ADDENDUM

Effective: November 11, 2010

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92B)
Chapter 91. Waterways (Refs & Annos)
→→ § 1. Definitions

In this chapter, unless the context otherwise requires, the following words shall have the following meanings:

"Boston harbor", that part of Boston harbor lying westerly and inside of a line drawn between Point Allerton on the south and the southerly end of Point Shirley on the north.

"Department", the department of environmental protection; provided, however, that in sections two, two A, three, four, five, six, seven, eight, nine, nine A, ten, eleven, eighteen A, twenty-five, twenty-seven, twenty-nine, twenty-nine A, thirty-one, thirty-two, thirty-three, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, 43A, 43B, 43C, forty-five, forty-six, forty-seven, forty-eight, forty-nine, forty-nine A and fifty, the word "Department" shall mean the department of conservation and recreation.

"Landlocked tidelands", filled tidelands, which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for any portion of such filled tidelands that are presently located: (a) within 250 feet of the high water mark of flowed tidelands; or (b) within any designated port area under the Massachusetts coastal zone management program. For the purposes of this definition, a public way may also be a landlocked tideland, except for any portion thereof which is presently within 250 feet of the high water mark of flowed tidelands.

"Structure" or "structures", as used in sections ten, twelve to twenty-two, inclusive, twenty-eight and thirty-four, shall include pipe lines, wires and cables, and all words used in connection with "structure" or "structures" shall mean and include their appropriate equivalent as applied to pipe lines, wires and cables.

"Tidelands", present and former submerged lands and tidal flats lying below the mean high water mark.

"Commonwealth tidelands", tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose.

"Private tidelands", tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water.

"Secretary," the secretary of the executive office of energy and environmental affairs.

"Substantial change in use", a use for a continuous period of at least one year of ten per cent or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity.

"Substantial structural alteration", a change in the dimensions of a principal building or structure which increases by more than ten per cent the height or ground coverage of the building or structure specified in the authorization or license, or an increase by more than ten per cent of the surface area of the fill specified in the authorization or license.

"Water-dependent uses", those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: marinas, recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site.

CREDIT(S)

Amended by St.1975, c. 706, §.123; St.1983, c. 589, §§ 20, 21; St.1986, c. 348, § 1; St.1990, c. 177, § 150; St. 2003, c. 26, § 237, eff. July 1, 2003; St.2007, c. 168, §§ 4, 5, eff. Nov. 15, 2007; St.2010, c. 309, §.1, eff. Nov. 11, 2010.

HISTORICAL AND STATUTORY NOTES

St.1911, c. 748, § 4.

St.1919, c. 350, § 113.

St.1927, c. 106, § 1.

St.1931, c. 394, § 49.

St.1975, c. 706, § 123, an emergency act, approved Nov. 25, 1975, and by § 312 made effective as of July 1, 1975, in the definition of Department, substituted "environmental quality engineering" for "public works".

Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92B)
Chapter 91. Waterways (Refs & Annos)
→→ § 2. Duties of public works department relative to commonwealth lands

The department shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navigation or to the rights of riparian owners; and may lease the same. It may sell and convey, or lease, any of the islands owned by the commonwealth in the great ponds. It may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council.

In carrying out its duties under the provisions of this chapter, the department shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.

The department of environmental protection shall protect the interests of the commonwealth in areas described herein in issuing any license or permit authorized pursuant to this chapter. The activities of the department of environmental management pursuant to this chapter shall be subject to the licensing and permitting authority of the department of environmental protection.

CREDIT(S)

Amended by St.1983, c. 589, § 22; St.1990, c. 177, § 151.

HISTORICAL AND STATUTORY NOTES

C

Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92B)
Chapter 91. Waterways (Refs & Annos)
→→ § 10. Powers and duties relative to harbors, etc.

The department shall have general care and supervision of the harbors and tide waters within the commonwealth, of the flats and lands flowed thereby, of the waters and banks of the Connecticut river and the banks and waters of the non-tidal portion of the Merrimack river and of all structures therein, in order to prevent and remove unauthorized encroachments and causes of every kind which may injure said Connecticut river or said part of Merrimack river or interfere with the navigation of such harbors, injure their channels or cause a reduction of their tide waters, and to protect and develop the rights and property of the commonwealth in such waters, flats and lands; and it may make such surveys, examinations and observations as it deems necessary therefor. The department of environmental protection shall protect the interests of the commonwealth in areas described herein in issuing any license and permit authorized pursuant to this chapter.

CREDIT(S)

Amended by St.1983, c. 589, § 23; St.1990, c. 177, § 152.

HISTORICAL AND STATUTORY NOTES

St.1866, c. 149, § 2.

P.S.1882, c. 19, § 6.

St.1885, c. 344, § 1.

R.L.1902, c. 96, § 8.

St.1914, c. 717, § 1.

St.1919, c. 350, § 113.

Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92B)
Chapter 91. Waterways (Refs & Annos)

→→ § 14. License for structures in or over tide water; conduits or cables under tide water; private or commonwealth tidelands

The department may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in or over tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership. A license shall not be granted for the construction of a bridge across a river, cove or inlet, except in a location above a bridge, dam or similar structure authorized by law over such tide water, in which no draw actually exists or is required by law, and not then, if objection is made by the aldermen or selectmen of the town where the bridge is to be built.

The said department may license and prescribe the terms for the construction or extension of a pipe line, conduit or cable under tide water beyond any established harbor line; provided, that such pipe line or conduit is entirely imbedded in the soil and does not in any part occupy, or project into such tide water, and provided also that said department may at any time require any pipe line, conduit or cable to be moved or relocated if channel changes or alterations demand the same.

Except as provided in section eighteen, no structures or fill may be licensed on private tidelands or commonwealth tidelands unless such structures or fill are necessary to accommodate a water dependent use; provided that for commonwealth tidelands said structures or fill shall also serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands.

CREDIT(S)

Amended by St.1975, c. 706, § 126; St.1983, c. 589, § 24.

HISTORICAL AND STATUTORY NOTES

St.1872, c. 236, §§ 1, 2.

Effective: November 15, 2007

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XIV. Public Ways and Works (Ch. 81-92B)
Chapter 91. Waterways (Refs & Annos)
→→ § 18. Application for license; notice; hearings; records

Upon or prior to applying for a license pursuant to this section, the applicant shall submit to the planning board of the city or town where the work is to be performed, except in case of a proposed bridge, dam or similar structure across a river, cove, or inlet, the application containing the proposed use, the location, dimensions and limits and mode of work to be performed.

Said planning board may conduct a public hearing within thirty days of receipt of license application. Within fifteen days of conducting said public hearing or within forty-five days of receipt of license application, the planning board shall submit a written recommendation to the department. Said recommendation shall state whether said planning board believes the development would serve a proper public purpose and would not be detrimental of the public's rights in these tidal lands. The department shall take into consideration the recommendation of the local planning board in making its decision whether to grant a license.

Every license granted under this chapter shall be signed by the department, shall state the conditions on which it is granted, including, but not limited to the specific use to which the licensed structure or fill is restricted, and shall specify by metes, bounds and otherwise the location, dimensions, and limits and mode of performing the work authorized thereby. Any changes in use or structural alteration of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by the department of a new license in accordance with the provisions and procedures established in this chapter. Any unauthorized substantial change in use or unauthorized substantial structural alteration shall render the license void. Licenses granted by the department pursuant to this chapter shall be revocable by the department for noncompliance with the conditions set forth therein. The department shall not revoke any license until it has given written notice of the alleged noncompliance to the licensee and those persons who have filed a written request for such notice with the department and afforded them a reasonable opportunity to correct said noncompliance. The department may promulgate regulations for implementation for its authority under this chapter.

No license shall be required under this chapter for fill on landlocked tidelands, or for uses or structures within landlocked tidelands.

The department shall submit any regulations promulgated under the provisions of this chapter to the joint legis-

lative committee on natural resources and agriculture, to the senate committee on ways and means and to the house committee on ways and means, for their review within sixty days prior to the effective date of said regulations.

Forty-five days before any license is granted pursuant to this chapter, the department shall give notice to the selectmen of the town or the mayor of the city and the conservation commission of the town or city where the work is to be performed that they may be heard, except in the case of a proposed bridge, dam or similar structure across a river, cove or inlet, the department shall give notice to the selectmen or mayor, and conservation commission of every municipality into which the tidewater of said river, cove or inlet extends, and the department shall cause said notice to be published at the same time in a newspaper or newspapers having a circulation in the area affected by said license at the expense of the applicant.

A public hearing shall be held in the affected city or town on any license application for nonwater dependent uses of tidelands, except for landlocked tidelands. No structures or fill for nonwater dependent uses of tidelands, except for landlocked tidelands may be licensed unless a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program. For those license applications where a public hearing is not mandated, a public hearing may be held, upon the request of the municipality or at the discretion of the department in the affected city or town.

Any person aggrieved by a decision by the department to grant a license pursuant to this chapter shall have the right to an adjudicatory hearing in accordance with chapter thirty A.

The department shall keep a record of each license and a plan of the work or structure. Said license shall be void unless, within sixty days after its date, it and the accompanying plan are recorded in the registry of deeds for the county or district where the work is to be performed. Work or change in use authorized under the license shall not commence until said license is recorded and the department has received notification of said recordation.

No license shall be granted for private tidelands unless the application therefor contains a certification by the clerk of the affected cities or towns that the work to be performed or changed in use is not in violation of local zoning ordinances and by-laws.

Each license granted shall contain a statement of the tidewater displacement assessments made with respect thereto and that payment has been received therefor, or that performance of other conditions in lieu of such payment has been completed to the satisfaction of the department and a statement of the assessment for occupation of commonwealth tidelands if, any, made with respect thereto for which payment has been received or shall be required in accordance with regulations of the department.

CREDIT(S)

C

Massachusetts General Laws Annotated Currentness
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment
→→ Art. XLIX. Right of people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment

ART. XLIX. 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.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

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.

HISTORICAL NOTES

The Forty-eighth Article of Amendment was submitted, by delegate in convention assembled, November 28, 1917, the Forty-ninth Article of Amendment, August 7, 1918, the Fiftieth to the Sixtieth Articles of Amendment, inclusive, August 15, 1918, the Sixty-first to the Sixty-fourth Articles of Amendment, inclusive, August 20, 1918, and the Sixty-fifth and Sixty-sixth Articles of Amendment, August 21, 1918, to the people, and by them ratified and adopted November 5, 1918.

In 1972 the Ninety-seventh Article of Amendment annulled original Article Forty-nine and adopted the present Article Forty-nine in place thereof.

The original Forty-ninth Article of Amendment provided:

"Art. XLIX. The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the commonwealth are public uses, and the general court shall have power to provide for the taking, upon payment of just compensation therefor, of lands and easements or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof and to enact legislation necessary or expedient therefor."

CROSS REFERENCES

Agriculture, generally, see c. 128, § 1 et seq.
Conservation services division, see c. 21, § 18 et seq.
Eminent domain, generally, see c. 79, § 1 et seq.
Environmental management department, see c. 21, § 1 et seq.
Forestry, generally, see c. 132, § 1 et seq.
Inland fisheries and game, generally, see c. 131, § 1 et seq.
Taking property for public use, right, see Const. Pt. 1, Art. 10.
Taxation of wild or forest lands, see Const. Amend. Art. 41.

LAW REVIEW AND JOURNAL COMMENTARIES

Indelible public interests in property: The public trust and the public forum. Karl P. Baker and Dwight H. Merriam, 32 B.C. Envtl. Aff. L. Rev. 275 (2005).

The missing instrument: Dirty input limits. David M. Driesen and Amy Sinden, 33 Harv. Envtl. L. Rev. 65 (2009).

Public trust doctrine and natural law: Emanations within a penumbra. George P. Smith II and Michael W. Sweeney, 33 B.C. Envtl. Aff. L. Rev. 307 (No. 2, 2006).

Updating the injunction to protect human health and safety. (1976) 11 Suffolk U.L.Rev. 114.

LIBRARY REFERENCES

Eminent Domain ⚿ 17, 28, 33.
Westlaw Topic No. 148.
C.J.S. Eminent Domain §§ 38 to 55.

RESEARCH REFERENCES

Treatises and Practice Aids

18A Mass. Prac. Series 20.1, Environmental Protection--Generally.

UNITED STATES SUPREME COURT

Federal installation of discharging water pollutants, state permits, see Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., U.S.Cal.1976, 96 S.Ct. 2022, 426 U.S. 200, 48 L.Ed.2d 578,

C

Massachusetts General Laws Annotated Currentness
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment
→→ **Art. XCVII. Annulment of Forty-ninth Article of Amendment and adoption of new Article**

ART. XCVII. Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof:--

[See Amend. Art. 49 for text]

HISTORICAL NOTES

1997 Main Volume

The Ninety-seventh Article of Amendment was adopted by joint sessions of the General Court in the years 1969 and 1971, and was approved by the people on the seventh day of November, 1972.

M.G.L.A. Const. Amend. Art. 97, MA CONST Amend. Art. 97

Current through amendments approved February 1, 2012

END OF DOCUMENT

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

IAN A. BOWLES
Secretary

LAURIE BURT
Commissioner

January 15, 2010

In the Matter of
Boston Redevelopment Authority

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

RECOMMENDED FINAL DECISION

I. INTRODUCTION

The petitioner, Sanjoy Mahajan, ("Mahajan") together with a group of residents of the city of Boston pursuant to G.L. c. 30A, § 10A, challenge the Massachusetts Department of Environmental Protection's ("the Department") September 17, 2008, determination to grant a chapter 91 waterways license to the Boston Redevelopment Authority ("BRA"). The license authorized the BRA to construct a restaurant and other facilities at the seaward end of Long Wharf in Boston, Massachusetts. Claiming errors of law in the final agency decision, the petitioners seek an adjudicatory hearing pursuant to 310 CMR 9.17. For the reasons set forth below, I recommend that the Department's Commissioner issue a Final Decision dismissing the petitioners' claims and affirming the license.

II. FACTS

Long Wharf in Boston is located east of Atlantic Avenue, north of Central Wharf, and south of Commercial Wharf. See Hearing Exhibit 10, Doc's Restaurant at Long Wharf,

Environmental Notification Form, at p. 3, Attachment A. Long Wharf is a designated National Historic Landmark. See Hearing Exhibit 10 at pp. 13-14. It is listed in the State Register of Historic Places, the Inventory of Historic and Archeological Assets of the Commonwealth, and the National Register of Historic Places. Id.

Construction of Long Wharf began in 1711. Testimony Richard McGuinness at ¶ B8.[1] It extended the view corridor of King Street, now State Street from the Town House to the end of the wharf. Id. at ¶ B10. Originally a third of a mile long, it was the longest wharf in North America as well as the oldest continuously operated. Id. at ¶ B7-8; Exhibit 1, Testimony Mark Paul ("Paul") at ¶ 14. Over time, most of the wharf was subsumed into landfill for Boston's working waterfront. Id. at ¶ B11. Subsequent infill projects produced Quincy Market as well as the United States Custom House. Id. at ¶ B11, 14. A final surge resulted in the creation of Atlantic Avenue. Id. at ¶ B11, Boston HarborWalk Initiative. The later construction of the elevated Central Artery effectively separated Long Wharf from Boston's business district. Id.[2] An integral part of the commonwealth's shipping and fishing industries, over the past twenty years, Long Wharf has transformed into a recreational and cultural center with hotel, boat landings, restaurants, shops offices and residences. Id. at ¶ B12-19, City of Boston Central Wharf and Long Wharf Water Transportation Improvement Project, Application for State Bond Funds, 2006; Boston HarborWalk Initiative.

Current uses and uses in the area of Long Wharf include waterborne transportation facilities, Massachusetts Bay Transportation Authority Blue Line subway access, office, hotel, retail, parking and restaurant uses. Exhibit 15. The wharf is open to the public and the Boston

[1] Nancy S. Seasholes, Gaining Ground: A History of Landmaking in Boston (MIT Press 2003) at p. 31.

[2] That connection however, was reclaimed with the depression of the Central Artery. Id. at ¶ B19, Boston HarborWalk Initiative at p. 4-5.

HarborWalk, an active pedestrian passageway, provides public access to the water and the water dependent uses located in the area. Id. At the end of Long Wharf, there is a large plaza that includes the Long Wharf pavilion and a large brass and marble compass set into the ground. Id. Long Wharf is the launch site for ferries to Charlestown, South Boston, the Harbor Islands, Salem, Quincy, and Provincetown. Id. at ¶ B19. There are also sightseeing cruise vessels and whale watch tours, a marina with mooring field and a Massachusetts Bay Transportation Authority, Blue Line stop servicing the wharf. Id.

The BRA proposed project will take place within filled tidelands, which as stated above required a chapter 91 Waterways License Application in accordance with 310 CMR 9.00. Id.; see also Chapter 91 License Application, December 4, 2007; Notice of Application, January 15, 2008; Exhibits 10-11. It involves redevelopment of the existing pavilion for a waterfront restaurant. Id. In its application, BRA requested authorization to enclose and construct a small addition to the shade structure, which it leased for restaurant use. Id. The design of the restaurant will complement the surrounding public open space and the other buildings on Long Wharf. Id. The use is likewise intended to complement the existing public and commercial uses including the hotel, restaurants, and offices, berthing facilities for public water transportation, commercial and recreational vessels. Id. A commensurate area of public seating in the shade will be provided. Id. The project does not include any expansion of the limited area presently available for vehicular parking. Id.

III. PRIOR PROCEEDINGS

A. Proceedings Before The Department Pursuant To The Public Waterfront Act And Waterways Regulations

As required, the BRA published public notice of the application on January 23, 2008, in the Boston Herald. Exhibit 10. The associated public hearing was held at the Department's

Boston Office on January 31 2008, and continued until February 25, 2008. Id. The Department published the same notice in the Environmental Monitor on February 6, 2008. Id.

Twenty-two persons or groups submitted written comments during the public comment period. Id. The commenters stated their support for the project or raised issues while remaining neutral: Boston City Councilor Sal Lamattina; Boston Environment Department; the Boston Harbor Association; New England Aquarium; Michael Vaughn; Board of Managers for the Residences at Rowe's Wharf; ELV Associates; Conservation Law Foundation; and the Boston Waterboat Marina. Id. The following twelve residents and the North End Waterfront Residents' Association raised issues in opposition: Anne Pistorio, Victor Brogna, David Kubiak, Patricia Thiboutot, Bob Skole, Pasqua Scibelli, Shirley Knessel, Stephanie Hogue, Thomas Schiavoni, Mary McGee, Mark and Naomi Paul, Mahajan , and Ted Schwartzberg. Id. All comments were reviewed, responded to by BRA, and addressed in the Department's findings or special conditions. Id.

The Department determined that the use of authorized filled Commonwealth Tidelands for restaurant purposes is a nonwater-dependent use pursuant to 310 CMR 9.12(2)(e)(1). See Written Determination at Findings (1). It also found that the project as conditioned complied with all applicable standards of the waterways regulations, including the special standards for nonwater-dependent use projects. Id. at (5). In addition, the Department concluded that the project complied with all requirements, modifications, limitations, qualifications and conditions set forth in the Decision on the City of Boston Municipal Harbor Plan approved by the Secretary of Environmental Affairs on May 22, 1991. Id. Finally, the Department determined that the project served a proper public purpose that provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b). Id. Specifically, the outdoor

dining areas were designed to retain the existing sight line emanating from State Street. Id. Moreover, the Department found that there will be no change to the expansive HarborWalk or to the existing water-based activities that line the edge of Long Wharf. Id.

B. **Proceedings Before Office Of Appeals And Dispute Resolution**

The petitioners filed this appeal on October 9, 2008. Pursuant to the November 10, 2008, Scheduling Order I conducted a Pre-Screening Conference on December 3, 2008. At the Conference, the following eight issues for resolution were established:

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 Executive Office of Energy and Environmental Affairs ("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) and 310 CMR 9.51(3)(c)?
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 petitioners have standing?
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)?

Deadlines for filing Pre-filed Testimony were also established after accommodations were made to incorporate time for the impending holidays and travel by the parties and witnesses.

On January 7, 2009, the petitioners forwarded an electronic message to Office of Appeals and Alternative Dispute Resolution's ("OADR") Case Administrator requesting "[a] brief and

reasonable postponement" until, January 16, 2009, of their Pre-Filed Testimony. I denied the motion in part and allowed it in part. The petitioners were granted leave to file Pre-filed Testimony and a memorandum of law no later than Monday, January 12, 2009.

On February 12, 2009, the petitioners submitted a "Motion For Extension To Submit Rebuttal Pleadings." The motion sought an extension until February 24, 2009, to file rebuttal testimony that was due on Tuesday, February 17, 2009. See Motion for Extension to Submit Rebuttal Pleadings, at p. 1. The petitioners asserted that the extension was necessary because he "received approximately 1,000 pages of memoranda, affidavits, legal citations, maps, photographs and engineering data from the [a]pplicant." Id. Additionally, the petitioners asked that the Hearing be rescheduled until March 3, 2009. Id.

The Department and BRA filed their objection on February 13, 2009. The motion to extend time to file Rebuttal Testimony, limited to matters asserted in the Respondents' Pre-filed Testimony, was allowed. See Revised Ruling and Order On Petitioner's Motion to Submit Rebuttal Pleadings, February 20, 2009. The petitioner was granted leave to file Rebuttal Testimony no later than Tuesday, February 24, 2009.[3] The request to reschedule the hearing was denied.

[3] The petitioners filed a Motion for Summary Decision on February 24, 2009. Their argument focused on the application BRA submitted to the Department because, in the petitioners view the project is parkland subject to constitutional and statutory prohibitions against commercial development. For this proposition, they cited Article 97 of the Massachusetts Constitution. See Petitioners' Motion for Summary Decision at p. 2. On March 6, 2009, the BRA and Department countered that Article 97 is outside the Department's express statutory authority. In the alternative, they maintain; the project is not subject to Article 97 since it was enacted after the BRA took possession of Long Wharf, and the project is inconsistent with MHP goals. See Joint Opposition of BRA and the Department at pp. 1-4. Due to the fact that I find the BRA's and Department's assertions controlling, and because I have held a protracted evidentiary hearing, no useful purpose would be served by an analysis of the petitioners' reasoning. Accordingly the petitioners' Motion for Summary Decision is denied.

The hearing took place on February 24, March 2, and March 9, 2009. The parties offered a total of 22 exhibits into evidence.[4] In addition, on March 23, 2009, I conducted a view of the site pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j).

IV. DISCUSSION

Statutory and Regulatory Schemes

"G.L. c. 91 charges the Department with protecting the Commonwealth's interest in its harbors, tidelands, and waters and with acting as a steward of the public's interest in those lands." Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 754, 755 (2005); G.L. c. 91, § 2; 310 CMR § 9.01(2). It mandates that "[u]pon or prior to applying for a license . . . the applicant shall submit to the planning board of the city or town where the work is to be performed . . . the application containing the proposed use, the location, dimensions and limits and mode of work to be performed. Said planning board may conduct a public hearing within

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[4] EXHIBIT LIST
1. Pre-filed Direct Testimony Mark Paul
2. Pre-filed Direct Testimony Sanjoy Mahajan
3. Rebuttal Testimony Sanjoy Mahajan
4. Pre-filed Direct Testimony Thomas Schiavoni
5. Pre-filed Direct Testimony Anne Pistorio
6. Pre-filed Direct Testimony Selma Rutenburg
7. Pre-filed Direct Testimony Victor Brogna
8. Rebuttal Testimony Victor Brogna
9. Open Space Plan, 2008-2012, Section 1, Executive Summary
10. Environmental Notification Form
11. Certification from Secretary of Energy & Environmental Affairs on Environmental Notification Form
12. Open Space Plan, 2002-2006
13. Pre-filed Direct Testimony Richard McGuiness
14. Letter from Melissa Cryan to Richard McGuiness, February 24, 2009
15. Letter from Melissa Cryan to Richard McGuiness, March 4, 2009
16. Long Wharf, Doc's Construction Plan
17. Plan Equipment Purchased and Stockpiled for Phase II
18. Open Space Inventory, Section 9
19. Pre-filed Direct Testimony Lawrence Mammoli
20A. Photograph View from HarborWalk
20B. Photograph View from HarborWalk
21. Pre-filed Direct Testimony Mark Donahue
22. Pre-filed Direct Testimony and Supplement with Corrections Andrea Langhauser

thirty days of receipt of license application. Within fifteen days of conducting said public hearing or within forty-five days of receipt of license application, the planning board shall submit a written recommendation to the department. Said recommendation shall state whether said planning board believes the development would serve a proper public purpose and would not be detrimental of the public's rights in these tidal lands. The department shall take into consideration the recommendation of the local planning board in making its decision whether to grant a license. Every license granted under this chapter shall be signed by the department, shall state the conditions on which it is granted, including but not limited to the specific use to which the licensed structure or fill is restricted.

A public hearing shall be held in the affected city or town on any license application for nonwater dependent uses of tidelands, except for landlocked tidelands. No structures or fill for nonwater dependent uses of tidelands except for landlocked tidelands may be licensed unless a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program."

See G.L. c. 91, § 18.

ISSUE No. 1 **Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2?**

Applicable Law Governing Issue No. 1

310 CMR 9.31(2)(b)1-2 provides that "[n]o license or permit shall be issued by the Department for any project subject to 310 CMR 9.03 through 9.05 and 9.09 unless said project:

(b) Nonwater-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2)

is met if the project is a nonwater-dependent use project which: 1. complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53; 2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and 3. if consisting entirely of infrastructure facilities." See 310 CMR 9.31

Findings of Fact Regarding Issue No. 1

The BRA relied on the Pre-filed Testimony of Richard McGuinness (McGuinness"). He is the Deputy Director for Waterfront Planning for the Boston Redevelopment Authority. Testimony McGuinness at ¶ 2. McGuiness has worked for the BRA for eight years and earned a degree in Political Science and Urban Policy from Catholic University. Id. He manages the BRA's waterfront planning initiatives that include the basic functions of community planning, urban design, zoning, and infrastructure planning. Id. McGuinness was directly involved in a number of important waterfront planning efforts over the past thirteen years. Id. at 4.

In 1970, pursuant to the city of Boston's 1964, Urban Renewal Plan, the BRA took ownership of Long Wharf and Custom House Block. Id. at ¶ C20-21; Order of Taking, Book 8373, p. 559, June 4, 1970. It owns a shade structure at the seaward end of Long Wharf. Id.; see also Written Determination; Notice of Application #W07-2172-N. The primary purpose of this enclosure is to provide fresh air, ventilation and emergency egress for the Massachusetts Bay Transit Authority ("MBTA") subway tunnel running below the wharf. Id. The existing structure occupies approximately 3,430 square feet, the proposed additions occupy

approximately 1,225 square feet. Id. Seasonal outdoor dining occupies 2,586 square feet. Id. The remaining 25,915 square feet of the lease area is reserved for open public space. Id. The Urban Renewal Plan included the following goals:

(a) Eliminate obsolete and substandard building conditions.
(b) Promote the preservation and enhancement of buildings in the area that have architectural and historical significance.
(c) Create a mixture of land uses compatible with living, working and recreational opportunities.
(d) Create an area for the development of marine or marine oriented activities designed to stimulate tourism and symbolize the importance of Boston's historic relationship to the area.
(e) Provide public ways, parks and plaza, which encourage the pedestrian to enjoy the harbor and its activities.
(f) Provide maximum opportunity for pedestrian access to the water's edge.
(g) Establish a relationship between buildings, open spaces, and public ways, which provides maximum protection to the pedestrian during unfavorable weather conditions.
(h) Create an unobstructed visual channel from the Old State House to Long Wharf and the harbor beyond.

Id. at ¶ C21(a)-(h).

The city of Boston's 1979, Long Wharf Master Plan to revitalize the wharf outlined similar goals. Id. at ¶ C22(a)-(f). The hearing record is replete with evidence that the project is consistent with the Boston HarborWalk Initiative, Municipal Harbor Plan, ("MHP") 1990, Revised Long Wharf Master Plan, 2000, "Open Space Plan 2002-2006, prepared by the city of Boston's Parks and Recreation Department, in that it incorporates growth that activates open spaces and supports year-round day and evening activity. Id. at ¶ C23-33; see also Exhibit 10, at p. 5. Moreover, the project is consistent with "MetroPlan2000, the Regional Development Plan for Metropolitan Boston,"[5] produced by the Metropolitan Area Planning Council. Id.

[5] The Plan endorses development that increases uses of public areas, upgrades or expands an existing facility rather than constructing a new facility, and is accessible by public transportation. Id.

On this point , the BRA offered the Pre-filed Testimony of Mark Donahue ("Donahue"). Donahue has been employed by the BRA for eleven years and is its Deputy Director for Asset Management. Testimony Donahue at ¶ 2. He holds a Bachelor of Arts Degree from the University of Massachusetts. Id. at ¶ 3. In his role as Deputy Director, Donahue has oversight and management responsibility for approximately seven million square feet of BRA owned-property. Id. Additionally, the Asset Management Department promotes the use of BRA-owned property for redevelopment. Id. at ¶ 4.

Donahue's testimony indicated that data for water transit riders passing through Long and Rowes Wharves grew from an estimated 555,000 passengers in 1988 to 1.4 million passengers in 1998. The estimated volume for 2010, is 3.8 million. Id. at ¶ 5. According to Donahue, in developing and designing the project the BRA focused on year-round use of the Long Wharf pavilion. Id. at ¶ 7. To that end, it began a series of meetings with interested parties, abutters, users of the waterfront, public agencies, and elected officials to "explore the idea of reuse of the MBTA vent structure." Id. In 2003, the BRA submitted an application to enhance water transportation that included a revised site plan from the Long Wharf Master Plan designating the pavilion as "potential adaptive re-use." Id. at ¶ 8.

In 2005, a series of public meetings took place. Id. at ¶ 9. At those meetings, Mayor Thomas Menino's Crossroads Initiative[6] and the redesign of State Street from the Old State House to the tip of Long Wharf were discussed. Id. at ¶ 9. The project's restaurant concept as a reuse of the MBTA vent structure met the needs articulated by the Urban Redevelopment Plan and the Crossroads Initiative. Id. at ¶ 10. The restaurant would also provide a destination and

[6] The Crossroad Initiative reunites neighborhoods and revitalizes thirteen streets that connect downtown [Boston] with the Harbor. Id. at ¶ 9.

amenities for pedestrians using the Norman Leventhal Walkway to the sea from the Old State House. Id.

In 2006, the BRA issued a Request for Proposals for the redevelopment and restaurant operation of the pavilion and associated plaza at Long Wharf. Id. at ¶ 11. The BRA sought proposals that would first, contribute to the revitalization of the downtown waterfront neighborhood by providing quality commercial opportunities to the resident of the City across a variety of income ranges and sizes; and second, reinvigorate the pavilion by creating a development that: blends the redevelopment of the project site with nearby structures, preserves the architectural character of the neighborhood, provides street level activity that enhances the public realm and exhibits a high quality of urban design. See Hearing Exhibit 10, at p. 3.

The preferred development option included the rehabilitation of approximately 3,400 square foot Long Wharf pavilion, which was built in 1983, to serve as a MBTA ventilation building and Blue Line tunnel emergency egress. Id. The existing brick structure would be expanded by approximately 1,225 square feet for a waterfront restaurant. Id. In addition to the interior seating, the restaurant will incorporate approximately 530 square feet of outdoor space on a seasonal basis. Id. The outdoor patio will consist of tables, chairs umbrellas, and planters. Id. There is no parking proposed as part of the project, because the location has a high volume of pedestrian traffic and is located near public transportation facilities. Id. BRA chose Eat Drink Laugh Restaurant Group as the designated developer for the site. Id. A community meeting was held on May 10, 2007, with the North End Waterfront Association to discuss the Crossroads Initiative. Id. at ¶ 12. The plans for Doc's restaurant were used. Id.

In 2007, the Department issued License Number 11853 to the BRA for improvements to Long Wharf. Id. at ¶ 13. Pursuant to this license BRA invested $1,600,000.00 which resulted in

public access to an additional 5,200 square feet on Long Wharf. Id. In September 2008, Boston dedicated the new "Norman B. Leventhal Walk to the Sea."[7] Id. at ¶ 14. The walk to the sea features informational panels at eight locations depicting four centuries of Boston history. Id. at ¶ 14. Three panels at Long Wharf are lit at night by low wattage LED lights powered by a small wind turbine, and can be seen from a new seating area. Id. One of the goals of a restaurant at the end of Long Wharf is to winterize the site and provide year-round use. Id. at ¶ 15. The pavilion is currently not fully utilized for approximately eight months of the year. Id.

On the other hand, the petitioners' evidence refined to its bare essence, and discussed in more detail below essentially restates the harm they believe the project will cause. See generally, Exhibits 1-7, Testimony Paul; Testimony Mahajan; Rebuttal Testimony Mahajan; Testimony Thomas Schiavoni ("Schiavoni"); Testimony Anne Pistorio ("Pistorio"); Testimony Selma Rutenburg ("Rutenburg"); Testimony Victor Brogna ("Brogna"). Nothing contained in it adds incrementally to my assessment of this issue. Therefore, after careful perscrutation of the record I conclude that the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2.

ISSUE No. 2 Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d)?

Applicable Law Governing Issue No. 2

310 CMR 9.53(3)(d) states in relevant part, "[a] nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of

[7] This is a way finding path from thee top of Beacon Hill, the highest point on the Shawmut peninsula, to Boston's furthest projection into the harbor Long Wharf. Id. at ¶ 14.

use are not primary but merely incidental to the achievement of public purposes. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1)(through (4)."

"The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d): (d) the Department shall consider only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality." See 310 CMR 9.53(3)(d).

Findings of Fact Regarding Issue No. 2

As stated above, the project includes a non-water dependent facility of public accommodation on filled tidelands. See Hearing Exhibits 10-11. Therefore, in accordance with 310 CMR 9.53(3)(d), the majority of the site will remain as open space and the proposed development will reinvigorate the HarborWalk for utilization of water-dependent purposes. Id.

The proposed building will occupy 4,890 square feet of the site and the remaining 28,440 square feet of filled tidelands will be reserved as open space. Id. The project was designed to conserve the capacity of the site for water-dependent uses and enhance the utilization of the shoreline. Id. The proposed restaurant will serve people using the HarborWalk, a water dependent use. CITE Significantly, no total reduction of the Water-Dependent Use Zone ("WDUZ"), as required in the Waterways Regulations and substitute provisions of the MHP, will occur. Id. In fact, an additional 3,135 square feet of WDUZ setback area is proposed. Id.

The Department fortified its position with the testimony of Andrea Langhauser ("Langhauser"). See Hearing Exhibit 22 with supplement. Langhauser earned a Bachelor of Science degree in Environmental Biology from the State University of New York in Syracuse in 1981. Testimony Langhauser at ¶ 2. She has been employed by the Department since 1988, save a period between June 1998 and April 2004, when she was a Regional Planner with the Executive Office of Environmental Affairs. Id. at ¶ 1. She returned to the Department as Regional Planner in May 2004. Id. In that capacity, Langhauser administers and enforces the Waterways Act and the accompanying regulations. As such, she reviews non-water dependent license applications, performs site inspection, and drafts licensing decisions and enforcement actions. Id. at ¶ 3. Langhauser was the primary author of the Written Determination issued in this matter. Id.

The Department determined that the project complied with all applicable standards if the waterways regulation, including the special standards for nonwater-dependent use projects described in 310 CMR 9.53 to activate commonwealth tidelands for public use. Id. at ¶ 11. The Department's rationale fits readily within an unforced reading of 310 CMR 9.52(1) (a). To elaborate, the project includes publicly accessible landscaped areas and the HarborWalk along

the full perimeter of the wharf, which are facilities that promote the active use of the project shoreline. Id. at ¶ 10.

Aside from that, Long Wharf is a center for existing water-based activity including water transportation to points in the harbor, to the harbor islands, and to Provincetown among other water-based operations. Id. On that basis, piles were installed to allow visiting vessels to berth; there are docks for a marina along one side and tocks for thee harbor cruise vessels located along the other side at the project site. Id. Langhauser opined that under existing conditions the site was fully utilizing the water sheet along the project shoreline. Id. Additionally, the proposed restaurant use will draw greater numbers of people to the site in more seasons of the year, which can promote a greater use of the publicly accessible landscaped areas, a water dependent use for longer periods of time. Id.

Langhauser, also contended that 310 CMR 9.53(3) addresses other development policies of the Commonwealth, and the regulatory provision is not applicable to this project because the application did not include any guidance from government agencies as described in 9.53(3)(a) or other written agreement from any state Executive Office as described in 9.53(3)(b). Id. at ¶ 12. Indeed, the city of Boston's MHP is the only document presented in the BRA's license application that resembles those contemplated in 310 CMR 9.53(3). Id. at ¶ 13.

Langhauser posited that the proposed project provides reasonably direct public non water-related benefits. Id. In her words, a restaurant, in this case DOC's, "provides services 'made directly available to the transient public on a regular basis, at which advantages if use are otherwise open on essentially equal terms to the public at large.'" Id. at ¶ 14; 310 CMR 9.02. She asserted too that the restaurant is designed to not interfere with the functions the structure has been performing for the MBTA subway system that runs underground, and the ability to vent

the tunnel and provide emergency egress will not be impaired by the project. Id. at ¶ 15, Exhibit C.

The petitioners mount several efforts to subvert the Department's decision. See Exhibits 3, 8, Rebuttal Mahajan and Brogna. However, nothing in their rebuttal evidence undermines the reasonableness of Langhauser's professed and documented belief that the project benefits the public. To sum up, I find that based on the foregoing, the project provides direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d).

ISSUE No. 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?**

Applicable Law Governing Issue No. 3

310 CMR 9.52 provides in material part, that "a nonwater-dependent use project that includes fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. In applying this standard, the Department shall take into account any relevant information concerning the capacity of the project site to serve such water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.. Except as necessary to protect public health, safety, or the environment, the Department shall act in accordance with the following provisions. (1) In the event the project site includes a water-dependent use zone, the project shall include at least the following: (a) one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances; in making this determination, the Department shall give particular

consideration to: 1. facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas; fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a); and 2. facilities for which a demonstrated need exists in the harbor in question and for which other suitable locations are not reasonably available; and (b) a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies) provided in 310 CMR 9.52(1)(a); at a minimum, such network shall consist of: 1. walkways and related facilities along the entire length of the water-dependent use zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width; and 2. appropriate connecting walkways that allow pedestrians to approach the shoreline walkways from public ways or other public access facilities to which any tidelands on the project site are adjacent. Such pedestrian access network shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site. (2) In the event the project site does not include a water-dependent use zone, the project shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent. (3) The requirements of 310 CMR 9.52(1) and (2), shall also apply in the event a nonwater-dependent use project is located on a Great Pond."

See 310 CMR 9.52.

Findings of Fact Regarding Issue No. 3

The BRA began the HarborWalk planning process for the waterfront in the early 1980s

with the goal of creating a continuous 47-mile waterfront walkway along Boston Harbor. Testimony McGuinness at ¶ 23. The HarborWalk connects the city's neighborhoods to the Harbor. Id. at ¶ 23(d).

The Department determined that the project will promote public use on the seaward end of Long Wharf in a clearly superior manner. This is true for a number of reasons. As an initial matter, approximately 25,915 square feet of the area at the seaward end of Long Wharf will be preserved as open space and continue to be used as a public plaza. Testimony McGuinness at ¶ D34(d); Testimony Mammoli at ¶ 5, 19. Next, none of the proposed additions are closer to the water than the existing structure. Id. at ¶ 21. Indeed, all of the proposed additions are at least twenty-eight feet from the water. Id. Further, seasonal outdoor dining will occupy approximately 2,586 square feet. Id. at ¶ 22. At the southeastern portion of the wharf, there will be eighteen seasonal shaded tables for public use, independent of patronage of the restaurant. Testimony McGuinness at ¶ D34(d). The proposed design of the restaurant will complement the surrounding open space and the other buildings on Long Wharf and the existing public and commercial uses. Id. at ¶ D34. Last but not least, the proposed design includes flood mitigation measures of rabbited aluminum barrier door stop. Testimony Mammoli at ¶ 26. The Department and BRA offered evidence that by establishing a restaurant more people will be attracted to the end of Long Wharf over a longer period of the day and into the colder months of the year, thereby providing a year-round destination without interfering with the important function performed by the underground subway system. Id. at ¶ 19. The project will serve the pedestrian public and other persons utilizing the existing water-dependent operations on and along the edge of the wharf, such ass the HarborWalk, public plaza, marina, water transportation to the

Charlestown Navy Yard, Boston, Harbor Islands, and Provincetown, and charter vessels and boats utilizing the adjacent mooring field. Id. at ¶ 20.

Significantly, Special Conditions Nos. 3 and 4 require the BRA to "maintain the seaward end of Long Wharf, as open space with no obstacles for safe, free, and universally accessible public passage twenty-four hours a day with no gates or other barriers installed to impede pedestrian circulation." See Written Determination at p. 7. BRA must also "provide restrooms for use by the general public, regardless of patronage, during . . . regular business hours."[8] Id.

Additionally, in order to maintain the existing use of the pavilion, there will be seating with views of the harbor continue to be available to the general public, free of charge on benches and as informal seating. Id. at ¶ 21. The same condition limits the area of outdoor seating and provides at a minimum 18 shaded tables with accompanying chairs to be arranged so the general public can enjoy the harbor vista in a manner that does not obstruct the view corridor from State Street. Id. The restaurant operator is also required to perform routine maintenance of pedestrian amenities including keeping the public binoculars in good working order, picking up trash on a daily basis, limiting the hours of deliveries to avoid conflict with the pedestrian public and clearing snow and ice in accordance with the Department snow disposal guidance. Id.

Another meaningful metric is the Department's determination that the reconfiguration of the setback distances for the project will promote public use and other water dependent activity on the seaward end of Long Wharf in a clearly superior manner because it provides a larger setback distance than required by 310 CMR 9.51(3)(c) and it allows modest additions to be constructed on an existing structure to expand the public use and activation of the seaward end of

[8] At least two clearly visible signs must be posted identifying the free public use of restrooms. Written Determination at p. 7.

Long Wharf. Id. at ¶ 24. The total amount of the substitute setback area us approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c). Id.

Based on the well-pleaded factual averments, the testimony that illuminated and supplemented those facts, I find 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. This finding while unfortunate for the petitioners is neither unreasonable nor implausible. It is also not inconsistent with the regulatory scheme or the broader context of the regulations as a whole which seek to make the best possible use of public lands.

ISSUE No. 4 Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)?

Applicable Law Governing Issue No. 4

310 CMR 9.34(2)(b)(1) states "[i]f the project conforms to the municipal harbor plan the Department shall: apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00 and associated guidelines of CZM.

A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. In applying this standard, the Department shall take into account any relevant information concerning the utility or adaptability of the site for present or future water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall adhere to the greatest

reasonable extent to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with the following provisions. The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use: (c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:

1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and

2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and 3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet. As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standards if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative setback distances and other requirements which ensure that new buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent activity and public access associated therewith, as appropriate for the harbor in question."

Findings of Fact Regarding Issue No. 4

Regarding the total amount of open space located within the reconfigured Water Dependent Use Zone, the current proposal included approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c) and the additions are no closer to the water than the existing structure. Id. at 3. The project complies with applicable city and state plans as well as written memoranda of understanding and decisions by the Secretary of Environmental Affairs. Testimony Mammoli at ¶ 14(c). In fact, the MHP allows for a "reconfiguration of setback distances along the ends and sides of wharves" if the reconfiguration "promotes public use or other water dependent activity in a clearly superior manner" and if no overall reduction of total setback area occurs. Testimony Mammoli at ¶ 15. There was also testimony that rejuvenating Long Wharf through redevelopment of the shade pavilion with seats and tables, refreshment, and restroom facilities will promote and enhance the used of the existing water transportation by making the area a destination. Testimony McGuinness at ¶ C 34(c).

The Department and BRA have the better of this argument. This is true because the petitioners offered can not skirt the regulatory channel markers by lumping together a mélange of claims and eschew a direct challenge to the opposing parties' submissions.[9] See generally, Exhibits 1-7, Testimony Paul; Testimony Mahajan; Rebuttal Testimony Mahajan; Testimony Schiavoni; Testimony Pistorio; Testimony Rutenburg; Testimony Brogna; Rebuttal Testimony Brogna. Against this backdrop, I find that the evidence showed that pursuant to 310 CMR 9.51(3)(c) the Department correctly waived the numeric standards for water-dependent use zones. Accordingly, the project complies with the requirements of 310 CMR 9.34(2)(b).1. and

[9] Findings of fact as to technical matters beyond the scope of ordinary experience are not warranted in the absence of expert testimony supporting such findings. Department of Revenue v. Sorrentino, 408 Mass. 340 (1990); In the Matter of Hargrove, Company, Docket No. 98-134, Determination of Applicability Ruling On Motion For Reconsideration (November 22, 1999)(no basis to alter decision to credit testimony of one witness over that of another).

310 CMR 9.51(3)(c) by substituting the alternate setback distances and other requirements of the MHP.

ISSUE No. 5 Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water?

Applicable Law Governing Issue No. 5

310 CMR 9.51(2)(b) indicates that "[i]f the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that 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 project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to: (b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity."

Findings of Fact Regarding Issue No. 5

There was evidence that the project complies with 310 CMR 9.51(2)(b). Specifically, the outdoor dining areas have been designed to retrain the existing sight line emanating from State Street. As an initial matter, the height, scale and massing of the building will not change. Testimony McGuinness at ¶ C38(d). The view corridor down State Street is important because unobstructed sight lines down public ways help to draw the public down to the waterfront. Id. Next, there was testimony that the project does not interfere with the HarborWalk in any way, which runs the full perimeter of Long Wharf. Id. Similarly, the proposed design does not adversely impact the view corridor from State Street or sight lines to the water from the

HarborWalk. Id.; Mammoli Testimony at ¶ 17, Exhibit 9, Aerial Photograph of Downtown Waterfront. Indeed, there are very limited changes in the view from the pavilion to the restaurant because the existing columned structure will be reused and existing open views through the pavilion will be maintained through the use of windowed walls. Testimony McGuinness at ¶ C 34(c). For the reasons elucidated above, I find that the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water.

ISSUE No. 6 Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i)?

Applicable Law Governing Issue No. 6

310 CMR 9.33(1)(i) states that "(1) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to: (i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07 the applicant shall file said form with the Massachusetts Historical Commission."

Findings of Fact Regarding Issue No. 6

The project's exterior architectural elements include a new wood frame folding storefront and reclaimed deck planks and signage that wrap around the upper level of the building. See Exhibit 10 at p. 14. BRA offered testimony that it sought to design and construct projects on Long Wharf that maximize public access to the water and waterfront view corridors. For example, innovative configuration of fully accessible ramps and floats at the marine facility respect the site's historic context while minimizing visual obstructions. Testimony Mammoli at ¶ 12. Moreover, the evidence showed that the project proposes to rehabilitate the Long Wharf pavilion, which was constructed in 1983 after the site's designation as a historic district in 1966.

See Exhibit 10 at p. 14. The project was designed to blend with nearby structures and to preserve the architectural character of the neighborhood. Testimony McGuinness at ¶ C34(b); see also Hearing Exhibit 10 at p. 14. Additionally, licensing funds from the project will be used to install interpretive signage that explains the history of Long Wharf. Id. In conclusion, I note that the petitioners, who assert that they will be irreparably harmed by the project have not satisfactorily explained how or why this is so. So, while I am sensitive to the concerns raised by the petitioners, I find their claims lacking in this instance. I reject them out of hand and for the reasons elucidated above rule that the project complies with the historic resource requirements of 310 CMR 9.33(1)(i).

ISSUE No. 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?

Applicable Law Governing Issue No. 7

G.L. c. 91 provides that a "person aggrieved by a decision of the department to grant a license . . . shall have the right to an adjudicatory hearing in accordance with chapter thirty A." See G.L. c. 91, § 18.[10] The persons who have the right to an adjudicatory hearing are listed in 310 CMR 9.17(1), and include "any person, aggrieved by the decision of the department to grant a license or permit who has submitted written comments within the public comment period."[11] It is the burden of the person claiming aggrieved party status to present, in writing, sufficient facts to allow the Department to determine whether or not he or she is in fact aggrieved. Id.; In the Matter of Town of Hull, Docket No. 88-22 DEQE Wetlands File No. 35-383 Decision on Motion

[10] "Aggrieved person means any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public which is within the scope of the public interests protected by G.L. c. 91." See 310 CMR 9.02.

[11] The petitioners here fulfilled all applicable procedural requirements. See Section IIA above.

fro Reconsideration of Dismissal, (July 19, 1988); In the Matter of Boston Harbor Marina Company, Docket No. 85-68 DEQE Wetlands File No. 59-160, Denial of Motion for Reconsideration (May 7, 1986). Conversely, "an allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement." In the Matter of Doe, Doe Family Trust, Docket No. 97-097 Final Decision, 5 DEPR 61, 64 (April 15, 1998).

To determine whether standing exists, the Supreme Judicial Court "look[ed] to the considerations set forth in Enos v. Secretary of Environmental Affairs, 432 Mass. 132, 135-36 (2000); see also Hertz & others v. Secretary of the Executive Office of Energy and Environmental Affairs & others, 73 Mass. App. Ct. 770, 771 (2009)(quoting Enos v. Secretary of Environmental Affairs, 432 Mass. at 135-36); the language of the statute [or regulations]; its or their intent and purpose; 'the nature of the administrative scheme; decisions on standing; any adverse effects that might occur, if standing is recognized; and the availability of other, more definite, remedies to the plaintiffs. In making [the] inquiry . . . special attention [is to be given] to the requirement that standing is usually is not present unless the governmental official or agency can be found to owe a duty directly to the plaintiffs." Id.

The cases instruct that the burden is not a particularly difficult one to meet. In the Matter of Hull, at 9. It is "analogous to a rule of pleading rather than to an evidentiary rule." Id. at 11. While as indicated above, conjectural injury is insufficient to show aggrievement, a person claiming to be aggrieved need only present facts showing a possibility of injury related to the interests protected by the Act and is not required to prove that the injury would actually occur or that he or she is entitled to the relief sought on appeal in order to show aggrieved person standing. Id. at 11-12. By this standard, the petitioners have not met this low-threshold burden.

None of the evidence offered recites any injury that they would suffer as a result of the project. They accordingly lack standing to appeal the license as aggrieved persons. Id.

Findings of Fact Regarding Issue No. 7

The petitioners rely on the following claims of harm to confer standing: (1) as abutters they will suffer injuries that are different in kind or magnitude from that suffered by the general public within the scope of public interest protected by chapter 91; (2) the project will block the view of the harbor that they enjoy , and will also impede their view as they travel to work and around the waterfront, an area they travel more frequently than the general public; and (3) the project will exacerbate an already severe noise, and trash problem. I reject these claims as conferring standing. Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 754, 756-57 (2005)(court rejected plaintiffs' claims that wharf development would block light air visual benefits of their property create traffic problems noise and pollution).

The petitioners all reside in Boston. See Exhibits 1, 2, 4, 5, 6, 7. Their addresses are as follows: Paul 61 Prince Street in the North End; Mahajan 5 Jackson Avenue in the North End; Schiavoni 46 Snow Hill Street in the North End; Pistorio 72 North Margin Street in the North End; Rutenburg lives at Harbor Towers, East India Row in Boston; and Brogna's address is 120 Commercial Street. Id. I conclude that under the regulations, abutters do not receive special status for purposes of standing. Id. "Rather, for persons in the circumstances of the petitioners, standing depends on whether they are persons aggrieved as defined in 310 CMR §§ 9.02 and 9.17(b), quoted above." Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57 (quoting In the Matter of Lipkin, 21 DEPR 249, 250 (1995)).

The petitioners fare no better on the claims concerning interference with their views of the harbor. More exactly, they assert that "overwhelms the site, obstructs sight lines and scenic

views, and usurps the immediate open space and parkland for a private enterprise." See Hearing Exhibit 4, Schiavoni, at ¶ 4. Other petitioners suggested that Long Wharf is "unique" and offers "uncluttered" "panoramic" "sweeping" "unobstructed" views. Exhibit 1, Paul ¶¶ 2-3; Exhibit 2, Mahajan at p. 1; Exhibit 5, Pistorio at ¶ 4G. In like vein, petitioners assert that their injury includes "damage to the environment" "excessive noise" disturbance of the tranquility of the mooring basin" and "loss of quiet enjoyment by those who live on their boats". See e.g., Exhibit 7, Brogna at ¶¶ 2(a)-3. For example, the evidence indicated that the petitioners commuted to work by way of the HarborWalk. Exhibit 1, Paul Pre-filed at ¶ 1. They also take walks along Long Wharf. Exhibit 2, Mahajan; Exhibit 4, Schiavoni at ¶ 1; Exhibit 5, Pistorio at ¶ 2. Brogna moors his boat near the project site.[12] See Hearing Exhibit 7, Brogna at ¶ 2(b).

While the impact on their views from may differ in kind or magnitude from that of the general public, this is not an interest that the statute protects. Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57. The statute protects for water-dependent purposes the public's interest in views from public places, such as parks and esplanades. Id. Furthermore, the petitioners' claim that their more frequent travel in the waterfront area differs in kind or magnitude from the general public is as a matter of law, not a difference in kind or magnitude of injury within the meaning of 310 CMR 9.02. With respect to the petitioners' third claim of injury, noise and trash problems, I rule that they likewise do not state a protected interest.[13] Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57; Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 774.

[12] Brogna also testified that he does not live on his boat, but sleeps on it during the summer once every 10 days.

[13] There was also testimony that the project will not appreciably increase noise levels at the end of Long Wharf. Testimony Mammoli at ¶ 18.

Further, I conclude that that petitioners' other claims such as diminished use of and access to the waterfront and their being subject to increased noise and pollution are not within the area of concern of the harbor plan regulations, or stated differently, the regulations do not create "a right in the particular plaintiff[s] to redress those injuries." Enos v. Secretary of Environmental Affairs, 432 Mass. at 139 n.6. Moreover, the Massachusetts Constitution does not confer standing on the petitioners in this appeal to protect the aesthetic qualities of their environment. Id. at 142 and n.7.

Beyond that, the Appeals Court believed that granting plaintiffs standing in such cases would also have adverse effects contrary to the purposes of the administrative regulatory scheme see Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 776, "would allow suit with the attending delay in almost every project . . . 'based on generalize claims by plaintiffs of injury such as loss of use and enjoyment of [their private] property.'" Id.; Enos v. Secretary of Environmental Affairs, 432 Mass. at 138. "Similarly here, granting standing to the [petitioners] to assert claims of harm to their private property, compare Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 758 n. 11 (claim based on goal of protecting clean air and aesthetic interests) would subject almost all municipal harbor projects to litigation and confer rights beyond those of comment and public hearing envisioned by the harbor plan regulations." Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 776.

The petitioners' claims contradict the considered views of prior decisions, which make plain that aggrieved parties must show that they suffered harm that was different in kind and magnitude from the public at large. See e.g., In the Matter of Mark Whouley/Three Oak Development, Docket No. 99-087, Final Decision, 2000 (May 16, 2000). Thus, there are two

main reasons underpinning my finding that the petitioners lack standing: (i) that under the regulations, abutters do not receive special status for purposes of standing and (ii) that the regulations do not create a right in the particular petitioners to redress the injuries they alleged. Applying the above tenets to this matter, I conclude that the petitioners' claims of standing fail.

ISSUE No. 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)?**

Applicable Law Governing Issue No. 8

In relevant part, 310 CMR 9.31(2)(b) provides that "no license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands. In applying 310 CMR 9.31(2), the Department shall act in accordance with the following provisions. (a) Water-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a water-dependent use project. (b) Nonwater-Dependent Use Projects. The Department shall presume 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which: 1. complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53; 2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and 3. if consisting entirely of infrastructure facilities, to which 310 CMR 9.31(2)(b)1. does not apply, complies with the special mitigation and public access standards governing such facilities, according to 310 CMR 9.55.

The presumptions of 310 CMR 9.31(2) are rebutted only if:(a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or (b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting; in the case of a project for which a final EIR has been prepared, the presumption may be overcome only if such detriment has been identified during the M.G.L. c. 30, §§ 61-62H review process."

Findings of Fact Regarding Issue No. 8

The proposed project is a portion of a process that articulates the goals of the MHP as well as the intent of chapter 91. Moreover, the project as conditioned serves a proper public purpose that provides greater benefit than detriment to the right of the public in tidelands in accordance with 310 CMR 9.31(2)(b). See Written Determination at p. 3. The outdoor dining areas have been designed to retain the existing sight line emanating from State Street. There will be no change to the expansive HarborWalk or to the existing water-based activated that line the edge of Long Wharf two water transportation facilities with destinations in the inner and outer harbor, berthing for a variety of excursion vessels, a marina and a mooring field. Id.

The BRA also provided the Pre-filed Testimony of Lawrence Mammoli ("Mammoli") the Director of Engineering and Facilities Management at BRA. See Exhibit 19. Mammoli is the Director of Engineering and Facilities Management for the BRA. He holds a degree in Civil Engineering from Northeastern University, and has worked for the BRA for twenty nine years. His experience includes management of all BRA properties, including its many waterfront properties such as Marine Industrial Park, Charlestown Navy Yard, Sargent Wharf, and Long

Wharf. He is also responsible for all capital improvements performed by the BRA, including a number of waterfront construction projects.

He testified that the BRA applied for state funding to finance in part a comprehensive, multi-year program known as the Central Wharf and Long Wharf Water Transportation Improvement Project. According to Mammoli the purpose of the project is to expand the capacity and improve the quality of water transportation infrastructure at Long Wharf. See Exhibit 13, Boston Inner Harbor Passenger Water Transportation Plan 2000; November 20, 2000 letter from the Executive Office of Transportation and Construction awarding BRA $1,800,000.00 grant. In 2000, the BRA and Executive Office of Transportation and Construction ("EOTC") identified the Long Wharf/Central Wharf area as the highest priority site in Boston's Inner Harbor for infrastructure investment because of the high volume of vessel operations which accommodate multiple uses. See Exhibit 13, Central Wharf and Long Wharf Water Transportation Improvement Project: Long Wharf North Terminal Extension, Application for State Bond Funds Fiscal Year 2006 (2006 Application), Section 4.

Mammoli indicated that the primary goals of the project are defined as follows:

> a. Maximize public access to and along the entire waterfront area while preserving much of the original form and character of the area.
> b. Promote active water dependent uses such as public landings, commuter ferries, commercial boating activities, and water taxi facilities.
> c. Anticipate growth of these boating activities and provide an orderly program for their expansion, considering both waterside and landside space and functional needs.
> d. Provide additional terminal sites and berthing capacity to sustain anticipated ferry growth.
> e. Improve linkages among different ferry services to facilitate passenger transfers.
> f. Ensure that newly constructed buildings and terminals (including waiting areas, kiosks, and associated amenities) continue to reflect and blend w/ the existing historic waterfront architecture.
> g. Preserve and enhance environmental and navigational conditions of the harbor

See Testimony Mammoli at ¶ 5, Exhibit 25, 2006 Application.

The proposed project extends from Christopher Columbus Park to East India Row along the downtown Boston waterfront. See Testimony Mammoli at ¶ 6. Since 1996, the BRA sought funding in each fiscal year for a number of discrete projects included in the Central Wharf and Long Wharf Water Transportation Improvement Project pursuant to legislative authorization for the expenditure of funds for "public piers and improvements to the public HarborWalk for the purpose of enhanced water transportation capacity and intermodal access to the waterfront. . . ."[14]

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[14] The BRA matched state funding for total project improvements of over nine million dollars that was invested in the Long Wharf area. From fiscal years 1998 through 2008, the BRA completed a number of improvement projects in the Central Wharf and Long Wharf project area. Funding for this work came from the BRA, EOTC, and the Commonwealth of Massachusetts Department of Environmental Management ("DEM"). Projects include but are not limited to:

Design and Construction of a Pedestrian Walkway on the north Side of Long Wharf:
This walkway begins at Christopher Columbus Park and extends to the head of Long Wharf, and includes all new decking, lighting, seating and other amenities. The total design and construction cost was $363,125.

Design and Removal of Dilapidated Timber Piles and Long and Central Wharves:
This work included the removal of dilapidated and rotted wood timbers and the removal of large granite blocks from the Central and Long Wharves watersheet to remove a hazard to navigation. The total design and construction cost was $78,702.

Walkway Improvements to East India Row/HarborWalk:
This work involved the preparation of contract documents that are suitable for public bidding and can be used to obtain all of the necessary permits to dredge an area on the north side of Long Wharf where Harbor Express is located along with required site improvements. The cost of this design was $113,500.

Dredging and Dock Reconfiguration North Side of Long Wharf:
This work involved the dredging and reconfiguration of the Harbor Express facility on the north side of Long Wharf. This work provided for an increase in watersheet on the north side of Long Wharf, minimizing the impact of the commuter docking facility on the use of the watersheet by additional water transportation vessels as well as recreational and commercial vessels in the area. This work represented the first phase of the long-term plan to build-out along the north side of Long Wharf. The cost of this project was approximately $716,000.

Preparation of Design and Construction Documents for Water Transportation Facility Improvements at Long and Central Wharves
The BRA hired consultants to prepare design and construction documents for the construction of water transportation facility improvements around the perimeter of Long Wharf, between Long and Central Wharves, and along the north face of Central Wharf. The Engineering and Design services have provided for safe and convenient facilities for use by the general public. The consultants determined the structural repairs necessary to satisfy typical loading requirements for a variety of maritime users who will be using the wharves for loading and unloading boats. Design and engineering elements included the reconstruction or rehabilitation of the seawall, rehabilitation of utility infrastructure, improvements to selected existing waterfront structures and development of new facilities and amenities, such as waiting area, signage and information area. The work was completed at a cost of $440,000.

Old Atlantic Avenue Project
The work included (1) the construction of a new pier facility adjacent to the existing seawall parallel to the old Atlantic Avenue together with a new floating dock to replace the existing 80-foot MBTA floating dock; (2) the installation of fixed and articulated ramps to provide fully accessible access from the new pier to the floating dock

The project complies with the MHP mandates. Testimony Mammoli at ¶ 14. First, according to the MHP, the pavilion is an underutilized site that currently does not serve the proper public purpose. Id. at ¶ 14(a). Second, the project aims to meet MHP mandates and create a superior use by revitalizing an underutilized structure with the use of private funds. Id. at ¶ 14(a). Third, the project will create job opportunities, an affordable dining establishment for residents and visitors, public amenities that currently do not exist i.e., public shaded seating and restrooms, and a destination location to attract residents and visitors to the waterfront year-round. Id. at ¶ 14(a). Fourth, through the creation of a partnership with the tenants, the BRA will

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surface; and (3) the construction of 150 feet of new linear berthing space along the north side of Central Wharf. Approximate cost $2.4 million.

Central Wharf, South Pier Improvements

The BRA and the New England Aquarium (NEAQ) partnered on a project to create a water transportation dock and public access on the south side of Central Wharf. NEAQ completed the HarborWalk around its IMAX theater in 2004. The South Pier is now open to the public. The Discovery was recently moved to accommodate the new dock. This dock will serve smaller vessels primarily, freeing up space on the north side of Central Wharf for larger vessels. Approximate cost $2 million.

Emergency Repair of Collapsed Seawall on the South Side of Long Wharf-Phase I

The BRA performed demolition, stabilization, and remediation of a collapsed length of historic Long Wharf. The cost of construction was $740,724.

Emergency Repair of Failed Seawall South Side of Long Wharf-Phase II

The BRA performed stabilization and remediation of an additional failed section of historic Long Wharf. The cost of construction was $644,524.

Long Wharf-South-Pier Restoration Project

The BRA completed construction of a new 300 foot long boardwalk to complete HarborWalk/Walk to the Sea improvements atop the recently completed seawall stabilization. Total project cost valued at approximately $1,300,300.

Long Wharf-North-Pier Restoration Project

BRA completed construction of a new boardwalk to complete HarborWalk/Walk to the Sea improvements and 180-foot long floating dock system. Total project cost valued at approximately $1,600,000.

Additional Improvements:

Additional improvements to the area included new light pole fixtures for the HarborWalk area on the south side of Long Wharf, repairs to the flagpole, and other site improvements. The cost of these improvements was approximately $120,000.

New waiting area/shelters for MBTA water shuttles have been installed with telephone kiosks at a cost of $160,000. A public bathroom was added in 2004 at a cost of $340,000. Another public bathroom is under construction at a cost of $350,000. The BRA and its design consultants received a design award for the phase one project. Mammoli Testimony at X. Among other aspects, the Adaptive Environment Group commended the BRA for its stewardship and "people friendly" design of Long Wharf. The Adaptive Environments' award for Excellence in Universal Design 2003 notes that the Long and Central Wharves Marine Berthing Facility: "solves a range of complex design, structural issues and queuing space problems in a very prominent downtown location that serves thousands of commuter and visitors. Instead of looking at the obligation of accessibility as a discrete task, the team sought an integrated solution that would address the disparate set of goals. The new pier, accessible ramps, and floating berthing facility resulted in a major new urban marine intersection that created a highly visible system with a bold industrial look that is a primary point of access for everyone to the Harbor." Id.

revitalize an underutilized structure and generate capital investment that will allow for improvements to adjacent open space. Id. at ¶ 14(b). Specifically, the BRA believes that the project will encourage year-round pedestrian use along the waterfront. Id. at ¶ 14(b). The project aims to attract pedestrians to the waterfront through reuse of an existing structure; creating a place for those to meet and be sheltered during the colder months as well as to sit and enjoy the outdoors space in the warmer months. Id. at ¶ 14(b).

The petitioners also complained that the BRA failed to correctly complete the Environmental Notification portion of its waterways application in accordance with applicable law. See Exhibit 8, Brogna Rebuttal at ¶¶ 19-23. To be sure, this claim bears a connection to the EOEEA Secretary's decision. The statutory channel markers indicate that the project is land that was designed and reconstructed with federal Land and Water Conservation Fund ("LWCF") assistance. See Exhibit 14. Therefore, a portion of the project site is legally protected park land open to recreational use by the general public. Id. Conscious of its role as a program administrator, the Division of Conservation Services ("DCS") took issue with the outdoor seating and whether it encroached on LWCF public parkland. Id.; see also Langhauser Affidavit, with Melissa Cryan ("Cryan") Attachment, March 6, 2009. Although the petitioners' factual premise is unarguably correct, the BRA resolved the issue and satisfied the agency's concerns.[15] Id.; Exhibits 13, 15. As the Cryan communications make manifest, if the conditions in the final license include the items set out at n.15 below, "the project causes no detriment to the public interest protected by the DCS as described in 310 CMR 9.31(3)(b)." Id. Accordingly, I

[15] Melissa Cryan, LWCF Stateside Coordinator, in a letter dated March 4, 2009, indicated that "[t]he BRA has said that they will be willing to put planters on the boundary line so that there is a clearly visible delineation of where the restaurant ends and where the parkland begins. This visible barrier and change in location of the seating will satisfy our concerns of a potential conversion." See Langhauser Affidavit, with Cryan Attachment, March 6, 2009.

conclude that the BRA redressed the issues raised by DCS and on that basis, I reject the petitioners' argument that the project contravenes 310 CMR 9.31(2)(b).

V. CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final decision dismissing the petitioners' appeal and affirming the license issued to the BRA.

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

January 15, 2010

Beverly Coles-Roby
Presiding Officer

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

January 29, 2010

In the Matter of
Boston Redevelopment Authority

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

FINAL DECISION

I adopt the Recommended Final Decision ("RFD") of the Presiding Officer except for the portion of the RFD at pages 26-31 regarding the issue of whether the Petitioners have standing to challenge the chapter 91 Waterways Permit ("the Permit") that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Applicant Boston Redevelopment Authority ("BRA") in this matter. I find that I need not reach the standing issue because the Petitioners' challenge of the Permit fails on the merits.

The Petitioners had the burden of proving in the Adjudicatory Hearing that the Department issued the Permit in contravention of chapter 91 statutory and regulatory requirements. As discussed in the RFD, the evidence that the Petitioners presented at the Adjudicatory Hearing was summary in nature. This is in stark contrast to the detailed and credible evidence presented by the BRA and Department. Accordingly, I affirm the Department's issuance of the Permit.

Laurie Burt, Commissioner

SERVICE LIST

In The Matter Of: Boston Redevelopment Authority

Docket No. 2008-128 File No. W07-2172-N
Boston

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CC:

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January 29, 2010

5

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET#: **SUCV2010-00802-B**

RE: Mahajan et al v Mass Dept Environmental Protection et al

TO: Robert L Quinan Jr, Esquire
Mass Atty General's Office
1 Ashburton Place
Boston, MA 02108-1698

NOTICE OF DOCKET ENTRY

You are hereby notified that on **06/10/2011** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER ON PLFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND BRA'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS (Fahey J) Notice sent 6/10/11
Dated at Boston, Massachusetts this 13th day of June, 2011.

Michael Joseph Donovan,
Clerk of the Courts

BY: Richard Muscato
Assistant Clerk

Telephone: 617-788-8141

NOTIFY 34

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-0802-H

SANJOY MAHAJAN and others[1]

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION and another[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND BRA'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

On September 17, 2008, defendant the Massachusetts Department of Environmental Protection ("DEP") granted defendant Boston Redevelopment Authority ("BRA") a G. L. c. 91 license ("the chapter 91 license") authorizing BRA to build a restaurant around a shade structure located on the eastern end of Boston's Long Wharf. The plaintiffs move for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) arguing that the chapter 91 license violates Article 97 of the Massachusetts Constitution[3] and that the issuance of the license was an error of law. The plaintiffs seek a writ of mandamus under G. L. c. 249, § 5 and a declaratory judgment under G. L. c. 231A. BRA cross-moves for judgment on the pleadings asking the court to affirm DEP's decision. For the following reason, the plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED** and BRA's Cross-Motion for Judgment on the Pleadings is **DENIED**. This court **VACATES** DEP's decision to issue the chapter 91 license.

NOTICE Out 6/13/11 MCM RLQ DAC ESE

[1] Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot

[2] Boston Redevelopment Authority

[3] The plaintiffs also argue that in granting the license, the DEP Commissioner failed to properly apply G. L. c. 91.

BACKGROUND

The land at issue is located on the eastern end of Boston Harbor's Long Wharf. Long Wharf is a designated National Historic Landmark, and is the site of water transportation, public transportation, hotels, retail establishments, and restaurants. It is also part of the Harborwalk—a pedestrian passageway that enhances public access to the waterfront. In 1970, under Boston's 1964 Urban Renewal Plan, BRA took by eminent domain a large portion of Long Wharf, including a shade structure on the eastern end ("the 1970 Taking").

In 2008, BRA proposed a plan to redevelop the eastern end of Long Wharf by building a waterfront restaurant with outdoor seating, takeout service, and a bar. As a part of the project, BRA sought to enclose and expand the shade structure. Specifically, BRA planned to add 1,225 square feet to the enclosed shade structure which currently occupies 3,430 square feet.

BRA obtained 14 zoning variances from the Boston Zoning Board of Appeals which allowed for live entertainment, takeout service, and food and alcohol service until 1:00 a.m. at the proposed restaurant. In addition, because the site of the proposed restaurant is located on filled tidelands, BRA was required to obtain a license from DEP pursuant to G. L. c. 91, § 18. BRA applied for a chapter 91 license and on September 17, 2008, DEP granted the license.

The plaintiffs, who are residents of Boston's North End, appealed DEP's decision to issue the chapter 91 license. They argued that the restaurant would create unnecessary noise and would damage public open space, parkland, and scenic quality. On January 29, 2010, the DEP Commissioner ("the Commissioner") issued a final decision affirming the grant of the chapter 91 license.

The plaintiffs now appeal the final decision. The crux of their argument is that the site at issue is protected under Article 97 of the Massachusetts Constitution, and that any change in use

or disposition of the land requires two-thirds approval from the legislature. According to the plaintiffs, the chapter 91 license authorized a disposition and change of use in land, and that because it was done without legislative approval, the license is invalid. The plaintiffs seek a declaratory judgment under G. L. c. 231A and a writ of mandamus under G. L. c. 249, § 5 ordering DEP to enforce Article 97's requirements.[4]

DISCUSSION

A. DEP Commissioner's Jurisdiction to Interpret and Apply Article 97

In her final decision, the Commissioner declined to address the plaintiffs' argument that the chapter 91 license violates Article 97. The Commissioner stated that DEP lacks jurisdiction over Article 97 and therefore, she cannot interpret or apply Article 97. The plaintiffs argue, however, that DEP assumed jurisdiction over Article 97 by issuing certain policy pronouncements and that the Commissioner's failure to address Article 97 was an error of law. This court disagrees.

The plaintiffs do not offer sufficient support for their argument that DEP assumed jurisdiction by issuing certain policy pronouncements. Moreover, it is well-established that an administrative agency has "only the powers, duties and obligations expressly conferred upon it by . . . statute . . . or such as are reasonably necessary . . . [to carry out] the purpose for which it was established." Saccone v. State Ethics Comm'n, 395 Mass. 326, 335 (1985), quoting Hathaway Bakeries, Inc. v. Labor Relations Comm'n, 316 Mass. 136, 141 (1944). General Laws chapter 91 sets forth DEP's powers, duties, and obligations with respect to issuing chapter 91 licenses. The statute does not grant DEP authority to interpret Article 97 or apply it when ruling

[4] In addition, the plaintiffs invoke G. L. c. 30A arguing that DEP's decision was an error of law. Because, as discussed below, this case can be disposed of based on Article 97, this court need not consider the plaintiffs' argument on this point.

on a chapter 91 license. In fact, Article 97, a constitutional amendment, is independent of chapter 91.

This court therefore accepts the Commissioner's conclusion that review of Article 97 is outside the scope of DEP's authority. The parties agree that this court has jurisdiction to interpret and apply Article 97, and accordingly, it will do so at this time. See Hartford Acc. & Indem. v. Commissioner of Ins., 407 Mass. 23, 26-27 (1990) (where question of law is outside the scope of an agency's discretion, the matter must be committed to the courts for disposition).

B. Article 97's Retroactivity

Article 97 applies only to lands and easements taken or acquired by governmental entities. Long Wharf was taken by eminent domain in 1970. Article 97, however, was not adopted until 1972. The defendants argue that Article 97 is not retroactive and that because it did not exist at the time of the 1970 Taking, it cannot be applied to the land at issue.

This court disagrees. The June 6, 1973 opinion of Attorney General Robert H. Quinn ("the Quinn Opinion") clearly states that Article 97 applies retroactively. Rep. A.G., Pub. Doc. No. 12, 139, 140-141 (1973) ("the House of Representatives asks . . . whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97 . . . . I answer in the affirmative."). The Quinn Opinion is good law and is consistently used in applying and interpreting Article 97. Thus, in accordance with the Quinn Opinion, this court concludes that Article 97 is retroactive and may be applied in the present case.

C. Article 97's Applicability to the Land at Issue

Article 97 provides that the "people shall have the right to clean air and water . . . and the natural, scenic, historic, and esthetic qualities of the environment" and that "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 . . . a public purpose."[5] It grants the legislature power to "enact legislation necessary or expedient to protect such rights." Specifically, Article 97 authorizes the legislature to "provide for the taking . . . or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish [Article 97's] purposes." Under Article 97, if the legislature takes or acquires land or easements for such purposes, the land or easement "shall not be used for other purposes or otherwise disposed of expect by laws enacted by a two thirds vote . . . of each branch of the [legislature]."

To determine whether the land at issue is subject to Article 97, this court must consider whether the land at issue was taken or acquired for an Article 97 purpose, and if so, whether the chapter 91 license effected a change in use or disposition of Article 97 land.

1. Whether the Land at Issue was Taken or Acquired

The parties agree that in 1970, BRA acquired a large portion of Long Wharf under the 1964 Urban Renewal Plan. The defendants maintain, however, that a portion of Long Wharf's eastern end, which contains the land at issue, was excluded from the 1970 Taking. The defendants assert that because the land at issue was not "taken," it is not subject to Article 97. This court disagrees.

The 1970 Order of Taking, which references the recorded plan, describes the acquired area as follows: The westerly boundary is "by Atlantic Avenue, as shown on [the recorded plan], 257.45 feet;" the northerly boundary is "by land now or formerly of [BRA] as shown on said Plan, 968.59 feet;" the easterly boundary is "by Boston Harbor[,] 274.48 feet;" and the southerly

[5] Article 97 amended Article 49 of the Massachusetts Constitution. While some authorities still refer to the provision as Article 49, this court will refer to it as Article 97.

boundary is "by land now or formerly of New England Aquarium as shown on said Plan, 963.93 feet." Thus, the 1970 Taking Map and Order of Taking indicate that Long Wharf's eastern end, including the land at issue, was part of the 1970 Taking. Contrary to the defendants' assertion, there is no indication that a portion of the eastern end was excluded from the 1970 Taking. Rather, the record shows that the land at issue was included in the 1970 Taking.

2. Whether the Land at Issue was Taken for an Article 97 Purpose

In order for Article 97 to apply, the land at issue must have been taken for an Article 97 purpose. See Board of Selectmen v. Lindsay, 444 Mass. 502, 504-506 (2005). BRA acquired the land at issue under the 1964 Urban Renewal Plan, which sought to encourage urban renewal and development. The defendants argue that the 1964 Urban Renewal Plan's goals are inconsistent with Article 97's conservation objectives, and therefore, the land at issue was not taken for Article 97 purposes. This court disagrees.

The record shows that the 1964 Urban Renewal Plan served at least three Article 97 purposes. First, the 1964 Urban Renewal Plan aimed to "provide public ways, **parks**, and plaza." Record at 1609-1610 (emphasis added). Providing parkland is an Article 97 purpose. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 141-142 (Article 97 purpose is carried out by parkland acquisition; Article 97 requirements apply to parkland). The parties dispute whether the land at issue qualifies as parkland. While the record contains evidence that the land at issue is parkland,[6] this court need not address this dispute because the 1970 Taking served additional Article 97 purposes.

Second, the 1964 Urban Renewal Plan sought to create parks and plazas "which encourage the pedestrian to **enjoy the harbor and its activities** . . . ." Record at 1609-1610

[6] For example, a bronze plaque at Long Wharf's eastern end contains the words, "Long Wharf Park," and references the National Park Service. See Plaintiffs' Additional Exhibits and References Relevant to Article 97, Exhibit 4. In addition, BRA's owned-land database notes the "Park located at the end of [Long] Wharf with benches." See id., Exhibit 5.

(emphasis added). The Quinn Opinion states that affording a means of **utilizing** natural resources, such as water, in harmony with their conservation is an Article 97 purpose. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 142. Thus, by creating a plan which encouraged pedestrians to use and enjoy the harbor and waterfront, the 1964 Urban Renewal Plan served an Article 97 purpose.

Third, the 1964 Urban Renewal Plan aimed to "establish . . . **open spaces** and views for both the pedestrian and the motorist." Record at 1609, 1611 (emphasis added). A fundamental purpose of Article 97 is to protect, conserve, and develop natural resources, which includes open spaces. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 143 (open spaces are natural resources for the purpose of Article 97). Because open spaces are natural resources which Article 97 seeks to protect, conserve, and develop, by creating open spaces, the 1964 Urban Renewal Plan served an Article 97 purpose.

In sum, because the 1964 Urban Renewal Plan aimed to create parkland, open space, and a means of utilizing and enjoying the harbor, it served Article 97 purposes. Accordingly, the land at issue, which was taken under the 1964 Urban Renewal Plan, was taken for Article 97 purposes.

3. Change in Use or Disposition of Article 97 Land

As noted, Article 97 states that land taken or acquired for Article 97 purposes "shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote . . . of each branch of the [legislature]." Thus, because the land at issue is protected by Article 97, any disposition or change in use of the land requires two-thirds approval from the legislature.

a. Disposition of Article 97 Land

The plaintiffs argue that by issuing the chapter 91 license, DEP authorized a disposition of Article 97 land. According to the plaintiffs, because the license disposed of Article 97 land without the requisite legislative approval, the license is invalid. This court agrees.

The Quinn Opinion defines disposition as a transfer of legal or physical control as between agencies. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144. By issuing the chapter 91 license, DEP ceded to BRA the right to develop the land at issue by constructing a restaurant. In addition, the chapter 91 license authorized BRA to enter leases with third parties regarding the land at issue.[7] Without the chapter 91 license, BRA would not enjoy such rights over the land at issue. Thus, by issuing the chapter 91 license, DEP transferred to BRA an extent of legal control over the land at issue.[8] This transfer of legal control constitutes a disposition of Article 97 land.[9]

b. Change in Use of Article 97 Land

Not only did the chapter 91 license create a disposition of Article 97 land,[10] it authorized a change in use of Article 97 land.

A change in use of Article 97 land includes a "change of use within a governmental agency." See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144. When it was taken under the 1964 Urban Renewal Plan, the land at issue was to be used as parkland, open space, and as a

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[7] The record indicates that in connection with proposed project, BRA may enter leases with third parties.

[8] At the least, the transfer of legal control is tantamount to granting an easement in that DEP gave BRA certain rights of use over the land at issue. The Quinn Opinion characterizes the taking or granting of easements as a disposition under Article 97. Rep. A.G., Pub. Doc. No. 12 at 144.

[9] Even if the chapter 91 license did not itself dispose of Article 97 land, BRA's foreseeable lease of the land to a third party constitutes a transfer of legal control. See Quinn Opinion, Rep. A.G., Pub. Doc. No. 12 at 144, citing United States v. Gratiot, 39 U.S. 526 (1840) (disposition may include a lease). In its letter approving the chapter 91 license, DEP noted BRA's plan to lease the shade structure for restaurant use. Lease of the land at issue to a third party constitutes a disposition of Article 97 land. Id.

[10] The defendants assert that the chapter 91 license did not create a disposition of Article 97 land because the license was revocable. While there is support for the assertion that revocable licenses do not result in dispositions (see Miller v. Commissioner of Dep't of Environ. Mngm't, 23 Mass. App. Ct. 968, 970 (1987)), this court need not analyze whether the chapter 91 license is "revocable." Even if the chapter 91 license did not effect a disposition, it clearly resulted in a change in use.

means of utilizing and enjoying the harbor. Under the proposed project, however, the land at issue would be used as a restaurant and commercial establishment. This commercial use would differ from the land at issue's original Article 97 use. Thus, by authorizing the new development, the chapter 91 license facilitated a change in use of Article 97 land.

As with disposition of Article 97 land, a change in use of Article 97 land requires legislative approval. See id. (land originally taken or acquired for Article 97 purpose may not be "used for other purposes" without two-thirds vote from the legislature); cf. Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969) (discussing public use doctrine). Because the chapter 91 license authorized a change in use and disposition of Article 97 land without the requisite legislative approval, the chapter 91 license is invalid.

In sum, because the land at issue was taken for Article 97 purposes, and because the chapter 91 license effected a disposition and change in use of Article 97 land, two-thirds votes from the legislature is required before BRA can go forward with its proposed development.

D. Mandamus; Declaratory Judgment

Having determined that Article 97 applies to the land at issue, this court must determine whether the plaintiffs are entitled to relief in the nature of mandamus and declaratory judgment.

1. Mandamus

The plaintiffs seek a writ of mandamus under G. L. c. 249, § 5 ordering DEP to enforce Article 97. This court concludes that the plaintiffs are entitled to a writ of mandamus.

At the outset, the defendants argue that because the plaintiffs did not suffer particularized harm, they lack standing to bring an action in the nature of mandamus. In an action in mandamus, however, plaintiffs who lack a specific interest in the matter at hand have standing by reason of their citizenship to bring an action to enforce a public duty. Pilgrim Real Estate,

Inc. v. Superintendent of Police of Boston, 330 Mass. 250, 251 (1953). Here, the plaintiffs seek to "secure on the part of the [DEP] the performance of a public duty . . . ." Id. Thus, contrary to the defendants' argument, the plaintiffs have standing to seek a writ of mandamus.

Mandamus is appropriate in cases, such as this, where the plaintiffs seek to set aside the illegal performance of a duty, or compel the performance of public duty by a public official. Town of Concord v. Attorney Gen., 336 Mass. 17, 27 (1957); see, e.g., Mariano v. Building Inspector of Marlborough, 353 Mass. 663, 666 (1968) (compelling building inspector to revoke building permit); Siegemund v. Building Comm'r of City of Boston, 259 Mass. 329, 335 (1927) (addressing building commissioner's failure to enforce zoning act). In this case, the plaintiffs seek to compel the defendants to comply with Article 97.

Mandamus is an extraordinary remedy and is available only where the law provides no other adequate and effectual relief or no other opportunity for judicial review. See McCarthy v. Mayor of Boston, 188 Mass. 338, 340 (1905). Mandamus should be granted where there would otherwise be a failure of justice. Id.; see also Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dep't, 448 Mass. 57, 59-60 (2006).

The defendants argue that mandamus is not available because the plaintiffs have other ways of enforcing their rights—specifically, because DEP's decision is reviewable under G. L. c. 30A ("30A"). According to the defendants, the plaintiffs can obtain judicial review through the 30A process, in which the court could remand DEP's decision. A 30A proceeding, however, would not offer meaningful judicial review of the Article 97 issue. See McCarthy, 188 Mass. at 59-60. As noted, the DEP Commissioner lacks jurisdiction to interpret Article 97. Thus, even if this court remanded the decision to DEP pursuant to 30A, on remand, DEP would still be unable to interpret and apply Article 97. Because DEP lacks jurisdiction to interpret Article 97, which is

the focus of the plaintiffs' complaint, the 30A process would not allow for meaningful judicial review of this critical issue.

In addition, because there is no private right of action under Article 97, the plaintiffs cannot obtain judicial review by bringing a claim under Article 97. See Chase v. The Trust for Public Land, 16 LCR 135, 139 (Mass. Land Ct. 2008); see also Enos v. Secretary of Environ. Affairs, 432 Mass. 132, 142 n.7 (2000). Thus, mandamus is the only vehicle through which the plaintiffs can obtain meaningful judicial review of the Article 97 issue. Although mandamus is an extraordinary remedy, it is warranted in the present case, and without it, there would be a failure of justice. See McCarthy, 188 Mass. at 59-60.

2. Declaratory Judgment

This court also concludes that the plaintiffs are entitled to declaratory relief under G. L. c. 231A. As discussed above, this court finds that Article 97 applies and that BRA must comply with Article 97's requirements and restrictions before commencing the proposed project. This court rejects the defendants' argument that declaratory relief is unwarranted because the claim is duplicative with the claim under G. L. c. 30A, § 14. As noted above, the 30A proceeding would not afford meaningful judicial review of the Article 97 issue. Therefore, the claims are not duplicative and the plaintiffs are entitled to declaratory relief.

E. Conclusion

In sum, this court finds that Article 97 applies to the land at issue and that the issuance of the chapter 91 license effected a disposition and change in use of Article 97 land. Because the license was issued without obtaining the requisite legislative approval under Article 97, the chapter 91 license is invalid. Because this court finds the chapter 91 license invalid for failure to

comply with Article 97, this court need not address the parties' additional arguments concerning the license's validity under the Waterways Statute.

ORDER

For the reasons state above, it is hereby **ORDERED** that the plaintiffs' Motion for Judgment on the Pleadings be **ALLOWED** and BRA's Cross-Motion for Judgment on the Pleadings be **DENIED**. In light of the restrictions under Article 97, DEP's final decision to issue the chapter 91 license is **VACATED**, and the chapter 91 license is voided.

EM Fahey

Elizabeth M. Fahey
Justice of the Superior Court

DATED: June 10, 2011

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.

project, where the amount of the borrowing includes One Hundred Thirty Thousand Dollars for new equipment and furnishings. The approval of the Emergency Finance Board is required by St. 1948, c. 645, § 8. The answer to your question depends upon the construction of the definition of "approved school project" as that term is used in the statutes relating to construction of school buildings.

The term "approved school project" was first defined in St. 1948, c. 645, § 5, but no mention was made in the original definition of equipment or furnishings. The definition was amended by St. 1950, c. 490, so that it read as follows:

> " 'Approved school project' shall mean any project for the construction or enlargement of a regional or consolidated school or of any public schoolhouse in any city or town, *and shall include the original equipment and furnishings*, whether movable or built in, to complete said project, the contract or contracts for which shall have been awarded on or after January first, nineteen hundred and forty-six, by any city, town or regional school building committee, which has been approved by the commission for the purposes of sections seven through nine, inclusive." (Emphasis supplied.)

The definition was again amended in 1968 by St. 1968, c. 754, § 1, to add the following sentence:

> "Approved school project shall also mean any project for the reconstruction, remodeling, rehabilitation and modernization of any schoolhouse in lieu of which, proper utilization of the present educational facilities would require complete structure replacement, the contract or contracts for which shall have been awarded on or after January first, nineteen hundred and sixty-eight, by any city, town or regional school building committee, which has been approved by the commission for the purposes of section seven through nine, inclusive, provided that the amount of money provided from the commonwealth for such reconstruction, remodeling, rehabilitation and modernization shall be limited to one third of the expenditure for new construction for the previous year."

In the light of the amended definition of "approved school project" the question for resolution is whether the Board may approve a borrowing which includes an amount for new equipment and furnishings where such equipment and furnishings are not the original equipment and furnishings. I answer the question in the affirmative.

I am of the opinion that the statute should be liberally construed, in view of its purpose which is to facilitate the reconstruction, remodeling, rehabilitation and modernization of presently existing school buildings. Clearly, "rehabilitation" and "modernization" of schools encompasses replacement of equipment and furnishings, as that step can be as effective as changes to the fabric of a building in promoting the statutory objective. Accordingly, I conclude that the Emergency Finance Board may grant approval for the City of Brockton to borrow an amount of money which includes a sum allocated for replacement of equipment and furnishings.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 45

June 6, 1973

Honorable David M. Bartley
Speaker of the House of Representatives
State House
Boston, Massachusetts

Dear Speaker Bartley:

The House of Representatives, by H. 6085, has addressed to me several questions regarding Article 97 of the Articles of Amendment to the Constitution of Massachusetts. Establishing the right to a clean environment for the citizens of Massachusetts, Article 97 was submitted to the voters on the November 1972 ballot and was approved. The questions of the House go to the provision in the Article requiring that acts concerning the disposition of, or certain changes in, the use of certain public lands be approved by a two-thirds roll-call vote of each branch of the General Court.

Specifically, your questions are as follows:

1. Do the provisions of the last paragraph of Article XCVII of the Articles of the Amendments to the Constitution requiring a two thirds vote by each branch of the general court, before a change can be made in the use or disposition of land and easements acquired for a purpose described in said Article, apply to all land and easements held for such a purpose regardless of the date of acquisition, or in the alternative, do they apply only to land and easements acquired for such purposes after the effective date of said Article of Amendments?

2. Does the disposition or change of use of land held for park purposes require a two thirds vote, to be taken by the yeas and nays of each branch of the general court, as provided in Article XCVII of the Articles of the Amendments to the Constitution, or would a majority vote of each branch be sufficient for approval?

3. Do the words "natural resources" as used in the first paragraph of Article XCVII of the Articles of the Amendments to the Constitution include ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds; wild mammals and game; sea and fresh water fish of every

description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal; underground and surface waters; minerals and natural deposits, as formerly set out in the definition of the words "natural resources" in paragraph two of section one of chapter twenty-one of the General Laws?

4. Do the provisions of the fourth paragraph of Article XCVII of the Articles of the Amendments to the Constitution apply to any or all of the following means of disposition or change in use of land held for a public purpose: conveyance of land; long-term lease for inconsistent use; short-term lease, two years or less, for an inconsistent use; the granting or giving of an easement for an inconsistent use; or any agency action with regard to land under its control if an inconsistent use?

The proposed amendment to the Constitution was agreed to by the majority of the members of the Senate and the House of Representatives, in joint session, on August 5, 1969 and again on May 12, 1971, and became part of the Constitution by approval by the voters at the state election next following, on November 7, 1972. The full text of Article 97 is as follows:

ART. XCVII. Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: — 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.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

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.

1. The first question of the House of Representatives asks, in effect, whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97, November 7, 1972. For the reasons below, I answer in the affirmative.

The General Court did not propose this Amendment nor was it approved by the voting public without a sense of history nor void of a purpose worthy of a constitutional amendment. Examination of our constitutional history firmly establishes that the two-thirds roll-call vote requirement applies to public lands wherever taken or acquired.

Specifically, Article 97 annuls Article 49, in effect since November 5, 1918. Under that Article the General Court was empowered to provide for the taking or acquisition of lands, easements and interests therein "for the purpose of securing and promoting the proper conservation, development, utilization and control" [of] "agricultural, mineral, forest, water and other natural resources of the commonwealth." Although inclusion of the word "air" in this catalogue as it appears in Article 97 may make this new article slightly broader than the supplanted Article 49 as to purposes for which the General Court may provide for the taking or acquisition of land, it is clear that land taken or acquired under the earlier Article over nearly fifty years is now to be subjected to the two-thirds vote requirement for changes in use or other dispositions. Indeed all land whenever taken or acquired is now subject to the new voting requirement. The original draftsmen of our Constitution prudently included in Article 10 of the Declaration of Rights a broad constitutional basis for the taking of private land to be applied to public uses, without limitation on what are "public uses." By way of acts of the Legislature as well as through generous gifts of many of our citizens, the Commonwealth and our cities and towns have acquired parkland and reservations of which we can be justly proud. To claim that new Article 97 does not give the same care and protection for all these existing public lands as for lands acquired by the foresight of future legislators or the generosity of future citizens would ignore public purposes deemed important in our laws since the beginning of our Commonwealth.

Moreover, if this amendment were only prospective in effect, it would be virtually meaningless. In our Commonwealth, with a life commencing in the early 1600s and already cramped for land, it is most unlikely that the General Court and the voters would choose to protect only those acres hereafter added to the many thousands already held for public purposes. The comment of our Supreme Judicial Court concerning the earlier Article 49 is here applicable: "It must be presumed that the convention proposed and the people approved and ratified the Forty-ninth Amendment with reference to the practical affairs of mankind and not as a mere theoretical announcement." *Opinion of the Justices*, 237 Mass. 598, 608.

2. In its second question the House asks, in effect, whether the two-thirds roll-call vote requirement applies to land held for park purposes, as the term "park" is generally understood. My answer is in the affirmative, for the reasons below.

One major purpose of Article 97 is to secure that 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." The fulfillment of these rights is uniquely carried out by parkland acquisition. As the Supreme Judicial Court has declared,

> "The healthful and civilizing influence of parks in or near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to the public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment." *Higginson* v. *Treasurer and School House Commissioners of Boston*, 212 Mass. 583, 590; see also *Higginson* v. *Inhabitants of Nahant*, 11 Allen 530, 536.

A second major purpose of Article 97 is "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." Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.

This question as to parks raises a further practical matter in regard to implementing Article 97 which warrants further discussion. The reasons the Legislature employs to explain its actions can be of countless levels of specificity or generality and land might conceivably be acquired for general recreation purposes or for very explicit uses such as the playing of baseball, the flying of kites, for evening strolls or for Sunday afternoon concerts. Undoubtedly, to the average man, such land would serve as a park but at even a more legalistic level it clearly can also be observed that such land was acquired, in the language of Article 97, because it was a "resource" which could best be "utilized" and "developed" by being "conserved" within a park. But it is not surprising that most land taken or acquired for public use is acquired under the specific terms of statutes which may not match verbatim the more general terms found in Article 10 of the Declaration of Rights of the Constitution or in Articles 39, 43, 49, 51 and 97 of the Amendments. Land originally acquired for limited or specified public purposes is thus not to be excluded from the operation of the two-thirds roll-call vote requirement for lack of express invocation of the more general purposes of Article 97. Rather the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in "public purpose," changed from "public uses" appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.

Thus, all land, easements and interests therein are covered by Article 97 if taken or acquired for "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" as these terms are

broadly construed. While small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify. Given the spirit of the Amendment and the duty of the General Court, it would seem prudent to classify lands and easements taken or acquired for specific purposes not found verbatim in Article 97 as nevertheless subject to Article 97 if reasonable doubt exists concerning their actual status.

3. The third question of the House asks, in effect, how the words "natural resources," as appearing in Article 97, are to be defined.

Several statutes offer assistance to the General Court, all without limiting what are "natural resources." General Laws c. 21, § 1 defines "natural resources," for the purposes of Department of Natural Resources jurisdiction, as including

> "ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds, wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits."

In addition, G. L. c. 12, § 11D, establishing a Division of Environmental Protection in my Department, uses the words "natural resources" in such a way as to include air, water, "rivers, streams, flood plains, lakes, ponds or other surface or subsurface water resources" and "seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks or historic districts or sites." General Laws c. 214, § 10A, the so-called citizen-suit statute, contains a recitation substantially identical. To these lists Article 97 would add only "agricultural" resources.

It is safe to say, as a consequence, that the term "natural resources" should be taken to signify at least these catalogued items, as a minimum. Public lands taken or acquired to conserve, develop or utilize any of these resources are thus subject to Article 97.

It is apparent that the General Court has never sought to apply any limitation to the term "natural resources" but instead has viewed the term as an evolving one which should be expanded according to the needs of the time and the term was originally inserted in our Constitution for just that reason. See *Debate of the Constitutional Convention* – 1917-1918, p. 595. The resources enumerated above should, therefore, be regarded as examples of and not delimiting what are "natural resources."

4. The fourth question of the House requires a determination of the scope of activities which is intended by the words: "shall not be used for other purposes or otherwise disposed of."

The term "disposed" has never developed a precise legal meaning. As the Supreme Court has noted, "The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical significa-

tion." *Phelps* v. *Harris*, 101 U.S. 370, 381 (1880). The Supreme Court has indicated however, that "disposition" may include a lease. *U.S.* v. *Gratiot*, 39 U.S. 526 (1840). Other cases on unrelated subjects suggest that in Massachusetts the word "dispose" can include all forms of transfer no matter how complete or incomplete. *Rogers* v. *Goodwin*, 2 Mass. 475; *Woodbridge* v. *Jones*, 183 Mass. 549; *Lord* v. *Smith*, 293 Mass. 555.

In this absence of precise legal meaning, *Webster's Third New International Dictionary* is helpful. "Dispose of" is defined as "to transfer into new hands or to the control of someone else." A change in physical or legal control would thus prove to be controlling.

I therefore conclude that the "dispositions" for which a two-thirds roll-call vote of each branch of the General Court is required include transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, of lands, easements and interests therein originally taken or acquired for the purposes stated in Article 97, and transfers from public ownership to private. Outright conveyance, takings by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements, and all means of transfer or change of legal or physical control are thereby covered, without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.

This interpretation affords a more objective test, and is more easily applied, than "used for other purposes." Under Article 97 that standard must be applied by the Legislature, however, in circumstances which cannot be characterized as a disposition — that is, when a transfer or change in physical or legal control does not occur. A change of use *within* a governmental agency or within a political subdivision would serve as an apt example. Within any agency or political subdivision any land, easement or interest therein, if originally taken or acquired for the purposes stated in Article 97, may not be "used for other purposes" without the requisite two-thirds roll-call vote of each branch of the General Court.

It may be helpful to note how Article 97 is to be read with the so-called doctrine of "prior public use," application of which also turns on changes in use. That doctrine holds that

> "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." *Robbins* v. *Department of Public Works*, 355 Mass. 328, 330 and cases there cited.

The doctrine of "prior public use" is derived from many early cases which establish its applicability to transfers between corporations granted limited powers of the Commonwealth, such as eminent domain and authority over water and railroad easements. *E.g.*, *Old Colony Railroad Company* v. *Framingham Water Company*, 153 Mass. 561; *Boston Water Power Company* v. *Boston and Worcester Railroad Corporation*, 23 Pick. 360; *Boston and Maine Railroad* v. *Lowell and Lawrence Railroad Company*, 124 Mass. 368; *Eastern Railroad Company* v. *Boston and Maine Railroad*, 111 Mass. 125, and *Housatonic Railroad Company* v. *Lee and Hudson Railroad Company*, 118 Mass. 391. The doctrine was also applied at an early date to transfers between such corporations and municipalities and counties. *E.g.*, *Boston and Albany Railroad Company* v. *City Council of Cambridge*, 166 Mass. 224 (eminent domain taking of railroad land); *Eldredge* v. *County Commissioners of Norfolk*, 185 Mass. 186 (eminent domain taking of railroad easement); *West Boston Bridge* v. *County Commissioners of Middlesex*, 10 Pick. 270 (eminent domain taking of turnpike land), and *Inhabitants of Springfield* v. *Connecticut River Railroad Co.*, 4 Cush. 63 (eminent domain taking of a public way).

The doctrine of "prior public use" has in more modern times been applied to the following transfers between governmental agencies or political subdivisions: a) a transfer between state agencies, *Robbins* v. *Department of Public Works*, 355 Mass. 328 (eminent domain taking of Metropolitan District Commission wetlands), b) transfers between a state agency and a special state authority, *Commonwealth* v. *Massachusetts Turnpike Authority*, 346 Mass. 250 (eminent domain taking of MDC land) and see *Loschi* v. *Massachusetts Port Authority*, 354 Mass. 53 (eminent domain taking of parkland), c) a transfer between a special state commission and special state authority, *Gould* v. *Greylock Reservation Commission*, 350 Mass. 410 (lease of portions of Mount Greylock), d) transfers between municipalities, *City of Boston* v. *Inhabitants of Brookline*, 156 Mass. 172 (eminent domain taking of a water easement) and *Inhabitants of Quincy* v. *City of Boston*, 148 Mass. 389 (eminent domain taking of a public way), e) transfers between state agencies and municipalities, *Town of Brookline* v. *Metropolitan District Commission*, 357 Mass. 435 (eminent domain taking of parkland) and *City of Boston* v. *Massachusetts Port Authority*, 356 Mass. 741 (eminent domain taking of a park), f) a transfer between a special state authority and a municipality, *Appleton* v. *Massachusetts Parking Authority*, 340 Mass. 303 (1960) (eminent domain, Boston Common), g) a transfer between a state agency and a county, *Abbot* v. *Commissioners of the County of Dukes County*, 357 Mass. 784 (Department of Natural Resources grant of avigation easement), and h) transfers between counties and municipalities, *Town of Needham* v. *County Commissioners of Norfolk*, 324 Mass. 293 (eminent domain taking of common and park lands) and *Inhabitants of Easthampton* v. *County Commissioners of Hampshire*, 154 Mass. 424 (eminent domain taking of school lot).

The doctrine has also been applied to the following changes of use of public lands within governmental agencies or within political subdivisions: a) intra-agency uses, *Sacco* v. *Department of Public Works*, 352 Mass. 670 (filling a portion of a Great Pond), b) intramunicipality uses, *Higginson* v. *Treasurer and School House Commissioners of Boston*, 212 Mass. 583 (erecting a building on a public park), and see *Kean* v. *Stetson*, 5 Pick. 492 (road built adjoining a river), and c) intracounty

uses, *Bauer* v. *Mitchell*, 247 Mass. 522 (discharging sewage upon school land). The doctrine may also possibly reach *de facto* changes in use, *e.g.*, *Pilgrim Real Estate Inc.* v. *Superintendent of Police of Boston*, 330 Mass. 250 (parking of cars on park area) and may be available to protect reservation land held by charitable corporations, *e.g.*, *Trustees of Reservations* v. *Town of Stockbridge*, 348 Mass. 511 (eminent domain).

In addition to these extensions of the doctrine, special statutory protections, codifying the doctrine of "prior public use," are afforded local parkland and commons by G. L. c. 45 and public cemeteries by G. L. c. 114, §§ 17, 41. As to changes in use of public lands held by municipalities or counties, generally, see G. L. c. 40, § 15A and G. L. c. 214, § 3(11).

This is the background against which Article 97 was approved. The doctrine of "prior public use" requires legislative action, by majority vote, to divert land from one public use to another inconsistent public use. As the cases discussed above indicate, the doctrine requires an act of the Legislature regardless whether the land in question is held by the Commonwealth, its agencies, special authorities and commissions, political subdivisions or certain corporations granted powers of the sovereign. And the doctrine applies regardless whether the public use for which the land in question is held is a conservation purpose.

As to all such changes in use previously covered by the doctrine of "prior public use" the new Article 97 will only change the requisite vote of the Legislature from majority to two thirds. Article 97 is designed to supplement, not supplant, the doctrine of "prior public use."

Article 97 will be of special significance, though, where the doctrine of "prior public use" has not yet been applied. For instance, legislation and a two-thirds roll-call vote of the Legislature will now for the first time be required even where a transfer of land or easement between governmental agencies, between political subdivisions, or between levels of government is made with no change in the use of the land, and even where a transfer is from public control to private.

Whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, it is recommended that the legislation meet the high standard of specificity set by the Supreme Judicial Court in a case involving the doctrine of "prior public use":

> "We think it is essential to the expression of plain and explicit authority to divert [public lands] to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use." (Footnote omitted.) *Robbins* v. *Department of Public Works*, 355 Mass. 328, 331.

Each piece of legislation which may be subject to Article 97 should, in addition, be drawn so as to identify the parties to any planned disposition of the land.

CONCLUSIONS

Article 97 of the Amendments to the Massachusetts Constitution establishes the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment. 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 declared to be a public purpose. Lands, easements and interests therein taken or acquired for such public purposes are not to be disposed of or used for other purposes except by two-thirds roll-call vote of both the Massachusetts Senate and House of Representatives.

Answering the questions of the House of Representatives I advise that the two-thirds roll-call vote requirement of Article 97 applies to all lands, easements and interests therein *whenever* taken or acquired for Article 97 conservation, development or utilization purposes, even prior to the effective date of Article 97, November 7, 1972. The Amendment applies to land, easements and interests therein held by the Commonwealth, or any of its agencies or political subdivisions, such as cities, towns and counties.

I advise that "natural resources" given protection under Article 97 would include at the very least, without limitation: air, water, wetlands, rivers, streams, lakes, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, sea and fresh water fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites.

I advise that Article 97 requires a two-thirds roll-call vote of the Massachusetts Senate and House of Representatives for all transfers between agencies of government and between political subdivisions of lands, easements or interests therein originally taken or acquired for Article 97 purposes, and transfers of such land, easements or interests therein from one level of government to another, or from public ownership to private. This is so without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes. I so advise because such transfers are "dispositions" under the terms of the new Amendment, and because "disposition" includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting or taking of easements.

I also advise that *intra*-agency changes in uses of land from Article 97 purposes, although they are not "dispositions," are similarly subject to the two-thirds roll-call vote requirement.

Read against the background of the existing doctrine of "prior public use," Article 97 will thus for the first time require legislation and a special vote of the Legislature even where a transfer of land between governmental agencies, between political subdivisions or between levels of government results in no change in the use of land, and even where a transfer is made from public control to private. I suggest that whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, the very highest standard of specificity should be required of the draftsmen to assure that legislation clearly identifies the locus, the present public uses of the land, the new uses contemplated, if any, and the parties to any contemplated "disposition" of the land.

In short, Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development or utilization of natural resources. If land is misused a portion of the public's natural resources may be forever lost, and no less so than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond existing law and much to the benefit of our natural resources and to the credit of our citizens.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46

June 20, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion on two questions relating to continued approval by you of Sunday licenses for certain games known as Skill Right, Fascination, Skill Light, Bing-O-Reno and Light A Line. You have advised me that the game Skill Right has been licensed by the Department of Public Safety since 1949, and the other games to which you refer were given temporary approval as Sunday games by the then Commissioner of Public Safety in 1962. You question whether you may continue to approve such Sunday licenses in view of the enactment of St. 1971, c. 486, entitled "An Act Authorizing the Licensing of a Game Commonly Called Beano."

I proceed first to a consideration of the pertinent statutory provisions. The power of the Commissioner of Public Safety to approve Sunday licenses is derived from G. L. c. 136, § 4, which provides in pertinent part:

> "(1) The mayor of a city or the selectmen of a town, upon written application describing the proposed dancing or game, sport, fair, exposition, play, entertainment or public diversion, except as provided in section one hundred and five of chapter one hundred and forty-nine, may grant, upon such reasonable terms and conditions as they may prescribe, a license to hold on Sunday, dancing or any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein, except horse racing, dog racing, boxing, wrestling and hunting with firearms; provided, however, that no such license shall be issued for dancing for which a charge in the form of the payment or collection of money or other valuable consideration is made for the privilege of engaging therein; and provided further, however, that no license issued under this paragraph shall be granted to permit such activities before one o'clock in the afternoon; and provided further, that such application, except an application to conduct an athletic game or sport, shall be approved by the commissioner of public safety and shall be accompanied by a fee of two dollars, or in the case of an application for the approval of an annual license by a fee of fifty dollars."

St. 1971, c. 486, § 2 inserts a new section 22B in Chapter 271 of the General Laws so as to legalize, under certain express conditions, "the game commonly called beano, or substantially the same game under another name in connection with which prizes are offered to be won by chance . . ." St. 1971, c. 486, § 3 (inserting G. L. c. 271, § 52) provides, in part, that "[n]o such license shall be granted to allow the operation, holding or conduct of [the game referred to in G. L. c. 271, § 22B] on a Sunday."

Thus, the question for resolution is whether the games to which you refer come within the language of G. L. c. 271, § 22B, i.e., "substantially the same game under another name," so as to prevent the licensing of such games on Sundays. For the reasons stated hereinafter, I beg to be excused from answering the question.

It is well settled that the Attorney General does not resolve factual questions. As early as 1897, the then Attorney General ruled that "[h]is [the Attorney General's] business is to deal with questions of law only." 1 Op. Atty. Gen'l 461, 462. The principle has been affirmed by my predecessors on many occasions. Whether the games to which you refer are so similar to beano as to come within the language of the beano statute involves factual determinations which are more appropriately made by you, as Commissioner. A comparison of the games, the way they are played, and the degree of skill involved in playing them are not legal questions within my province.

You should be advised, however, that before passage of St. 1971, c. 486, Beano, or substantially the same game under another name, was

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS

EOEA ARTICLE 97 LAND DISPOSITION POLICY
FEBRUARY 19, 1998

I. Statement of Policy

It is the policy of EOEA and its agencies to protect, preserve and enhance all open space areas covered by Article 97 of the Article of Amendment to the Constitution of the Commonwealth of Massachusetts. Accordingly, as a general rule, EOEA and its agencies shall not sell, transfer, lease, relinquish, release, alienate, or change the control or use of any right or interest of the Commonwealth in and to Article 97 land. The goal of this policy is to ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions. Exceptions shall be governed by the conditions included in this policy. This policy supersedes all previous EOEA Article 97 land disposition policies.

An Article 97 land disposition is defined as a) any transfer or conveyance of ownership or other interests; b) any change in physical or legal control; and c) any change in use, in and to Article 97 land or interests in Article 97 land owned or held by the Commonwealth or its political subdivisions, whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance or change. A revocable permit or license is not considered a disposition as long as no interest in real property is transferred to the permittee or licensee, and no change in control or use that is in conflict with the controlling agency's mission, as determined by the controlling agency, occurs thereby.

II. Conditions for Disposition Exceptions

EOEA and its agencies shall not support an Article 97 land disposition unless EOEA and its agencies determine that exceptional circumstances exist. A determination of 'exceptional circumstances" is subject to all of the following conditions being met:

1. all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist (monetary considerations notwithstanding).
   Note: The purpose of evaluating alternatives is to avoid using/affecting Article 97 land to the extent feasible. To that end, the scope of alternatives under consideration shall be commensurate with the type and size of the proposed disposition of Article 97 land, and must be performed by the proponent of the disposition to the satisfaction of EOEA and its agencies. The scope of alternatives extends to any sits that were available at the time the proponent of the Article 97 disposition first notified the controlling agency of the Article 97 land, and which can be reasonably obtained: (a) within the appropriate market area for private proponents, state and/or regional entities; or (b) within the appropriate city/town for municipal proponents.
2. the disposition of the subject parcel and its proposed use do not destroy or threaten a unique or significant resource (e.g., significant habitat, rare or unusual terrain, or areas of significant public recreation), as determined by EOEA and its agencies;

3. as part of the disposition, real estate of equal or greater *fair market value* or *value in use of proposed use*, whichever is greater, and significantly greater resource value as determined by EOEA and its agencies, are granted to the disposing agency or its designee, so that the mission and legal mandate of EOEA and its agencies and the constitutional rights of the citizens of Massachusetts are protected and enhanced;
4. the minimum acreage necessary for the proposed use is proposed for disposition and, to the maximum extent possible, the resources of the parcel proposed for disposition continue to be protected;
5. the disposition serves an Article 97 purpose or another public purpose without detracting from the mission, plans, policies and mandates of EOEA and its appropriate department or division; and
6. the disposition of a parcel is not contrary to the express wishes of the person(s) who donated or sold the parcel or interests therein to the Commonwealth.

III. Procedures for Disposition

Although legislation can be enacted to dispose of Article 97 land without the consent of an EOEA agency, it is the policy of EOEA to minimize such occurrences. To that end, and to ensure coordination, EOEA agencies shall:

1. develop an internal review process for any potential Article 97 land disposition to ensure that, at a minimum, the conditions in Section II above are met;
2. develop, through the Interagency Lands Committee, a joint listing of all requests, regardless of their status, for the disposition of Article 97 land;
3. notify the Interagency Lands Committee of any changes to the Article 97 land disposition list;
4. monitor all legislation that disposes of Article 97 land, and communicate with legislative sponsors regarding their intent;
5. recommend to the Secretary that the Governor veto any legislation that disposes of Article 97 land, the purchase, improvement, or maintenance of which involved state funds, on and for which the EOEA agency has not been consulted and received documentation (including information on title, survey, appraisal, and a MEPA review, all at the proponent's expense);
6. obtain the concurrence of the Secretary of EOA for any proposed Article 97 land disposition decision prior to finalizing said decision;
7. if recommending an Article 97 disposition, attach to all Article 97 legislative recommendations and TR-1 forms a justification of the disposition and an explanation of how it complies with this policy, signed by the EOEA agency head;
8. ensure that any conditions approved by EOEA and its agencies to any Article 97 land disposition are incorporated within the surplus declaration statement submitted to and published by DCPO as required by M.G.L. C. 7, §40F and 40F1/2 and throughout the disposition process, and if such conditions are not incorporated in said statement throughout the disposition process, the EOEA agency head shall recommend to the Secretary that the Governor veto any resulting legislation;
9. recommend to the Secretary that the Governor veto legislation that disposes of Article 97 land of which the agency disapproves; and

10. ensure that any Article 97 land disposition is authorized by enacted legislation and approved by all municipal, state and federal agencies, authorities, or other governmental bodies so required and empowered by law prior to conveyance.

IV. Applicability of the Policy to Municipalities

To comply with this policy, municipalities that seek to dispose of any Article 97 land must:

1. obtain a unanimous vote of the municipal Conservation Commission that the Article 97 land is surplus to municipal, conservation and open space needs;
2. obtain a unanimous vote of the municipal Park Commission if the land proposed for disposition is parkland;
3. obtain a two-thirds Town Meeting or City Council vote in support of the disposition;
4. obtain two-thirds vote of the legislature in support of the disposition, as required under the state constitution;
5. comply with all requirements of the Self-Help, Urban Self-Help, Land and Water Conservation Fund, and any other applicable funding sources; and
6. comply with EOEA Article 97 Land Disposition Policy [note: the municipality must also file an Environmental Notification Form with EOEA's MEPA office].

After the effective date of this policy, any municipality that proposes, advocates, supports or completes a disposition of Article 97 land without also following the terms of this policy, regardless of whether or not state funds were used in the acquisition of the Article 97 land, shall not be eligible for grants offered by EOEA or its agencies until the municipality has complied with this policy. Compliance with this policy by municipalities shall be determined by the EOEA Secretary, based on recommendations by the EOEA Interagency Lands Committee.

Trudy Coxe, Secretary
Executive Office of Environmental Affairs