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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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Commissioner

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

December 15, 2008

In the Matter of
Boston Redevelopment Authority

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

PRE-SCREENING CONFERENCE REPORT AND ORDER

INTRODUCTION

In this case, the petitioner, Sanjoy Mahajan has appealed a chapter 91 Waterways Permit that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP or "the Department") issued to the Applicant Boston Redevelopment Authority ("BRA") on September 17, 2008 ("the Permit") concerning its proposed project ("the Project") at 206 Atlantic Avenue and 80 Long Wharf, the seaward end of Long Wharf in Boston, Massachusetts.

The Project will take place within filled tidelands, which requires a Chapter 91 Waterways License Application in accordance with 310 CMR 9.00, and involves redevelopment of the existing pavilion for a waterfront restaurant. The existing structure will be expanded by

approximately 1,225 square feet and will incorporate the outdoor space for seasonal seating. The amount of square feet for the seasonal seating will be determined through the licensing process.

Both the Department and the BRA contend that the Permit was properly issued. More exactly, they assert that the Department correctly determined that the Project complied with all applicable standards of the Waterways regulations, including the special standards for nonwater dependent use projects at 310 CMR 9.51-9.53 and G.L. c. 91, the Public Waterfront Act. See Department's Pre-Screening Conference Statement, December 2, 2008; BRA's Pre-Screening Conference Statement, December 3, 2008. The Petitioner, among other things, disputes the Department's position; he contends that "the [P]roject does not comply with the proper-public purpose requirement of 310 CMR 9.31(2)(b)(1). See Petitioner's Pre-Screening Conference Statement, November 28, 2008.

On December 3, 2008, I conducted a Pre-Screening Conference in this appeal in accordance with 310 CMR 1.01(5)(a)15; 310 CMR 10.05(7)(j)7.a; and a Scheduling Order that was issued to the parties on November 10, 2008 ("the Scheduling Order").¹ The purpose of the Pre-Screening Conference was to determine the appeal's potential amenability to settlement through alternative dispute resolution or other means, and to identify the issues for resolution in this appeal. See Scheduling Order, ¶ 5.

The first topic of discussion at the Pre-Screening Conference was potential settlement of this appeal by agreement of the parties. After the parties presented summaries of their respective positions in the appeal, they and I concluded that settlement of this appeal by agreement of the

¹ Under 310 CMR 1.01(5)(a)15, the authority of Presiding Officers to prescreen appeals includes the power to conduct prescreening conferences with the parties to an appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." Presiding Officers are also authorized to conduct simplified hearings of appeals in accordance with 310 CMR 1.01(8)(a), and issue recommended final decisions for dismissals of appeals. 310 CMR 1.01(5)(a)15.

parties is not possible at this time. As a result, I informed the parties that the appeal will be resolved according to the schedule set forth on **page 7 of this Order**, which I announced at the Pre-Screening Conference. Any party who without good cause fails to file any required materials in accordance with the schedule will be subject to sanctions pursuant to 310 CMR 1.01(10).²

ISSUES FOR RESOLUTION IN THE APPEAL

At the Pre-Screening Conference, the parties agreed on the issues for resolution in this appeal. Those issues are the following:

1. Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2?
2. Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d)?
3. Whether the project complies with Condition No. 5 of the EOEEA Secretary's decision on the 1991 Boston Harbor Plan because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner?
4. Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) 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)?

² Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

7. Whether petitioner has 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)?

THE PARTIES' RESPECTIVE WITNESSES FOR HEARING

Per the Scheduling Order, I will conduct an evidentiary or Adjudicatory Hearing³ in this appeal on **Tuesday, February 24, 2009**. See Scheduling Order, ¶ 10. The purpose of the Hearing is the cross-examination of individuals (“witnesses”) who have filed Pre-filed Testimony on behalf of the parties in this case, and not to give direct testimony. See 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3. Re-direct examination of witnesses following their cross-examination is not permitted unless authorized by the Presiding Officer, and “[i]f redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination.” 310 CMR 1.01(13)(h)3.

The Scheduling Order required the parties to file Pre-Hearing Statements prior to the December 3, 2008 Pre-Screening Conference that set forth their respective positions in the appeal and “the names and addresses of [their respective] witnesses, including expert witnesses, who [would] be filing Pre-filed Testimony.” See Scheduling Order, ¶ 8. The parties complied with this requirement. The parties’ respective witnesses for the Hearing are as follows:

The Petitioner: A. Expert Witnesses:

David A. Kubiak
5 Cleveland Place Apartment 3
Boston, MA 02113;

³ An “Adjudicatory Hearing” is a hearing “where [the] parties may present evidence on issues of fact, and argument on issues of law and fact prior to the Commissioner’s issuance of a final decision” on the appeal. 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(c); 310 CMR 1.01(14)(b).

Kris Lucius
17 Lakeville Road No. 3
Jamaica Plain, MA 02130.

B. Other Witnesses

- (1) Sanjoy Mahajan
5 Jackson Avenue Unit 2
Boston, MA 02113
(617) 227-0728;
- (2) Mark Paul
61 Prince Street
Boston, MA 02113;
- (3) Pasqua Scibelli
19 Wiget Street
Boston, MA 02113;
- (4) Victor Brogna
120 Commercial Street
Suite 5-3
Boston, MA 02109;
- (5) Robert Skole
Lincoln Wharf 715
357 Commercial Street
Boston, MA 02109;
- (6) Mary McGee
46 Snow Hill Street
Boston, MA 02109;
- (7) Naomi Paul
61 Prince Street
Boston, MA 02113;
- (8) Shelia Ross
North Square
Boston, MA 02113;
- (9) Selma Rutenberg
Harbor Towers
East India Row
Boston, MA;

(10) Stephanie Hogue
7 Henschman Street Apartment 402
Boston, MA 02113;

(11) Ann M. Pistorio
72 North Margin Street
Boston, MA 02113;

(12) Thomas Schiavoni
46 Snow Hill Street
Boston, MA 02113;

(13) Patricia Thiboutot
100 Fulton Street
Boston, MA 02109.

The Applicant:

(1) Richard E. McGuinness
Deputy Director for Waterfront Planning
Boston Redevelopment Authority
One City Hall Plaza
Boston, MA 02201
(617) 918-4323;

(2) Mark Donahue
Deputy Director for Asset Management
Boston Redevelopment Authority
22 Drydock Avenue
Boston, MA 02210
(617) 918-6230;

(3) Lawrence Mammoli
Director of Engineering and Facilities
Management
Boston Redevelopment Authority
22 Drydock Avenue
Boston, MA 02210
(617) 918-6201.

The Department:

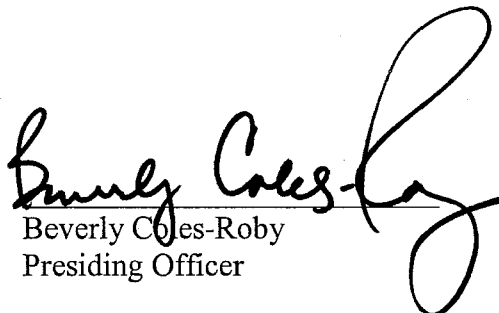
(1) Andrea Langhauser
Senior Planner
One Winter Street
Boston, MA 02108
(617) 348-4084.

SCHEDULE OF PROCEEDINGS

The Schedule for the remaining proceedings in this appeal is as follows:

<u>Action</u>	<u>Deadline or Date Scheduled</u>
Petitioner's Pre-filed Direct Testimony and supporting memorandum of law addressing the Issues for Resolution	On or before Friday, January 9, 2009;
Respondent/Department's Pre-filed Direct Testimony and supporting memorandum of law addressing the Issues for Resolution	On or before Tuesday, February 10, 2009;
Petitioner's Rebuttal Testimony (limited to matters asserted in Respondents' Pre-filed Testimony)	On or before Tuesday, February 17, 2009;
Hearing	On Tuesday, February 24, 2009, from 9 a.m. to 4 p.m. in the Department's Boston Office at One Winter Street, Boston, Massachusetts; **Department personnel are responsible for scheduling a conference room for the Hearing and for arranging electronic or stenographic recording of the Hearing;
Recommended Final Decision	On or before Thursday, March 26, 2009;
MassDEP Commissioner's Final Decision	On or before Monday, April 27, 2009.

December 15, 2008


Beverly Coles-Roby
Presiding Officer

SERVICE LIST

In The Matter Of: Boston Redevelopment Authority

Docket No. 2008-128

File No. W07-2172-N
Boston

Representative

Party

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Boston Redevelopment

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DEPARTMENT

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INTERVENOR

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Date: December 15, 2008