

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 3, 2008

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In the Matter of )  
Boston Redevelopment Authority )

OADR Docket No. 2008-128  
Waterways Application No. W07-2172-N

PRE-HEARING STATEMENT  
OF THE BOSTON REDEVELOPMENT AUTHORITY

(1) **Summary of the Permit being appealed:** The permit in question is the M.G.L. c. 91 License Written Determination for Waterways Application # W07-2172-N, Doc's Restaurant @ the Long Wharf Pavilion, 80 Long Wharf, Filled Tidelands of Boston Inner Harbor, Boston, Suffolk County issued by the Department of Environmental Protection (the "DEP") on September 17, 2008 (the "Written Determination"). The Boston Redevelopment Authority (the "BRA"), as the property owner of the Long Wharf Pavilion/Massachusetts Bay Transportation Authority ("MBTA") egress located at 80 Long Wharf at the seaward end of Long Wharf in Boston, Massachusetts (the "Site"), submitted an application to the DEP on December 4, 2007 for a Nonwater Dependent M.G.L. c. 91 License to allow its designated developer, Eat Drink Laugh Restaurant Group, to redevelop the Site into a waterfront restaurant with public facilities (the "Application"). In the Written Determination the DEP found that the Application complied

with the DEP Waterways Regulations set forth in 310 CMR 9.00 and stated that the DEP will approve the proposed structures and uses set forth in the Written Determination.

(2) **Summary of the final relief that the party seeks in this appeal:** The BRA seeks a decision from the Commissioner of the DEP upholding the Written Determination.

(3) **List of disputed relevant facts for resolution in this appeal and the party's position on each issue.**

The BRA supports the facts as set forth by the DEP in the Written Determination. In regard to the petitioners' Notice of Claim, the BRA seeks the resolution of the following disputed relevant facts:

(a) The Petitioners' characterization of the Site as a Public Shade Structure [p. 2 of the Notice of Claim] -- The Site was not designed solely as a public shade structure. The structure was created as a MBTA subway tunnel emergency ventilation and egress shaft. The design of the structure also provided a shelter for Long Wharf visitors.

(b) The Petitioners' characterization of the Site as a place of Quiet Repose [p. 2 of Notice of Claim] - The Site is not considered a place for "quiet repose" by the BRA. The Site is located at the end of one of the City of Boston's busiest waterfront destinations. Long Wharf is surrounded by passenger vessel facilities, a hotel, restaurants, excursion vessel facilities, public and private dockage, ticket booths, the aquarium and other commercial uses.

(c) The petitioners statement that "The Area is already a secure...year-round destination..." [p. 3 of Notice of Claim] -- The BRA does not currently consider the Site a secure, year-round destination. The BRA seeks to improve security by activating the Site and bringing in a private entity to monitor security and add lighting and additional security features. The Site is not

currently winterized and development of the Site will winterize the Site and bring visitors to the Site year round.

(4) **List of legal issues for resolution in this appeal and the BRA's position on each issue:**

(a) Whether the petitioners have a right to an adjudicatory hearing as set forth in 310 CMR 9.17. **BRA Position:** It is the BRA's position that the petitioners do not have a right to an adjudicatory hearing as they do not fall under any of the categories of persons having a right to bring an appeal under 310 CMR 9.17(1). The Petitioners, individually or collectively, are not an "aggrieved person", entitled to an adjudicatory hearing pursuant 310 CMR 9.17(1)(b), defined at 310 CMR 9.02 as "any person who, because of a decision of the Department to grant a license or permit, may suffer an injury in fact, which is different in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A" as they have not, individually or collectively, alleged to have suffered an injury in fact, which is different in kind or magnitude, from that suffered by the general public.

Further, the petitioners do not meet the requirements of 310 CMR 9.17(1)(c) as "ten residents of the Commonwealth, pursuant to M.G.L. c. 30A §10A..." as the petitioners have not alleged any damage to the environment, as defined in M.G.L. c. 214 § 7A, nor have they limited their intervention to the issue of damage to the environment and the elimination or reduction thereof as required by M.G.L. c. 30A §10A. The petitioners have also not complied with the requirement of 310 CMR 9.17(1)(c) that "each appealing resident shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative."

(b) Whether the proposed use of the seaward end of Long Wharf as a year-round restaurant facility (the "Proposed Project") meets the proper public purpose requirement of 310 CMR

9.31(2)(b). **BRA Position:** It is the BRA's position that the Proposed Project will serve a proper public purpose which provides greater benefit than detriment in compliance with 310 CMR 9.31(2)(b).

(c) Whether the Proposed Project protects the utility and adaptability of the Site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the Site in compliance with 310 CMR 9.51(2). **BRA Position:** It is the BRA's position that the Proposed Project does comply with 310 CMR 9.51(2) by protecting the utility and adaptability of the Site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the Site .

(d) Whether the Proposed Project provides reasonably direct public non-water related benefits in compliance with the 310 CMR 9.53(3)(d). **BRA Position:** It is the BRA's position that the Proposed Project does provide reasonably direct public non-water related benefits in compliance with the 310 CMR 9.53(3)(d).

(e) Whether the reconfiguration of setback distances required for the Proposed Project will promote public use or other water-dependent activity in a "clearly superior manner" as required by Requirement 5(c) of Decision on the City of Boston Request for Approval of the Boston Harborpark Plan Pursuant to 301 CMR 23.00 by the Secretary of the Executive Office of Energy and Environmental Affairs, approving City of Boston Municipal Harbor Plan (the "Plan"). **BRA Position:** It is the BRA's position that reconfiguration of setback distances required for the

Proposed Project will promote public use or other water-dependent activity in a “clearly superior manner” as required by the Plan.

(i) Whether the Proposed Project is in compliance with the requirements of 310 CMR 9.51(3)(c), as such setbacks requirements set forth in 310 CMR 9.51(3)(c) have been waived by the DEP in accordance with 310 CMR 9.34(2)(b)(1) and substituted with the alternative setbacks set forth in the Plan. **BRA Position:** It is the BRA’s position that the Proposed Project is in compliance with 310 CMR 9.51(3)(c).

(f) Whether the Proposed Project complies with 310 CMR 9.33(1)(i). **BRA Position:** It is the BRA’s position that the Proposed Project complies with this provision of 310 CMR 9.33(1)(i).

**(5) Names and addresses of each party’s witnesses, including expert witnesses, who will be filing Pre-filed Testimony:**

The BRA reserves the right to supplement this Pre-Hearing Statement witness list with additional witnesses and expert witnesses. Notwithstanding the foregoing, the BRA anticipates that the following persons will be filing Pre-filed Testimony:

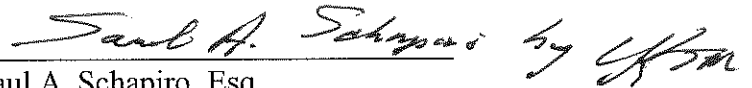
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