

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 10-0802-H

SANJOY MAHAJAN, VICTOR BROGNA,)
STEPHANIE HOGUE, DAVID KUBIAK, MARY MCGEE,)
ANNE M. PISTORIO, THOMAS SCHIAVONI,)
PASQUA SCIBELLI, ROBERT SKOLE, and)
PATRICIA THIBOUTOT,)

Plaintiffs)

v.)

MASSACHUSETTS DEPARTMENT OF)
ENVIRONMENTAL PROTECTION, and)
BOSTON REDEVELOPMENT AUTHORITY)

Defendants)

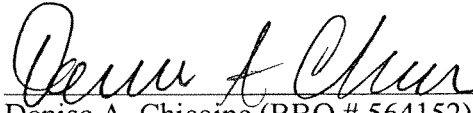
**DEFENDANT BOSTON REDEVELOPMENT AUTHORITY'S OPPOSITION TO
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND
CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

NOW COMES Defendant Boston Redevelopment Authority ("BRA") pursuant to M.R.Civ.P. Rule 12(c) to oppose Plaintiffs' Motion for Judgment on the Pleadings and to submit its Cross-Motion for Judgment on the Pleadings. In support, BRA states that Plaintiffs cannot demonstrate the DEP Decision was unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. This Court should grant the BRA's Motion for Judgment on the Pleadings because the DEP Decision is comprehensive and correct. In further support, BRA submits the attached memorandum of law.

Respectfully submitted,
Boston Redevelopment Authority

By its counsel

September 27, 2010

A handwritten signature in cursive script, appearing to read "Denise A. Chicoine", written over a horizontal line.

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MEMORANDUM IN SUPPORT OF
DEFENDANT BOSTON REDEVELOPMENT AUTHORITY'S OPPOSITION TO
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND
CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES Defendant Boston Redevelopment Authority ("BRA") pursuant to M.R.Civ.P. Rule 12(c) in support of its opposition to Plaintiffs' Motion for Judgment on the Pleadings and its Cross-Motion for Judgment on the Pleadings.

I. FACTUAL AND PROCEDUAL BACKGROUND

On January 29, 2010 the Massachusetts Department of Environmental Protection ("DEP") issued a Final Decision affirming the issuance of a Nonwater Dependent M.G.L. Chapter 91 License to the BRA. The BRA is the owner of Long Wharf and the site at issue, which is the Long Wharf Pavilion Massachusetts Bay Transportation Authority

vent structure located at the seaward end of Long Wharf. The BRA seeks to redevelop the seaward end of Long Wharf into a waterfront restaurant with outdoor seating and public facilities. The goal is to create a year-round destination to complement the Harborwalk Initiative, the centerpiece of the City of Boston's harbor agenda to enhance public access to the waterfront.

In regard to Chapter 91 licensing in the city of Boston, DEP's mandate is to determine whether a proposed project advances the goals of the Municipal Harbor Plan and the intent of Chapter 91. DEP reached its Final Decision in this matter based on three days of hearing, a site view, and careful review of an extensive record. DEP concluded that the BRA's Chapter 91 Application complies with all relevant Waterways Regulations, all necessary conditions of the Municipal Harbor Plan, and all applicable Coastal Zone Management policies.

Plaintiffs filed this action in February 2010 attempting to obtain judicial review of the DEP proceedings pursuant to M.G.L. ch. 30A § 14. Not one of the plaintiffs lives close enough to the seaward end of Long Wharf to see or hear the proposed restaurant from where they live. In April 2010 the BRA filed a motion to dismiss, asserting that Plaintiffs do not have standing under M.G.L. Chapter 91 and that there is no private right of action under Article 97. DEP then filed a motion to dismiss Plaintiffs' claims for declaratory relief against it.

On July 20, 2010, DEP filed the administrative record of the proceeding under review.

On October 13, 2010, the Court is scheduled to hear oral argument on the motions to dismiss which the BRA and DEP have filed.

II. STANDARD OF REVIEW

Standing Order 1-96 establishes that any complaint for judicial review of administrative agency proceedings “shall be resolved through a motion for judgment on the pleadings, Mass.R.Civ.P. 12(c).” In accordance with Standing Order 1-96, the Rule 12(c) review “shall be confined to the record.”

As the party challenging DEP's decision, Plaintiffs bear the burden of establishing the decision's invalidity. *Fisch v. Bd. of Registration*, 437 Mass. 128, 131 (2002); *Haverhill Mun. Hosp. v. Comm'r of Div. of Med. Assistance*, 45 Mass.App.Ct. 386, 390 (1998). The Court may set aside an agency's decision only on the grounds stated in M.G.L. ch. 30A § 14. *Howard Johnson Co. v. Alcoholic Beverages Control Comm'n*, 24 Mass.App.Ct. 487, 490 (1987). The grounds to set aside or modify an agency decision include that it was unsupported by substantial evidence, was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. M.G.L. ch. 30A, §§ 14(7)(e), (g). The court's role is not to make a *de novo* determination of the facts or to substitute its judgment for that of the agency. *Vaspourakan, Ltd. v. Alcoholic Beverages Comm'n*, 401 Mass. 347, 351 (1987). The statute directs the court to consider the entire record and to give “due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred on it.” M.G.L. ch. 30A, § 14(7); *see also Norwood Hosp. v. Comm'r of Pub. Welfare*, 417 Mass. 54, 58 (1994) (agency interpretation of own rule entitled to great weight); *Southern Worcester Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420-21 (1982) (agency “has considerable leeway in interpreting a statute it is charged with enforcing.”).

III. ARGUMENT

A. Plaintiffs' Motion for Judgment on the Pleadings Must Be Denied Because DEP Correctly Found It Lacked Jurisdiction Over Article 97.¹

Plaintiffs argue, without any citation to authority, that DEP and EOEEA have “assumed” jurisdiction over Article 97 by virtue of various policy pronouncements. However, Article 97 is a constitutional amendment, entirely independent of Chapter 91. In the absence of express statutory authority committing a question of law outside the scope of the regulations to an agency's discretion, the matter must be committed to the courts for disposition. *See Mass. Federation of Teachers, AFT, AFL-CIO v. Bd. of Education*, 436 Mass. 763, 773 (2002); *Hartford Acc. & Indem. v. Com'r of Ins.*, 407 Mass. 23, 27 (1990). Specifically, DEP is bound by the regulations the Department promulgated to implement Chapter 91 when adjudicating Waterways claims arising under Chapter 91. *Cf. Royce v. Com'r of Correction*, 390 Mass. 425, 427 (1983) (agency regulations have the force of law). The Supreme Judicial Court recently held that “[t]he purpose stated in the municipal harbor plan regulations, which also appears in the trust lands [Waterways] regulations, does not create in the plaintiffs a protected interest in clean air and water.” *Hertz v. EOEEA*, 73 Mass.App.Ct. 770, 772 (2009). Thus, DEP’s

¹ Article 49 of the Amendments to the Massachusetts Constitution, as amended by Article 97 of the Amendments. Article 97 reads in pertinent part as follows:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights. . . . Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

finding² that jurisdiction to interpret and apply Article 97 is beyond the scope of DEP regulations should be upheld as in accordance with law.

B. Plaintiffs' Motion for Judgment on the Pleadings Must Be Denied Because There is No Private Right of Acton Under Article 97.

Plaintiffs' primary contention is that Long Wharf is a "park" protected by Article 97, and that the Chapter 91 license constitutes a change in use and control requiring a two-thirds vote of the state legislature. As is clear from the language of the amendment itself, Article 97 "is an exercise of state police power which grants certain authority to the Commonwealth to protect important rights of the public, for the benefit of the public as a whole." *Blair v. Mass. DCR*, 2006 WL 3292645 *7 (Mass.Super. 2006). Article 97 expressly authorizes the Commonwealth to act in furtherance of the stated purpose of protecting natural resources by effecting a taking or purchasing property interests. *Id.*

In *Chase v. Trust for Public Land*, the Land Court squarely addressed whether a private citizen may invoke Article 97 to obtain judicial review of an agency decision affecting conservation land. 2008 WL 642635 *5 (Mass.Land Ct. 2008). The Land Court held there is no private right of action under Article 97. *Id.* This is consistent with the Supreme Judicial Court's analysis in *Enos v. Secretary of Env'tl. Affairs*, where the Court rejected the plaintiffs' claim that their Article 97 constitutional right to clean air and clean water conferred standing to challenge the Secretary of Environmental Affairs' action. 432 Mass. 132, 142 and n.7 (2000).

² Record p. 568, Recommended Final Decision, n. 4.

C. Plaintiffs' Motion for Judgment on the Pleadings Must Be Denied Because Plaintiffs Are Not Entitled to a Mandamus to Enforce Article 97 Under the Public Duty Doctrine.

Plaintiffs attempt to characterize their Article 97 claim as an action in the nature of mandamus under M.G.L. ch. 249 § 5, as opposed to a private right of action. Relief in the nature of mandamus is an extraordinary remedy which will be granted only when there exists no other adequate and effective remedy. *Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dept.*, 448 Mass. 57 (2006); *Murray v. Com.*, 447 Mass. 1010 (2006). The DEP decision is reviewable under M.G.L. Chapter 30A, rendering mandamus unavailable. See *Lutheran Svc. Assoc. of New England, Inc. v. Metropolitan District Comm'n*, 397 Mass. 341, 344 (1986).

Moreover, in considering requests for mandamus, standing is of critical significance.³ Courts must enforce the “concrete and particularized harm” requirement of standing rigorously and construe it narrowly. *Alliance, AFSCME/SEIU, AFL-CIO v. Com.*, 427 Mass. 546, 549, (1998). “From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government.” *Doe v. The Governor*, 381 Mass. 702, 704 (1980). “Standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. . . . the plaintiffs' interests must come within the 'zone of interests' protected by [the statute]

³ The BRA continues to assert Plaintiffs lack standing under Chapter 91 as a separate and independent ground for dismissal of the Complaint. This argument is fully briefed in the BRA's pending Motion to Dismiss.

[and] the defendant must additionally have violated some duty owed to the plaintiffs."

Enos, 432 Mass. 132, 135-136.

The only evidence in the record regarding standing is three Plaintiffs' assumptions based on the characterization of the project as a "late-night destination."⁴ Such claims are inadequate to confer standing, as they are speculative and remote. It is important to note that the Waterways Regulations under Chapter 91 do not regulate noise.⁵ Further, the Court rejected similar claims about views and noise raised by abutters in *Hertz* and *Higgins*, whereas Plaintiffs herein can neither see nor hear the project from where they live in the North End. *Hertz*, 73 Mass.App.Ct. 770; *Higgins v. DEP*, 64 Mass.App.Ct. 754 (2005). As with the plaintiffs in *Higgins*, the fact that Plaintiffs may frequent Long Wharf, or even view it as an extension of their backyard, does not amount to an injury that is "different either in kind or magnitude, from that suffered by the general public." 64 Mass.App.Ct. at 756-57; 310 CMR § 9.02.

⁴ Petitioners' Pre-Filed Testimony about noise is as follows:

Testimony of Victor Brogna

Record, p. 286, ¶ 3 ("The noise from the late-night destination envisioned by the BRA [will] continue until 1:00 a.m., seven nights a week, for the entire year. . . . [t]he many persons who live aboard their boats throughout the year at the marina slips will, I believe, have the quiet enjoyment of their floating homes severely compromised.")

Record, p. 287 ¶ 4 ("I believe that . . . excessive noise . . . will be generated by the BRA's proposed change of use")

Testimony of Mark P. Paul

Record, p. 310 ¶ 7 ("Similar to Tia's, the large crowds that will congregate at the Doc's location, principally to eat and drink, will create significant, unacceptable and excessive noise . . . that will reduce, if not totally discourage true water dependent use. Any live entertainment will likely exacerbate the noise.")

Rebuttal Testimony of Sanjoy Mahajan

Record, p. 621 ¶ 48 ("boats blowing their horns three times is not comparable to the continuous noise from a late-night restaurant and bar.")

⁵ Chapter 91 "charges the Department with protecting the Commonwealth's interests in its harbors, tidelands, and waters and with acting as a steward of the public's interest in those lands." *Higgins v. DEP*, 64 Mass.App.Ct. 754 (2005), citing M.G.L. ch. 91 § 2; 310 CMR § 9.01(2).

Plaintiffs are now acknowledging that they have no personal interest in the Article 97 claim, but instead assert standing to enforce a public duty.⁶ Under the “public duty” doctrine, “the plaintiff acts under the public right to have a *particular duty* performed that the law requires to be performed.” *Perella v. Mass. Tpk. Authority*, 55 Mass.App.Ct. 537, 539 (2002). The “public duty” doctrine has always been limited to the enforcement of clear and unequivocal duties, such as election officials' duty to count ballots correctly, *Brewster v. Sherman*, 195 Mass. 222, 225 (1907), or the Secretary of the Commonwealth's duty to omit from the ballot an initiative question which described the proposed law inaccurately. *Brooks v. Sec'y of Com.*, 257 Mass. 91, 93-94 (1926). “Because the “public duty” doctrine is in such obvious tension with our general jurisprudence requiring a rigorous application of the doctrine of standing, we are unwilling to extend it into new territory.” *Alliance*, 427 Mass. at 550. No court in the Commonwealth has applied the “public duty” doctrine to Article 97. *Cf. Tax Equity Alliance for Mass. v. Comm'r of Rev.*, 423 Mass. 708, 714 (1996) (public right doctrine cannot be invoked for broad purposes).

Even taken in the light most favorable to Plaintiffs, the allegations that Long Wharf is and should remain a quiet contemplative place, and that another restaurant is not needed in this area, are simply subjective value judgments. The public duty doctrine should not be applied here, where Plaintiffs seek to reverse a decision that was well within the statutory responsibilities of DEP and based on substantial evidence.

⁶ Plaintiffs' Memorandum of Law In Support of Motion for Judgment on the Pleadings, p. 6 (“This is not a case where the Plaintiffs seek a private right of action under Article 97.”).

D. Even If Plaintiffs Presented A Cognizable Article 97 Claim, The Record Demonstrates That The Proposed Project Is Not Subject To Article 97.

Even assuming, *arguendo*, the Court finds a private right of action under Article 97 and that Plaintiffs have standing, the City of Boston took Long Wharf prior to the enactment of Article 97, for reasons totally unrelated to the stated purposes of Article 97.⁷ In order for the two-thirds state legislative vote requirement of Article 97 to come into play, the lands or easements being disposed of must have been “taken or acquired” for the stated purposes, namely “the protection of the people in their right to the conversation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources.” *Newburyport Redevelopment Authority v. Com*, 9 Mass.App.Ct. 206, 232-233 (1980), *citing* Rep.A.G., 1976 Pub.Doc.No. 12, at 158. The purpose of the taking of Long Wharf was to engage in urban renewal, not the conservation of natural resources, parkland, or open space. *See* PreFiled Testimony of Richard McGuinness ¶ 21. As such, Article 97 has no applicability to Long Wharf.⁸

E. This Court Should Grant the BRAs’ Motion for Judgment on the Pleadings Because the DEP Decision is Comprehensive and Correct.

The DEP Decision should be affirmed in its entirety as it is supported by substantial evidence and in accordance with law. The Recommended Final Decision

⁷The 1970 Order of Taking for Long Wharf and the Taking Area Description create only two easements relevant to this proceeding: (1) a pedestrian walkway; and (2) a pedestrian access easement to the existing buildings on Long Wharf. BRA PreFiled Exhibit 14. Taking Area Description. The Long Wharf project does not interfere with either of these easements, and the City has ensured full public access to the waterfront through the Boston Harborwalk Initiative. PreFiled Testimony of Richard McGuinness ¶ 23.

⁸ DEP also claims that Article 97 has no applicability to Long Wharf, for a different reason. In its Motion to Dismiss DEP contends that the issuance of a revocable Chapter 91 license is not a disposition under Article 97. The BRA fully supports this argument.

dated January 15, 2010, which the DEP Commissioner adopted on January 29, 2010, framed and analyzed the following eight issues⁹:

1) Whether the project serves a proper public purpose in compliance with 310 CMR 9.31 (2)(b)1-2;

2) Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d);

3) Whether the project complies with Condition No. 5 of the EOEEA Secretary's decision on the 1991 Boston Harbor Plan because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner;

4) Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) (compliance with municipal harbor plan) and 310 CMR 9.51(3)(c) (appropriate setbacks);

5) Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water;

6) Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i);

7) Whether the Petitioners have standing to appeal either: as abutters to the proposed project pursuant to 310 CMR 10.04, and/or as aggrieved parties pursuant to 310 CMR 10.04;¹⁰

8) Whether the project provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b).

⁹ Record p. 567 n.3

¹⁰ The Commissioner declined to adopt the conclusion of the Recommended Final Decision regarding Petitioners' lack of standing because the Commissioner agreed that Petitioners' claims failed on the merits.

An examination of the evidence DEP relied upon demonstrates that the Final Decision is manifestly correct.

1) The project serves a proper public purpose.

A proposed project serves a proper public purpose if it: a) conserves or accommodates water-dependent use and b) activates tidelands for public use. 310 CMR 9.31(2)(b)1-2. DEP considered the comprehensive record addressing the history of Long Wharf and BRA planning initiatives to enhance Long Wharf's role as the hub of the City of Boston's water transportation. Record, pp. 571-575. DEP determined that the project's restaurant concept as a reuse of the MBTA vent structure meets the needs articulated by the Urban Redevelopment Plan and the Crossroads Initiative. Record, p. 573. DEP noted that "[t]he hearing record is replete with evidence that the project is consistent with the Boston HarborWalk Initiative, Municipal Harbor Plan, the Revised Long Wharf Master Plan 2000 and the Boston Parks and Recreation Department Open Space Plan." Record, p. 572.

The current water-dependent use for Long Wharf is a water transportation hub, with an estimated 3.8 million passengers utilizing Long Wharf in 2010. Record, p. 573. DEP found that the BRA's project will both conserve and accommodate this water-dependent use by providing public accommodation and shelter to the passengers, crew, and support staff of the various ferries, tour-boats, and other water craft. Record, pp. 573-575. The project will create public restrooms, a place to meet and be sheltered during the colder months, as well as to sit and enjoy the outdoor space in the warmer months. *Id.* Based on these facts DEP determined that BRA's proposed development will activate the

public's use of this tideland area by providing year-round amenities, instead of only the current seasonal use of the pavilion. Record p. 575.

In contrast, Plaintiffs' evidence was simply a speculative statement of the "harm" they believe they will suffer, rather than any probative detail regarding activation of tidelands or the alleged lack of water-dependent use. *Id.*

2) The project provides reasonably direct public non-water related benefits.

In assessing the quantity and quality of benefits to the public that the proposed restaurant use will provide in compliance with 310 CMR 9.53(3)(d), DEP found that that majority of the site will remain as open space¹¹ and the development will reinvigorate the HarborWalk for utilization of water-dependent purposes. Record p. 576. DEP determined that there will be no total reduction of the Water-Dependent Use Zone as required in the Waterways Regulations. Record p. 577. Indeed, the project adds 3,135 feet to the Water-Dependent Use Zone setback area. *Id.* Additionally, the proposed restaurant use will draw greater numbers of people to the site in more seasons of the year, which will promote a greater use of the publicly accessible landscaped areas.

The BRA introduced evidence of other direct benefits relevant to the regulatory analysis. These include: (1) improving security at the site; (2) creating permanent jobs on-site; and (3) providing an essential pedestrian link and visual connection between the Old State House, the financial district and the water. PreFiled Testimony of Richard McGuinness ¶ 39. DEP concludes its analysis of this issue by noting that "nothing in [Plaintiffs'] rebuttal evidence undermines the reasonableness of [the DEP Regional

¹¹ Specifically, the proposed building will occupy only 4,890 square feet of the site and the remaining 28,440 square feet of filled tidelands will be reserved as open space.

Planner's] professed and documented belief that the project benefits the public." Record p. 577.

3) The project promotes public use or other water-dependent activity on the seaward end of long wharf in a clearly superior manner.

DEP determined, based on the well-pleaded factual averments and the testimony that illuminated and supplemented those facts, that the project complies with Condition No. 5 of the EOEEA Secretary's decision on the 1991 Boston Harbor Plan because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner. Record pp. 582-583. The factors key in DEP's analysis of superior use included, first, the fact that none of the proposed additions will be closer to the water at the seaward end than the closest point of the existing structure. Record p. 581. Second, all of the proposed additions will be at least twenty-eight feet from the water. *Id.* Third, there will be eighteen seasonal shaded tables for public use, independent of patronage of the restaurant. *Id.* Lastly, the proposed design will complement the other buildings on Long Wharf, and will not adversely impact the planned view corridor from the Old State House at Washington and State Streets down to Long Wharf, or sight lines to the water from the Harborwalk. *Id.*

Overall, DEP found that the restaurant re-use will be advantageous to the current use of the seaward end of Long Wharf by adding public restrooms, public binoculars, more public seating, shelter and lighting, and public binoculars, thereby increasing the period of use of the pavilion from seasonal to year-round.

4) The project meets requirements regarding setback and open space calculations.

DEP determined that the project unequivocally satisfies Municipal Harbor Plan standards and setbacks. Significantly, the project complies with all applicable city¹² and state plans as well as written memoranda of understanding and decisions by the Secretary of Environmental Affairs. Record p. 584. None of the proposed additions will be closer to the water than the closest point of the existing structure, and all of the proposed additions will be at least twenty-eight feet from the water. Record, p. 584. Moreover, the proposed amount of open space of approximately 25,915 square feet of area at the seaward end of Long Wharf is 3,135 square feet more area than required by 310 CMR 9.51(3)(c). *Id.*

DEP points out that the only evidence presented by the Plaintiffs “skirt[ed] the regulatory channel markers by lumping together a mélange of claims and eschew[ed] a direct challenge to the opposing parties’ submissions.” Record, p. 585.

5) The project meets the requirements regarding public views of the water.

The regulation at issue dictates that new structures must be developed in a manner that protects the utility of the site for water-dependent proposes by preventing significant incompatibility in design with existing structures and spaces, including the layout and configuration of buildings insofar as they may affect existing and potential public views of the water. *See* 310 CMR 9.51(2)(b). DEP conducted a site view and carefully examined the design of the proposed restaurant to determine that the project complies

¹² On January 22, 2008, the City of Boston Board of Appeal granted variances from the zoning code to permit a change of occupancy for the Pavilion to a restaurant. Nonetheless, contrary to Plaintiffs’ contention, the project complies with 310 CMR 9.34(a)(2) because it did not require any variances from the numerical standards or substantive provisions of MHP appearing at 301 CMR 23.05. Record pp. 1393-94, Prefiled Direct Testimony of Andrea Langhauser ¶ 34.

with the regulatory strictures. As evidence, DEP cites the use of windowed walls between the existing columns, and that the height, scale, and massing of the present building will not be altered. Record p. 586. All of these factors result in a structure that will not interfere with sight lines from the State Street corridor or the HarborWalk. *Id.*

6) The project complies with historic resource requirements.

The project complies with 310 CMR 9.33(1)(i) by satisfying the requirements of the Massachusetts Historical Commission Act. The letter from the Massachusetts Historic Commission dated November 15, 2007 finding the project creates no adverse impact is prima facie evidence. BRA PreFiled Exhibit 30. DEP also noted that the project respects the site's historic context in a number of ways, including blending in with existing architectural character, minimizing visual obstructions to the water, and using licensing funds to install interpretive signage that explains the history of Long Wharf. Record p. 587. As to Plaintiffs' claims relating to historic resource requirements, DEP "rejecte[d] them out of hand." *Id.*

7) The project provides greater benefit than detriment to the rights of the public in tidelands.

In order for DEP to approve a license, the project must provide a net benefit to the rights of the public in the tidelands. *See generally* 310 CMR 9.31(2). DEP found that the project advances the goals of the Municipal Harbor Plan and the intent of Chapter 91. DEP placed much emphasis on the comprehensive, multi-year, multi-million dollar program to expand the capacity and improve the quality of water transportation infrastructure at Long Wharf. Record pp. 594-596 and n.14. Significantly, the project meets Municipal Harbor Plan mandates by creating a public/private partnership to revitalize an underutilized structure and generate capital investment that will allow for

further improvements to adjacent open space. Record p. 597. In the process, the project will create job opportunities, an affordable dining establishment, and a pedestrian waterfront destination. *Id.* Further, as defined by the MHP, the restaurant will be a Facility of Public Accommodation, as it will create public amenities that currently do not exist such as public restrooms and shaded outdoor seating. *Id.*

DEP's thoughtful analysis highlights the myriad benefits the project will confer on public rights in tidelands and should be upheld.

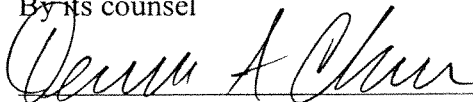
III. CONCLUSION

Plaintiffs' Motion for Judgment on the Pleadings must be denied because Plaintiffs have not met the high burden of demonstrating that the DEP Decision was unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. For the reasons asserted herein, this Court should reject the contention that the Legislature has conferred standing on private individuals under Article 97 who wish to litigate questions concerning the allegedly wrongful use of public lands. In view of the volumes of uncontroverted evidence, this Court should grant the BRA's Motion for Judgment on the Pleadings and uphold the DEP Decision in its entirety.

Respectfully submitted,

Boston Redevelopment Authority

By its counsel

A handwritten signature in cursive script, appearing to read "Denise A. Chicoine", written over a horizontal line.

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