 379, 385 (2008).

The standard of review "var[ies] according to the nature of the action for which review is sought." Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). See Pollard v. Conservation Comm'n of Norfolk, 73 Mass. App. Ct. 340, 348 (2008) (standard of review pursuant to certiorari statute "accommodates to the kind of administration decision involved" [citation omitted]). The "proper standard of review under the certiorari statute is flexible and case specific" but must ultimately "turn on whether the agency's decision was arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law." Langan, 477 Mass. at 1025, quoting Hoffer v. Board of Registration in Med., 461 Mass. 451, 458 n.9 (2012).

Where "the decision was not made in an adjudicatory proceeding" but rather is an "exercise of the board's administrative discretion," the "arbitrary and capricious" standard applies. Revere v. Massachusetts Gaming Comm'n, 476 Mass. 591, 605 (2017) (citation omitted). See Forsyth Sch. 404 Mass. at 217 (when agency is "free to use its judgment in determining when and to whom to grant exemptions from its regulations," its decision is subject to arbitrary and capricious standard of review). See also Diatchenko v. District Attorney for Suffolk Dist., 471 Mass. 12, 31 (2015) ("Because the decision whether to grant parole to a particular . . . offender is a discretionary determination by the board . . . an abuse of discretion standard is appropriate."). The substantial evidence standard, on the other hand, applies principally in cases in which there is an adjudicatory hearing, see Figgs v. Boston Hous. Auth., 469 Mass. 354, 361-362 (2014), which did not occur here.

However, both types of agency decisions – a discretionary decision or one made after an adjudicatory hearing – must be consistent with the law. See Matter of Elec. Mut. Liab. Ins. Co., Ltd. (No. 1), 426 Mass. 362, 366 (1998) ("An administrative agency

has only the powers and duties expressly or impliedly conferred on it by statute."). The courts will not uphold a decision that stemmed from legal error or exceeded the agency's scope of authority. See Commercial Wharf E. Condo. Ass'n v. Department of Env't Prot., 99 Mass. App. Ct. 834, 841 (2021) ("An erroneous interpretation of a statute by an administrative agency is not entitled to deference." [quotations omitted]); Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-541 (2014) ("On certiorari review, the Superior Court's role is to . . . correct substantial errors of law apparent on the record adversely affecting material rights." [quotation omitted]); Herrick v. Essex Reg'l Ret. Bd., 77 Mass. App. Ct. 645, 648 (2010) ("Deference is not abdication. It does not permit a detectable error of law by the agency." [quotation omitted]); Fafard v. Conservation Comm'n of Reading, 41 Mass. App. Ct. 565, 567-568 (1996) ("When considering a case under certiorari, . . . the reviewing court examines the agency action to determine whether it was authorized by the governing statute . . . .").

## II. Analysis

The principal question before me is whether the DOR, in administering the Brownfields tax credit, is foreclosed from analyzing, assessing, challenging and ultimately reaching its own conclusion about whether the costs incurred and for which a developer seeks a tax credit were "for the purpose of achieving a permanent solution."

### A. Offensive Collateral Estoppel

Boston Seaport argues that the DOR is bound by Abodez Acorn CW LLC v. Commissioner of Revenue, No. 2016-1238-H, slip op. (Mass. Super. Nov. 20, 2017), in which the Court (Wilkins, J.) construed the Brownfields Act and held that the DOR was bound by the LSP-of-Record's determination of the amount of excavation necessary for remediation because "the Legislature likely intended for the DEP filings to fix the activities for which expenditures qualify for the tax deductions." Id. at 8.

In that case, as here, the developer submitted a RAM Plan to the DEP for the environmental response in connection with a development, achieved a permanent solution without an AUL, and sought a tax credit. Id. at 2. The DOR, as here, partially disallowed costs which it determined were related to construction and not remediation. Id. The Court found for the plaintiff-developer, reasoning that "[n]othing in the DEP regulations, or the filings required thereby" permit the DOR "to usurp the LSP[-of-Record]'s role by considering matters peculiarly within the LSP's expertise – and distinctly outside the Commissioner's expertise – concerning the scope of the activities required for Brownfields redevelopment." Id. at 8-9. Judge Wilkins considered the language of the Brownfields Act and concluded that the "statute's treatment of DEP's and DOR's respective roles strongly implies that the Commissioner has the power to adjust the amount of the requested tax credit only for matters traditionally within DOR's traditional purview, including matters of accounting, documentation of costs, mistake, fraud, sham and the like." Id. at 9. Final judgment entered in Abodez and the DOR did not appeal. Boston Seaport argues that the DOR is thus collaterally estopped from relitigating the factual issues decided in that case.

"[O]ffensive use of collateral estoppel 'occurs when a plaintiff seeks to prevent a defendant from litigating issues which the defendant has previously litigated unsuccessfully in an action against another party.'" Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 60 (2014) (quotations omitted).[13] Ordinarily, "[o]ffensive issue preclusion 'does not require mutuality of parties, so long as there is an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction.'" Id., quoting Pierce v. Morrison Mahoney LLP, 452 Mass. 718, 730 (2008). Thus, "[a] party is precluded from relitigating

[13] Collateral estoppel, a subset of the doctrine of res judicata, is also often called "issue preclusion." Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 60 (2014). I use both terms without distinction.

an issue where (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication, was essential to the earlier judgment, and was actually litigated in the prior action." DeGiacomo v. Quincy, 476 Mass. 38, 42 (2016) (internal quotations omitted).

However, "[w]hile offensive collateral estoppel is a generally accepted practice . . . courts should perform a careful evaluation of the circumstances of the prior litigation before invoking the doctrine, to ensure that it is being fairly applied in the circumstances." Barry v. Planning Bd. of Belchertown, 96 Mass. App. Ct. 314, 321-322 (2019) (quotation omitted). "Courts accordingly have wide discretion" in determining whether the application of offensive collateral estoppel would be fair to the defendant." Id. at 322.

The issues decided in Abodez which Boston Seaport argues estop the DOR here are that (i) the LSP-of-Record's "controlling DEP filings" bind the DOR absent the Court's identified exceptions and (ii) the DOR may not substitute its judgment for the LSP-of-Record regarding what actions to undertake "for the purpose of achieving a *permanent solution*." G. L. c. 62, § 6(j)(4).

The DOR argues in response that nonmutual collateral estoppel cannot bind the Commonwealth.[14] Although that question has not been answered directly in the Commonwealth in a civil case, I agree that the law does not permit collateral estoppel against the Commissioner of Revenue and DOR in these circumstances.

In United States v. Mendoza, 464 U.S. 154 (1984) the Supreme Court held that "nonmutual offensive collateral estoppel is not to be extended to the United States[.]"

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[14] Nonmutual collateral estoppel refers to the fact that Boston Seaport was not a party to the Abodez case.

Id. 464 U.S. at 158-159. The Court reasoned that the government is not the same as a private litigant and application of the doctrine would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." Id. at 160. In part, that is because the government, unlike a private litigant, does not appeal every case, even when it can prevail. Id. at 161. Further, the Supreme Court considered that litigation decisions by the government involve "policy choices" that can differ from administration to administration. Id. It concluded, "[t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government." Id. at 162-163.

State courts have differed in their conclusion about whether to extend Mendoza to the state governments. Two California appellate courts have followed Mendoza to preclude estoppel claims against that state's governmental entities. See K.G. v. Meredith, 204 Cal. App. 4th 164, 172 fn.9 (2012) ("[N]onmutual offensive collateral estoppel is not available against a government entity."); Helene Curtis, Inc. v. Assessment Appeals Bd. 76 Cal. App. 4th 124, 133 (1999) ("nonmutual collateral estoppel does not apply against the government as a way to preclude relitigation of issues . . . ."). A Wisconsin appellate court likewise held nonmutual issue preclusion inapplicable against the state. Gould v. Department of Health and Soc. Servs., 216 Wis. 2d 356 (Wis. Ct. App. 1998) (finding "the reasoning of Mendoza regarding the differences between government and private litigants to be sound, and applicable in significant respects to state agencies" and noting that "to hold otherwise would require a state agency to appeal every adverse decision to ensure that it could relitigate the issues against another party"). Multiple federal Courts of Appeals have also extended Mendoza to the states. See Idaho Potato Comm. v. G & T Terminal Packaging, Inc., 425

F.3d 708, 714 (9th Cir. 2005) (holding Mendoza rationale applies to state governments); In re Complaint of Hercules Carriers, Inc., 768 F.2d 1558, 1579 (11th Cir. 1985) ("[T]he rationale outlined . . . in Mendoza for not applying nonmutual collateral estoppel against the government is equally applicable to state governments.").

Other states have declined to apply Mendoza to their own governments. In State v. United Cook Inlet Drift Ass'n, 895 P.2d 947 (Alaska 1995), the Alaska Supreme Court held that "[t]he exception . . . which the Mendoza court created was one especially fashioned for the federal government as a litigant." Id. at 951. In In re Stevenson, 615 Pa. 50 (2012), the Pennsylvania Supreme Court held that Mendoza's policy concerns do not necessarily apply to state governments and declined to extend Mendoza to the state in the absence of specific advocacy by the government. Id. at 67. Accord City of Covington v. Board of Trs. of Policemen's and Firefighters' Ret. Fund, 903 S.W.2d 517, 522 (Ky. 1995) (declining to extend Mendoza and favoring "case by case" approach).

Although the Supreme Judicial Court (SJC) has not decided the question of whether the Commonwealth and its agencies and departments can be bound by nonmutual offensive collateral estoppel, the law is not silent on the myriad concerns addressed by Mendoza.[15] For example, as I recently concluded, applying established

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[15] These concerns are summarized in the Restatement (Second) of Judgments (1982):

> When the issue involved is one of law, stability of decision can be regulated by the rule of issue preclusion or by the more flexible rule of stare decisis. See § 28, Comment *b*. If the rule of issue preclusion is applied, the party against whom it is applied is foreclosed from advancing the contention that stare decisis should not bind the court in determining the issue. Correlatively, *the court is foreclosed from an opportunity to reconsider the applicable rule, and thus to perform its function of developing the law.* This consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined, *as when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court;* . . . or when the issue is of general interest and has *not been resolved by the highest appellate court that can resolve it.* As indicated in § 28, Comment *c*, it is also pertinent that the party against whom the

precedent, the related doctrine of equitable estoppel cannot be asserted as an affirmative defense against the Commonwealth when to do so would impede the public interest, force the government to engage in litigation conduct it otherwise might not simply to forestall application of estoppel, and hinder the ability of the government to make differing policy choices. See Commonwealth v. Hometap, No. 2584CV00469-BLS2, slip op. at 3-8 (Mass. Super. Dec. 19, 2025), citing Del Gallo v. Secretary of Commonwealth, 442 Mass. 1032, 1033 (2004); LaBarge v. Chief Admin. Justice of the Trial Court, 402 Mass. 462 (1988); Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth., 387 Mass. 687 (1982); Commonwealth v. Exxon Mobil Corp., No. 19-3333-BLS1, 2022 WL 16839211 (Mass. Super. Mar. 21, 2022) (Krupp, J.). These same animating concerns arise when a party invokes nonmutual offensive collateral estoppel against the government.

In addition, the SJC has addressed the issue in the criminal context, holding that nonmutual collateral estoppel did not apply to preclude the Commonwealth from prosecuting a defendant for conspiracy even though his alleged coconspirator had been acquitted at a prior trial. Commonwealth v. Cerveny, 387 Mass. 280, 284-286 (1982). The Court reasoned that "the public interest in securing just and accurate results in the criminal law" outweighed the "intellectual[ ] discomfort[ ]" of potentially inconsistent verdicts. Id. at 286. In Commonwealth v. Stephens, 451 Mass. 370 (2008), the Court extended that conclusion to suppression motions, finding that "there is no sound policy reason why the Commonwealth should be precluded from seeking to enforce the criminal laws against a defendant where, for whatever reason, a codefendant has

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> rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons. When any of these factors is present, the rule of preclusion should ordinarily be superseded by the less limiting principle of stare decisis.

Id. at § 29 (emphasis added).

prevailed on a motion to suppress." Id. at 378. The SJC reasoned that "[m]utuality of parties in criminal cases is required for another reason: to permit the Commonwealth to decide, depending on the import of each case and the resources available, whether to take an interlocutory appeal from a suppression order." Id. at 379. Such a decision "may be based on considerations independent of the merits of any appeal," including that the "charge does not justify the cost of appeal." Id. at 379-380.

As to the prior decision at issue here, Abodez was decided in 2017, under a different Attorney General, Governor, and Commissioner of Revenue than the ones in office today. There may have been policy reasons the Commonwealth did not appeal that decision. Indeed, despite its strong similarity to the instant case, Abodez ultimately concerned a requested tax credit in the amount of $897,209. It is reasonable to conclude that an appeal was deemed not cost effective, whereas the tax credit sought here exceeds $15 million.

Based on the above, I hold that it is inappropriate to apply nonmutual collateral estoppel to the Commonwealth in the circumstances presented here. The uniqueness of the government as a litigant compels this conclusion. Application of the doctrine would freeze the development of the law,[16] force the government to take appeals in cases it otherwise would not simply to avoid the doctrine (and thereby swell the time and expense of litigation beyond what the immediate case prudently warrants), and impede differing policy choices and priorities of successive administrations. Mendoza, 464 U.S.

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[16] The Superior Court is the trial court of general jurisdiction in the Commonwealth with 81 Associate Justices hearing and deciding all manner of cases brought by and against the Commonwealth in every county of the state. A persuasive, even a highly persuasive decision from a single Justice of the Superior Court is not binding on the other Justices who can, and often do, apply their own reasoning and judgment to decide legal issues differently. The appellate courts of the Commonwealth are benefitted by having before them the analysis and reasoning undergirding differing legal conclusions from the Superior Court.

at 161-162.

The decision in Barry v. Planning Bd. of Belchertown, 96 Mass. App. Ct. 314, 324 (2019) does not persuade me elsewise. There, the Appeals Court declined to apply nonmutual collateral estoppel finding it would be unfair to "preclude a government board from litigating about the adequacy of a way, based upon an incorrect finding in a thirty year old judgment involving litigants other than" the plaintiffs. Id. at 324. The Court noted that applying collateral estoppel would "undermine the public interest," and that "recognized principles . . . speak caution in applying offensive collateral estoppel in such circumstances." Id., citing Restatement (Second) of Judgments, supra at § 28(5); Mendoza, 464 U.S. at 159-161.

While Boston Seaport is correct that the Court did not apply Mendoza to hold that nonmutual collateral estoppel was inapplicable to the government in all civil cases, it likely did not go so far because it did not need to do so. The Court found the doctrine was inapplicable because the issues were not the same as the prior matter and material facts had changed. Id. at 322. Here, by contrast, the DOR has expressly sought a determination whether nonmutual collateral estoppel can bind the Commonwealth. Additionally, in Barry, the "governmental" party was a town planning board, not a Department of the Commonwealth. The distinction may be significant. Most notably, the policy ramifications of permitting offensive collateral estoppel against the Commonwealth (as opposed to a municipal board) would be significantly broader. I have not considered whether nonmutual collateral estoppel should apply to all governmental entities including cities and towns, and need not do so here. For clarity, I hold that nonmutual collateral estoppel does not apply to the Commonwealth and its departments, agencies, boards and commissions, like the Commissioner of Revenue and the DOR.

**B. The DOR Acted Contrary to Law**

My conclusion that the DOR is not collaterally estopped by Abodez does not end the analysis. I must now determine whether the DOR has the statutory authority to itself investigate environmental matters, down to the level of determining the nature of the contamination of the soil at redevelopment sites, to reach its own determination of the costs that were necessary to achieve a permanent solution consistent with Chapter 21E and the MCP. I conclude that the Legislature has not granted that authority to the DOR. I also conclude that the DOR's assertion of that power undercuts the policy and purpose of the Brownfields Act ***and*** the Commonwealth's excruciatingly detailed laws and regulations governing environmental remediation.

I begin, as I must, with the tax credit statute(s) and apply the well-developed "traditional rules of construction," beginning with the text as "the principal source of insight into regulatory purpose." Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 410 (2014). In so doing, I do not construe statutory terms mechanically; rather, I consider them in the context in which they appear, with reference to the surrounding words, id. at 410-411, and in a manner that avoids "absurd consequences" the Legislature could not have intended. Commonwealth v. Buccella, 434 Mass. 473, 481-482 (2001). I must "ascertain and effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense." Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019). Further, I presume that "the Legislature intended what the words of the statute say." Commonwealth v. Williamson, 462 Mass. 676, 679 (2012). See Ciani v. MacGrath, 481 Mass. 174, 178 (2019) ("Ordinarily where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent."), quoting Sharris v. Commonwealth, 480 Mass. 586, 594 (2018). Finally, I must construe a statute logically and consistently with the Legislature's intent. Randolph v. Commonwealth, 488 Mass. 1, 5 (2021); Ciani, 481 Mass. at 178. I may not enlarge or limit a statute "unless its object and plain meaning require it." Canton v. Commissioner of Mass. Highway Dep't, 455

Mass. 783, 789 (2010), quoting Rambert v. Commonwealth, 389 Mass. 771, 773 (1983).

The Brownfields Act tax credit statutes provide that a taxpayer who "commences and diligently pursues an environmental response action" and who "achieves and maintains a permanent solution or remedy operation status in compliance with [ ] chapter 21E and the Massachusetts Contingency Plan . . . which does not include an activity and use limitation" "***shall***, at the time such permanent solution or remedy operation status is achieved, be allowed" a "credit of 50 per cent" of the "net response and removal costs ***incurred***[.]" G. L. c. 62, § 6(j)(1); G. L. c. 63, § 38Q(a) (emphasis added). The credit may be taken "only after a response action outcome statement or remedy operation status submittal has been filed with the department of environmental protection as set forth in said Massachusetts Contingency Plan," and "net response and removal costs ***shall*** be expenses ***paid*** by the taxpayer for the purpose of achieving a permanent solution or remedy operation status in compliance with chapter 21E." G. L. c. 62, § 4(j)(1), (4); G. L. c. 63, § 38Q(d) (emphasis added).

I begin with the Legislature's use of the word "shall" as highlighted above. A taxpayer who achieves a permanent solution "shall" be entitled to a tax credit of "net response and removal costs" which "shall be expenses paid by the taxpayer for the purpose of achieving a permanent solution or remedy operation status in compliance with chapter 21E." The plain meaning of "shall" communicates a mandate. Massachusetts Insurers Insolvency Fund v. Workers' Comp. Trust Fund, 496 Mass. 234, 241 (2025). See Kauders v. Uber Techs., Inc., 486 Mass. 557, 569-570 (2021) ("The use of 'shall' is mandatory"), citing Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 791 (2016) ("shall confirm" in statutory provision is "directive" and "carries no hint of flexibility" [citation omitted]). See also Attorney Gen. v. Milton, 495 Mass. 183, 189 n.15 (2025) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation." [quotation omitted]). "Shall" does not imply a grant of discretion. Boston Tchrs. Union, Loc. 66 v. School Comm. of Boston, 494 Mass. 519, 523-524 (2024). And the

only interpretation of the plain and ordinary phrase "expenses paid by the taxpayer for the purpose of achieving a permanent solution" is that the taxpayer shall get a credit for actual expenses actually incurred to achieve a permanent solution. Both the fact of the credit and the amount – "the expenses paid" – are legislatively mandated by the use of the term "shall."

I also consider that the statute includes no mechanism for the DOR to challenge whether all the amounts "paid" to achieve a permanent solution were "necessary," or to conduct an after remediation environmental investigation in order to approve a credit based on only the barest minimum of what would be necessary to remediate in the absence of development.

The DOR argues that the meaning of the phrase "for the purpose of achieving a permanent solution" is ambiguous and, therefore, I must defer to its interpretation which is that the eligible expenses are only those "required" to achieve a permanent solution. In other words, the DOR reads nonexistent language into the statute and argues that I must defer to such insertion. I disagree. See id. at 523 (refusing to "add[ ] words to a statute that the Legislature did not put there" or to find discretion for conditions not found in statutory text). To the contrary, I agree with Judge Wilkins that the specific incorporation of Chapter 21E and the MCP into the tax credit statute and the use of terms of art defined by both, such as permanent solution, remedy operation status, and response action statement, "strongly implies" that the DOR does not have the authority (or expertise) to second guess the LSP-of-Record and the DEP, and then adjust the amount of the tax credit based on its conclusions about what environmental remediation activities the DOR determines were "required." Abodez, supra, at 9.

Put elsewise, by incorporating Chapter 21E and the complex, lengthy, and detailed MCP, the Legislature intended that the DEP's conclusions, based on submissions by the LSP-of-Record, to control. I construe that incorporation of the Commonwealth's environmental statute and regulations relating to environmental

remediation as I must, and as Judge Wilkins did in Abodez: The Legislature intended the filings of the DEP – the agency with "primary authority" to implement and enforce Chapter 21E, Commonwealth v. Boston Edison Co., 444 Mass. 324, 328 (2005) – to "fix the activities for which expenditures qualify for the tax credits." Abodez, supra, at 8.[17]

The DOR's position, that the DEP filings "fix" nothing, but only provide relevant evidence from which the DOR itself may determine what activities will qualify for the tax credit would make all the references to Chapter 21E and the MCP in the tax credit statutes superfluous. The DOR's position would render all the DEP filings and work of the LSP-of-Record as mere background information from which the DOR can assess and analyze but to which it is not bound, in my view an insupportable reading of the statute.

That the DOR hired a consulting LSP after the remediation, indeed after development, was complete, thus purporting to empower itself with some environmental expertise, does not change my view. A later hired consulting LSP purporting to conclude which activities were necessary to achieve a permanent solution circumvents the role of the LSP-of-Record which is to ensure compliance with the environmental laws and regulations of the Commonwealth. It ignores the LSP-of-Record's important statutory and regulatory role. As the Appeals Court has recognized, "the rules governing the authority of LSPs, found at G.L. c. 21A, §§ 19–19J, establish that LSPs are workers licensed by the government whose role is to advise and guide the cleanup efforts of" responsible parties, including developers like Boston Seaport here. Commonwealth v. Eskanian, 74 Mass. App. Ct. 666, 672 (2009). As the Court in Abodez concluded, the "DEP filings are prepared by an expert LSP, with specific qualifications in determining what cleanup and excavation activities must occur

[17] Chapter 21E charges the DEP with determining whether a permanent solution has been achieved and the MCP gives the DEP final authority over all remediation. G. L. c. 21E, § 3A(g); 310 CMR §40.0402.

under the MCP. For DOR to determine the scope of the necessary remediation is to usurp the role of DEP and the LSP." Abodez, supra, at 9. H&A was tasked, during remediation of the Site, with developing the RAM Plan, reporting to the DEP during the remediation, and filing the RAM Completion Report and Permanent Solution Statement certifying the remedial activities that were conducted to reach a permanent solution. It did so under seal and consistent with the law and regulations and the governing Rules of Professional Conduct for LSPs. See 310 CMR § 40.0169(3).

The DOR handwaves away the important statutory and regulatory role of the LSP-of-Record during remediation, the fact that it is an agent of the DEP, and that it certifies its conclusions and opinions to the DEP, arguing that "compliant with the MCP and necessary to achieve a permanent solution under the MCP are not the same thing." (Def.'s Memo. at 17 (emphasis in original)). The opposite conclusion is the only appropriate one. The complex and detailed MCP ensures the protection of the health, safety, public welfare and the environment and prescribes "the respective roles and responsibilities of the [DEP], other governmental agencies, Responsible Parties, Potentially Responsible Parties, Licensed Site Professionals, Other Persons, and the public in response actions." 310 Code Mass. Regs. (CMR) § 40.0002. By directly incorporating the MCP into the tax credit statute, the Legislature intended that conclusions reached consistent with the MCP govern the applicability of the tax credit.

The alternative results in the absurd consequence where, rather than basing a tax credit on the "expenses paid" by the developer, as the tax credit statute requires, tax credits would be based on the DOR's own, post hoc, non MCP-governed, review of DEP filings and then the creation of alternative scenarios and "estimated costs." But developers must comply with the MCP. See Grand Manor Condo. Ass'n v. Lowell, 478 Mass. 682, 690 (2018) (chapter 21E "mandates that responsible parties engage *in the MCP remediation process*") (emphasis added). Why would the Legislature incorporate the MCP into the tax credit statute if the DOR was empowered to ignore the MCP and

conduct its own environmental assessment of the scope of the minimum amount of activities required to achieve a Permanent Solution?

Here, Verdantas' conclusions also lack the credibility and imprimatur of the LSP-of-Record who acts as a quasi-governmental agent to advise a developer during a cleanup and who must certify the activities undertaken, the results, and its opinions to the DEP. The DOR's LSP in this case simply reviewed the DEP filings, reached a different conclusion regarding the amount of soil that needed remediation, estimated costs – including costs for an earthen support that was not used during remediation – and then advised the DOR on the appropriate amount of a tax credit. And the mandatory language of the tax credit statute(s) refutes rather than suggests that the Legislature authorized the DOR to engage in such a battle of the experts, much less empowered it to serve as the final arbiter of such disputes and effectively overrule the DEP's endorsement as to what environmental response was "necessary."

While I recognize that, in the ordinary course, particularly on certiorari review, Courts should defer to an agency's or department's reasonable interpretation of a statute, the law is clear that an incorrect interpretation deserves no deference. Commercial Wharf, 99 Mass. App. Ct. at 841. Here, the DOR has not construed the words of the statute and given them their ordinary meaning in the context of the statute as a whole. Instead, the DOR has added terms and concepts to the statute wholesale. The DOR construes "expenses paid by the taxpayer for the purpose of achieving a permanent solution . . . in compliance with chapter 21E" as meaning "***the minimum necessary*** expenses paid by the taxpayer for the purpose of achieving a permanent solution . . . ***based on a post remediation environmental audit performed by the DOR.***" That construction cannot be squared with the language of the statute, its basic purposes, or the Legislature's evident intent that the DEP, Chapter 21E, and the comprehensive and detailed MCP control what expenses were "for the purpose of achieving a permanent solution." Such a construction – adding terms and

responsibilities not provided in the statute – is not "statutory construction" entitled to deference, it is invention.

I next turn to the purposes of the tax credit which was cogently and succinctly stated by Judge Wilkins: "to facilitate and incentivize cleanup and reuse of brownfields properties, both to promote beneficial reuse of previously-contaminated properties and to reduce pressure to develop pristine land that may be appropriate for other purposes than commercial development." Abodez, supra, at 11. See G. L. c. 21E, § 19 (office of brownfields revitalization charged with creating a strategy to "(i) promote the redevelopment and reuse of sites that are located in economically distressed areas and are contaminated by oil or hazardous material, and (2) to the maximum extent feasible, reap the combined benefits of environmental protection and economic redevelopment for the commonwealth."); Northeastern Univ. v. Commissioner of Revenue, 92 Mass. App. Ct. 1120, 2017 WL 6612896, at *4 (Dec. 28, 2017) (Rule 1:28) (purpose of Brownfield tax credit statute is "to provide for economic investments in the commonwealth"), citing St. 2006, c. 123, Preamble.

The DOR's position – that it can second guess the LSP-of-Record's determinations made pursuant to the MCP – would eviscerate those purposes. It cannot be gainsaid that the incentive of a fifty percent tax credit of remediation costs to spur development would be severely weakened if developers understood that it must comply with its LSP-of-Record and the MCP and incur costs in compliance with Chapter 21E, but the DOR could unilaterally decide that not all of those incurred costs were "necessary," long after they were paid.[18] This remains true if the DOR need only rely on the opinion of a later retained LSP that diverged in some fashion from the LSP-

[18] It would be a relatively unlikely scenario that a developer would deliberately engage in unnecessary and excessive remediation – all while paying out of pocket – simply to achieve a fifty percent tax credit.

of-Record. Undoubtedly, a certain amount of development simply would not occur in the face of that uncertainty which would undercut both purposes of the Brownfields Act, development and the environmental remediation of contaminated sites. It is also likely to encourage band-aid style rather than comprehensive cleanup efforts, something the Legislature plainly did not intend from its incorporation of Chapter 21E, a statute designed to promote environmental remediation rather than revenue collection.

The DOR likely will respond that the credit should not encompass pure construction costs. Everyone agrees. But that does not compel a conclusion that the DOR has the expertise or authority to (re)draw such lines. Here specifically, the DOR's focus on the concrete slurry wall as not necessary for remediation divorces construction and development from environmental remediation which also will certainly disincentivize developers. Limiting the tax credit to remediation costs in the absence of development, i.e., ignoring that cleanup will occur only in connection with development (and must dovetail therewith), will result in no development and no remediation.[19]

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[19] The DOR's blithe assertion that its interpretation of the statute does not contravene the Legislature's purpose because, "there is no evidence of any legislative purpose to award a windfall to developers," has no factual or evidentiary support here. To the contrary, Boston Seaport *understood and agreed* that some percentage of the costs of the concrete slurry wall was attributable solely to construction and not remediation and did not, therefore, seek a tax credit of the full amount. There is zero information before me and none before the DOR to indicate that Boston Seaport or its LSP-of-Record H&A were engaged in any wrongdoing intended to achieve a windfall. For that same reason, the exception outlined in Abodez, that the DOR has the power to examine tax credit applications for matters within its "traditional purview, including matters of accounting, documentation of costs, mistake, fraud, sham and the like" is inapplicable here. Id. at 9. If a tax credit-seeker included in its claim for a credit costs that clearly had *nothing* to do with obtaining a permanent solution the DOR has the power to conclude that the statutory "for the purpose of" standard was not met. Indeed, that circumstance would constitute "fraud" which is included in the ordinary powers of the

Finally, I address certain of the DOR's specific arguments here.[20] The DOR argues that it must discern the minimum amount required to achieve a permanent solution because H&A used a RAM Plan. According to the DOR, a RAM Plan is a type of preliminary response action intended to allow for accelerated remedial actions limited in scope and complexity and pursuant to which LSPs are not required to evaluate remedial alternatives other than the ones selected, as they would do with a comprehensive site assessment pursuant to 310 CMR § 40.0900. The use of a RAM Plan in connection with the development of the Site does not, in my view, provide justification for the DOR's position.

First, nothing in the tax credit statute requires an LSP to proceed pursuant to a comprehensive site assessment versus a RAM Plan. Second, a RAM Plan complies with the MCP which is all the tax credit statute requires. Third, as the DOR concedes, RAM Plans are often used in Brownfields developments. Fourth, contrary to the DOR's argument, the MCP requires that RAM Plans include a risk characterization and describe the remedial actions deemed necessary to achieve a permanent solution. See 310 CMR § 40.0442. Finally, as discussed above, the RAM Plan H&A submitted identified the amount of contaminated soil that needed to be removed to achieve a permanent solution and H&A's Permanent Solution Statement certified the final actual amount of soil removed. Moreover, given that there is no dispute RAM Plans are the most common method to remediate under Chapter 21E in the context of construction, the DOR's position would create a permanent tax credit statute exception.

Finally, the DOR's assertion that it did not act arbitrarily or capriciously where it relied on its consulting LSP misses the thrust of Boston Seaport's argument, which is

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DOR as described in Abodez. Id. However, it cannot be that proceeding pursuant to a RAM Plan contemplated by and compliant with the MCP constitutes a "fraud" "sham" or "mistake" or results in any "windfall" to the developer.

[20] Those not addressed were not persuasive.

that the DOR does not have the statutory authority to undertake the environmental review it did and, thus, acted contrary to law, which is by definition arbitrary and capricious. See Armstrong v. Secretary of Energy & Env't Affs., 490 Mass. 243, 247 (2022) ("When an agency acts beyond the scope of authority conferred to it by statute, its actions are invalid and ultra vires."); American Fam. Life Assur. Co. v. Commissioner of Ins., 388 Mass. 468, 476 (1983) (actions beyond agency's statutory "would be arbitrary and capricious on their face"). Accord Fafard, 41 Mass. App. Ct. at 567-568 (conduct not authorized by the governing statute is arbitrary and capricious).[21]

## ORDER

For the reasons stated, Plaintiff's Motion for Judgment on the Pleadings is **ALLOWED**. Defendant's Cross-Motion for Judgement on the Pleadings is **DENIED**. Judgment shall enter for the Plaintiff. Further, in connection with the Plaintiff's request for declaratory relief:

I hereby **DECLARE** that the Department of Revenue does not have the statutory authority to substitute its judgment for the judgment of the LSP-of-Record concerning the scope of the environmental remediation necessary to achieve a permanent solution and instead is bound by the LSP-of-Record's determination of necessary remediation activities as described in their DEP filings.

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[21] Nothing about this decision should be read to impede the DOR from its proper statutory role to determine whether the costs were incurred "for the purpose of achieving a permanent solution or remedy operation status in compliance with chapter 21E." The DOR simply may not determine for itself what *environmental* remediation actions were "necessary" to achieve a permanent solution as the environmental decision making role is reserved for the DEP and LSP-of-Record pursuant to the MCP and Chapter 21E.

I further hereby **DECLARE** Plaintiff is entitled to a Brownfields tax credit pursuant to G. L. c. 62, § 6(j) for net response and removal costs in the amount of $30,694,593.

Judgment shall enter accordingly.

Debra A. Squires-Lee
Justice of the Superior Court

January 20, 2026