

Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs
Department of Environmental Protection

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In the Matter of : Boston Redevelopment Authority

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1 Project is not compliant in several respects

1 Contrary to assertions in the testimony, the project is not compliant with city, state, and federal policies, regulations, and statutes.

1.1 Public agencies have shown that the project is not in the public interest

2 Applicant and Department cite 310 CMR 9.31(3)(b) on how to rebut a presumption of compliance:¹

3 [The presumptions of 310 CMR 9.31(2) may be overcome only if]...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;

4 As detailed in Section 1.1.1 and Section 1.1.2, these showings are already available. Furthermore, Applicant's testimony asserts that '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 of Lawrence Mammoli, para. 14(c)]. As detailed in Section 1.1.2, this assertion is not correct.

1.1.1 Federal agency

5 A Federal agency has made a showing that the proposed change of use is not in the public interest. The National Park Service website² lists grants awarded under the federal Land and Water Conservation Fund (LWCF) Act of 1965 (Public Law 88-578). Among the grants for Suffolk County is grant #295-xxx entitled 'Long Wharf'. It was a type-D (development) grant for the period 5/15/1981-5/15/1986 to the City of Boston in the amount of \$795,307.51. An article in the *Boston Globe* indicates that the grant was accepted in order to make a 'public park on Long Wharf'.³

6 The LWCF Act further contains stringent measures against conversion to other uses:⁴

¹ Applicant's Memorandum of Law, Sec. III.H, p. 25; similar wording is in Department's Memorandum of Law, p. 2.

² <http://waso-lwcf.ncrc.nps.gov/public/index.cfm>

³ Anthony J. Yudis, 'Long Wharf design pact ok'd by BRA', 7 March 1980.

⁴ LWCF Act, Section 6(f)(3) or 16 USC 1.LXIX.B.4601-8(f)(3).

7 No property acquired or developed with assistance under this section shall, without the approval
of the Secretary [of the US Department of the Interior], be converted to other than public outdoor
recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with
the then existing comprehensive statewide outdoor recreation plan and only upon such conditions
as he deems necessary to assure the substitution of other recreation properties of at least equal fair
market value and of reasonably equivalent usefulness and location.

8 The LWCF Manual⁵ lists 'situations that trigger a conversion':⁶

- 9 a. Property interests are conveyed for private use or non-public outdoor recreation uses.
- 10 b. Non-outdoor recreation uses (public or private) are made of the project area, or a por-
tion thereof, including those occurring on pre-existing rights-of-way and easements,
or by a lessor.
- 11 c. Unallowable indoor facilities are developed within the project area without NPS ap-
proval, such as unauthorized public facilities and sheltering of an outdoor facility.
- 12 d. Public outdoor recreation use of property acquired or developed with LWCF assis-
tance is terminated.

13 Leasing part of Long Wharf to a restaurant and bar falls under item c and is therefore
a conversion. Based on information and belief, no approval has been sought or giv-
en. Rather, as set forth in the rebuttal testimony of Victor Brogna, Applicant incorrect-
ly answered 'No' to question E of the ENF application when asked whether any part
of the project site is subject to a conservation, preservation, agricultural, or watershed-
preservation restriction.

14 About unapproved conversions, the LWCF Manual states:⁷

15 If the NPS is alerted or otherwise becomes aware of an ongoing conversion activity that has not
been approved, NPS shall request the State Liaison Officer (SLO) to advise the project sponsor of
the necessary prerequisites for approval of a conversion *and to discontinue the unauthorized conversion
activities*. If the conversion activity continues, NPS shall formally notify the State it must take ap-
propriate action to preclude the project sponsor from proceeding further with the conversion, use,

⁵ Its full citation is National Park Service, *Land and Water Conservation Fund State Assistance Program*,
effective date 1 October 2008, Federal Financial Assistance Manual, Volume 69; available online at
<http://www.nps.gov/ncrc/programs/lwcf/>

⁶ LWCF Manual, p. 113.

⁷ LWCF manual, p. 113.

and occupancy of the area pending NPS independent review and decision of a formal conversion proposal (see Section 10 below). [my italics]

16 In short, a federal agency – the NPS, part of the Department of Interior – empowered by federal law, has made a clear showing that the project cannot go forward.

1.1.2 *State and city agencies*

17 Furthermore, state and city agencies have also made a showing that the project cannot go forward. This showing is based on several facts:

18 1. The City of Boston Parks and Recreation Department, in its *Open Space Plan 2002–2006*, identifies Long Wharf as Protected Open Space. The protections are listed as:⁸

19 a. Article 97 of the Mass. Constitution;

20 b. the federal LWCF Act (see Section 1.1.1);

21 c. Chapter 91; and

22 d. the Wetlands Protection Act.

23 2. A state agency defines the proposed restaurant-and-bar use as an Article 97 land disposition. As evidence, the *EOEA Article 97 Land Disposition Policy* published by the (then-named) Executive Office of Environmental Affairs (dated 19 February 1998) states (p. 1):

24 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.

25 3. A state agency further requires that such dispositions follow a rigorous set of procedures. As evidence for this statement, the *Policy* further states (p. 1):

26 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

⁸ See rebuttal testimony of Victor Brogna for supporting exhibits.

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.

27 Furthermore, this review process includes a requirement (p. 1) that ‘all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist (monetary considerations notwithstanding).’

28 In short, a city agency (the Boston Parks Department) and a state agency (the then-named EOEA) have made a showing that the seaward end of Long Wharf shall not be leased for a restaurant and bar.

1.2 Project does not comply with the MHP

29 Applicant’s testimony asserts that ‘the project did not require any variances from the numerical standards or substantive provisions of MHP under 310 CMR 9.34(a)(2)’ [Testimony of Richard McGuinness, para. 45].

30 This statement is, first, partly not relevant. Because there are no regulations numbered 310 CMR 9.34(a)(2), I assume that the witness meant to specify 310 CMR 9.34(2)(a)(2), which is relevant to variances. That regulation states:

31 the Department shall not find the requirement [to comply with the MHP] has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of MGL c. 91 or 310 CMR 9.00.

32 The regulation does not mention ‘numerical standards’, hence not needing a variance from numerical standards is not relevant.

33 Second, the statement is not correct. The project required variances from the following sections of the Boston Zoning Code:

34 a. from Article 30: Section 1.

35 b. from Article 42A: Sections 4–11, 13, 18

36 c. from Article 8: Sections (use items) 36A, 37, 38.

37 Here is a small subset of the section titles: ‘Chapter 91 requirements’ (42A-5), ‘Open space requirements’ (42A-6), ‘Waterfront yard area requirements’ (42A-7), ‘Environmental protection and safety standards’ (42A-9). The Board of Appeal states that it granted a variance ‘from the dimensional, open space, environmental and design requirements cited for the project’.⁹

38 These requirements are therefore not de minimus; rather, they are significant requirements. Furthermore, they are related to the purposes of MGL c. 91 and to the purposes of 310 CMR 9.00. Therefore, the project does not comply with the MHP. Therefore it cannot use the MHP setback distances, and instead must follow the setback distances specified in 310 CMR 9.51(3)(c) – which it does not.

2 Project has adverse effects

39 The project has serious adverse affects.

2.1 Long Wharf is unique in material ways

40 Applicant asserts that other nearby parks provide seats, shade, and waterfront views [Testimony of Mark Donahue, para. 19]. The implication is that there is nothing requiring special protection. However, the claim is incomplete (and the implication is incorrect). Long Wharf is unique in material ways. It is a park and is used as such by the public. Even during these bitter winter days with ice on the ground, one can find dozens of people enjoying the views. And in the summer, it is very heaven. In all seasons, it is quiet – yet centrally located. It offers panoramic vistas of the harbor and East Boston. It is rich in history. And it is a large open, public space free of condos or other privatized spaces.

41 No other wharf – including Burroughs, Battery, Fosters, Rowes, India, Central, Commercial, Lewis, Sargents, Union, and Lincoln – offer both the views provided by Long Wharf and its large park-like setting.

42 This point is addressed at length in our original witness testimony (see for example the testimony of Ann Pistorio), and is not rebutted in any filing by Department or Applicant. A site visit will further bear out this point.

⁹ Decision of the Board of Appeal, 22 January 2008, p.11/15, Applicant’s Exhibit 31.

2.2 Seaward end of Long Wharf is not noisy now

43 Applicant repeatedly claims that the seaward end of Long Wharf is already loud and that the restaurant and bar would not increase the levels:

44 1. '... the end of long Wharf is very loud a majority of the time' [Testimony of Richard McGuinness, para. 37].

45 2. 'The restaurant use will not appreciably increase noise levels at the end of Long Wharf ... the United States Coast Guard requires vessels to blast the horn three times when leaving the fairways from either side of Long Wharf or when entering into the harbor' [Testimony of Lawrence Mammoli, para. 18].

46 These statements are inaccurate or irrelevant. The noise is at the landward end where the large ferries dock and the passengers alight. As explained in Applicant's testimony, wave action at the seaward end of Long Wharf means that no boat dockage can be sited there [Testimony of Lawrence Mammoli, para. 13].

47 The engine noise from the landward end hardly carries to seaward end, being dispersed into the open air with no barriers to reflect it back. My own experience at Long Wharf confirms this acoustics reasoning. I also repeated the experience by spending half an hour at Long Wharf on 16 February 2008 at midday. The whole time it was peaceful and quiet, with merely a distant hum from the large ferries at the landward end.

48 Second, boats blowing their horn three times is not comparable in duration or character to the continuous noise from a late-night restaurant and bar. Rather, such horn blasts are a kind of sound that visitors go to the water to hear.

49 Third, the police reports (see Section 3.3) provide evidence that the area is peaceful and quiet: The only complaint filed by a member of the public (from March 2007 through December 2007) was because of a street performer at lunchtime. The area must therefore be quiet enough that a street performer could be regarded as a disturbance.

2.3 Project would interfere with the Harborwalk

50 Applicant asserts that the project would not interfere with the Harborwalk at all:

- 51 1. 'The proposed project does not interfere with the Harbor walk in any way...' [Testimony of Lawrence Mammoli, para. 17].
- 52 2. 'The proposed project does not interfere with the Harbor walk in any way...' [Testimony of Richard McGuinness, para. 41].
- 53 3. 'The proposed project does not interfere with the Harbor walk in any way...' [Applicant's Memorandum of Law, Sec. A.2, p. 16].

54 These statements are not accurate. First, the massing of the structure would change due to several additions to the shade structure, as shown on plans provided by Applicant.¹⁰ Second, views from the Harborwalk to the water would be affected (see Section 2.4). Third, placing a noisy restaurant and bar along the Harborwalk would harm the quiet, peaceful character of the Harborwalk (see Section 2.2 on noise).

2.4 Project would interfere with view corridors

55 Applicant and Department claims in several places that the project would have a de minimus effect on sight lines and views. Here is an example:

56 The proposed design does not adversely impact... sight lines to the water from the Harborwalk. There are very limited changes in 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 of Richard McGuinness, para. 36]

57 The many claims about the views from State Street being unaffected are incomplete. The regulations also expressly require considering sight lines from 'other areas of concentrated public activity' [310 CMR 9.51(2)(b)] – which include the Harborwalk and the plaza and pavilion at the seaward end of Long Wharf.

58 The statements about the views from the these locations being unaffected or only minimally affected are inaccurate. Windowed walls – which are mentioned neither in the Written Determination (17 Sept 2008) nor in the ENF Certificate (26 Nov 2007) – do not provide the open view now available through the open shade structure. A sight line to the water through the proposed enclosed structure would pass through two or more glass walls (a geometric requirement). Each glass wall reflects ambient light and images, the

¹⁰ See Applicant's Exhibit 32, sheet 3 of 6.

more so when coated in the residue of salty mist, thereby obstructing the view. In addition, the structure would contain seated and standing people, further obstructing the view.

59 These points are demonstrated in the design mock-ups provided by Applicant in their Exhibit 12:

- 60 1. In the mock-up from the seaward end looking toward the Marriott: One cannot see through the windowed wall on the north side at all; for example, the Marriott building is not visible through the walls. Instead only reflections are visible. Similarly, the water would not be visible looking from the plaza through the enclosed structure.
- 61 2. In the mock-up from the plaza showing (among others) the take-out section of Doc's: The windowed walls are again impenetrable.
- 62 3. In the mock-up from the plaza showing the flagpole and water spouts: The windowed walls are again impenetrable.

63 Those obstructed views compare unfavorably to the clear views through the structure available now (see Applicant's Exhibit 10).

3 Benefits asserted for project are not substantiated

64 The benefits asserted for the project are not substantiated by the evidence, and in many instances are against the evidence.

3.1 Restroom facilities exist in the area

65 Applicant's testimony repeatedly cites the provision of restroom facilities. For example:

- 66 1. Rejuvenating the end of Long Wharf. . . with. . . restroom facilities will promote and enhance the use of existing water transportation. . . ' [Testimony of Richard McGuinness, para. 34(c)].
- 67 2. 'by providing. . . public restrooms' [Testimony of Richard McGuinness, para. 38(b)].
- 68 3. 'The restaurant would provide. . . amenities for pedestrians using the Norman Leventhal Walkway to the Sea from the Old State House' [Testimony of Richard McGuinness, para. 40]. (I'm assuming that amenities is intended to include restrooms.)

69 4. 'The project will create... public amenities that currently do not exist (public shaded seating and restrooms)...' [Testimony of Mark Donahue, para. 38(g)].

70 5. 'Rejuvenating the end of Long Wharf... with... restroom facilities' [Applicant's Memorandum of Law, Sec. II.F.c, p. 8].

71 However, there are public restrooms nearby: The Marriott, as a condition of its Chapter 91 license, provides them. If the public is unaware of these restrooms, the Marriott can simply be required to provide additional signage. This point was raised in the original appeal (8 October 2008), and has not been addressed or rebutted by Applicant or Department.

3.2 Public seating and shelter exist nearby

72 Applicant's testimony repeatedly cites the provision of public seating and shelter. For example:

73 1. 'by providing... public seating and shelter for water transit users' [Testimony of Richard McGuinness, para. 38(b)].

74 2. 'The project will create... public amenities that currently do not exist (public shaded seating and restrooms)...' [Testimony of Mark Donahue, para. 38(g)].

75 3. 'Rejuvenating the end of Long Wharf... with... seats and tables...' [Applicant's Memorandum of Law, Sec. II.F.c, p. 8].

76 However, there are already beautiful seats throughout the seaward end of Long Wharf, on the large granite blocks. And those wanting shade sit under the (appropriately named) shade structure.

77 Furthermore, water-transit users do not dock at the seaward end of Long Wharf. Rather, they alight toward the landward end – right next to several locations that provide shelter, restrooms, and refreshments, such as Legal Seafood and the Marriott (which contains a Starbucks and Tia's).

3.3 The area is not an insecure destination

78 Applicant's testimony asserts that the seaward end of Long Wharf is unsafe (and that the project is needed to solve this problem). Here is one example: 'The Site currently is

not a secure destination, as indicated by the spate of Boston Police Department Area A-1 reports and Municipal Protective Services Incident reports' [Testimony of Mark Donahue, para. 16]. However, these reports reports contain the following distribution of incidents (from March 2008 through December 2007):

<i>Type of incident</i>	<i>Number</i>
Skateboarding	135
Sleeping/homeless	89
Chain down or broken	8
Parking Violation	7
Street performers	4
Drug paraphernalia	1
Cigarette in a planter	1
Rescue	1
Motorcycle	1
Graffiti	1
Fishing	1

79 In an insecure area, one would expect incidents of pickpocketing, mugging, assault, or battery. None of the reports at Long Wharf include any such incidents. It cannot be called an insecure area. Furthermore, several types of incidents would likely increase if the project goes forward – for example, parking violations, cigarette in a planter, or rescue (drunk patrons falling into the harbor).

3.4 Pavilion is not underutilized

80 Applicant's testimony asserts that the site is underutilized: 'According to the MHP, the pavilion is an underutilized site that currently does not serve the proper public purpose' [Testimony of Lawrence Mammoli, para. 14(a)]. The witness does not provide a page or section number in the MHP, so it is difficult to verify the citation from the MHP. Second, even if the MHP said what was claimed, the MHP was published in 1990, based presumably on data from preceding years. So that opinion would be at least 20 years old. It does not reflect conditions today. Even on a cold winter day (16 Feb 2008), I found 20 people peacefully enjoying the views of the water. Third, how is 'underutilized' defined? Relative to what standard is the pavilion underutilized? The testimony contains no explanation.

3.5 Proposed use is not clearly superior

81 Department's testimony states that there is no statutory or regulatory guidance on the meaning of a 'clearly superior manner' in evaluating the proposed use [Testimony of Andrea Langhauser, para. 17]. However, there is guidance from other reliable sources. The *Oxford English Dictionary* defines 'clearly' as 'manifestly; evidently' (in the contextually relevant, non-obsolete definition). The plain meaning of a 'clearly superior manner' is then that the proposed use as a restaurant and bar must be manifestly – i.e. obviously – better than the current use as passive, open-space parkland (see Section 1.1.2 on its current designation).

82 Several pieces of evidence show that the proposed use is therefore not clearly superior. First, the conversion of protected open space (see Section 1.1.2) into a restaurant and bar is, at best, a controversial change of use. The proposed change therefore cannot be called manifestly better.

83 Second, the Department received more comment letters opposing the project than supporting the project: '9 stated their support, and the North End Residents Association and 12 residents raised objections' [Testimony of Andrea Langhauser, para. 18]. Therefore, the public itself did not find that the proposed use was manifestly better.

3.6 Project may create few if any permanent jobs

84 Applicant claims that the project will create permanent jobs on site and therefore that the project provides direct benefits. This claim is based on incomplete evidence and an inaccurate reading of the regulations.

85 First, no evidence is offered for the highly questionable statement that the project will create permanent jobs. Suppose for the sake of argument in this paragraph that the proposed restaurant and bar attract many people. It may well do so by drawing patrons away from numerous nearby restaurants and bars, who then reduce their staff. It also may create only seasonal, non-permanent jobs that accommodate the larger numbers of patrons in the summer than in the winter.

86 Second, the regulations list 'creating a *large number of* permanent jobs on-site' (emphasis added) [310 CMR 9.53(3)(d)]. No evidence is offered about how many jobs might be created or whether that number is a large number. It is reasonable to presume that the net number is not large.

4 Lack of community support and participation

87 Despite several contrary assertions, the community was not involved in the planning process and did not support the project.

4.1 NEWRA opposed the project

88 Applicant's testimony asserts that the North End Residents Association supported the project. I know no North End Residents Association; however, I assume that Applicant intends to reference the North End *Waterfront* Residents Association (NEWRA). Here is an example of a statement claiming support from NEWRA: '... the project enjoys broad community support from the North End Residents' Association' [Testimony of Richard McGuinness, para. 46(c)].

89 However, at the two meetings where the project was discussed (see Section 4.2), most of the comments were strongly opposed to the project. At the December 2007 meeting, members voted, first, to amend the proposed resolution to specify an 11pm closing hour rather than a 1am closing hour; second, to oppose even those reduced hours; and third, to oppose the application for live entertainment. Furthermore, NEWRA's president (Victor Brogna) summarized the meeting in a letter to the Board of Appeal, Andrea Langhauser, and the BRA (to Peter Gori). That letter contained the following paragraph:¹¹

90 From the comments of the members present, it appeared that even with the closing hour reduced from 1:00 A.M. to 11:00 P.M., there was a desire to retain the site at the end of Long Wharf as a place of quiet and respite, inviting to families with children, as it now exists. It appeared that adding to the activation of the site by the introduction of a late-night restaurant was not considered by the members present to be in the interest of the community. Existing restaurants in close proximity already served the public need.

4.2 NEWRA did not review the plans for Doc's

91 Applicant repeatedly claims that Applicant presented plans for Doc's to the North End Waterfront Residents Association (NEWRA). Here are two examples:

92 1. 'A separate community meeting was held on May 10, 2007 with the North End Waterfront Association [sic] to discuss the Crossroads Initiative planning. Plans used

¹¹ Letter of Victor Brogna, 21 February 2008; included in Department's Exhibit E.

during this public process included Doc's Restaurant at the end of Long Wharf as a Crossroads destination' [Testimony of Richard McGuinness, para. 31].

93 2. 'A separate community meeting was held on May 10, 2007 with the North End Waterfront Association [sic] to discuss the Crossroads Initiative planning. Plans used during this public process included Doc's Restaurant at the end of Long Wharf as a Crossroads destination' [Testimony of Mark Donahue, para. 12].

94 I attended that NEWRA meeting and listened carefully to the presentation by Peter Gori. Mr. Gori indeed discussed plans for State Street and showed sketches, but there was no mention of a restaurant and bar.

95 The first mention of a restaurant came at a subsequent NEWRA meeting, in September 2007, when Doc's sought community approval for an alcohol license. NEWRA, in accordance with its policy, voted to table the matter until the alcohol license was formally applied for. The matter accordingly arose again at the 13 December 2007 meeting.¹²

96 At the September meeting, much outrage was expressed about putting a late-night restaurant and bar at the end of Long Wharf, and about the lack of any community involvement. The comments included:

97 1. From Sheila Ross of North Square, who said she valued the quiet, passive-respite character of that end of Long Wharf and was 'appalled' at the decision to put a restaurant and bar there.

98 2. From Ann Pistorio, North Margin Street, saying that the plans amounted to privatizing public waterfront.

99 3. From Sanjoy Mahajan, Jackson Avenue, who asked why the BRA didn't come to the neighborhood for input before deciding to place a restaurant/bar there; said that the neighborhood is being 'railroaded'; and asked if had been a public process to establish the proposed use. That question received no answer.

100 After the meeting, I asked Peter Gori my question again. Peter Gori told me and others that the Crossroads Initiative plans that he showed in May 2007 included a restaurant at the end of Long Wharf, so the community had been involved in the process. A map that includes plans for a restaurant and bar may constitute sufficient notice for a convention

¹² See Applicant's Exhibit 23A.

of architects and city planners, accustomed to reading and interpreting plans, but it is not sufficient for a residents' association. Furthermore, a discussion May 2007 was anyway far too late to be part of a public process, since the BRA board, from information and belief, had already voted to go forward with the project and the selection of Doc's as the proponent.

5 Miscellaneous points

101 Here are rebuttal points that did not fit easily into other categories.

5.1 Petitioners' residential locations are not relevant to this appeal

102 Applicant repeatedly cites Petitioners' residential locations. Here are several examples:

- 103 1. 'None of the petitioners can reach Long Wharf on foot without going through Christopher Columbus Park' [Testimony of Mark Donahue, para. 18].
- 104 2. 'Other parks in Boston which provide seats, shade, and waterfront views in proximity to the petitioners are: ...' [Testimony of Mark Donahue, para. 19].
- 105 3. '[Petitioners] all live in the North End of Boston, far from Long Wharf. . . All of the Petitioners must walk through Christopher Columbus Park to reach Long Wharf' [Applicant's Memorandum of Law, Sec. II.H, p. 12].

106 The above statements are, first, incorrect. For example, I can easily first walk to State Street, then down Long Wharf, without going through Christopher Columbus Park – as can anyone else on foot. Furthermore, Robert Skole, also a petitioner, lives at Lincoln Wharf, only a five-minute walk from Long Wharf and can see Long Wharf from his deck.

107 Second, the above statements are irrelevant. For one, other parks nearby do not provide the outstanding expansive waterfront views, as set forth in our pre-filed testimony and not rebutted in any filing by Applicant or the Department.

108 Third, our residential addresses are relevant to this appeal in only two ways. Those ways are given by MGL c. 30A s. 10A:

109 . . . not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the

issue of damage to the environment and the elimination or reduction thereof. . . in any proceeding pursuant to chapter 91, at least 5 of the 10 persons shall reside in the municipality in which the license or permitted activity is located.

110 Our party must therefore contain at least 10 residents of the Commonwealth, and it does; and contain at least 5 residents of Boston, and it does. Beyond those requirements, our residential addresses are irrelevant.

5.2 Long Wharf likely had no tavern at its seaward end in the 1700's

111 The Applicant's testimony and legal memorandum repeatedly claims that the seaward end of Long Wharf had a tavern there, namely the Bunch of Grapes Tavern, and that it therefore should have one again. I do not understand how this point, even were a tavern there in the 1700's, helps decide on a use for Long Wharf now. However, because of its ubiquity, here is a rebuttal.

112 Here are several instances of this claim:

113 1. 'Among the first public establishments built on Long Wharf in the 1700s was the Crown Coffee House at the landward end and the Bunches of Grapes Tavern at the seaward end' [Testimony of Richard McGuinness, para. 12].

114 2. 'Among the first public establishments built on Long Wharf in the 1700s was the Crown Coffee House at the landward end and the Bunches of Grapes Tavern at the seaward end' [Applicant's Memorandum of Law, Sec. II.A, p. 2].

115 3. 'The proposed restaurant reinstates one of the first uses at Long Wharf in the early 18th century – a tavern at the seaward end of the Wharf' [Applicant's Memorandum of Law, Sec. III.G, p. 24].

116 I find no Bunches of Grapes Tavern in the historical literature. However, I found many mentions of a famous Bunch of Grapes Tavern associated with Long Wharf in the 1700s, so I assume that Applicant intended to reference the Bunch of Grapes Tavern. Its location is described in *Old Landmarks and Historic Personages of Boston* by Samuel Adams Drake, which states:¹³ 'The Bunch of Grapes Tavern was on the corner of Kilby Street (formerly

¹³ Boston: James R. Osgood and Co., 1873, p. 105; copy from Harvard University, digitized by Google on 2 March 2007, accessed 18 February 2008.

Mackerel Lane) and State.’ The location is confirmed in *Rambles Around Old Boston* by Edwin M. Bacon, a book referred to often in the Applicant testimony, which states:¹⁴ ‘There was first the Bunch of Grapes on the west corner of Kilby Street, begun before 1712.’ Kilby Street intersects State Street near the Old State House, far from the seaward end of Long Wharf.

117 Thinking that Applicant’s testimony reversed the two taverns, so that the Bunch of Grapes would fall at the landward end and the Crown Coffee House would fall at the seaward end, I looked into the location of the Crown Coffee House. It was at the landward end of Long Wharf.¹⁵

118 In short, neither the Bunch of Grapes Tavern nor the Crown Coffee House were at the seaward end of Long Wharf.

5.3 Clarifying questions raised about my computer model

119 Department’s testimony raises two questions about the computer model that I used to prepare the figures in my original testimony [Testimony of Andrea Langhauser, para. 38]. I appreciate the chance to clear up confusions that I may have created.

120 The Department’s second point was that I computed the effect on the views at eye level. In the diagram showing the effect during the months with outdoor seating and umbrellas, I assumed that the umbrellas are at or near eye level and therefore would adversely affect the view (in those directions toward the outdoor patio). (This assumption finds subsequent support in the design mock-ups provided in Applicant’s Exhibit 12.)

121 The first point in Department’s testimony was that the view of the water from a seaward corner would be unobstructed. That’s true. However, the model computed not whether the water was visible – a binary, all-or-none calculation – but rather in *what portion* of the 360° field of view was it visible or was there an unobstructed view. The zone colored green indicated locations where that portion is at least 270° – an outstanding panoramic view. The zone colored orange indicated locations where that portion is between 180°

¹⁴ Boston: Little, Brown, and Company, 1914, chapter 6; copy online at <http://www.kellsraft.com/RamblesBoston/ramblesbostoncontent.html>, accessed 18 February 2008.

¹⁵ Walter Kendall Watkins, *Ye Crown Coffee House: A Story of Old Boston* (Boston: Henderson & Ross, 1916), p. 16; copy from Harvard University, digitized by Google on 29 August 2006, accessed 18 February 2008.

and 270°. Therefore, the in-season diagram shows orange zones even at the seaward edge of the wharf – because the enclosed structure and outdoor area obstruct a large-enough portion of the field of view.

Summary

122 Because the project is not compliant with statute and regulation, because it has adverse effects, because its benefits are not substantiated, and because of the lack of community involvement or support, the project should not go forward.

Signed under penalty of perjury,



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