

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 10, 2009

In The Matter of Boston)
Redevelopment Authority)

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

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MEMORANDUM OF LAW

The Department of Environmental Protection (MassDEP) files this Memorandum of Law as required by the Prescreening Order issued by Presiding Officer (P.O.) Beverly Coles-Roby on December 15, 2008. More than ten residents of the Commonwealth (Petitioners) appealed MassDEP's issuance of a written determination pursuant to G.L. c. 91. The Boston Redevelopment Authority (BRA or Applicant) proposes to enclose, and construct a small addition onto a shade structure located at the end of Long Wharf on Boston Harbor. The structure is currently unenclosed and is used primarily to provide fresh air, ventilation and emergency egress for the MBTA subway tunnel running below the wharf. The Applicant intends to lease the remodeled structure for restaurant use. MassDEP seeks a Final Decision upholding the written determination of intent to approve Waterways Application No. W07-2172-N because it complies with all applicable statutory and regulatory requirements.

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

310 CMR 9.31(2) prohibits MassDEP from issuing licenses or permits for nonwater-dependent use projects on tidelands unless such projects serve "a proper public purpose which

provides greater benefit than detriment to the rights of the public in said lands.” 310 CMR 9.31(2)(b) creates a presumption that the proper public purpose requirement of 310 CMR 9.31(2) is met for nonwater-dependent use projects which meet the requirements of 310 CMR 9.31(2)(b) 1-3. 310 CMR 9.31(2)(b) 3. does not apply to the Applicant’s proposed project because it is not an infrastructure facility, which is defined as facility that produces, delivers, or otherwise provides electric, gas, water, sewage, transportation, or telecommunication services to the public. 310 CMR 9.02. The proposal meets the requirements of 9.31(2)(b) 1. because it complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use in accordance with applicable provisions of 310 CMR 9.51-9.52, and it complies with the standard for activating Commonwealth tidelands for public use according to the applicable provisions of 310 CMR 9.53. Langhauser Testimony, pars. 5-8.

The presumption of 310 CMR 9.31(2)(b) can only be overcome if the basic requirements of 9.31(1) have not been met; or a municipal, state, regional, or federal agency makes a clear showing that requirements beyond those contained in the Waterways regulations are needed to prevent overriding detriment to a public interest they are charged with protecting. 310 CMR 9.31(2)(c). The Applicant’s project meets all applicable requirements of 310 CMR 9.31(1). Langhauser Testimony, par 34. Additionally, the Petitioners have not submitted evidence to demonstrate that a municipal, state, regional, or federal agency has made a showing that additional requirements are needed to prevent an overriding detriment to a public interest. Therefore, the regulatory presumption that this project meets the proper public purpose requirement has not been rebutted in accordance with 310 CMR 9.31(2)(c), and cannot be otherwise rebutted by the Petitioners.

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

The provisions of 310 CMR 9.53(3) do not apply to this project. 310 CMR 9.53(3) requires projects located on Commonwealth tidelands to promote “other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs....” The Petitioners have not submitted evidence to demonstrate that the project will detract from the implementation of any specific Commonwealth policy, plan, or program, as further described at 310 CMR 9.53(3)(a)-(c). Furthermore, the BRA’s project application did not include any guidance from government agencies as described in 9.53(3)(a), or “an MOU or other written agreement” from any state Executive Office as described in 9.53(3)(b). Langhauser testimony, par. 12. Therefore, the project does not violate the provisions of 310 CMR 9.53(3)(d) because those provisions are inapplicable.

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

Requirement No. 5(c) of the EOEEA Secretary’s decision on the 1991 MHP allows a reconfiguration of setback distances along the ends and sides of a pier or wharf only if the reconfiguration “will promote public use or other water-dependent activity in a clearly superior manner....” Langhauser testimony, Exhibit 5 at pg, 32. MassDEP determined that reconfiguration of the setback distances for this project will promote public use and other water dependent activity on the seaward end of Long Wharf in a clearly superior manner. Langhauser testimony, pars. 16-29. The Petitioners have not submitted evidence to demonstrate that reconfiguration of setback distances will *not* promote public use or other water-dependent

activity in a clearly superior manner. Rather, they argue that the project itself will not promote public use or other water-dependent activity in a clearly superior manner because it will “reduce sweeping vistas and fragment contiguous open space.” Petitioner’s Memorandum of Law, pg. 3. They argue that outdoor seating for the restaurant will annex part of the public open space, but fail to mention that the project will reserve eighteen shaded seating areas for non-patron public use. Langhauser testimony, par 21. The Petitioners do not provide evidence to demonstrate how public “open space” will promote public use or other water-dependent activity in a clearly superior manner to a facility of public accommodation with shaded seating areas for the general public.

Issue 4: Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)?

310 CMR 9.34(2)(b)1. requires MassDEP to substitute the use limitations or numerical standards specified in the MHP for the respective limitations or standards contained within 310 CMR 9.51(3), 9.52(1)(b)1. and 9.53(2)(b) and (c) if the project conforms to the MHP. 310 CMR 9.51(3)(c) also requires MassDEP to waive the numeric standards for water-dependent use zones listed in subparts 1. through 3. if the project conforms to a MHP, which specifies alternative setback distances and other requirements. MassDEP has determined that the project does conform to the MHP. Langhauser testimony, par.30-31. Therefore, MassDEP complied with the requirements of 310 CMR 9.34 (2)(b)1. and 310 CMR 9.51(3)(c) by substituting the alternate setback distances and other requirements of the MHP for the respective limitations and standards contained within 310 CMR 9.51(3), 9.52(1)(b)1. and 9.53(2)(b) and (c). *Id.* at par.33.

310 CMR 9.34 (1) requires projects located on filled Commonwealth tidelands to comply with applicable municipal zoning ordinances and by-laws. 310 CMR 9.34 (2)(a) requires

projects located within an area subject to a municipal harbor plan to conform to the provisions of the plan to the degree applicable under plan approval at 310 CMR 23.00. 310 CMR 9.34 (2)(a)2. provides that MassDEP shall not determine that the requirement at 310 CMR 9.34 (2)(a) is met if the project requires a variance or other exemption from the substantive provisions of the municipal harbor plan. The Petitioners allege on page 4 of their legal memorandum that the project does not meet the requirements of 310 CMR 9.34 (2)(a) (an issue *not* identified for adjudication) because it required zoning variances from the City of Boston Zoning Board of Appeals (ZBA). However, zoning variances are relevant to whether a project complies with 310 CMR 9.34 (1), not to whether it complies with a municipal harbor plan as required by 310 CMR 9.34 (2)(a). The project does comply with the provisions of 310 CMR 9.34 (1). Langhauser testimony, par. 34.

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

Rather than preclude the licensing of all nonwater-dependent use structures on tidelands, 310 CMR 9.51(2) establishes minimum design criteria for these structures to protect the utility of the site for water-dependent purposes by preventing structures with incompatible designs. 310 CMR 9.51(2) (b) lists as a potentially incompatible design element, a building layout and configuration that may affect existing public views of the water and objects of scenic, historic or cultural importance to the waterfront, especially views along public ways and other areas of concentrated public activity. MassDEP determined that the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water because it is designed to retain the existing sight line emanating from State Street, the nearest public way, and also considers views from the Harborwalk. Langhauser testimony, par. 37.

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

310 CMR 9.33(1)(i) requires projects to comply with the Massachusetts Historical Commission Act, as amended, (Act) and its implementing regulations at 950 CMR 71.00. In accordance with section 26, the Waterways Program consults with the Massachusetts Historic Commission (MHC) when considering c. 91 license applications that may affect historical assets of the Commonwealth. G.L. c. 9, §26; Langhauser testimony, par. 39. As a result of such consultation, MassDEP concluded in Finding #4 of the Written Determination that the project complies with the historic resource requirements of 310 CMR 9.33(1)(i). Langhauser testimony, par. 39. The MHC reviewed the Environmental Notification Form for the project submitted during the Massachusetts Environmental Policy Act (MEPA) review and provided a comment letter dated November 15, 2007. Id. The MHC determined that the project will not have an adverse effect, as that term is defined at 950 CMR 71, on the Custom House Block or Long Wharf historic resources. Langhauser testimony at Exhibit H. The project has not substantively changed from the description provided in the ENF. Langhauser testimony, par. 39. Furthermore, the Petitioners do not provide any testimony or legal argument sufficient to demonstrate that the project does not comply with the requirements of 310 CMR 9.33(1)(i). Therefore, the project fully complies with CMR 9.33(1)(i).

Issue 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)?

310 CMR 9.31(2) prohibits MassDEP from licensing nonwater-dependent use projects on tidelands unless the “project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands.” 310 CMR 9.31(2) (b) requires the

Department to presume that 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which meets the provisions of 310 CMR 9.31(2) (b) 1-3. As asserted in response to Issue # 1 above, the project meets the requirements of 310 CMR 9.31(2) (b) 1 and 2, and 310 CMR 9.31(2) (b) 3. is inapplicable.

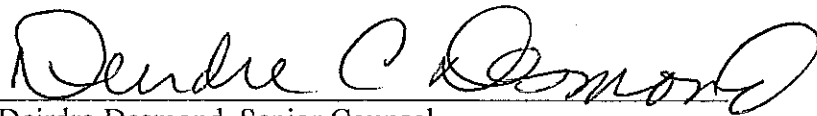
CONCLUSION

The Office of Appeals and Dispute Resolution should issue a Recommended Final Decision upholding the written determination of intent to approve Waterways Application No. W07-2172-N in its entirety because the Petitioners have failed to meet their burden of demonstrating that any provision of the written determination is inconsistent with G.L. c. 91 or the implementing Waterways Regulations at 310 CMR 9.00, and MassDEP has submitted testimony to demonstrate that each and every contested provision is consistent with applicable statutory and regulatory requirements.

Respectfully submitted,

DEPARTMENT OF ENVIRONMENTAL PROTECTION

By its attorney:



Deirdre Desmond, Senior Counsel
Department of Environmental Protection
One Winter Street, Third Floor
Boston, MA 02108
(617) 556-1028; FAX (617) 338-5511

Dated: February 10, 2009