

# Commonwealth of Massachusetts

Suffolk, S.S.

Superior Court Civil No. SUCV2010-0802-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*

## **Plaintiffs' Opposition to Defendant BRA's Renewed Motion to Dismiss**

Defendant BRA argues that plaintiffs lack standing. The BRA's argument fails for the reasons set forth below.<sup>1</sup> The BRA states that "None of the Plaintiffs ... even live close enough to see or hear the proposed restaurant." Memorandum in Support of Defendant BRA's Renewed Motion to Dismiss ("BRA Memorandum"), p. 3. This claim, although made many times in these proceedings, is incorrect. Plaintiff Victor Brogna now lives on Atlantic Avenue, less than one-quarter mile from the project site, and can see the project

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<sup>1</sup> Plaintiffs submit this opposition also as their memorandum of law and rest upon the legal arguments herein contained.

site. Affidavit of Victor Brogna (Attachment A), paragraphs 3, 6, and 7. Although the BRA did not know this information until recently, plaintiff Bob Skole has lived at Lincoln Wharf for over 20 years, can see the project site, and will likely hear the noise from the proposed restaurant and bar. Affidavit of Bob Skole (Attachment B), paragraphs 2, 4, 5, and 8. His address has been part of the record since the beginning of these proceedings. Complaint, p. 2.

The BRA claims that “Plaintiffs have already represented to this Court that their specific interests will *not* be harmed by the Chapter 91 license.” BRA memorandum, p. 4 (emphasis original); BRA’s motion, p. 1. Plaintiffs’ statement, however, was different: that, because plaintiffs’ standing is conferred by regulation and statute, they did not need to show a personal injury. Not needing to assert X is different from asserting not X.<sup>2</sup>

## **I. Plaintiffs have standing to appeal the Chapter 91 license**

To statutory standing Plaintiffs now turn.

### **A. The *Sturbridge* decision supports Plaintiffs’ standing**

On standing, the BRA relies on the recently decided *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass. 548 (2012)—as do plaintiffs. In *Sturbridge*, the SJC ruled that the ten-citizen petitioners did not have standing to seek judicial review of a landfill operator’s application. *Id.*, at 560. The SJC explained the denial as follows: “[T]here is no indication of how close any of the members of the citizen groups may live to the [project]...” *Ibid.* Here, the addresses of all plaintiffs are part of the record. Amended Complaint, p. 2. Furthermore, the BRA has provided an aerial photograph of the area showing Long Wharf and several of plaintiffs’ addresses—although not showing plaintiff Skole’s longstanding address at Lincoln Wharf with a direct view of the project site, and not showing plaintiff Brogna’s new address at 111 Atlantic Avenue. Affidavit of Robert Skole, paragraphs 2 and 5; Affidavit of Victor Brogna, paragraph 3; Record, p. 1574.

Second, *Sturbridge* concerned a public hearing, which is a nonadjudicatory proceed-

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<sup>2</sup> The emphasis below is on statutory standing.

ing.<sup>3</sup> *Sturbridge* at 561 (n.28). The DEP proceeding from which plaintiffs appealed, is an adjudicatory proceeding. 310 CMR 9.17(1)(c). The *Sturbridge* decision turned heavily on this distinction; in an adjudicatory proceeding, the grounds for standing are those given in *Save the Bay v. Department of Public Utilities*, 366 Mass. 667 (1975): “[I]n *Save the Bay*, the court was discussing intervention in an administrative agency’s ‘adjudicatory proceeding.’” *Sturbridge*, at 557.

In *Save the Bay*, the SJC applied the following reasoning in conferring standing. First it provided a general principle: “Only where the parties have demonstrated the required participation in the administrative proceeding and have presented an orderly record before the agency have they properly preserved their appellate rights.” *Save the Bay* at 672. Then it applied the principle:

Concerned Citizens fully participated in the proceedings before the Department by introducing evidence, cross-examining witnesses and objecting to certain evidence offered in support of the exemption. . . .

...

The participation by Concerned Citizens (and thus Pereira) was similar to that found sufficient to permit an appeal by the town of Wilmington under G. L. c. 25, Section 5, in *Wilmington v. Department of Pub. Util.* 340 Mass. 432, 434-435 (1960). In that case the town counsel cross-examined the railroad’s witnesses, presented evidence on the town’s behalf, filed requests for rulings and submitted a brief.

*Save the Bay* at 675. Here, consonant with the standard set forth in *Save the Bay*, plaintiffs’ participated fully—some would say too fully—in the proceedings, by calling witnesses, cross-examining BRA and DEP witnesses, objecting to evidence, filing requests for rulings, and submitting briefs. For all these reasons, plaintiffs have standing, consistent with *Save the Bay* and *Sturbridge*.

## **B. Statutory standing**

In reviewing a motion to dismiss under Mass. R. Civ. P. 12(b)(1), the factual allegations in the plaintiff’s complaint, as well as any favorable inferences reasonably drawn from them, are accepted as true. *Ginther v. Commissioner of Insurance*, 427 Mass. 319, 322 (1998).

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<sup>3</sup> *Enos v. Sec. of Environ. Affairs*, 432 Mass. 132 (2000), on which the BRA also relies, also concerns a nonadjudicatory proceeding.

This case involves the issuance by the Massachusetts Department of Environmental Protection (“DEP”) of a Chapter 91 Waterways Permit to the Boston Redevelopment Authority (“BRA”) for the construction of a late-night restaurant and bar on parkland at Long Wharf in Boston. In their complaint the plaintiffs have alleged that they are ten residents of the Commonwealth, at least five of whom are residents of the City of Boston, that they have claimed damage to the environment and that they were parties to DEP adjudicatory proceeding which is the basis for their appeal. They have also alleged that parkland and open space will be damaged by the enclosure and expansion of a shade structure for the construction of the restaurant and bar with takeout service and outdoor table service.

These allegations place the plaintiffs squarely within the purview of G.L. c. 30A §10A, which provides as follows:

Notwithstanding the provisions of section ten, 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 order that any decision in such proceeding shall include the disposition of such issue.

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.

The intervention shall clearly and specifically state the facts and grounds for intervening and the relief sought, and each intervening person shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative.

Notwithstanding any other provision of this chapter, any intervener under this section may introduce evidence, present witnesses and make written or oral argument, except that the agency may exclude repetitive or irrelevant material. Any such intervener shall be considered a party to the original proceeding for the purposes of notice and any other procedural rights applicable to such proceeding under the provisions of this chapter, *including specifically the right of appeal* (emphasis and paragraph breaks added).

G.L. c. 214 §7A, which is referenced in G.L. c. 30A §10A, defines damage to the environment in a broad way to include, inter alia, damage to open spaces and parks.

The provisions of G.L. c. 30A §10A have been incorporated into the DEP regulations in several places. DEP’s adjudicatory-proceedings regulations at 310 CMR 1.01(7)(f) include

a section entitled “Intervention to Protect the Environment Pursuant to M.G.L. c. 30A §10A” which mirrors the language of the statute. The DEP’s Waterways regulations, at 310 CMR 9.17(1)(c), also refer to G.L. c.30A, §10A. The definition section at 310 CMR 9.02 defines a “party” as “...the applicant, any person allowed by the Department to intervene pursuant to M.G.L. c.30A, §1, or any ten citizens allowed by the Department to intervene pursuant to M.G.L. c. 30A, §10A. The appeals section at 310 CMR 9.17 (1) lists the persons who have the right to an adjudicatory hearing concerning a decision to grant or deny a license or permit and includes “ten residents of the Commonwealth, pursuant to M.G.L. c. 30A, §10A...” 310 CMR 9.17(1)(c).

There are numerous cases involving analogous proceedings in which parties to agency administrative hearings have been deemed to have standing to seek judicial review of the agency decisions. In *Schoolman v. Health Facilities Appeals Board*, 10 Mass. App. Ct. 799 (1980), a group of ten taxpayers participated in a hearing before Health Facilities Review Board under a statutory grant of authority. They then sought judicial review of the Board’s decision pursuant to G.L. c. 30A §14. The defendants argued that the ten taxpayers did not have standing, stating that standing traditionally depended upon a showing that a private legal right had been infringed. The Appeals Court stated that “[t]here can be no serious question that the Legislature has the power to confer standing to sue upon ten taxpayers of the Commonwealth,” citing *Barrows v. Farnum’s Stage Lines, Inc.*, 254 Mass. 240, 243 (1926), 10 Mass. App. Ct. at 804 and concluded that the ten taxpayers had the requisite standing to seek judicial review.

In a case dealing with the standing of a citizen’s group and other individuals to appeal a decision of the department of Public Utilities, the Supreme Judicial Court set out the standard for determining standing to seek judicial review and stated, in part: “Our determination whether one is a party to an adjudicatory proceeding, for purposes of standing to seek review of the administrative decision reached in that adjudicatory proceeding, is guided by G.L. c. 30A, §1(3), which defines a party to an adjudicatory proceeding as...(b) any other person who as a matter of constitutional law or by any provision of the General Laws is entitled to participate fully in the proceeding (emphasis added), and who...makes an appearance;” *Save the Bay* at 673. The standards set out in *Save the Bay* were repeated

approvingly in *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346 (2001).

The materials submitted by the defendant BRA focus on the fact that the plaintiffs have not personally suffered legal harm. However, this is not the standard set out in G.L. c. 30A §10A and it is clear that the legislature may provide a statutory grant of standing to obviate the requirement of showing legal harm. *Gerte v. Department of Public Health*, 18 Mass. App. Ct. 901, 902 (1984). In an unpublished decision the Appeals Court specifically stated that reliance on a zoning approach of establishing standing is misplaced when dealing with a statutory claim by ten taxpayers. *Daly v. McCarthy*, 63 Mass. App. Ct. 1103 (2005). The primary cases relied on by the defendant BRA, *Higgins v. DEP*, 64 Mass. App. Ct. 754 (2005) and *Hertz v. EOEEA*, 73 Mass. App. Ct. 770 (2009) involve individual property owners who made claims of injury to their personal property rights. These cases are simply not apposite to an analysis of the plaintiff's complaint, which is based on a statutory grant of standing.

## **II. Plaintiffs have standing in mandamus to maintain their new claims**

Plaintiffs are, with this opposition, also submitting to the opposing parties a motion under Rule 9A to amend plaintiffs' complaint, based on newly discovered official documents in state and federal archives. Affidavit of Sanjoy Mahajan (Attachment C), paragraphs 4–5 (on finding the new documents).<sup>4</sup> In light of the SJC's ruling in *Mahajan v. DEP*, 464 Mass. 604 (2013) that Article 97 does not bar DEP from issuing a license, plaintiffs have eliminated the corresponding claim in their amended complaint. The new claims are summarized here:

1. The BRA has failed to comply with the BRA–DEM agreement authorized by legislation and executed on September 13, 1984. The agreement calls for the BRA to record a 99-year easement on behalf of the Commonwealth for public open-space use on Long Wharf. BRA–DEM Agreement (Attachment G), paragraph Q at p. 11.

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<sup>4</sup> A copy of the motion is attached to this opposition as Attachment D; a copy of the amended complaint is attached as Attachment E; and a copy of the accompanying memorandum is attached as Attachment F.

2. The BRA has failed to comply with Section 6(f) of the federal Land and Water Conservation Fund and the corresponding provisions in the Code of Federal Regulations. The seaward end of Long Wharf, including the entire project site, was reconstructed with federal funds under the Land and Water Conservation Fund (LWCF) Act of 1965. This act requires that the land be maintained in public outdoor recreation in perpetuity. The protected area is the dark shaded area shown in the map provided by the federal government. 6(f) map for Long Wharf, dated March 27, 1980 (Attachment H); transmittal email from National Park Service (Attachment I).
3. The BRA has failed to obtain the plain and explicit legislation required under the doctrine of prior public use before lands devoted to one public use are devoted to an inconsistent use.
4. The BRA has failed to comply with Article 97, requiring a two-thirds vote of the legislature before any disposition. Although the *Mahajan* court ruled that Long Wharf was not protected by Article 97, it did so without the benefit of the BRA-DEM Agreement and the LWCF 6(f) map discovered after oral argument.

For all these claims, plaintiffs' standing for relief by mandamus is because plaintiffs seek to enforce duties owed to the public generally. In the words of Ronan, J., in *Pilgrim Real Estate v. Superintendent of Police of Boston*, 330 Mass. 250, 251 (1953):

The apparent object of the petition is to secure on the part of the [BRA] the performance of a public duty which, if it exists, was owed by [the BRA] to all the citizens. In such a proceeding, the petitioner is a nominal party, for the real party in interest is all the people.

Further, at p. 251:

It has been frequently decided that where the object of a petition is to procure the enforcement of the law, a petitioner `without special interest in the subject matter independent of the rights of the public has a standing by reason of his citizenship to maintain a petition for a writ of mandamus to enforce a public duty of interest to citizens generally.' (Citations omitted.)

In *Town of Concord v. Attorney General*, 336 Mass. 17, 27 (1957) the SJC held that "where a public officer owes a specific duty to the public to perform some act or service not due the

government as such or to administer some law for the public benefit which he is refusing or failing to perform or administer any member of the public may compel by mandamus the performance of the duty required by law."

Mandamus is indeed an extraordinary remedy and is available only where the law provides no other adequate and effectual relief. *McCarthy v. Mayor of Boston*, 188 Mass. 338, 340 (1905). In *Mahajan*, the SJC held, consistent with this court's ruling, that Article 97 and related issues are not part of the DEP process. Thus, the 30A appeal provides no remedy for these issues. Where the petitioner has no other adequate and effective relief, and unless he can bring a petition for a writ of mandamus, there "would or might be a failure of justice"; in such cases, the writ of mandamus is properly brought. *McCarthy* at 340.

### III. Conclusion

For the reasons set forth above, the BRA's renewed motion to dismiss should be denied.

Respectfully submitted,

Plaintiffs, *Pro Se*

April 17, 2013

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## **Attachment A. Brogna affidavit**



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and  
Boston Redevelopment Authority,  
*Defendants*

## Affidavit of Victor Brogna

1. My name is Victor Brogna. I am one of the plaintiffs in this case. The statements sworn to herein are made of my own personal knowledge, except where I indicate that the statement is upon information and belief and as to that statement I believe it to be true.
2. I live at the Mercantile Wharf Building on the Boston Waterfront.
3. My address is 111 Atlantic Avenue, Apartment 310, Boston, MA 02110.
4. I have lived at this address since May 1, 2012.
5. The windows of my apartment face Christopher Columbus Park, which is directly adjacent to Long Wharf.

6. I believe, based on the information at <http://www.geodistance.com/>, that the distance from my apartment to the proposed site of a restaurant/bar at the Long Wharf Park Shade Pavilion is 420 yards.
7. The proposed site of a restaurant/bar at the Long Wharf Park Shade Pavilion is clearly visible from my windows at the Mercantile Wharf Building.

Signed under the penalties of perjury this 17th day of April, 2013,

## **Attachment B. Skole affidavit**





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and  
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## Affidavit of Robert Skole

1. My name is Robert Skole. I am one of the plaintiffs in this case. The statements sworn to herein are made of my own personal knowledge, except where I indicate that the statement is upon information and belief and as to that statement I believe it to be true.
2. I live at Lincoln Wharf on Boston's waterfront.
3. My address is 357 Commercial Street, Unit 715, Boston, MA 02109.
4. My wife and I have lived at this address since 1990.
5. The proposed site of a restaurant/bar at the Long Wharf Park Shade Pavilion is clearly visible from our deck and windows at Lincoln Wharf.
6. During our 23-year residence at Lincoln Wharf, we have directly experienced how sound travels over the water.

7. We already hear noise from waterfront bars and party boats, especially in the evening and at night.
8. Based on our long experience, I believe that we would hear noise from a restaurant/bar with outdoor tables at the present location of the Long Wharf Park Shade Pavilion.

Signed under the penalties of perjury this 17th day of April, 2013,

## **Attachment C. Mahajan affidavit**



## Commonwealth of Massachusetts

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and  
Boston Redevelopment Authority,  
*Defendants*

### **Affidavit of Sanjoy Mahajan**

1. My name is Sanjoy Mahajan. I am one of the plaintiffs in this case. The statements sworn to herein are made of my own personal knowledge, except where I indicate that they are based on information and belief and as to that statement I believe it to be true.
2. From May 2008 until December 2011, my primary residence was 5 Jackson Avenue, Boston, MA 02113.
3. Since December 2011, I have lived at 950 Massachusetts Ave, Apt 613, Cambridge, MA 02139.
4. On November 15, 2012, in the week following oral arguments in the SJC, I found the agreement executed September 13, 1984 and entitled ``Agreement between the Commonwealth of Massachusetts Acting by and through the Department of Environmental Management and the Boston Redevelopment Authority Relative to Development and Management of Public Open Space on and Adjacent to Long Wharf, Boston.''

5. I found this document in the LWCF files held at the EOEEA offices, 100 Cambridge Street, Boston, MA 02114.
6. In the same files, I found a record of a vote authorizing the BRA director to execute said agreement. This record stated that said agreement is Document No. 4440 in the Document Book of the Authority.
7. On December 20, 2012, as the best Christmas present that I have ever received, the National Park Service in Philadelphia sent me the LWCF 6(f) boundary map for LWCF Project #25-00295 (Long Wharf), dated March 27, 1980, showing that the entire seaward end of Long Wharf, including the project site, is within the 6(f) boundary area.
8. This map also is the map in an untitled document that I found in the LWCF files at EOEEA and that I believe to be the BRA's LWCF proposal for Long Wharf.

Signed under the penalties of perjury this 17th day of April, 2013,

## **Attachment D. Copy of motion to amend complaint**

The motion to amend the complaint, as filed with the BRA and DEP pursuant to Rule 9A, is here attached (with duplicative attachments elided).





# Commonwealth of Massachusetts

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## Plaintiffs' Motion to Amend Complaint

Plaintiffs move, pursuant to rule M.R.Civ.P. 15(a), for leave of the court to amend their complaint. Rule 15(a) states that "leave shall be freely given when justice so requires." In support of their motion, the plaintiffs submit the following reasons:

1. Since the proceedings began in 2008, two plaintiffs have moved, one (Brogna) within Boston and one (Mahajan) from Boston to Cambridge. Affidavit of Victor Brogna ( of plaintiffs' Amended Complaint), paragraphs 3-4; Affidavit of Sanjoy Mahajan ( of plaintiffs' Amended Complaint), paragraphs 2-3. The amended complaint contains the updated addresses.
2. The Supreme Judicial Court, in *Mahajan v. DEP*, 464 Mass. 604 (2013), ruled that DEP's Chapter 91 licenses are not an Article 97 disposition. Thus, plaintiffs have eliminated the corresponding claims from the amended complaint.
3. After oral argument concluded in the Supreme Judicial Court, two documents relevant to the protected status of Long Wharf were discovered by plaintiff Mahajan in state and federal archives. Affidavit of Sanjoy Mahajan, paragraphs 4-7. The two documents are:

- a. The federal map showing the area of Long Wharf protected as “public outdoor recreation in perpetuity” under Section 6(f) of the federal Land and Water Conservation Fund Act of 1965. 6f Boundary Map, dated March 27, 1980 ( of Plaintiffs’ Amended Complaint). This area includes the entire seaward end of Long Wharf, including the shade pavilion and entire project site. Transmittal email from NPS ( of Plaintiffs’ Amended Complaint).
- b. The agreement executed September 13, 1984 between the DEM and BRA in which the BRA covenanted to record an easement “on behalf of the Commonwealth, placing a restriction for public open space use on the title of the Authority to the Wharf site . . .” BRA–DEM agreement ( of Plaintiffs’ Amended Complaint), paragraph Q at p. 11.

Plaintiffs submit herewith a proposed amended complaint and memorandum in support, and request a hearing on their motion.

Respectfully submitted,

Plaintiffs, *Pro Se*

April 17, 2013

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## **Attachment E. Copy of amended complaint**

The amended complaint, as filed with the BRA and DEP pursuant to Rule 9A, is here attached (with duplicative attachments elided).



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## Amended complaint

### Complaint

1. This is an action for judicial review of a final decision of the Massachusetts Department of Environmental Protection (“the Department” or “DEP”) issuing a Chapter 91 waterways license to the Boston Redevelopment Authority (“BRA”) for the construction of a late-night restaurant and bar on parkland at Long Wharf in Boston, Massachusetts. Plaintiffs ask this Court to find that the Department’s final decision is based on errors of law, is not supported by substantial evidence, violates constitutional provisions, exceeds the agency’s statutory authority, is based upon unlawful procedure, and is arbitrary and capricious and an abuse of discretion.
2. Plaintiffs also seek declaratory relief pursuant to G.L. c. 231A §1–5, and mandamus pursuant to G.L. c. 249 §5.

## **Parties**

3. PLAINTIFFS, all residents of the Commonwealth of Massachusetts, nine of whom reside in Boston's North End neighborhood and one who resides in Cambridge, are as follows:
  - a. Sanjoy Mahajan of 950 Massachusetts Ave, Apt 613, Cambridge, MA 02139
  - b. Victor Brogna of 111 Atlantic Ave, Apt 310, Boston MA 02110
  - c. David Kubiak of 5 Cleveland Place Apt 3, Boston MA 02113
  - d. Stephanie Hogue of 7 Henchman St., Apt 402, Boston MA 02113
  - e. Mary McGee of 46 Snow Hill St., Boston MA 02113
  - f. Anne M. Pistorio of 72 North Margin St., Boston MA 02113
  - g. Thomas Schiavoni of 46 Snow Hill St., Boston MA 02113
  - h. Pasqua Scibelli of 19 Wiget St, Boston MA 02113
  - i. Robert Skole of Lincoln Wharf 715, 357 Commercial St, Boston MA 02109
  - j. Patricia Thiboutot of 100 Fulton St., Boston MA 02109
4. DEFENDANT, Massachusetts Department of Environmental Protection, is a state agency established by G.L. c. 21A, which has regulatory authority over activities pursuant to G.L. c. 91. The Department's headquarters are located at One Winter Street, Boston, MA 02108.
5. DEFENDANT, Boston Redevelopment Authority, is a public entity created by statute for planning and development in the city of Boston. BRA headquarters are at Boston City Hall, Floor 9, City Hall Plaza, Boston MA 02201.

## **Jurisdiction and venue**

6. The Court has jurisdiction over the subject matter of this action pursuant to G.L. c. 30A §14(1), G.L. c. 214 §1, G.L. c. 184 §32, and G.L. c. 249 §5.
7. Venue for this action lies in Suffolk County in accordance with G.L. c. 30A §14(1)(c).



8. Plaintiffs have properly filed the original complaint within thirty days of the receipt of the Department's final decision issued by DEP Commissioner Laurie Burt on January 29, 2010.

### **Background and statement of facts**

9. The park at issue is located at the seaward (eastern) end of Long Wharf in Boston Harbor. The park is utilized extensively by residents and visitors to enjoy marine sights and sounds and for other passive-recreation purposes. It is unique among the wharves and parks in the downtown/waterfront area in the combination it provides of expansive harbor views — surrounded on three sides by water — and a spacious, quiet public space in which to enjoy them.
10. The park at Long Wharf is designated 'Protected Open Space' in the City of Boston Parks Department *Open Space Plan 2002—2006* and in its draft *Open Space Plan 2008—2012*. On both plans, Long Wharf is marked as subject to Article 97 of the Amendments to the Massachusetts Constitution (hereafter Article 97), the Land and Water Conservation Fund (LWCF), Chapter 91, and the Wetlands Protection Act.
11. The BRA sought a Chapter 91 license allowing it to enclose and expand the current shade structure in the park, in order to construct a late-night restaurant and bar with takeout service and outdoor table service.
12. The Executive Office of Environmental Affairs ("EOEA") Article 97 Land Disposition Policy (February 19, 1998) mandates that the EOEA and its agencies shall not change the control or use of any right or interest in Article 97 land unless the change has been approved by a two-thirds vote of the Massachusetts Legislature.
13. On or about September 17, 2008, DEP granted the BRA a Chapter 91 waterways license to construct a 4,655 square-foot restaurant and bar in this park.

14. The BRA had been granted 14 zoning variances by the Boston Zoning Board of Appeals to allow for, among other permissions, live entertainment, take-out service, and food and alcohol service until 1am at the proposed restaurant.
15. Numerous restaurants and bars exist within 1 mile of the park.
16. The restaurant-and-bar proposal with its substantive variances did not conform to the requirements of the City of Boston Municipal Harbor Plan.
17. On or about October 9, 2008, pursuant to G.L. c. 30A §10A, the plaintiffs, as ten residents of the Commonwealth, at least five of whom reside in the City of Boston, alleging damage to the environment, appealed the DEP's decision to award the BRA the Chapter 91 license.
18. The DEP held a hearing on the appeal on February 24, March 2, and March 9, 2009.
19. On or about January 29, 2010, the DEP issued a final decision affirming the grant of the Chapter 91 license for construction of a restaurant and bar.
20. The plaintiffs, who were all parties to the DEP proceeding, are aggrieved by the Department's final decision.

### **Causes of action**

21. The BRA owes a duty to the public to preserve the seaward end of Long Wharf as public open space and has failed to do so.
  - i. The BRA has failed to obey an agreed deed restriction for public open space at the seaward end of Long Wharf. This deed restriction is required by its September 1984 contract with DEM (which contract was authorized by legislation). This de-facto release of the open-space restriction is also in violation of G.L. c. 184 §32.

On information and belief, plaintiffs allege that BRA has failed to record an easement for public open space, as required by its September 13, 1984 agreement with the Department of Environmental Management (DEM), which contract was authorized by legislation.

- ii. The BRA has failed to obtain project approval from the United States Secretary of the Interior, as required by the LWCF Act, section 6(f), by 36 CFR 59.3, and by its contract with the Commonwealth when it accepted the LWCF funds. This de-facto release of an open-space restriction is also in violation of G.L. c. 184 §32.
  - iii. The BRA has failed to get legislative approval, by a simple majority, for a change of use, as required by the common-law doctrine of prior public use.
  - iv. The BRA has failed to follow the requirements of Article 97 to get a two-thirds roll-call vote of the legislature authorizing the disposition.
22. The DEP's final decision is contrary to its own regulations, is based upon errors of law and unlawful procedure, is unsupported by substantial evidence, and is arbitrary, capricious, and an abuse of discretion. Among other deficiencies, the decision failed to find that the project violated the Municipal Harbor Plan because of the substantive variances required; improperly credited the project with benefits provided by pre-existing projects; and failed to consider the effect of the project on view corridors from sites of "concentrated public activity."

### **Prayers for relief**

Plaintiffs request:

23. that the Court order the BRA to perform its written agreement with the Commonwealth, for which it obtained \$9 million from the Commonwealth in 1984, to maintain Long Wharf as public open space; and, if it has not already done so, to record the easement required by the BRA-DEM agreement.

24. that the Court declare that the BRA failed to follow the proper procedure for changes of use or control in a park, usurped Legislative authority, including the doctrine of prior public use, and violated Article 97 of the Amendments to the Massachusetts Constitution.
25. that the Court declare that Long Wharf is subject to Article 97, to the doctrine of prior public use, and to the Land and Water Conservation Fund Act.
26. that the Court order the BRA to cancel any outstanding lease to a restaurant operator, and to refrain from any construction work or change of use at the seaward end of Long Wharf until the above conditions precedent are satisfied.
27. that the Court find that the Department's decision was contrary to its own regulations, was based upon errors of law, was made upon unlawful procedure, was unsupported by substantial evidence, and was arbitrary, capricious, and an abuse of discretion.
28. that the Court declare the Department's final decision with respect to the issuance of a Chapter 91 Waterways permit to be null and void and in violation of regulatory and statutory provisions.
29. such other relief at law or in equity as the Court may allow, including the recovery of costs and award of attorney fees.

Respectfully submitted,

Plaintiffs, *Pro Se*

April 17, 2013

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## **Attachment F. Copy of memorandum accompanying amended complaint**

The memorandum accompanying the amended complaint, as filed with the BRA and DEP pursuant to Rule 9A, is here attached.





# Commonwealth of Massachusetts

Suffolk, S.S.

Superior Court Civil No. SUCV2010-0802-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*

## **Plaintiffs' memorandum of law in support of motion to amend complaint**

Plaintiffs submit the following memorandum in support of their motion to amend their complaint. In particular, plaintiffs explain here why the claims should be sustained.

### **I. The BRA's proposed restaurant and bar violates its covenant, purchased with \$9 million of state funds, to preserve Long Wharf as public open space**

On September 13, 1984, the BRA and the Commonwealth—acting through the Department of Environmental Management (DEM)<sup>1</sup>—executed an agreement regarding the redevelopment of Long Wharf. Agreement between the Commonwealth of Massachusetts Acting by and through the Department of Environmental Management and the Boston Redevelopment Authority Relative to Development and Management of Public Open Space on and Adjacent to Long Wharf, Boston (“BRA-DEM Agreement,” of plaintiffs’ Amended

<sup>1</sup> The legal successor to the DEM is the Department of Conservation and Recreation (DCR). G.L. c. 21 §1.

Complaint). This agreement, authorized by Section 19A of Chapter 589 of the Acts of 1983, called for the DEM to provide the BRA with \$9 million (\$7 million from the legislature pursuant to the cited act, and \$2 million that the DEM had available from previous legislative appropriations). BRA–DEM Agreement, pp. 1, 3. In return, the BRA agreed to

execute and duly record in the Suffolk Registry of Deeds an easement, on behalf of the Commonwealth, placing a restriction for public open space use on the title of the Authority to the Wharf site, as described in Exhibit A, for the duration of this Agreement [99 years] ... .

*Id.*, paragraph Q at p. 11.

The BRA further agreed to provide an annual maintenance fund of at least \$100,000, adjusted annually for inflation; and to maintain Long Wharf, unless it turns over the responsibility to a suitably funded nonprofit entity. *Id.*, paragraph E at p. 13. The BRA’s proposed lessee and restaurant-and-bar operator is not a nonprofit entity.

Furthermore, the agreement created on Long Wharf a conservation restriction:

... a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition ... .”

G.L. c. 184 §31. The de-facto release of the conservation restriction, by constructing an unauthorized restaurant, violates G.L. c. 184 §32: “No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value.”

## **II. The BRA proposed restaurant and bar violates federal regulations and law**

In 1980, the City/BRA applied to the federal Land and Water Conservation Fund (LWCF) for funds to reconstruct Long Wharf. Application for Federal Assistance (Attachment A). For this first phase of the project, the total project cost was \$1,751,000; the LWCF awarded

the City/BRA \$825,000 (via the state). LWCF Agreement, dated May 15, 1981, between the Commonwealth and the Heritage Conservation and Recreation Service,<sup>2</sup> available in Tab 5, pp. 4–5, of Defendant BRA’s Supplemental Filing to Dismiss Plaintiff’s Article 97 Claims, (“BRA’s Supplemental Filing,” a very large black binder).

The City/BRA and the Commonwealth agreed to follow the LWCF provisions. LWCF agreement between the BRA and the Commonwealth, BRA’s Supplemental Filing, Tab 5, pp. 2–3. The LWCF project-agreement general provisions provide that the "State agrees that the property described in the project agreement and the signed and dated project boundary map made part of that agreement is being acquired or developed with Land and Water Conservation Fund assistance ...and that, without approval of the Secretary, it shall ...be maintained in public outdoor recreation in perpetuity ...." LWCF Project Agreement General Provisions, in the BRA’s Supplemental Filing, Tab 5, p. 8 (counting nonblank sides after the tab divider; paragraph II.B).<sup>3</sup>

This boundary map is also called the 6(f) map, in reference to the protection provided by Section 6(f)(3) of the LWCF Act of 1965:

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.

The National Park Service (NPS) recently provided plaintiff Mahajan the 6(f) map ( of plaintiffs’ Amended Complaint). On it, the dark shaded area (marked Phase 1) is the 6(f) protected area. Transmittal email from National Park Service ( of plaintiffs’ Amended Complaint). The federal courts have ruled that a conversion includes “instances in which [p]roperty interests are conveyed for non-public outdoor recreation uses” (internal quote

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<sup>2</sup> This agency’s functions are now handled by the National Park Service.

<sup>3</sup> Also available online at [http://www.nps.gov/ncrc/programs/lwcf/forms/lwcf\\_general\\_provisions.frm.pdf](http://www.nps.gov/ncrc/programs/lwcf/forms/lwcf_general_provisions.frm.pdf)

marks omitted). *Friends of the Shawangunks v. William Clark, Secretary, United States Department of the Interior*, 754 F.2d 446, 451 (1985). Conversions have to follow the extensive requirements set forth in 36 CFR 59.3 (Attachment B).

### **III. Long Wharf is protected under the doctrine of prior public use and by Article 97**

The two public-trust doctrines, Article 97 and prior public use, are similar, and often turn on the same facts and result in almost the same legal conclusions. However, because the SJC in *Mahajan v. DEP*, 464 Mass. 604 (2013) ruled that Article 97 does not apply to Long Wharf, a holding that plaintiffs challenge with newly discovered documents, as explained below, it is particularly important in this case to analyze the applicability of each doctrine.

A fundamental similarity between the doctrines is that, under either doctrine, authorizing legislation must follow the principles enunciated in *Robbins v. Department of Public Works*, 355 Mass. 328 (1969). The substantive differences between Article 97 protection and protection under prior public use are as follows:

1. Article 97 protection requires that the land or easement be taken or acquired for natural-resources purposes. Article 97 (“Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of . . .”). Prior-public-use protection requires that the land be designated for one public use, which need not be the purpose for which the land was taken or acquired. *Robbins* at 330. Thus, land could be subject to prior public purpose but not to Article 97—for example, land held by a city in its corporate capacity that, without any legislative taking or acquisition, it dedicates to park use.
2. Article 97, perhaps in return for its more stringent requirement for applicability, requires a supermajority legislative vote. Article 97 (“laws enacted by a two thirds vote”). Prior public use requires only a simple majority (“plain and explicit legislation”). *Robbins* at 330.

3. Article 97 protects against changes of use and dispositions, which are more general than changes of use. For example, a lease of Article 97 land, even if it did not change the use, requires an Article 97 vote. In contrast, prior public use protects only against changes of use inconsistent with the prior use.

Long Wharf is, for the reasons set forth in this section, protected under both doctrines. Although the SJC ruled in *Mahajan* that Long Wharf is not protected under Article 97, it did not have two crucial pieces of information from the BRA: the BRA–DEM agreement, and the correct LWCF 6(f) map. The BRA did not provide these documents to the SJC.<sup>4</sup> Instead, they were discovered through the researches of plaintiff Mahajan, but only following oral argument in the SJC. Affidavit of Sanjoy Mahajan ( of plaintiffs’ Amended Complaint).

With this information, and based on the holdings in *Mahajan*, there are four moments when Long Wharf came under the protection of one or both public-trust doctrines, Article 97 or prior public use—with only one time and only one doctrine sufficient for a finding that mandamus lies against the BRA.

**A. Long Wharf became public-trust land on May 15, 1981, when the BRA and the Commonwealth executed the LWCF agreement**

Long Wharf became public-trust land on May 15, 1981, when the BRA and the Commonwealth executed the LWCF agreement. This question was reached at oral argument before the SJC, but the SJC did not have full information: Only the incorrect LWCF map was available, and BRA counsel therefore argued that the project site—by which counsel meant only

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<sup>4</sup> The BRA–DEM agreement was signed by the BRA director and, plaintiffs believe, based on other documents in the state LWCF files, is in the Document Book of the Authority as Document No. 4440. Affidavit of Sanjoy Mahajan, paragraph 6 ( of plaintiffs’ Amended Complaint). However, the BRA provided only the text of the act authorizing the agreement, commenting “There is no legislative requirements set for the in the Act relative to open space.” BRA’s Supplemental Filing, Tab 8.

Plaintiffs further believe, based on the state LWCF files, that the LWCF 6(f) map is a copy of the map in BRA’s proposal to the state and federal authorities for LWCF funds. Affidavit of Sanjoy Mahajan, paragraph 8.

the restaurant/bar and outdoor seating area—was not on the (incorrectly) limited LWCF area. Transcript of oral argument, p. 9, lines 16–17 (Attachment C).

However, it is now known that the entire seaward end of Long Wharf, as well as a portion of the Harborwalk, is protected by the LWCF Act, by the associated federal regulations (36 CFR 59.1–4), and by the corresponding open-space restriction (discussed at pp. 2ff). This restriction is a dedication to one public purpose (to open space use), placing the seaward end of Long Wharf, including the entire project site, under the protection of the doctrine of prior public use.

The LWCF open-space restriction—the right of the public to use Long Wharf for “public outdoor recreation in perpetuity”—is plainly an easement. By the language of Article 97 itself (“Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of . . .”) and of the *Opinions of the Justices to the Senate*, 383 Mass. 895, 918 (1981) (“...the two-thirds vote requirement . . . applies only to the disposal of lands and easements.”), the restriction may not be disposed of without an Article 97 vote. This conclusion is acknowledged by BRA’s counsel. At oral argument before the SJC, BRA’s counsel conceded that LWCF funding would trigger Article 97 protection:

So a portion of Long Wharf is protected by Article 97 . . . And the . . . area is protected specifically in that scenario because of the acceptance of federal funds, under the Land and Water Conservation Fund . . .

Transcript of oral argument, pp. 9 (line 15)–10 (line 2) (Attachment C).<sup>5</sup> The new informa-

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<sup>5</sup> The de-facto release of the LWCF conservation restriction, by constructing an unauthorized restaurant, violates G.L. c. 184 §32 on repaying state funds used in its acquisition (LWCF funds flow through the state, so the LWCF funds are also state funds).

Furthermore, even an Article 97 vote is insufficient to release the LWCF conservation restriction, because this restriction is a result of federal law and regulation and of a contract between the state and the federal government. States, except in exceptional circumstances not present here, may not impair the obligation of contracts, especially their own contracts. U.S. Const., Art. I, 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977) (“...[A] State is not free to impose a drastic impairment [on its own contract] when an evident and more moderate course would serve its purposes equally well.”).

tion is that the protection portion includes the whole seaward end of the wharf, which includes the project site.

**B. Long Wharf became public-trust land on September 13, 1984, with the execution of the BRA–DEM Agreement**

Long Wharf also became public-trust land on September 13, 1984, with the execution of the BRA–DEM Agreement (discussed at pp. 1ff and available as of plaintiffs' Amended Complaint). This agreement required the BRA to record an easement on its title to Long Wharf and on behalf of the Commonwealth for public open-space use.

For several reasons, this interest in land is an easement for Article 97 purposes. The first reason is the text of the agreement itself, which gives the Commonwealth, acting on behalf of the public, an easement for public open-space use. The second reason is the text of the act authorizing the agreement. The act authorizes the funds in order to construct the "waterfront component of the Boston Harbor Islands State *Park*. . . ." Acts of 1983, Chapter 589, Section 19A (emphasis supplied). The third reason is the legal character of the DEM. The DEM's enabling act provides:

There shall be a department of environmental management, in this chapter called the "department". It shall be the duty of said department to exercise general care and oversight of the natural resources of the commonwealth and of its adjacent waters; to make investigations and to carry on research relative thereto; and to propose and carry out measures for the protection, conservation, control, use, increase, and development thereof. . . .

The department shall also be concerned with the development of public recreation as related to such natural resources; and shall have control and supervision of such parks, forests, and areas of recreational, scenic, or historic significance as may be from time to time committed to it.

G.L. c. 21 §1, prior to 2009. Thus, the DEM cannot acquire any arbitrary easement; rather, it can acquire only easements consistent its purposes, which are all Article 97 purposes. By acquiring a conservation restriction, in particular an easement, from the BRA, that easement became subject to the two-thirds vote requirement of Article 97.

Separate from Article 97, the legislative appropriation for one public use (public open

space)—being a “a prior public or private grant restricted to a particular public purpose”—places Long Wharf under the protection of prior public use. *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591 (1974).

**C. Long Wharf became public-trust land in 1989, when the BRA dedicated Long Wharf Park**

Long Wharf became public-trust land in 1989, when the BRA dedicated Long Wharf Park. This reasoning was discussed at oral argument before the SJC, but BRA’s counsel argued that this park dedication applied only to a small part of Long Wharf, because the “plaque does not define the boundaries of the area that is a park.” Transcript of oral argument, pp. 11 (lines 9–11) (Attachment C). However, the dedication plaque contains the LWCF logo, the text “Land and Water Conservation Fund,” and the text “National Park Service,” which is the federal agency that administers the LWCF Act. Photo of Bronze Plaque at Long Wharf, in plaintiffs’ Additional Exhibits and References Relevant to Article 97 Protection. A reasonable inference is that the dedication area is at least equal to the LWCF-funded area. Because LWCF funds applied to the entire seaward end of the wharf, including the project site, the entire seaward end of the wharf is part of the formally dedicated park area. Thus, following the test in *Muir v. Leominster* at 592 (“formal dedication by the city of this area as park land”), which is cited approvingly in *Mahajan* at 617, the site is protected under prior public use.

**D. Long Wharf became impressed with public-trust status in 1970, when the BRA took it by eminent domain**

In *Mahajan*, at 620, the SJC ruled that the language of a taking order alone is not necessarily determinative of Article 97’s applicability. Rather, “the ultimate use to which the land is put may provide the best evidence of the purposes of the taking, notwithstanding the language of the original order of taking or accompanying urban renewal plan.” *Ibid.* The SJC thereby declared new law regarding the interpretation of Article 97. However, the SJC had to apply the new law to the old information, without the benefit of the BRA–DEM



Agreement or the correct LWCF 6(f) map.

With these documents, we know that the ultimate use at Long Wharf is public parkland. This use is the result of a \$9 million legislative appropriation—\$7 million of which was authorized by the statute that authorized the BRA–DEM agreement (discussed at pp. 7ff). This use is also the result of the LWCF funds and agreement between the state and federal government and between the BRA and the state to maintain the site for “public outdoor recreation in perpetuity” (discussed at pp. 5ff). The purpose of the taking for Article 97 purposes is further supported by the 1989 plaque dedicating Long Wharf Park (discussed at p. 8). The park use is also fully consonant with the BRA’s accompanying urban-renewal plan, which, on the “Proposed Land Use” plan, designated Long Wharf as public open space. Map 2 of Exhibit B of the Downtown Waterfront–Faneuil Hall Urban Renewal Plan, in Exhibit 3 of plaintiffs’ Additional Exhibits and References Relevant to Article 97 Protection. In sum, the ultimate use shows that the purpose of the original order of taking was for Article 97 purposes.

#### **E. Long Wharf is public-trust land many times over**

In summary, Long Wharf became public-trust land in six different ways:

1970 (taking)		<i>Article 97</i>
1981 (LWCF Agreement)	<i>Prior public use</i>	<i>Article 97</i>
1984 (BRA–DEM Agreement)	<i>Prior public use</i>	<i>Article 97</i>
1989 (park dedication)	<i>Prior public use</i>	

They are also listed out below:

- a. At the time of the taking (1970), it came under the protection of Article 97.
- b. Upon the execution of the BRA–DEM Agreement (1984), it came under the protection of Article 97 and prior public use.

- c. Upon the execution of the LWCF Agreement (1981), it came under the protection of Article 97 and prior public use.
- d. Upon dedication as Long Wharf Park (1989), it came under the protection of prior public use.

Any one of the six possibilities is enough for a finding that the BRA is acting ultra vires and that mandamus lies against it. The BRA and the DEP both argued to the Presiding Officer that “jurisdiction to interpret and apply Article 97 lies with the courts of the Commonwealth.” Record, p. 458. The public-trust requirements should be applied in the proceedings again before this Court.

#### **IV. The DEP improperly granted a Chapter 91 license to the BRA**

So much for the public-trust aspects of the case, which the SJC and this court have ruled are outside the Chapter 91 process. Plaintiffs now turn to the Chapter 91 aspects. Except for minor editing for flow, this section is mostly identical to the corresponding section in plaintiffs earlier brief accompanying their motion for judgment on the pleadings. The two substantive differences are as follows:

1. In view of the *Mahajan* court’s holdings regarding DEP’s relation to Article 97, plaintiffs no longer assert the argument that DEP is violating constitutional provisions (Article 97).
2. With the discovery of the correct LWCF boundary map, plaintiffs use that document to support the argument, made earlier, that DEP’s license is inconsistent with its regulations requiring DEP to take notice of relevant guidance from a state, local, or federal agency.

**A. The Chapter 91 license is based on numerous errors of law**

The Final Decision of the Commissioner of the Executive Office of Energy and Environmental Affairs (Record, p. 600), which adopted almost entirely the Recommended Final Decision of the Presiding Officer (Record, p. 563), were based on the several errors of law, discussed in turn in the following subsections.

**1. DEP failed to consider crucial guidance from other agencies**

310 CMR 9.53(3)(a) provides that

the Department shall take into account *any guidance forthcoming from a state, federal, regional, or municipal agency* as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archaeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation. (emphasis supplied)

Such guidance includes the correct federal LWCF map, showing that Long Wharf was designated for public outdoor recreation in perpetuity.

**2. The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from “areas of concentrated public activity”**

The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from “areas of concentrated public activity.” 310 CMR 9.51(2)(b).

From almost any location in the park on the end of Long Wharf, visitors now enjoy an approximately 270-degree panorama of Boston Harbor and nearby historic locations. Enclosing and filling the shade structure greatly reduces the zone where the public would enjoy 270-degree panoramas. And in the summer, the additional blockage from the outdoor seating and sun umbrellas shrink that zone to a few meager regions near the water. Record, p. 610–615 and also the photographs at 605–609 and 636–637.

The Defendants try to overcome this problem by stating that the project will enclose the shade structure using windowed walls, a claim adopted by the Presiding Officer in the Recommended Final Decision. Record, p. 586. However, windowed walls surrounding an

active restaurant significantly degrade the wide, expansive, see-through views currently available. (The windowed walls are shown on the plan at Record, p. 1297; on the obstructive effect of the windowed walls, as shown in the proponent's own renderings, see Mahajan rebuttal testimony at paras. 58–63, Record, p. 622–623.)

The Waterways regulations, at 310 CMR 9.51(2), provide 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.

The project, however, would create significant incompatibility in design. The regulations continue (310 CMR 9.51(2)(b)) by explaining what "aspects of built form" constitute such an incompatibility:

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[.]

On this issue, the Recommended Final Decision contains several materially incorrect statements leading to the incorrect conclusion of regulatory compliance. Record, p. 586. The first incorrect statement is that the "height, scale, and massing" of the building will not change. *Ibid.* In fact, the building will be enlarged, thereby changing its scale; and the building will be enclosed, thereby changing its massing. Record, p. 38. The second incorrect statement is that the project does not interfere with the HarborWalk "in any way." Record, p. 586. As discussed above, the views from the HarborWalk to the water through the structure will be significantly diminished.

Because the project's proposed nonwater-dependent structure would detrimentally affect views of the water from areas of concentrated public activity, including by greatly diminishing the panoramic vistas offered to the Long Wharf park visitor, on the Harborwalk and elsewhere, the project fails to meet the regulatory requirement of 310 CMR 9.51(2)(b).

The contrary finding by the Presiding Officer was an error of law.

**3. The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, does not comply with the Municipal Harbor Plan**

The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, fails to comply with the Municipal Harbor Plan, and therefore that the project violates the Waterways regulations.

Because the proposed project is located in an area covered by the City of Boston Municipal Harbor Plan, the Waterways regulations require that the project comply with the Municipal Harbor Plan. 310 CMR 9.34(2)(a). The regulations provide stringent standards before the Department can find compliance with the Municipal Harbor Plan, including that

the Department shall not find the requirement [of compliance with the Municipal Harbor Plan] 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 GL c. 91 or 310 CMR 9.00.

310 CMR 9.34(2)(a)(2). The Municipal Harbor Plan adopts the provisions of Boston Zoning Code (excluding only conditional uses and de-minimus variances). Secretary's Decision on the Municipal Harbor Plan, Section VI(b), p. 37 [this document is referred to by the Presiding Officer in the Recommended Final Decision (Record, p. 582)]. This project required 14 variances, many substantial, from the Boston Zoning Code and therefore from the Municipal Harbor Plan. Record, p. 659. The variances required include the following:

Change the legal occupancy to a restaurant. . .A takeout, allowing outdoor seating and patio use until midnight. Also, allow live entertainment.

Record, p. 659, City of Boston ZBA hearing notice. Here is a further subset of the section titles of the variances, indicating their substantive nature: `Chapter 91 requirements' (42A-5), `Open space requirements' (42A-6), `Waterfront yard area requirements' (42A-7), and `Environmental protection and safety standards' (42A-9). The Zoning Board of Ap-

peal written decision further describes that it granted variances ``from the dimensional, open space, environmental and design requirements cited for the project.'' Record, p. 129, 139.

Because the project needed substantive variances, the DEP is mandated by the regulations at 310 CMR 9.34(2)(a) to find that it does not comply with the Municipal Harbor Plan and therefore that it cannot go forward.

#### **4. The Presiding Officer failed to rule that the project improperly encroaches on water-dependent use zone**

The project fails because it does not meet the dimensional requirements of the regulations. Specifically, the regulations specify a water-dependent use zone in which ``new or expanded buildings for nonwater-dependent use'' shall not be located. 310 CMR 9.51(3)(c). This zone, shaded in gray on the map provided by the proposed lessee (Record, p. 36), includes a portion of the pavilion proposed for enclosure and expansion. Because the project is a nonwater-dependent use (Record, p. 49, Written Determination), it may not use the water-dependent use zone for new or expanded buildings.

The project, according to the Recommended Final Decision, circumvents this restriction via the Municipal Harbor Plan. The Municipal Harbor Plan indeed provides alternative setback distances, with which the project is argued to comply. However, as discussed in the Recommended Final Decision (Record, p. 585), the Municipal Harbor Plan distances are applicable only if the project ``promotes public use or other water-dependent activity in a clearly superior manner.'' The Presiding Officer incorrectly found that the project does so. Record, p. 582, 583, 585. A project that changes the use or control of LWCF-protected, prior-public-purpose, and Article-97 protected land without the mandated federal and legislative authorization, and amounts to the de-facto release of several conservation restrictions, cannot reasonably be said to promote public use in a clearly superior manner.

Failing the clearly superior manner test, the project cannot use the Municipal Harbor Plan's setback distances. Instead, it must meet the dimensional requirements of 310

CMR 9.51(3)(c)—which it does not. Therefore, the project fails to meet the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)(2). The contrary finding by the Presiding Officer is an error of law.

**5. The Presiding Officer failed to rule that the project does not serve a proper public purpose**

The regulatory requirement is that the project must serve “a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands.” 310 CMR 9.31(2)(b) After a lengthy discussion of the Transportation Improvement Project, the history and funding of the HarborWalk, and much else, the Presiding Officer found that the project does indeed serve a proper public purpose. Record, p. 594–598. These basic findings of the Presiding Officer are irrelevant to, and do not support, the ultimate finding of proper public purpose. First, the HarborWalk and Transportation Improvement Project already exist, are not part of this project, and therefore cannot be counted among its public benefits. Nominal improvements, such as adding binoculars to the existing amenities on the HarborWalk, do not change this basic fact.

The regulatory presumptions (based on 310 CMR 9.31(2)) that the project serves a proper public purpose may be overcome 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[.]

310 CMR 9.31(3)(b). Here, a clear showing has been made by a federal agency (the NPS) that the LWCF restrictions and requirements are necessary to “prevent overriding detriment to a public interest which said agency is responsible for protecting[.]” As the DEP’s name implies, and its regulations provide, the DEP is responsible for protecting the environment. 310 CMR 9.01(2). The DEP therefore must find that the project does not serve a proper public purpose. The Presiding Officer’s contrary finding is an error of law.

**B. The Final Decision and the Recommended Final Decision were a result of unlawful procedure**

The Final Decision (Record, p. 600) and the Recommended Final Decision (Record, p. 563) were a result of unlawful procedure and therefore should be reversed.

After the close of evidence in the case, Attorney Kenneth P. Fields, who represented the proposed restaurant operator in the proceedings, sent an ex-parte communication to the Presiding Officer. Record, p. 561. This communication was a flagrant and unlawful attempt to influence the Presiding Officer and the outcome of the proceedings, which is expressly prohibited by 310 CMR 1.03(7). The method of contact, coupled with its inaccurate factual content, was highly inappropriate and prejudicial. Attorney Fields' ex-parte communication, by virtue of its content, was an attempt to undermine the neutrality and independence of the Presiding Officer. The ex-parte communication also assumed an outcome favorable to the BRA and restaurant operator.

Of equal concern to the plaintiffs was the content of the OADR Case Administrator's response. Record, p. 561. Rather than informing Attorney Fields that his communication was inappropriate and would not be responded to, it instead gave him a corrected email address for the Chief Presiding Officer (Salvatore Giorlandino) and acceded to Mr. Fields' demands by establishing an immediate deadline for the issuance of a decision in a case involving several days of trial, multiple pleadings and memoranda, and a record exceeding over one thousand pages of documentary evidence (submitted at the insistence of the Defendant BRA over the objections of the plaintiffs). The response from the DEP's Office of Alternative Dispute Resolution gave the impression that Attorney Fields' assumption of a favorable outcome was warranted.

**V. Conclusion**

The Chapter 91 license is void for substantive errors of law: on views of the water, compliance with the Municipal Harbor Plan, the water-dependent use zone, and the proper-pub-



lic-purpose requirement. Furthermore, the BRA is violating federal laws and regulations designed to protect open space and parkland, as well as its covenant to record an easement on behalf of the Commonwealth for public open-space use at Long Wharf. Finally, Long Wharf is public-trust land many times over. When the public has rights in land, those rights cannot be abrogated except by an express act of the legislature. See *Arno v. Commonwealth*, 457 Mass. 434 (2010). The relief prayed for in the amended complaint should be granted.

Respectfully submitted,

Plaintiffs, *Pro Se*

April 17, 2013

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**Patricia Thiboutot**  
100 Fulton St  
Boston MA 02109

**Attachment A. LWCF application**



<b>FEDERAL ASSISTANCE</b>		2. APPLICANT'S APPLICATION	a. NUMBER	3. STATE APPLICATION IDENTIFIER	a. NUMBER 77030384
1. TYPE OF ACTION <input type="checkbox"/> PREAPPLICATION <input checked="" type="checkbox"/> APPLICATION <small>(Mark appropriate box)</small>		b. DATE Year month day 19 80 3 24		b. DATE ASSIGNED 19 77 3 3	
<input type="checkbox"/> NOTIFICATION OF INTENT (Opt.) <input type="checkbox"/> REPORT OF FEDERAL ACTION		Leave Blank			
4. LEGAL APPLICANT/RECIPIENT			5. FEDERAL EMPLOYER IDENTIFICATION NO. NA		
a. Applicant Name : Commonwealth of Massachusetts			6. PRO. GRAM (From Federal Catalog)		
b. Organization Unit : Executive Office of Environmental Aff			a. NUMBER   1 5   4 0   0   0		
c. Street/P.O. Box : 100 Cambridge Street			b. TITLE Outdoor Recreation - Acquisition, Development and Planning		
d. City : Boston a. County : Suffolk					
f. State : MA g. ZIP Code: 02202					
h. Contact Person (Name & telephone No.) : Joel A. Lerner (617)727-1552					
7. TITLE AND DESCRIPTION OF APPLICANT'S PROJECT <u>Long Wharf Reconstruction and Park</u>			8. TYPE OF APPLICANT/RECIPIENT A-State H-Community Action Agency B-Intergalata I-Higher Educational Institution C-Substate J-Indian Tribe District K-Other (Specify): D-County E-City F-School District G-Special Purpose District Enter appropriate letter <input type="checkbox"/> A		
10. AREA OF PROJECT IMPACT (Names of cities, counties, States, etc.)			9. TYPE OF ASSISTANCE A-Basic Grant D-Insurance B-Supplemental Grant E-Other Enter appropriate letter(s) <input type="checkbox"/> A C-Loan		
11. ESTIMATED NUMBER OF PERSONS BENEFITING			12. TYPE OF APPLICATION A-New C-Revision E-Augmentation B-Renewal D-Continuation Enter appropriate letter <input type="checkbox"/> A		
13. PROPOSED FUNDING		14. CONGRESSIONAL DISTRICTS OF:		15. TYPE OF CHANGE (For 12c or 12e) A-Increase Dollars F-Other (Specify): B-Decrease Dollars C-Increase Duration D-Decrease Duration E-Cancellation Enter appropriate letter(s) <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
a. FEDERAL \$ 825,000 .00	a. APPLICANT NA	b. PROJECT 08			
b. APPLICANT .00	16. PROJECT START DATE Year month day 19 80 5 1	17. PROJECT DURATION 40 Months			
c. STATE .00	18. ESTIMATED DATE TO BE SUBMITTED TO FEDERAL AGENCY 19 80 3 25				
d. LOCAL 926,000 .00					
e. OTHER .00					
f. TOTAL \$ 1,751,000 .00					
20. FEDERAL AGENCY TO RECEIVE REQUEST (Name, City, State, ZIP code) Heritage Conservation & Recreation Service, Philadelphia, PA19106			21. REMARKS ADDED <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
22. THE APPLICANT CERTIFIES THAT		b. If required by OMB Circular A-95 this application was submitted, pursuant to instructions therein, to appropriate clearinghouses and all responses are attached: (1) Executive Office of Community & Devel. <input type="checkbox"/> <input checked="" type="checkbox"/> (2) Metropolitan Area Planning Council <input type="checkbox"/> <input checked="" type="checkbox"/> (3) <input type="checkbox"/> <input checked="" type="checkbox"/>			
23. CERTIFYING REPRESENTATIVE	a. TYPED NAME AND TITLE John A. Bewick State Liaison Officer	b. SIGNATURE <i>William M. Hicks</i>	c. DATE SIGNED Year month day 19 80 3 25		
24. AGENCY NAME			25. APPLICATION RECEIVED 19		
26. ORGANIZATIONAL UNIT			27. ADMINISTRATIVE OFFICE		
29. ADDRESS			28. FEDERAL APPLICATION IDENTIFICATION		
31. ACTION TAKEN			30. FEDERAL GRANT IDENTIFICATION		
<input type="checkbox"/> a. AWARDED	32. FUNDING		34. STARTING DATE 19		
<input type="checkbox"/> b. REJECTED	a. FEDERAL \$ .00	33. ACTION DATE 19	35. ENDING DATE 19		
<input type="checkbox"/> c. RETURNED FOR AMENDMENT	b. APPLICANT .00	35. CONTACT FOR ADDITIONAL INFORMATION (Name and telephone number)			
<input type="checkbox"/> d. DEFERRED	c. STATE .00				
<input type="checkbox"/> e. WITHDRAWN	d. LOCAL .00				
	e. OTHER .00				
	f. TOTAL \$ .00				
36. FEDERAL AGENCY A-95 ACTION			37. REMARKS ADDED <input type="checkbox"/> Yes <input type="checkbox"/> No		
a. In taking above action, any comments received from clearinghouses were considered. If agency response is due under provisions of Part 1, OMB Circular A-95, it has been or is being made.			b. FEDERAL AGENCY A-95 OFFICIAL (Name and telephone no.)		

SECTION I - APPLICANT/RECIPIENT DATA

SECTION II - CERTIFICATION

SECTION III - FEDERAL AGENCY ACTION



## **Attachment B. 36 CFR § 59.3. Conversion requirements**

(a) Background and legal requirements. Section 6(f)(3) of the L&WCF Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments in L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value.

(b) Prerequisites for conversion approval. Requests from the project sponsor for permission to convert L&WCF assisted properties in whole or in part to other than public outdoor recreation uses must be submitted by the State Liaison Officer to the appropriate NPS Regional Director in writing. NPS will consider conversion requests if the following prerequisites have been met:

(1) All practical alternatives to the proposed conversion have been evaluated.

(2) The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.

(3) The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted. Dependent upon the situation and at the discretion of the Regional Director, the replacement property need not provide identical recreation experiences or be located at the same site, provided it is in a reasonably equivalent location. Generally, the replacement property should be administered by the same political jurisdiction as the converted property. NPS will consider State requests to change the project sponsor when it is determined that a different political jurisdiction can better carry out the objectives of the original project agreement. Equivalent usefulness and location will be determined based on the following criteria:

(i) Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The property being proposed for substitution must then be evaluated in a similar manner to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site. This criterion is applicable in the consideration of all conversion requests with the exception of those where wetlands are proposed as replacement property. Wetland areas and interests therein which have been identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion regardless of the nature of the property proposed for conversion.

(ii) Replacement property need not necessarily be directly adjacent to or close by the converted site. This policy provides the administrative flexibility to determine location recognizing that the property should meet existing public outdoor recreation needs. While generally this will involve the selection of a site serving the same community(ies) or area

as the converted site, there may be exceptions. For example, if property being converted is in an area undergoing major demographic change and the area has no existing or anticipated future need for outdoor recreation, then the project sponsor should seek to locate the substitute area in another location within the jurisdiction. Should a local project sponsor be unable to replace converted property, the State would be responsible, as the primary recipient of Federal assistance, for assuring compliance with these regulations and the substitution of replacement property.

(iii) The acquisition of one parcel of land may be used in satisfaction of several approved conversions.

(4) The property proposed for substitution meets the eligibility requirements for L&WCF assisted acquisition. The replacement property must constitute or be part of a viable recreation area. Unless each of the following additional conditions is met, land currently in public ownership, including that which is owned by another public agency, may not be used as replacement land for land acquired as part of an L&WCF project:

(i) The land was not acquired by the sponsor or selling agency for recreation.

(ii) The land has not been dedicated or managed for recreational purposes while in public ownership.

(iii) No Federal assistance was provided in the original acquisition unless the assistance was provided under a program expressly authorized to match or supplement L&WCF assistance.

(iv) Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land so acquired.

In the case of development projects for which the State match was not derived from the cost of the purchase or value of a donation of the land to be converted, but from the value of the development itself, public land which has not been dedicated or managed for recreation/conservation use may be used as replacement land even if this land is transferred from one public agency to another without cost.

(5) In the case of assisted sites which are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered. If such a conversion is approved, the unconverted area must remain recreationally viable or be replaced as well.

(6) All necessary coordination with other Federal agencies has been satisfactorily accomplished including, for example, compliance with section 4(f) of the Department of Transportation Act of 1966.

(7) The guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action. In cases where the proposed conversion arises from another Federal action, final review of the State's proposal shall not occur until the NPS Regional office is assured that all environmental review requirements related to that other action have been met.

(8) State intergovernmental clearinghouse review procedures have been adhered to if the proposed conversion and substitution constitute significant changes to the original Land and Water Conservation Fund project.



(9) The proposed conversion and substitution are in accord with the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and/or equivalent recreation plans.

(c) Amendments for conversion. All conversions require amendments to the original project agreements. Therefore, amendment requests should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out with NPS. Section 6(f)(3) project boundary maps shall be submitted with the amendment request to identify the changes to the original area caused by the proposed conversion and to establish a new project area pursuant to the substitution. Once the conversion has been approved, replacement property should be immediately acquired. Exceptions to this rule would occur only when it is not possible for replacement property to be identified prior to the State's request for a conversion. In such cases, an express commitment to satisfy section 6(f)(3) substitution requirements within a specified period, normally not to exceed one year following conversion approval, must be received from the State. This commitment will be in the form of an amendment to the grant agreement.

(d) Obsolete facilities. Recipients are not required to continue operation of a particular facility beyond its useful life. However, when a facility is declared obsolete, the site must nonetheless be maintained for public outdoor recreation following discontinuance of the assisted facility. Failure to so maintain is considered to be a conversion. Requests regarding changes from a L&WCF funded facility to another otherwise eligible facility at the same site that significantly contravene the original plans for the area must be made in writing to the Regional Director. NPS approval must be obtained prior to the occurrence of the change. NPS approval is not necessarily required, however, for each and every facility use change. Rather, a project area should be viewed in the context of overall use and should be monitored in this context. A change from a baseball field to a football field, for example, would not require NPS approval. A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would, however, require NPS review and approval. To assure that facility changes do not significantly contravene the original project agreement, NPS shall be notified by the State of all proposed changes in advance of their occurrence. A primary NPS consideration in the review of requests for changes in use will be the consistency of the proposal with the Statewide Comprehensive Outdoor Recreation Plan and/or equivalent recreation plans. Changes to other than public outdoor recreation use require NPS approval and the substitution of replacement land in accordance with section 6(f)(3) of the L&WCF Act and paragraphs (a) through (c) of this section.



## **Attachment C. Transcript of oral argument**



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Volume: I  
Pages: 1-36

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
Docket No. SJC-11134

\* \* \* \* \*

SANJOY MAHAJAN & others,  
Plaintiffs/Appellees

vs.

MASSACHUSETTS DEPARTMENT OF  
ENVIRONMENTAL PROTECTION & another,  
Defendants/Appellants

\* \* \* \* \*

TAPE TRANSCRIPTION

BEFORE: The Honorable Francis X. Spina  
The Honorable Robert J. Cordy  
The Honorable Margot Botsford  
The Honorable Ralph D. Gants

DATE: November 5, 2012

LOCATION: John Adams Courthouse  
One Pemberton Square  
Boston, Massachusetts 02108

SHEA COURT REPORTING SERVICES  
15 Court Square, Suite 920, Boston, Massachusetts 02108  
(617) 227-3097

1 Botsford, that if you had taken -- if you take  
2 land for the purpose of redevelopment and then  
3 convey it to a conservation commission or parks  
4 and recreation, then that land becomes protected  
5 under Article 97. Do you agree with that?

6 MS. CHICOINE: Yes, Your Honor,  
7 absolutely.

8 JUDGE GANTS: Okay. So if there were  
9 to be -- now here, of course, there was a -- it's  
10 declared to be a park. You put a plaque on it.  
11 Should that be viewed as the equivalent of a  
12 conveyance in terms of the intention of the BRA to  
13 have that land be parkland?

14 MS. CHICOINE: It is not a conveyance,  
15 and it is, though, a park. So a portion of Long  
16 Wharf is protected by Article 97, and that is the  
17 Compass Rose area that is adjacent to this project  
18 site.

19 JUDGE BOTSFORD: Is that --

20 JUDGE GANTS: And it's protected  
21 because --

22 JUDGE BOTSFORD: Yeah.

23 MS. CHICOINE: And the Compass Rose  
24 area is protected specifically in that scenario

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1 because of the acceptance of federal funds, under  
2 the Land and Water Conservation Fund, to create  
3 the Compass Rose. So that area is impressed with  
4 a special status, as is the Harbor Walk. And that  
5 is what the plaque, Long Wharf Park, refers to  
6 is --

7 JUDGE GANTS: So it's become -- is it  
8 within Article 97 or simply that you risk federal  
9 funding if you were to depart from what was a  
10 commitment to the federal government?

11 MS. CHICOINE: Well, there has not  
12 previously been really any statement of when urban  
13 renewal land and what uses become subject to  
14 Article 97, but it is classified that way by the  
15 Parks and Recreation Commission of the City of  
16 Boston that one protection, which does apply to  
17 one portion of Long Wharf, is Article 97.

18 JUDGE GANTS: Okay. So, now, BRA --  
19 so, land conveyed for urban development can become  
20 Article 97 land if, one, it's conveyed to the  
21 Parks and Recreation, or second, if you accept  
22 federal funding with the commitment that it remain  
23 parkland? Is that sort of another addendum to  
24 when it can become Article 97 land?

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1 MS. CHICOINE: I would say that it is,  
2 yes, a condition that would then alter its status  
3 as urban renewal land that can be modified.

4 JUDGE GANTS: Okay. Now, they will, I  
5 assume, come up and say there's a third addendum,  
6 which is when you put a plaque on it and say it is  
7 part of a park and you've declared it to be such.  
8 Why should there not be this third addendum?

9 MS. CHICOINE: Because the plaque does  
10 not define the boundaries of the area that is a  
11 park. And Long Wharf, you must recall, was built  
12 over three hundred years ago and has been the site  
13 of an array of commercial uses. There were  
14 deteriorating warehouses and fish-processing  
15 plants on Long Wharf until the BRA took  
16 stewardship of it.

17 And it was through the BRA's vision  
18 that it became a gem of the Boston waterfront,  
19 with pedestrian access and a bustling marina. And  
20 the ability to modify urban renewal land is what  
21 the BRA is charged with, under the urban renewal  
22 statute, to meet the city's evolving needs.

23 And I would say, just in closing, also  
24 that the Superior Court erred in this circumstance

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# Commonwealth of Massachusetts

Suffolk, S.S.

Superior Court Civil No. SUCV2010-0802-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*

## **Plaintiffs' memorandum of law in support of motion to amend complaint**

Plaintiffs submit the following memorandum in support of their motion to amend their complaint. In particular, plaintiffs explain here why the claims should be sustained.

### **I. The BRA's proposed restaurant and bar violates its covenant, purchased with \$9 million of state funds, to preserve Long Wharf as public open space**

On September 13, 1984, the BRA and the Commonwealth—acting through the Department of Environmental Management (DEM)<sup>1</sup>—executed an agreement regarding the redevelopment of Long Wharf. Agreement between the Commonwealth of Massachusetts Acting by and through the Department of Environmental Management and the Boston Redevelopment Authority Relative to Development and Management of Public Open Space on and Adjacent to Long Wharf, Boston (“BRA-DEM Agreement,” of plaintiffs’ Amended

<sup>1</sup> The legal successor to the DEM is the Department of Conservation and Recreation (DCR). G.L. c. 21 §1.



## **Attachment G. Agreement between DEM and BRA**



AGREEMENT

between

THE COMMONWEALTH OF MASSACHUSETTS

Acting by and through the Department of Environmental Management

and

THE BOSTON REDEVELOPMENT AUTHORITY

Relative to

DEVELOPMENT AND MANAGEMENT OF  
PUBLIC OPEN SPACE ON AND ADJACENT TO  
LONG WHARF, BOSTON

THIS AGREEMENT, entered into this *13<sup>th</sup>* day of *Sept.*, 1984, by and between the Commonwealth of Massachusetts (hereinafter referred to as the "Commonwealth"), acting by and through the Department of Environmental Management (hereinafter referred to as the "Department"), pursuant to and by virtue of the powers conferred by Massachusetts General Laws, Chapters 21 and 132A, as amended, and by Section 19A of Chapter 589 of the Acts of 1983, and the Boston Redevelopment Authority (hereinafter referred to as the "Authority"), pursuant to and by virtue of the powers conferred by Massachusetts General Laws, Chapter 121B, as amended, and Chapter 652 of the Acts of 1960.

WITNESSETH THAT:

WHEREAS, the Authority holds title to real property on and adjacent to Long Wharf in the City of Boston (hereinafter referred to as the "Wharf Site") as shown on the plan set forth in Exhibit A; and

WHEREAS, the Authority has prepared a Master Plan for the Wharf Site which calls for the development of a public open space area thereon to be used in a variety of ways, including a major entrance to the Boston Harbor Island State Park (hereinafter referred to as "Harbor Island Park"), an introduction to Boston for visitors sailing or motoring into the harbor and the focus of a highly functional, interconnected land and water transportation system; and

WHEREAS, certain elements of public open space adjacent to the Wharf Site have been already developed, including the Waterfront Park, and site improvements adjacent to the Marriot Hotel at Long Wharf and the New England Aquarium, Inc.; and

WHEREAS, certain private, commercial excursion and commuter boat operators presently tie-up at the Wharf Site and use space thereon for ticketing services under certain license agreements with the Authority, as identified in the schedule set forth in Exhibit B; and

WHEREAS, the Department is established as the "acquiring agency" relative to the development of the Harbor Islands Park, pursuant to the provisions of Chapter 742 of the Acts of 1972; and

WHEREAS, the Department has prepared a Master Plan for the Harbor Islands Park which states the necessity of incorporating a central, mainland access and orientation facility for the park on the Boston Waterfront, adjacent to public mass transportation and accommodating boat shuttles to the islands located within the park; and

WHEREAS, the Wharf Site uniquely satisfies the Department's requirements for such a mainland facility for the Harbor Islands Park; and

WHEREAS, the Department has been authorized by Section 19A of Chapter 589 of the Acts of 1983 to expend a sum not exceeding seven million (\$7,000,000.00) dollars for improvements and associated costs at the Wharf Site; and

WHEREAS, the Department intends to make available an additional two million (\$2,000,000.00) dollars from other sources for improvements and associated costs at the Wharf Site; and

WHEREAS, the Department, in Section 19A of Chapter 589 of the Acts of 1983, has been authorized to transfer funds to the Authority, for the purpose of improvements and associated costs at the Wharf Site, subject to this Agreement relative to the use of such transferred funds; and

WHEREAS, the Department has determined that certain actions relative to the project (as hereinafter defined in Article II, Paragraph A.1 of this Agreement) may appropriately be performed by the Authority on behalf of the Commonwealth.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the parties hereto mutually covenant and agree as follows.

## ARTICLE I

### Duration of Agreement

This Agreement shall be deemed to remain in full force and effect for a period of ninety-nine (99) years from and after the date of execution, which Agreement may be extended by the parties.

## ARTICLE II

### Definitions and Exhibits

A. Definition of Terms. The following terms shall have the following meanings in this Agreement:

1. "Project" - The acquisition, design, construction, management and maintenance of public improvements within the Wharf Site and consisting of land owned or to be acquired by the Authority, including without limitation, seawall, bulkhead, paving, walls, plant material, street furnishing, lighting, site utilities, outdoor exhibits, storm drainage, docks, and a Visitors Center (as hereinafter defined) building or buildings including, public information, wash rooms and exhibit facilities, and a combined ticket sales office for all commercial boat operators tying up at Long Wharf, and any associated activities as agreed mutually by the Department and the Authority;
2. "Public open space use" - Public uses associated with the waterfront site including, without limitation, improved boating and docking facilities for Harbor Island Park ferries, commuter boats, excursion boats, and transient boating space; passive recreation including walking, sitting, thinking, eating, viewing and the like; public spaces for ceremonies, public events and public entertainment; and related facilities;
3. "Visitors Center" - Structure or structures which may be built on a portion of the Wharf Site to provide for interpretive exhibits concerning the Harbor Island Park and the Commonwealth's system of state forests and parks, centralized ticketing and information facilities, exhibits concerning the Wharf Site and the Boston waterfront,



sheltered waiting spaces, public indoor facilities and services as deemed appropriate by mutual agreement between the Department and the Authority.

4. "Transferred funds" - Any funds transferred to the Authority by the Department in accordance with Section 19A of Chapter 589 of the Acts of 1983 and from other sources;
5. "Project Development Fund" - Any and all funds held by the Authority in accordance with the terms of Article VI of this Agreement;
6. "Annual Maintenance Fund" - Funds provided by the Authority and/or others for the maintenance of the Wharf Site on an annual basis.
7. "Wharf Site" - All land included within Areas 1A, 1B and 2 as depicted on the plan entitled "Wharf Site", set forth in Exhibit A; provided that the boundaries of said Areas may be revised in accordance with Article V, A.
8. "Allowable Costs" - Any costs for purposes set forth in Article IV, Paragraph B.1 and 2 and Article VI, Paragraph F of this Agreement, if and only if incurred in the manner set forth therein;
9. "Invoice" - Commonwealth of Massachusetts Standard Invoice (Form No. CD-12) or such other forms as determined by the Department;
10. "Contract" - Any binding agreement, including but not limited to designer services contracts, other consultant contracts, and construction contracts;

B. Exhibits. The below indicated exhibits are attached hereto and incorporated as a part hereof.

1. "Exhibit A" - Plan of the Wharf Site.
2. "Exhibit B" - Schedule of Wharf Site Licensees.
3. "Exhibit C" - Project Development Fund Budget.
4. "Exhibit D" - Schedule of Funds to be Transferred.
5. "Exhibit E" - Maintenance Activities.

### ARTICLE III

#### Responsibilities of the Department

The Department agrees:

- A. To transfer, subject to the provisions of this Agreement, funds totalling in aggregate an amount not exceeding nine million (\$9,000,000.00) dollars to the Authority, in such amounts, at such times and upon the conditions referred to in the schedule set forth in Exhibit D, following receipt of an invoice or invoices, relating to allowable costs for purposes set forth in Article IV, Paragraph B.1 and 2, and Article VI, Paragraph F;
- B. To assign by notice a Project Manager or his or her successor to provide project management, planning, design and engineering technical assistance, liaison and project review services to the Authority during the planning, design and construction phases of the Project;
- C. To provide for the programming, design, fabrication and installation of interpretive exhibits in the Visitors Center;
- D. To permit the Authority to participate in the review of designer and contract performance and to attend meetings and presentations relative to the design, fabrication and location of the interpretive exhibits;

- E. To accept, on behalf of the Commonwealth, a long-term leasehold interest in the Visitors Center and/or the land beneath and/or adjacent to it in accordance with an appropriate lease agreement, upon completion of the appropriate construction phase of the Project.
- F. To approve and accept, on behalf of the Commonwealth, a restriction granted by the Authority for public open space use on its title to the Wharf Site, as described in Exhibit A, by means of an easement duly recorded in the Suffolk Registry of Deeds.
- G. To provide, subject to the availability of funds, all staff necessary to operate and maintain the Visitors Center following acquisition of leasehold interest therein by the Department;
- H. To plan and implement, in conjunction with the Authority and others, an on-going program of exhibits, events and activities for the public on the Wharf Site following completion of the Project;
- I. To make space available in the Visitors Center for centralized ticket sales for public and private water-based transportation providers operating from the Wharf Site.

#### ARTICLE IV

##### Responsibilities of the Authority

The Authority agrees:

- A. To acquire by purchase, gift, contribution or otherwise, or through the exercise of its eminent domain power pursuant to applicable law that portion of the Wharf Site, as set forth in Exhibit A, which is not owned by the Authority as of the date of this Agreement.
- B. To enter into a contract or contracts for professional designer and related services for the preparation of schematic, preliminary and final

design plans and specifications and for designer services during construction for the following elements of the Project, at a minimum:

1. Site improvements at the Wharf Site, as described in Article II, Paragraph A.1; and
2. Visitors Center building, as described in Article II, Paragraph A.3.

In connection with the foregoing to secure all permits and/or approvals required by applicable law in order to construct the Site Improvements and the Visitors Center building.

- C. To comply with all appropriate laws of the Commonwealth and any other pertinent laws, rules, regulations and guidelines relative to the selection of professional designer services and contractors, if applicable;
- D. That the Department shall have the right of prior approval relative to the following contract-related matters for any contract to be paid in whole or in part from the Project Development Fund:
  1. Form and content of the contract;
  2. Process for selecting the contractors;
  3. List of finalists eligible to compete for the contract;
  4. Contractor, including sub-contractors;
  5. Award of the contract;
  6. Notice to proceed for any phase of the contract;
  7. Change or addition to any provision of the contract, and
  8. Change order, extra-work order and the like.

Provided, further, that the Authority agrees that the exercise of such right of prior approval in itself shall not be deemed to make the Department a party to any such contract, nor shall any change or modification which the Department may require the Authority to perform prior to granting any such approval be so deemed, unless the Department is a co-signer of such contract or other documents.

- E. To structure all contracts for professional designer services such that all payments for such services are contingent upon the Authority's receipt and approval of deliverable products, and, further, to permit designated agents of the Department to participate in the Authority's process of approving such products; provided however that alternative methods of structuring professional services in any contract may be used by the Authority if approved in advance by the Department;
- F. To require any professional design contractor to comply with all applicable federal, state and municipal, laws, ordinances, regulations, administrative rules, codes, and standards;
- G. To provide to the Department two (2) copies of all correspondence, minutes, memoranda, reports, plans, drawings and the like relative to the Project;
- H. To provide to the Department upon its request a report summarizing the status and current completion schedule of any contract funded in whole or in part from the Project Development Fund;
- I. To assign by notice an individual or his or her successor who shall serve as Project Administrator for all activities relative to the Project for the Authority;
- J. To establish, with the approval of the Department, prior to the final design phase of any portion of the Project, a "fixed limit of construction cost" which shall include a fifteen percent (15%) construction contingency, and which shall comprise the construction budget for such portion of the Project;
- K. To refrain from awarding any contract for the construction of any portion of the Project for which no qualified and responsive bid has been received by the Authority at a price equal to or less than eighty-five percent

(85%) of the specified "fixed limit of construction cost", unless or until the parties mutually agree to revise the overall Project Development Budget, set forth in Exhibit C, to increase the applicable portion thereof to cover the bid received, or the Authority has recommended to the Department a means of making sufficient funds available to pay the cost of the difference between said price and preferred bid and the Department has approved such recommendation; provided that in the event that either a Project Development Budget revision is not agreed to by the Department or the recommendation by the Authority is deemed unsatisfactory by the Department, the parties shall mutually agree as to the actions to be undertaken in order to construct that portion of the Project.

- L. To notify the Department in advance of all meetings, presentations and the like relative to the Project;
- M. To provide the Department staff members assigned to the Project with office space including at a minimum for each a desk and convenient use of a telephone;
- N. To provide clerical support and postage to Department staff in support of the Project;
- O. To provide for full-time construction inspection by a resident engineer or clerk of the works throughout the duration of any and all construction contracts awarded pursuant to this Agreement, who shall be responsible to the Project Administrator and who shall have demonstrated capabilities in the inspection of the type or types of construction to be performed under such contract and have a minimum of five (5) years of appropriate field experience;

- P. To transfer to the Department, on behalf of the Commonwealth, a long-term leasehold interest in the Visitors Center and/or the land beneath and/or adjacent to it as identified as Area 1A in Exhibit A, in accordance with a lease agreement, upon completion of the appropriate construction phase of the Project;
- Q. To execute and duly record in the Suffolk Registry of Deeds an easement, on behalf of the Commonwealth, placing a restriction for public open space use on the title of the Authority to the Wharf Site, as described in Exhibit A, for the duration of this Agreement, subject to the long-term lease of the Visitors Center and any other temporary or permanent easements of record at the time of such recording, upon completion of all construction phases of the Project. In addition to the foregoing and for the duration of this Agreement.
1. The Authority shall not grant any permanent easements affecting any portion of the Wharf Site after the execution of this Agreement without the prior approval of the Department.
  2. The Authority after the execution of this Agreement shall submit to the Department for approval all agreements with licensees and sub-licensees within Area 1B prior to execution; provided, however, if within thirty (30) calendar days of receipt by the Department such agreements are not approved or disapproved by notice to the Authority, they shall be deemed approved.
  3. The Authority after completion of the Project shall submit to the Department all agreements with licensees and sub-licensees for the use of any portion of the Wharf Site within Area 2 prior to execution for a determination by the Department whether such agreements are inconsistent with the public open space use restriction;

provided, however, if within thirty (30) calendar days of receipt by the Department a determination is not made by notice to the Authority, they shall be deemed by the Department to be consistent with such use.

- R. To maintain separate full accurate accounts, records and books relative to the Project in such manner and in such detail as the Department may prescribe consistent with generally accepted practices for accounting for capital improvements for a project funded by the Commonwealth;

#### ARTICLE V

##### Project Management and Maintenance

- A. The Authority and the Department agree that the boundary lines of Areas 1A, 1B and 2 within the Wharf Site, as set forth in Exhibit A, may be revised by agreement of the parties at any time and all references in this Agreement to said Areas shall mean the boundaries as revised.
- B. The Authority and the Department agree that during construction of the Project, when responsibility for the development thereof is referred to by either party to this Agreement in any notice, publication or on any sign, joint involvement shall be referenced.
- C. The Authority and the Department agree that within Area 1B, as outlined in the Plan for the Wharf Site set forth in Exhibit A, that priority assignment of the right to dock in such area, upon completion of the Project, shall be given by the Authority to operators of commuter boats and Harbor Island Park ferries, as licensees.
- D. The Authority agrees to fund or cause to be funded the annual maintenance of the Wharf Site, covering the Maintenance Activities and Budget as described in Exhibit E, on a continuous basis for the duration of this Agreement, and it shall guarantee to the Department an Annual



Maintenance Fund in the total amount of no less than One Hundred Thousand (\$100,000.00) Dollars, for every year after completion of the Project. For every successive year after the first, the Annual Maintenance Fund shall be adjusted according to changes in the United States Department of Labor "Consumer Price Index for all Urban Consumers". This Annual Maintenance Fund shall be provided by the Authority from various sources, such as grants, contributions and loans from appropriate public and private sources, revenues or other income from the licensees or sub-licensees within Area 1B and to the extent necessary licensee income from the remainder of the Wharf Site, and the related Budget may be revised by mutual agreement of the parties. Any monies from the beforementioned sources received by the Authority in excess of the guaranteed Annual Maintenance Fund shall be used by the Authority for the maintenance of the Downtown-Waterfront Park which is adjacent to the Wharf site to the extent required to assure an acceptable level of high quality maintenance. Notwithstanding the foregoing, the Department shall have the right to perform and fund at its own expense maintenance activities within the Wharf Site; provided that the Department shall not duplicate, interfere or conflict with the maintenance activities of the Authority and notice shall be provided in advance to the Authority.

*Law Office*

- E. The Authority and the Department agree to negotiate in good faith and use their collective best efforts to organize a non-profit entity prior to the construction of the Project which would assume the responsibility for the regular maintenance of the Wharf Site for the duration of this Agreement. Members of this non-profit entity may include but shall not be limited to property owners located on or adjacent to the Wharf Site, such as the Marriot Hotel at Long Wharf, New England Aquarium, Inc., and the New England Telephone. In no event shall the Authority be

released from its obligation to provide such maintenance, as set forth in Paragraph D above, unless both parties mutually agree that such non-profit entity has the capacity and the financial resources to assume the maintenance responsibility. The Authority shall include in the contract or contracts for professional designer services, referred to in Article IV, A, as an element of the scope of work the preparation of a study of the most appropriate entity to assume the maintenance responsibilities for the Wharf Site.

- F. The Authority and the Department agree that all areas of the Wharf Site, except as otherwise mutually agreed in writing, shall be open and accessible to the general public.

## ARTICLE VI

### Project Development Fund

#### A. Revenues and Accounts

The Authority agrees that it will establish and maintain an account as hereinafter provided, in such manner that:

1. The Project Development Fund account shall be separate and distinct from all accounts of the Authority relative to any other project, purpose or enterprise administered or engaged in by the Authority;
2. All transferred funds received or held by or for the account of the Authority for the purpose of or in connection with the development, execution or administration of the Project will at all times be segregated and held in a bank account separate and distinct from all other funds and bank accounts of the Authority; and
3. All interest on transferred funds pursuant to this Agreement which is accrued in the Project Development Fund account shall not be expended or withdrawn therefrom; provided, however that the

Department, following proper notification to the Authority that the Project has ended may withdraw an amount equal to all such accrued interest and shall transfer such amount to the State Treasurer for deposit in the General Fund of the Commonwealth, unless otherwise agreed by the parties.

All transferred funds in connection with the Project shall be deposited only in the Massachusetts Municipal Depository Trust, or other bank or banks approved by the Department and in accordance with an administration fund agreement or agreements between the Authority and such bank or banks, such agreements to be in a form as prescribed by the Department. All monies on deposit in such bank accounts shall be defined as "Project Development Fund".

B. Disbursements or Expenditures

The Authority agrees that upon receipt and its approval of all vouchers or requests for payment from professional designers or construction contractors covered by this Agreement, it shall submit the same to the Department, who in turn may disapprove by notice to the Authority said vouchers or requests for payment within fifteen (15) calendar days of receipt for non-compliance with the provisions of this Agreement or the particular design or construction contract, specifying the reasons for disapproval, otherwise they shall be deemed approved. In the event of any such disapproval, the Authority may resubmit the vouchers or requests for payment accompanied by such additional documentation to satisfy the concerns of the Department. The Authority shall have the right to make disbursements from the Project Development Fund in payment of vouchers or requests for payment which have not been disapproved within thirty (30) calendar days of their receipt by the

Authority, as required by applicable law. Any interest on payments due any professional designer or construction contractor resulting from any delay in the payment thereof shall be an allowable cost under this Agreement and shall be payable from the Project Development Fund.

C. Rights of the Commonwealth with Respect to Bank Accounts of the Authority

1. The Authority agrees that if either one or both of the following events occurs and is not corrected or remedied to the satisfaction of the Department, then the Department shall have the right to direct the bank with which the Authority maintains the Project Development Fund account(s) to refuse to permit any withdrawals from any such account(s) until further notice from the Department and after reasonable notice to the Authority if,
  - a. The Authority shall have defaulted in the observance or performance of any one or more of the terms, covenants or conditions of this Agreement; and
  - b. The Authority shall have made any misrepresentation of material fact in any of the certificates, reports, statements or other documents or data required to be submitted pursuant to this Agreement.
2. If any such event occurs, as described in Paragraph 1 above, and after reasonable notice to the Authority, the Department may itself withdraw funds from any such account at such times as may be necessary in order to make any disbursement or expenditure properly chargeable to the Project (including any payments due under any outstanding contract of the Authority entered into under this Agreement) and shall apply such funds in accordance with the

applicable provisions and requirements of this Agreement. The Authority will, at the time of opening any account with any bank, obtain an agreement with such bank that,

- a. Upon the receipt of any direction from the Department, and until such direction has been revoked by the Department, no further withdrawal by the Authority shall take place; and
- b. Such bank will agree with the Department that the bank will forthwith comply with such direction unless and until revoked by the Department; and
- c. Any withdrawal of funds signed by the Department shall be honored by such bank only if the Authority's right to make withdrawals from the account has been suspended. At any time after a direction following the default or misrepresentation of material fact, the Department may authorize the bank again to permit withdrawals by the Authority and whenever the Authority shall have made good all such default or corrected all such misrepresentations to the satisfaction of the Department, the Department will authorize the bank again to permit withdrawals by the Authority.

D. Financial Management Requirements - Accounts, Records, Books and Audits

The Authority agrees to manage all funds and activities which are subject to this Agreement so as to provide for:

1. Records that identify adequately the source and application of funds for Project Development Fund-supported activities. These records shall contain information pertaining to obligations, unobligated balances, assets, liabilities, outlays, and income; and

2. Effective control over and accountability for all funds, property, and other assets. The Authority shall adequately safeguard all such assets and shall assure that they are used solely for authorized purposes; and
3. Comparison of actual outlays with budgeted amounts for each activity. Also, relation of financial information with performance data; and
4. Procedures for determining reasonableness, allowability and allocability of costs in accordance with the provisions of this Agreement; and
5. Accounting records that are supported by source documentation; and
6. Examinations in the form of audits or internal audits. Such audits shall be made by qualified individuals who are sufficiently independent of those who authorize disbursements from the Project Development Fund, to produce unbiased opinions, conclusions, or judgements. These examinations are intended to ascertain the effectiveness of the financial management systems and internal procedures that have been established to meet the terms and conditions of the Agreement. They should be made in accordance with generally accepted auditing standards including the standards published by the U.S. General Accounting Office, "Standards for Audit of Governmental Organizations, Programs, Activities and Functions". Examinations will be conducted with reasonable frequency on a continuing basis or at scheduled intervals, but not less frequently than every year. The frequency of these examinations shall depend upon the nature, size, and the complexity of the activity; and
7. A systematic method to assure timely and appropriate resolution of audit findings and recommendations. The Authority further agrees that it will,

- a. Maintain separate full accurate accounts, records and books relative to the Project in such manner and in such detail as the Department may reasonably prescribe consistent with generally accepted practices for accounting for capital improvements in a government environment; and
- b. Grant to the Governor of the Commonwealth or his designee, the Secretary of Administration and Finance, or his designee, and the State Auditor, or his designee, the right at reasonable times and upon reasonable notice to examine the books, records and other compilations of data of the Authority which pertain to the performance of the provisions and requirements of this Agreement; and
- c. Permit the Department or any accountants or auditors approved by the Department to make periodic audits, excerpts or transcripts of the accounts and financial records of the Authority; and
- d. Furnish to the Department such financial, operating, statistical and other reports, records, statements, and documents on whatever basis as may be required by the Department; and
- e. Furnish copies of contracts of the Authority entered into under this Agreement and other documents in the possession of the Authority as the Department may from time to time require.

E. Project Development Fund Budget

The Project Development Budget, as set forth in Exhibit C, may be amended or revised by mutual agreement of the parties.

F. Allowable Costs Payable with Project Development Funds

The Authority agrees that only costs related solely to the Project and approved in advance by the Department shall be paid from the Project Development Fund, provided that all disbursements or expenditures shall be in compliance with the Project Development Budget, set forth in Exhibit C.

G. Schedule of Funds to be Transferred

The Authority and the Department agree that the Department shall transfer funds under this Agreement to the Authority in such amounts, at such times and upon the conditions as referred to in the schedule set forth in Exhibit D.

H. Certification Upon Disbursement or Expenditures of Project Development Funds

The Authority agrees that each disbursement or expenditure from the Project Development Fund shall constitute a certification that:

1. All of the representations and warranties of the Authority as set forth in this Agreement continue to be valid, true and in full force and effect;
2. The Authority is in compliance with all of its obligations specified in this Agreement which by their terms or interests are applicable at the time of such disbursement or expenditure;
3. Any conditions to the Authority's right to make such disbursements or expenditure shall have been satisfied in accordance with this Agreement; and
4. The funds being disbursed or expended are for allowable costs actually incurred by the Authority in accordance with this Agreement.



ARTICLE VII

Miscellaneous Provisions

A. The Authority and the Department agree that any matters related to the Project which are not covered by the provisions of this Agreement shall be addressed in joint consultation between the parties.

B. Notices. All notices, approvals, statements, reports or other documents required or permitted to be given under this Agreement shall be in writing, signed by a duly authorized representative of the party and shall be deemed delivered if mailed to the principal office of the party to which it is directed, which is as follows unless otherwise designed by written notice to the other party:

Department: Department of Environmental Management  
Commonwealth of Massachusetts  
100 Cambridge Street  
Boston, Massachusetts 02108  
Attention: Commissioner

Authority: Boston Redevelopment Authority  
One City Hall Square / 9th Floor  
Boston, Massachusetts 02201  
Attention: Director

C. Amendment. This Agreement may not be amended, revised, changed, waived or discharged orally, but only by a written amendment, signed by the parties, except that Exhibits A, C, D, and E may be revised by an agreement signed by the Commissioner of the Department and the Director of the Authority without an amendment.

D. Successors and Assigns. The provisions of this Agreement shall be binding upon and shall insure to the benefit of the successors and assigns of the public body or bodies succeeding to the interest of the Authority and the Department.

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed by its officers duly authorized as of the day first above written.

Approved as to Form:

James S. Bass  
9557 Attorney General  
Commonwealth of Massachusetts

Approved as to Form:

Arthur [Signature]  
Chief General Counsel  
Boston Redevelopment Authority

DEPARTMENT OF ENVIRONMENTAL  
MANAGEMENT

3 James [Signature]  
James Hutensohn, Commissioner

BOSTON REDEVELOPMENT AUTHORITY

By: [Signature]  
Robert J. Ryan, Director

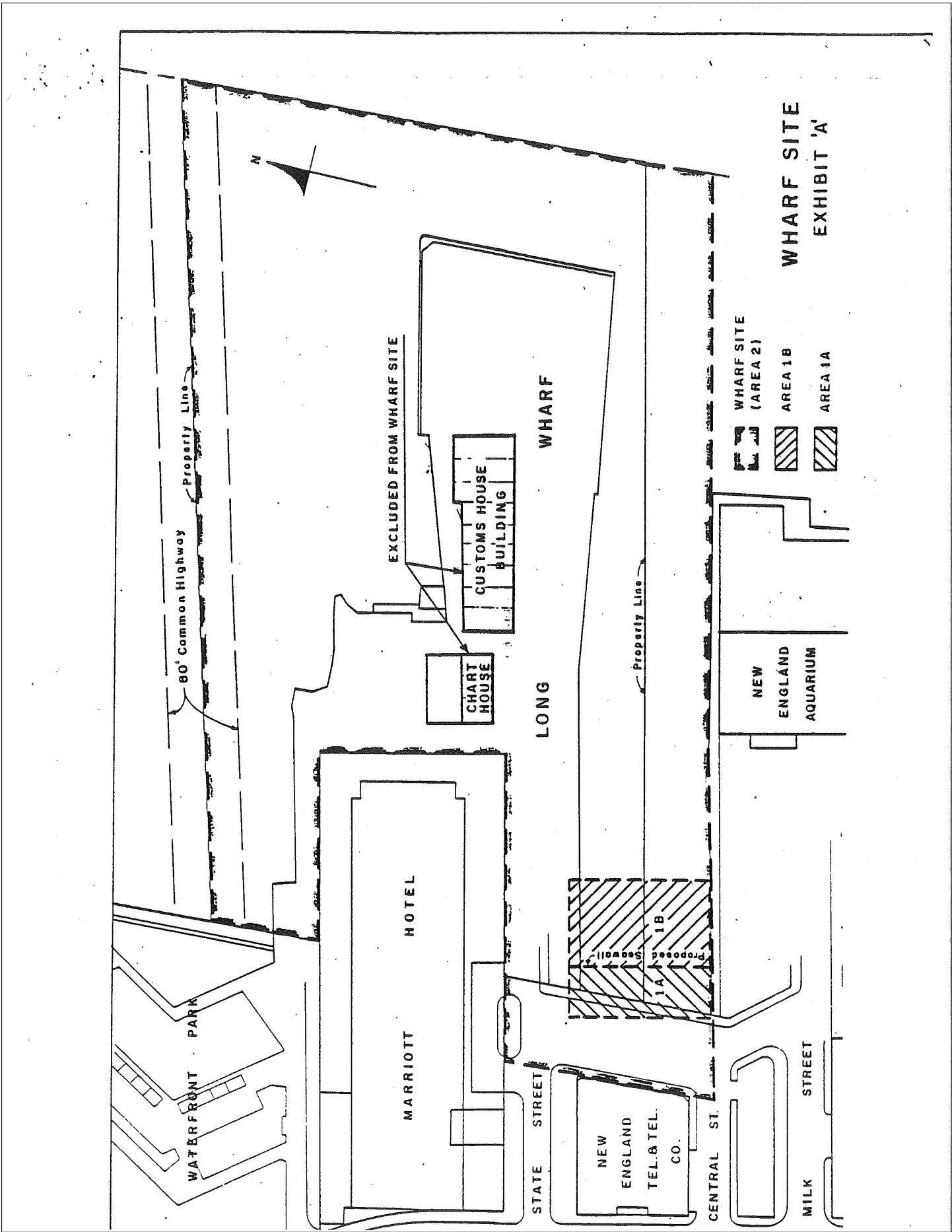
Agreement Approved:

CITY OF BOSTON

BY: Raymond L. Flynn  
Raymond L. Flynn, Mayor  
City of Boston

Approved as to Form:

[Signature]  
Corporation Counsel  
City of Boston



- WHARF SITE (AREA 2)
- AREA 1B
- AREA 1A

**WHARF SITE  
EXHIBIT 'A'**

EXHIBIT B

SCHEDULE OF WHARF LICENSEES

As of the date of the Agreement

Boston Harbor Cruises  
One Long Wharf  
Boston, MA 02110

Rick Nolan, Treas./Matt Hughes, Capt.

Bay State Spray  
20 Long Wharf  
Boston, MA 02110

Richard Nakashian, President

Lawrence Cannon  
67 Lovell Road  
Melrose, MA 02176

The Chart House, CHE - d/b/a  
7432 La Jolla Blvd.  
La Jolla, CA 92037

Custom House Block Trust C/O  
Wilder/Manley Associates, Inc.  
66 Long Wharf  
Boston, MA 02110

Al Manley

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EXHIBIT C

PROJECT DEVELOPMENT FUND BUDGET

I. PROJECT DESIGN AND ADMINISTRATION (including special consultants and environmental fees)	\$1,152,586
II. PROJECT CONSTRUCTION (including resident engineer and contingencies)	\$7,847,414

EXHIBIT D  
SCHEDULE OF FUNDS TO BE TRANSFERRED

I. PROJECT DESIGN & ADMINISTRATION

Funds to be transferred upon submission and approval of invoices in accordance with this Agreement.

\$1,152,586

II. PROJECT CONSTRUCTION

Transfer of funds contingent upon:

- A. Agreement by the Authority and the Department that Article V, E has been complied with;
- B. Agreement by the Authority and the Department of the boundary lines of Areas 1A, 1B, and 2 within the Wharf Site; and
- C. Evidence of Authority ownership of areas within Wharf Site scheduled for construction activities.

\$7,847,414

EXHIBIT E

MAINTENANCE ACTIVITIES

The Authority's responsibility to perform maintenance activities in excess of those provided by departments or agencies of the City of Boston and abutters to the Wharf Site shall include but may not be limited to the following:

- A. Provide all equipment (including vehicles and other motorized equipment), material, and supplies necessary for the proper maintenance of the Wharf Site, and to replace said equipment according to a schedule reflecting normal wear and tear;
- B. Assign qualified maintenance personnel to perform the tasks, duties, and responsibilities enumerated in Paragraph C below;
- C. Maintain the Wharf Site in accordance with the following minimum requirements for grounds maintenance:

Daily Maintenance Tasks

- o Empty all litter receptacles.
- o Pick up all litter and debris from walks, grass, plazas, etc.
- o Sweep all plazas and sitting areas.

Maintenance Tasks - As Required

- o Repair or replace any damaged or worn items, structures, surfaces, etc., such as litter receptacles, park benches, light poles, etc.;
- o Repair or remove any damage caused by vandalism;
- o Sweep sand and dirt from all hard surface areas such as walking paths, vehicle roads, etc.;
- o Clean litter receptacles;
- o Remove sand and debris from catch basins, culverts, drainage ditches, etc.;

- o Prune dead branches, limbs, from trees and shrubs. Cut back deciduous shrubs and hedges as required;
- o Keep all walks and roads clear of limbs, branches and vegetation that may obstruct safe passage;
- o Repair damaged pavement surfaces;
- o Reset or replace loose or damaged curb;
- o Water grass and plant materials;
- o Maintain tree wells and shrub beds;
- o Fertilize, aerate, and lime all plant areas at appropriate times of the year;
- o Replacing bulbs;
- o Repair and/or updating of signage;
- o Snow removal;
- o Steam cleaning brick and granite paving.

D. Inspect the Wharf Site in accordance with the following minimum schedule:

Daily and or Weekly Inspection

- o Grounds, structures, hard surface for cleanliness, damage, grafitti;
- o Grounds for erosion, turf damage due to disease or pests, and, trees and shrubs for broken limbs or branches and disease and pest damage;
- o Catch basins, culverts, and drainage ditches for proper functioning;
- o Signs, signposts, fences, gates for damage or wear;
- o Water fountains, irrigation systems, light poles for proper operation.

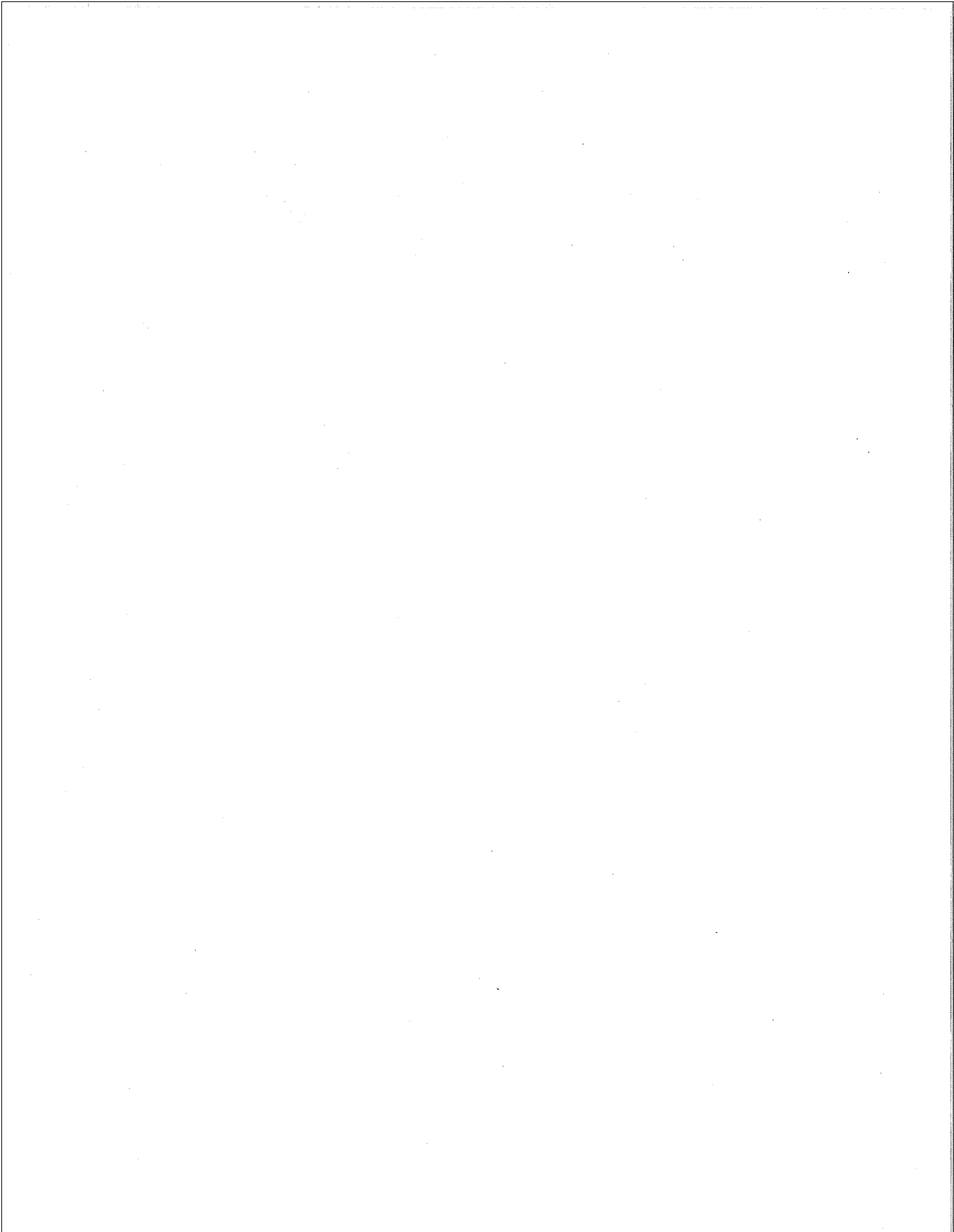
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The Authority agrees to provide the Department annually with the following:

A Management Plan which shall include a brief outline of the following items:

- o A resource protection plan (law enforcement, fire protection, insect pests, public rules and regulations, etc.).
- o A listing of the equipment and supplies the Authority will use for maintenance of the Wharf Site.
- o The number and job titles of personnel assigned to the Wharf Site on a full-time and/or part-time basis.
- o A list of major repairs and alterations completed during the preceding year.
- o The anticipated expenses for the maintenance of the Wharf Site.

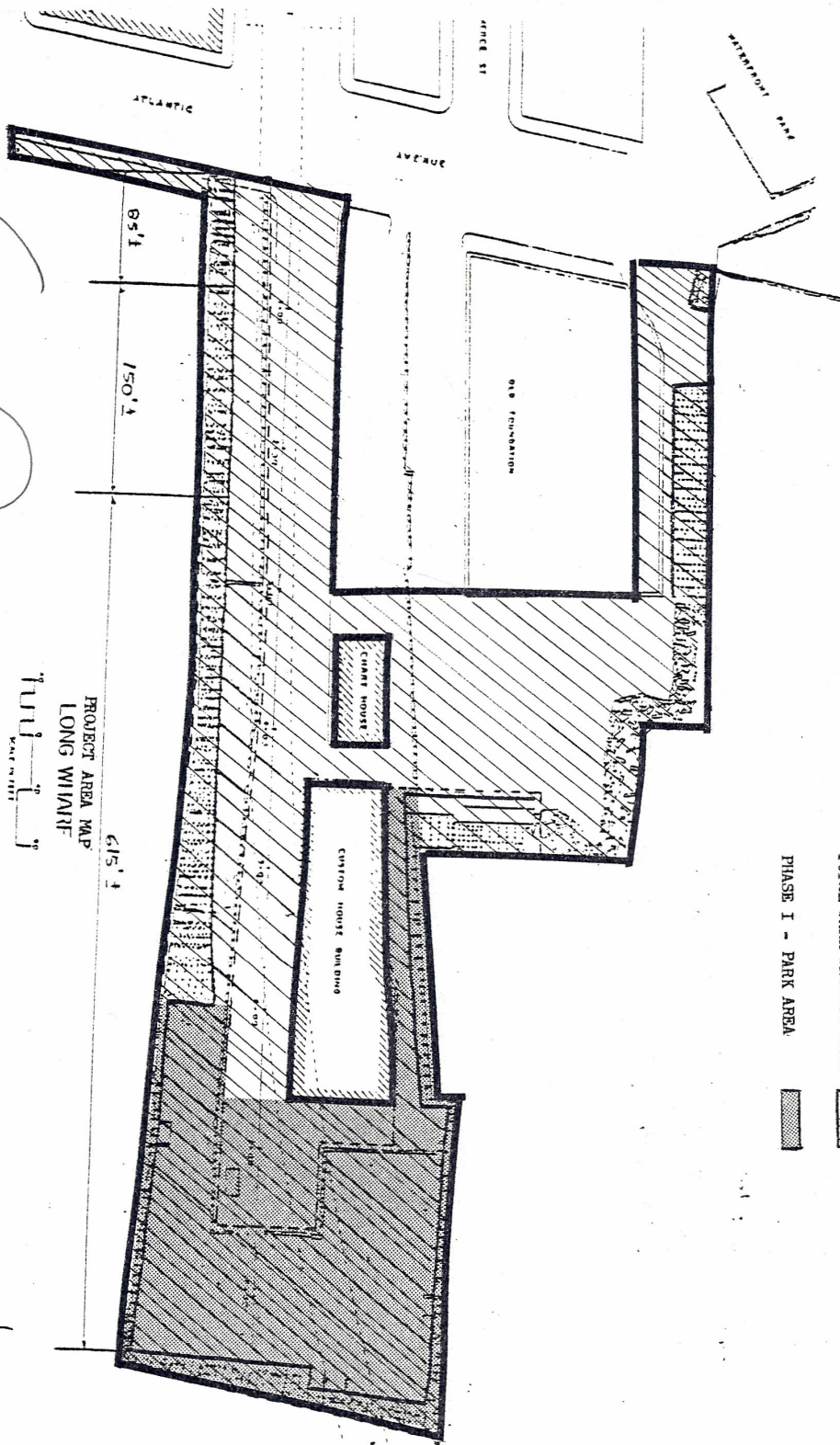


## **Attachment H. LWCF 6(f) boundary map**



TOTAL PARK PROJECT AREA

PHASE I - PARK AREA



PROJECT AREA MAP  
LONG WINDY  
SCALE IN FEET

*65*

*65 boundary map  
3/27/00*



## Attachment I. Transmittal email from NPS

From: Howard, Jack <jack\_howard@nps.gov>  
Subject: Re: LWCF Project #25-00295, Long Wharf  
To: Sanjoy Mahajan <sanjoy@olin.edu>  
Cc: melissa.cryan@state.ma.us  
Date: Thu, 20 Dec 2012 07:43:15 -0500

Dear Mr. Mahajan,

As requested, attached for your review is the 6(f) boundary map for LWCF project #25-00295, Long Wharf. The darken [sic] shaded area for the Phase 1 proposed development is the actual 6(f) boundary area for Long Wharf. The State Division of Conservation Services, the agency that administers the LWCF Program on behalf of the National Park Service in the Commonwealth of Massachusetts has been monitoring the situation at Long Wharf and communicating with their office any concerns you have on this matter would be the appropriate course of action. Ms. Melissa Cryan would be the contact person and her telephone number is (617) 626-1171 and the e-mail address is <Melissa.Cryan@state.ma.us>.

Jack W. Howard, Manager  
State and Local Assistance Programs  
National Park Service

