

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' Reply to Defendants' Opposition to Motion to Amend Complaint

Now come the plaintiffs, with leave of the court, to reply to the defendants' separate oppositions to Plaintiffs' Motion to Amend Complaint.

I. Procedural background

In Superior Court, plaintiffs won a judgment that Long Wharf is protected as parkland by Article 97 of the Amendments to the Constitution of the Commonwealth ("Article 97"). As part of the judgment, DEP's Chapter 91 license to the BRA was canceled. On direct appellate review, the SJC ruled that Long Wharf is not protected by Article 97, remanding the Chapter 91 license appeal to the Superior Court. The BRA moved to dismiss claiming that plaintiffs lack standing to maintain the Chapter 91 appeal.

Plaintiffs served an opposition to the BRA's motion, arguing standing to appeal the Chapter 91 license, and standing to maintain their other proposed amended claims. For simultaneous with serving their opposition, plaintiffs moved to amend the complaint based on newly discovered documents from state and federal archives, previously unavailable to the plaintiffs and the SJC. These documents show that Long Wharf is protected as public

open space by legal agreements, by federal law, by Article 97, and by the doctrine of prior public use.

The BRA opposes the motion to amend by arguing that plaintiffs do not have standing to enforce said agreements, that the documents are immaterial, and that they have been superseded. DEP opposes the motion to amend by arguing that the documents were submitted too late and would prejudice DEP. To these DEP and BRA arguments plaintiffs reply here.

II. The BRA misunderstands the basis for relief regarding the agreements

The BRA argues that plaintiffs' motion is futile, because plaintiffs, as members of the general public, do not have standing to enforce either the Land and Water Conservation Fund (LWCF) Project Agreement¹ or the BRA-DEM (Department of Environmental Management) agreement,² because plaintiffs are merely "incidental beneficiaries." BRA's Reply to Plaintiffs' Opposition to Renewed Motion to Dismiss ("BRA's Reply"), pp. 1-2. The argument of futility is futile for two reasons.

First, the public are intended, not incidental, beneficiaries. The BRA-DEM Agreement provides for a restriction (an easement) at Long Wharf for "*public* open space use" (emphasis supplied). BRA-DEM Agreement, p. 11 at paragraph Q. The LWCF Agreement requires that the land be kept in "*public* outdoor recreation in perpetuity" (emphasis supplied). LWCF Project Agreement General Provisions, II.B, in BRA's Supplemental Filing to Dismiss Plaintiff's Article 97 Claims, Tab 5, p. 8 (a large black binder supplied to this Court in the prior proceedings). The public, under either agreement, qualifies as an intended beneficiary under the standard from Restatement (Second) of Contracts §302 (1981), adopted by the SJC, that "the promisee [here, the Commonwealth] intends to give the beneficiary [here, the public] the benefit of the promised performance." *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 195 (1982). On the same page, the SJC further explained:

[W]e recognize again the principle of law that, "when one person, for a valuable

¹ Executed May 15, 1981 and included in Attachment A of the BRA's Reply to Plaintiffs' Opposition to Renewed Motion to Dismiss ("BRA's Reply").

² Included in Attachment F of plaintiffs' Amended Complaint.

consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.” *Brewer v. Dyer*, 7 Cush. 337, 340 (1851).

Second, if despite the above reasoning, the public cannot enforce the contract through the equitable remedy of specific performance, then a clear public duty is being disregarded and mandamus is the appropriate remedy. See Plaintiffs’ Opposition to Defendant BRA’s Renewed Motion to Dismiss (“Plaintiffs’ Opposition”), pp. 6–8. In short, plaintiffs have standing to enforce the agreements either as intended beneficiaries or by mandamus.

Finally, the enforcement of the agreements is only one of many routes to a finding that this project is illegal. For the agreements themselves create conservation restrictions that each rise to the level of an easement, and thus create both Article 97 and prior-public-use restrictions. See Plaintiffs’ Memorandum of Law in Support of Motion to Amend Complaint (“Plaintiffs’ Memorandum”), pp. 6–8. These public-trust restrictions can be enforced by mandamus.

III. The BRA’s May 1985 “contract documents” are irrelevant

The BRA claims that it is complying with the LWCF Act by keeping its project outside the LWCF-protected park area. BRA’s Opposition to Plaintiffs’ Motion to Amend Complaint (“BRA’s Opposition”), p. 3. In support, it offers May 1985 “Contract Documents,”³ whose irrelevance will be demonstrated below.

However, because the LWCF map has been a contested issue starting in 2009, a quick review may assist the court in tracking the evidentiary twists and turns. During the OADR proceedings, plaintiffs discovered, from the City of Boston Parks and Open Space Plan 2002–2006, that Long Wharf was protected by the LWCF Act. Administrative Record (“Record”), pp. 831 (listing LWCF protection for Long Wharf), 847 (legend explaining meaning of LWCF). Plaintiffs moved for summary judgment based on the LWCF requirement that the area be kept in public outdoor recreation in perpetuity.⁴ Record, p. 431.

³ Included in Attachment A of the BRA’s Reply.

⁴ The Presiding Officer did not respond to the motion for nine months, and then only as part of her Recommended Final Decision. Record, p. 568 (note 4).

Plaintiffs also alerted the state Division of Conservation Services (DCS), who administer the state's responsibilities under the LWCF Act. The state official, Melissa Cryan, produced an undated map showing an LWCF-protected park area. Record, pp. 1292–1294. Even based on this incorrect map (whose incorrectness plaintiffs will demonstrate below), the BRA's proposed project was encroaching on the LWCF-protected park area. *Ibid.* Thus, the BRA agreed to remove its outdoor seating from the LWCF-protected park area. *Ibid.* These discussions resulted in the March 4, 2009 correspondence between the BRA and Melissa Cryan, itemized on p. 3 of the BRA's Opposition (and included in the record at p. 1294).

Then, at oral argument in the SJC, Justice Gants asked about the LWCF funding and its consequences for Article 97. Transcript of Oral Argument ("Transcript", Attachment C of Plaintiffs' Memorandum), p. 10; see Plaintiffs' Memorandum, p. 6. The BRA conceded that LWCF funding would make an area protected by Article 97, but contended that the LWCF area was a small part of the wharf, one on which the project did not sit. Transcript, p. 10. Given this concession, which is also in accord with the state's policy on LWCF-protected parkland, it is not surprising that the BRA argues so strenuously for the smaller LWCF-protected park area.

However, a former National Park Service (NPS) official, who had worked on the Long Wharf project from the federal side, contacted the plaintiffs. He remembers that the LWCF area contained the shade structure that is the BRA's proposed restaurant site. Affidavit of Edward Rizzotto (Attachment A), paragraphs 3–5. He also gave plaintiff Mahajan the contact information for Jack Howard, the federal official in the regional office of the NPS who administers the LWCF program. Mr. Howard provided the correct LWCF map from the federal files, which he sent to Melissa Cryan and to plaintiff Mahajan. Affidavit of Sanjoy Mahajan (Attachment B), paragraph 4 and Attachment C of the affidavit.

Mr. Howard also provided the same map to Robert McIntosh, the regional director of the Heritage Conservation and Recreation Service (HCRS) in the US Department of the Interior from January 1979 to May 1981, when the BRA applied for and was awarded LWCF funds (the HCRS administered the program at the time). Affidavit of Robert W. McIntosh (Attachment C), paragraphs 3, 4, 6, 14, and 15. The map is drawn according to the determination at the time, made by Mr. McIntosh and his staff, that LWCF funds would be used

only for the areas “to be dedicated to public open space.” *Id.*, paragraph 11.

This map is the one that the BRA incorrectly claims is superseded by the May 1985 Contract Documents. The BRA’s claim is disproved by many pieces of evidence, all leading to the same conclusion: that the map from the NPS, showing the entire end of the wharf as LWCF-protected parkland, is the correct map. Therefore, the entire end of the wharf is protected by federal law, by legal agreement, and by both public-trust doctrines (Article 97 and prior public purpose).

A. The May 1985 Contract Documents are not a legal agreement

The May 1985 Contract Documents, and the BRA’s statements about them, create the misimpression that the LWCF and the BRA amended the LWCF agreement in 1985; for example, the BRA states that the 1980 map (the one from the NPS) is “unenforceable because it was superseded by the 1985 contract documents between the BRA and the LWCF. . . .” BRA’s Reply, p. 4. However, the LWCF contracts are called agreements (“Project Agreements”), as is the 1983 BRA–DEM Agreement. These legal agreements bear parties’ signatures. In contrast, this May 1985 “Contract” has no signatures.

Furthermore, the record contains no 1985 LWCF agreement or amendment. Although the BRA supplied one amendment, it was executed in 1986. Amendment to Project Agreement, executed November 24, 1986 (Attachment A of BRA’s Reply). It deleted perimeter wood decking and walkways from the project scope, and says, “In all other respects the agreement of which this is an amendment, *and the plans* and specifications relevant thereto, shall remain in full force and effect” (emphasis supplied). *Ibid.*

B. The May 1985 Contract Documents are for a different project (“Phase 1A”), not for the NPS project (“Phase 1”)

The LWCF map from the federal government is marked “Phase 1 – Park area”; the corresponding dark shaded area is the LWCF-protected area. Email from Jack Howard (NPS) to Sanjoy Mahajan (included as Attachment C of Mahajan Affidavit, which is itself Attachment B of this document). These phases are distinct. A document entitled “Long Wharf” (hereafter, “Long Wharf Phasing”), found by plaintiff Mahajan in the state LWCF files, details the phases. Mahajan Affidavit, paragraph 3 and, for the document itself, Attachment A of the affidavit.

1. Phase 1 is funded by the NPS (and matched by the state). Long Wharf phasing, p. 1. Thus, as marked on the LWCF map, phase 1 is the LWCF project.
2. Phase 1A is a DEM project for \$800,000. *Ibid.*
3. Phase 2 is the \$9 million BRA–DEM agreement. *Id.*, p. 2.

Consistent with this phasing, right under “City of Boston, Massachusetts,” the May 1985 Contract Documents state in large type, “In cooperation with DEM.” Thus, the map on the page following the May 1985 cover page, which map the BRA claims reflects the scope of the LWCF project, actually reflects a separate project, one with the DEM. In the lower right corner, “Phase 1A” is also stated again, as is “Phase 1-A existing conditions per Phase 1 contract.” The notation “Phase-1 contract” is easy to explain. The LWCF, which funded Phase 1, funded the BRA to do a “planning and design study.” LWCF Project Agreement, p. 1. Thus, LWCF funds paid for the engineering work to draw the Phase 1-A (or 1A) “existing conditions plan.”

C. The BRA implausibly claims that the project shrank because it received less funding than anticipated

The BRA, to explain why the LWCF area allegedly shrank, states that it received less money than it anticipated from the LWCF: “When the BRA received less funding from BRA [sic] than initially anticipated, the scope of the project covered by LWCF changed, as reflected by the 1985 contract documents. . . .” BRA’s Reply, p. 4. This factual claim, supported neither by affidavit nor apparent on the record, is belied by the following evidence.

First, the BRA applied for, and was awarded \$825,000 from the LWCF. Application for LWCF funding, at line 13a (Attachment A of Plaintiffs’ Memorandum); LWCF Project Agreement, p. 1. The BRA’s LWCF billing statements, which were also in the LWCF files, show that the BRA billed for \$795,307.51. Mahajan Affidavit, paragraph 3 and (for the document itself) Attachment B of the affidavit. A 4-percent alleged shortfall is hardly a sufficient reduction to justify the cutting the project scope by a factor of 3. Furthermore, the BRA, on the billing statement, marked the project “100% complete.” *Ibid.*

Second, Edward Rizzotto, the former NPS official who worked in the Philadelphia NPS office during the 1980s, who was for a time the LWCF liaison for Massachusetts, and who remembers the Long Wharf project well, never saw any request from the state or BRA

to reduce the LWCF-protected park area. Affidavit of Edward Rizzotto, paragraphs 3, 4, and 6. Such a request would have been “absurd just based on the extensive federal investment in the project.” *Id.*, paragraph 6.

D. Summary of the BRA’s May 1985 Contract Documents

The May 1985 Contract Documents offered by the BRA are project documents, but for a different project than the LWCF project, and thus are irrelevant to determining the LWCF-protected park area. That area is the area shown on the map provided by the federal government, and it includes the entire seaward end of Long Wharf, including the proposed restaurant site.

IV. The BRA failed to disclose the latest, supervening, email from the state LWCF coordinator

The BRA cites 2009 correspondence with the LWCF stateside grant manager, Melissa Cryan, claiming that it is following the LWCF requirements. BRA’s Opposition, p. 3; BRA’s Reply, pp. 3-4. However, Melissa Cryan, after receiving the correct map from the federal government (in December 2012), sent the BRA a further email—not disclosed by the BRA—stating that the BRA’s proposed project is within the park boundary, that the park boundary is protected by Article 97, and that the BRA needs federal approval for the restaurant:

I’ve attached the park boundary map of Long Wharf. As you’re aware, all land that is within the park boundary is protected under Article 97 of Massachusetts’ constitution, as well as Section 6(f)(3) of the Land and Water Conservation Fund Act. While a restaurant may potentially be constructed within a park boundary, it must be approved by the National Park Service (see page 8-12 of the LWCF Manual at <http://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf> for more information).

Email dated February 4, 2013 from Melissa Cryan to Richard McGuinness of the BRA (Mahajan Affidavit, paragraph 5 and, for the email itself, Attachment D of the affidavit).

The crucial point is that the proposed restaurant is within the LWCF-protected park boundary.⁵ Thus, rather than the 1980 NPS map’s being superseded, the BRA’s position

⁵ The LWCF Manual lists, as an example of a use that would not normally be approved,

is the one superseded (by Melissa Cryan's 2013 email).

The BRA, which received this official notification on February 4, 2013, while the SJC was deliberating its decision *Mahajan v. DEP and BRA* (decided March 15, 2013), should have disclosed it to the SJC. It should also have disclosed this notification to this Court.⁶

V. The BRA's claims about the BRA-DEM agreement are irrelevant or incorrect

The second crucial document is the BRA-DEM agreement. The BRA claims that "it was not relevant to the Chapter 91 license proceedings..." BRA Reply, p. 3. However, on the Environmental Notification Form (ENF), submitted with the Chapter 91 license application, the BRA was asked whether "any part of the project site currently subject to a conservation restriction..." ENF at question II.E, Record, p. 825. Although the BRA-DEM contract created a conservation restriction, the BRA incorrectly answered "No" and did not disclose the agreement (nor did it disclose the equally relevant LWCF Agreement, which also created a conservation restriction).

The BRA further claims that "[t]he original agreement set forth obligations that would arise only if the now-defunct DEM paid BRA all the funds under the terms of the agreement." BRA's Opposition, p. 2 (note 2). This factual statement is, although relevant, neither supported by affidavit nor apparent on the record. Not least, it lacks any supporting citation to the original agreement. Nor could it, for the original agreement contains no such provision. Rather, it sets forth obligations of the DEM (BRA-DEM Agreement, Article III, pp. 6-7) and obligations of the BRA (*Id.*, Article IV, pp. 7-12), with no specification that the BRA's obligations are conditional upon DEM's funding.⁷

"restaurants catering primarily to the general public[.]" LWCF Manual, p. 8-13.

⁶ Plaintiffs assume that the BRA neglected to disclose this letter through an internal communication mishap; for to do so deliberately would fall afoul of Rule 3.3 of Professional Conduct. Now that the incorrectness of the earlier LWCF map has been pointed out by the federal government, and the state LWCF coordinator (Melissa Cryan) has provided the BRA with the correct map, the BRA should comply with Rule 3.3 by taking remedial measures to correct any misimpression created before the SJC and Superior Court.

⁷ It does specify, however, that the DEM may freeze the BRA's bank account for the project if the BRA fails to perform any of the terms of the agreement. BRA-DEM Agreement, paragraph IV.C.1, p. 16.

The BRA further argues that it did not need to record the easement because “the parties amended the DEM Agreement five times, and DEM ultimately failed to transfer all the required funds to the BRA.” BRA’s Opposition, p. 2 (note 2). This statement is also neither supported by affidavit nor apparent on the record, because the BRA has not disclosed, even now, the terms of these amendments. Nor is it relevant, because DEM’s failure, simply as alleged by the BRA, does not license BRA self-help. Finally, even if the agreement was amended, the amendments cannot validly remove the BRA’s obligation to record an easement, without first obtaining the two-thirds vote of the Legislature to dispose of lands or easements acquired for natural-resources purposes. Article 97; see Plaintiffs’ Memorandum, pp. 5–8 (on agreements creating public-trust protections). The Court should disregard this BRA argument, as unsupported, irrelevant, and inaccurate, and simply order it to perform its duty to the public to record the easement.

VI. The DEP’s arguments about timeliness and futility are incorrect

DEP argues for a narrow interpretation of M.R.Civ.P. Rule 15(a) and cites *Mathis vs. Mass. Elec. Co.*, 409 Mass. 256, 264 (1991) (affirming a denial to amend). However, *Mathis* supports plaintiffs’ position: “[L]eave should be granted unless there are good reasons for denying the motion. *Goulet v. Whittin Mach. Works, Inc.*, 399 Mass. 547, 549 (1987).” As the *Goulet* court pointed out, “this court adopted the Massachusetts Rules of Civil Procedure with their liberal policy toward allowing amendments to pleadings.” *Goulet* at 554.

DEP further argues that the motion to amend should be denied due to “unexcused delay” and “futility.” Neither reason is valid. First, the unexcused delay applies not to the plaintiffs, but to the BRA for not disclosing these documents in prior proceedings. Similarly, DEP argues that the “Plaintiffs’ new arguments are based on documents that were never submitted to DEP.” That is once again a failure not of the plaintiffs but of the BRA. DEP’s gun is pointing in the wrong direction.

DEP claims that judicial review under G.L. c. 30A §14 is limited to the record considered by the agency. G.L. c. 30A §14(5). However, the same provision continues with: “. . .except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court.” An example of such irregularity is the BRA’s failure to disclose these material documents—to EOEEA on the ENF

and thus to DEP on the Chapter 91 license application, to the DEP hearing officer, to the Superior Court, or to the SJC.

Second, and contrary to DEP and BRA, the new documents create claims that are far from futile. If, as plaintiffs argue in their accompanying memorandum, the documents show that Long Wharf is protected as parkland by federal law, by two conservation restrictions, by Article 97, and by prior public purpose, then mandamus is the correct and available remedy to enforce any of these protections. Thus, re-briefing is appropriate and necessary (and plaintiffs are providing their brief with the amended complaint, and have already provided it as an attachment to the 9A package resulting from the BRA's Renewed Motion to Dismiss).

VII. DEP should thank plaintiffs for helping it evaluate the merits of the license

Instead of arguing that the new documents would unfairly prejudice DEP, as it does on p. 1 of its Opposition, DEP should thank plaintiffs for bringing to its attention documents necessary to evaluate the merits, or otherwise, of the Chapter 91 license application. For example, on the ENF, a part of the Chapter 91 license application, the BRA denied that the land is subject to a conservation restriction. This denial is inaccurate, and material. Furthermore, DEP is mandated to take into account relevant official guidance from “from a state, federal, regional, or municipal agency”; such guidance includes the LWCF map from the federal government (NPS) and from the LWCF stateside coordinator (Melissa Cryan). 310 CMR 9.53(3)(a).

The DEP is in a difficult position because the documents were not disclosed by the BRA—its co-defendant. Perhaps the only way to cut this Gordian knot is with mandamus, whereby the court orders DEP to perform its clear public duty, which it cannot otherwise agree to do due to its entanglement with the BRA in these proceedings.

VIII. Conclusion

For the reasons set forth above, plaintiffs request that this Court accept their motion to amend the complaint.

Respectfully submitted,

Plaintiffs, *Pro Se*

May 20, 2013

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Attachment A. Rizzotto affidavit

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,
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Defendants

Affidavit of Edward Rizzotto

1. My name is Edward Rizzotto. The statements sworn to herein are stated from 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 1 Station Street, Hingham, MA 02043.
3. I worked in Philadelphia in the National Park Service (NPS) grant office in the 1980s, including in 1985, and, for portion of my office tenure, was the federal Land and Water Conservation Fund (LWCF) liaison for Massachusetts.
4. I remember the Long Wharf project well.
5. Given the importance of the shade shelter to the LWCF Long Wharf project, I cannot imagine any possibility that the shade shelter and adjacent paved area would have been removed from the LWCF project area.

6. I do not remember any request from the State or BRA to reduce the LWCF-protected area (also known as the 6f area because it is protected by section 6(f) of the federal LWCF Act). If such a request had come in, I would have found it absurd just based on the extensive federal investment in the project.
7. I remember that the original seawall at Long Wharf had collapsed into the water unexpectedly, allegedly due to dredging to deepen the adjacent water channel. Based on information and belief, I believe that the State and the BRA had a subsequent separate project (separate from the original LWCF project) that involved a smaller area and the rebuilding of the south seawall.
8. I do not remember any Federal monetary involvement in that rebuilding.
9. In any case, the dollar amount of the LWCF grant would have had relatively little to do with the 6f area. We at the NPS generally dedicated the entire park boundary for LWCF protection. We never dedicated less than the area on which we worked or spent Federal monies. As an example, there were projects where we paid just for site equipment (like new picnic tables) but included the entire park boundary as the viable dedicated park unit, which then became subject to 6f protection.

Signed under the penalties of perjury this 19th day of May, 2013,

Attachment B. Mahajan affidavit

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,
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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. I live at 950 Massachusetts Ave, Apt 613, Cambridge, MA 02139.
3. On November 15, 2012, in the state LWCF files at the EOEEA offices, 100 Cambridge Street, Boston, MA 02114, I found the following documents:
 - a. a 3-page document entitled ``Long Wharf'' describing the three phases of the Long Wharf project (Phase I, Phase IA, and Phase II). It is included as Attachment A.
 - b. The final ``Outlay report and request for reimbursement for construction programs'' under federal grant 25-00295 (the NPS's project number for the Long Wharf LWCF project), signed by Stephen Coyle (BRA director). It is included as Attachment B.

4. On May 10, 2013, at 10:21am, Jack Howard of the NPS called me and affirmed that the map that he sent in his earlier email is the correct LWCF map and is the map of record. For the convenience of the Court, his earlier email is attached to this affidavit as Attachment C.

5. On March 25, 2013, Melissa Cryan, state LWCF coordinator, sent me a copy of the email that she sent to the BRA on February 4, 2013 regarding the LWCF area at Long Wharf. This email included the map provided by the federal government. Her email is Attachment D to this affidavit.

Signed under the penalties of perjury this 19th day of May, 2013,

Attachment A. Long Wharf project phasing

LONG WHARF

BACKGROUND

In 1979, BRA completed a Master Plan for the water's edge of the Downtown Waterfront, generally extending from the Waterfront Park, around Fort Point Channel to Commonwealth Pier in South Boston. Sasaki Associates were the consultants.

Subsequent to this, BRA again retained Sasaki Associates to prepare a detailed Master Plan and development program for the 3.4 acre Long Wharf. Both efforts were carried out under the review of participants of a "Harbor Workshop", consisting of about 60 public and private interest groups.

Funding for Phase I of the Master Plan was obtained from the National Park Service (NPS), matched by CD funds, and by activities being carried out by the MBTA on Long Wharf. Funding for the remaining portions of the Master Plan were obtained from the Commonwealth.

BUDGET SUMMARY

Phase I (under construction)

NPS	\$825,000 (complete)
BRA	825,000 (complete)
MBTA	5,500,000
	<hr/>
	\$ 7,150,000

Project being constructed under two contracts; BRA \$1,650,000; MBTA \$5,500,000.

Phase IA (ready for public bidding)

DEM	\$800,000 +
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Construction of Phases I & IA will result in completed reconstruction eastern end of end of Long Wharf, open pavillion, underground MBTA vent shafts, and exit hatches from Blue Line under Harbor, and new docking space for Harbor boats along perimeter of Wharf.

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Phase II

DEM (Chapter 589, Acts of 1983)	\$7,000,000
DEM (previous funds appropriated by Legislature)	2,000,000
	<hr/>
	\$9,000,000

Funds cover all design, engineering, fees, BRA administrative costs and construction. Construction includes facilities for commuter, Harbor cruise, public boat basin, public landings, Harbor Island ferries, and Harbor Islands visitors' center with central ticketing facilities, and interpretive exhibits.

AGREEMENT BETWEEN BRA AND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

The Agreement for Long Wharf has been executed by the Department of Environmental Management and the BRA.

Key points negotiated in the Agreement are:

1. BRA filing of "an Easement, on behalf of the Commonwealth placing a restriction for public open space use of the title of the Authority to the Wharf Site".
2. BRA contracting for all improvements to be made on the Wharf, including the construction of the Harbor Islands Terminal building.
3. Agreement by BRA to establish an "Annual Maintenance Fund" upon completion of project in an amount not less than \$100,000 per year. Fund to be used by BRA to operate and maintain Long Wharf. Funds to be derived from income to BRA from Long Wharf lessees, and other sources. Excess income to be earmarked for maintenance of Waterfront Park adjacent to Wharf.

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CURRENT STATUS

Phase IA - funded by DEM, this \$800,000 construction project for eastern end of Wharf is being advertised now for public bidding.

Construction completion expected in spring/summer 1986.

Phase II

The following contracts are monitored jointly by the Department of Environmental Management and the Boston Redevelopment Authority:

- Wallace, Floyd Associates/Cambridge Systematics-Analysis of water transportation at the wharf for 1985 and the year 2000 and recommended management plans. The final report gives design options for space and location requirements for boats and all related facilities (completed)
- Landscape and Structural reconstruction. Work includes evaluation of Master Plan, schematic, preliminary and final design, as well as design standards for boat operators (\$500,000, Sasaki Associates - underway)
- Exhibit Design Contract - Joint BRA/DEM contract to begin in January, 1986. Work includes design criteria for Visitor Center building, educational programs, promotion plan, marketing, advertising plan and input into landscaping design as it relates to outdoor exhibits. Exhibits will focus on the history of Long Wharf and the Harbor Islands (\$800,000)
- Management/Operation Study - Joint BRA/DEM contract - to begin in 1986 - Work includes: Overall Management plan for maintenance operation of the Wharf. The study will also recommend ways to increase and best use revenue generated by the project. The results of this study will direct some of the landscape and exhibit design.
- Building Design Contract - Visitors' Center - Joint BRA/DEM contract. Following approval of the building design criteria prepared by the exhibit designs, this contract will be put out to bid. Work will include conceptual, schematic, preliminary and final design.

Attachment B. Long Wharf project billing

OMB NO. 50-10181

OUTLAY REPORT AND REQUEST FOR REIMBURSEMENT FOR CONSTRUCTION PROGRAMS		1. Federal Agency and Organizational Element NPS	2. Federal Grant No. or Other Identification Number 25-00295	
3. Type of Request <input checked="" type="checkbox"/> Final <input type="checkbox"/> Partial	4. Basis of Request <input checked="" type="checkbox"/> Cash <input type="checkbox"/> Accrued Expenditure	5. Partial Payment Request No. 8/F		
6. Employer Identification No. 04-6006386	7. Grantee Account No. or Identifying No.	8. Period Covered (Month, Day, Year) FROM 11, 16, 85 TO 5, 15, 86		
9. Name of Grantee Organization BOSTON REDEVELOPMENT AUTHORITY One City Hall Square, Rm 909 CITY STATE ZIP CODE Boston MA 02201		10. Name of Payee (If different than Item 9) STREET NO. AND NAME CITY STATE ZIP CODE		
11. STATUS OF FUNDS				
Long Wharf Park CLASSIFICATION	PROGRAMS — FUNCTIONS — ACTIVITIES			
	(1)	(2)	(3)	TOTAL
a. Administrative expense	\$	\$	\$	\$
b. Preliminary expense				
c. Land, structures, right-of-way				
d. Architectural engineering basic fees				
e. Other architectural engineering fees	265,780.91			
f. Project inspection fees				
g. Land development				
h. Relocation expense				
i. Relocation payments to indiv. and businesses				
j. Demolition and removal				
k. Construction and project improvement cost	1,324,834.11			
l. Equipment				
m. Miscellaneous cost				
n. Total cumulative to date (Sum of Lines a-m)	1,590,615.02			
o. Deductions for program income				
p. Net cumulative to date (Line n minus Line o)	1,590,615.02			
q. Federal share to date	795,307.51			
r. Rehabilitation grants (100% reimbursement)				
s. Total Federal share (Sum of Lines q and r)	795,307.51			
t. Federal payments previously requested	763,188.26			
u. Amount requested for reimbursement	\$ 32,119.25	\$	\$	
v. Percent of project completed	% 100	%	%	%
12. CERTIFICATION — I certify that to the best of my knowledge and belief the billed costs of disbursements are in accordance with the terms of the project and that the reimbursement represents the Federal share due which has not been previously requested and that an inspection has been performed and all work is in accordance with the terms of the grant.				
a. GRANTEE		b. STATE, LOCAL, OR FEDERAL GOVERNMENT REPRESENTATIVE		
Name STEPHEN F. COYLE	Name			
Title Director	Telephone No. 722-4300	Title	Telephone No.	
Signature of Authorized Official 	Date 8-26-86	Signature of Authorized Official	Date	

INT: 4883-74

Attachment B. Long Wharf project billing

11


**Attachment C. Email from Jack Howard of the NPS with
the correct LWCF map**


Attachment C. Email from Jack Howard of the NPS with the correct LWCF map 13

14 *Attachment C. Email from Jack Howard of the NPS with the correct LWCF map*

MIT WebMail

An email service from Information Services & Technology

Date: Thu, 20 Dec 2012 07:43:15 -0500 [12/20/2012 07:43:15 AM EDT]
From: "Howard, Jack" <jack_howard@nps.gov>
To: Sanjoy Mahajan <sanjoy@olin.edu>
Cc: melissa.cryan@state.ma.us
Subject: Re: LWCF Project #25-00295, Long Wharf
Part(s):  2 Scan_Doc0072.pdf [application/pdf] 808 KB

 1 unnamed [text/plain] 1.40 KB

Dear Mr. Mahajan,

As requested, attached for your review is the 6(f) boundary map for LWCF project #25-00295, Long Wharf. The darken 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

On Thu, Dec 20, 2012 at 6:56 AM, Sanjoy Mahajan <sanjoy@olin.ëdu> wrote:

[Hide Quoted Text]

> >> As requested, attached for your review is the 6(f) boundary map for
 > >> LWCF project #25-00295, Long Wharf. The darken shaded area for the
 > >> Phase I proposed development is the actual 6(f) boundary area for
 > >> Long Wharf.
 >
 > Dear Mr. Howard,
 >
 > What a wonderful piece of news to get before Christmas! Could you send
 > me a copy of the 6(f) map? (It didn't come through in the forwarded msg
 > from Ed.)
 >
 > What do you think the next step is? Does the state contact the BRA?
 >
 > Best wishes for the holidays,
 >
 > -Sanjoy
 >

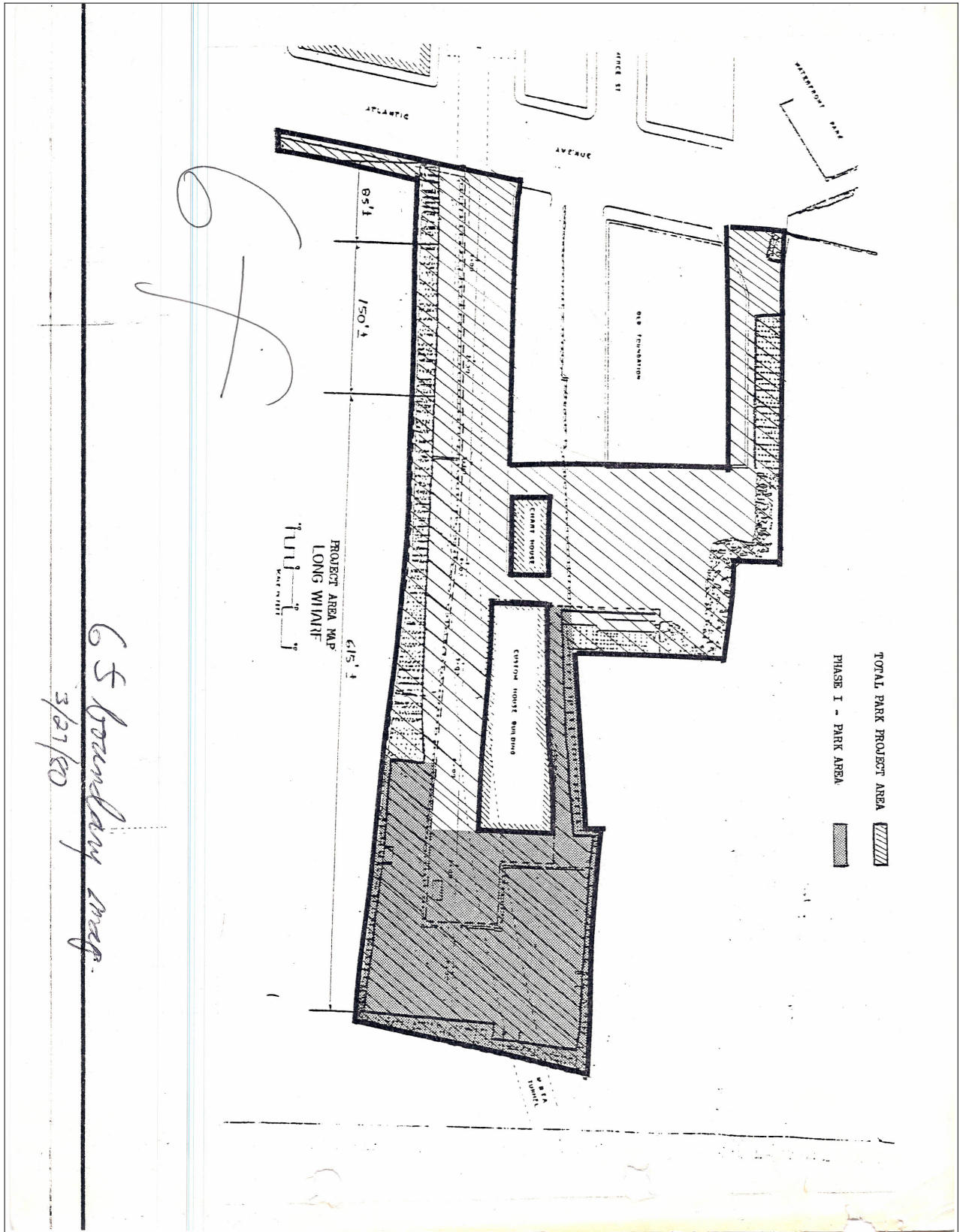
Email Services

Posted on: May 15, 2013 10:27:40 am
 All services are operating normally.



MASSACHUSETTS
 INSTITUTE OF
 TECHNOLOGY

Visit the WebMail homepage for documentation.
 Ask for computing help or call 617-253-1101.



16 Attachment C. Email from Jack Howard of the NPS with the correct LWCF map

Attachment D. Email dated February 2013 from Melissa Cryan to the BRA

Attachment D. Email dated February 2013 from Melissa Cryan to the BRA



17


MIT WebMail

An email service from Information Services & Technology

Date: Mon, 25 Mar 2013 15:33:54 -0400 [03/25/2013 03:33:54 PM EDT]
From: "Cryan, Melissa (ENV)" <melissa.cryan@state.ma.us>
To: Sanjoy Mahajan <sanjoy@olin.edu>
Subject: FW: Long Wharf, LWCF #25-00295

Part(s):

 2 Scan_Doc0072.pdf	[application/pdf]	808 KB
 3 policy on proceeds 5 17 04.docx	[application/vnd.openxmlformats-officedocument.wordprocessingml.document]	17 KB

 1 unnamed [text/plain] 1.26 KB

Sanjoy,

Here's a copy of the email that I sent to the BRA.

Melissa

~~~~~  
 Melissa Cryan  
 (617) 626-1171

From: Cryan, Melissa (EEA)  
 Sent: Monday, February 04, 2013 11:31 AM  
 To: 'richard.mcguinness.bra@cityofboston.gov'  
 Subject: Long Wharf, LWCF #25-00295

Rich,

I've attached the park boundary map of Long Wharf. As you're aware, all land that is within the park boundary is protected under Article 97 of Massachusetts' constitution, as well as Section 6(f)(3) of the Land and Water Conservation Fund Act. While a restaurant may potentially be constructed within a park boundary, it must be approved by the National Park Service (see page 8-12 of the LWCF Manual at <http://www.nps.gov/nrcr/programs/lwcf/manual/lwcf.pdf> for more information). Also, to be compliant with the state's policy on proceeds, any revenue generated at this site must be used for park and recreation purposes.

The contact at the National Park Service in Philadelphia is Jack Howard. He can be reached at (215) 597-1565 or [jack\\_howard@nps.gov](mailto:jack_howard@nps.gov)<[mailto:jack\\_howard@nps.gov](mailto:jack_howard@nps.gov)>.

When you're ready to begin the process of getting approval for the restaurant from NPS, feel free to get in touch with me.

Thank you,

Melissa

~~~~~  
 Melissa Cryan
 (617) 626-1171

**PROCEEDS GENERATED FROM DCS FUNDED PROPERTIES
STATEMENT OF POLICY**

Proceeds may be generated from DCS funded projects in several ways including an outright disposition of the property or an interest therein such as a utility easement, or from users fees including entry fees, facility fees (i.e. golf courses, or zoos) and special use permits (i.e. special events or ceremonies).

DCS policy concerning the funds generated from a DCS funded property is as follows:

Any proceeds generated by the lease or sale of a DCS funded property, or by the user fees or special use licenses generated by the approved use of the Property, will be reserved for appropriation to pay the remaining debt service on the acquisition land as it becomes due. Any balance remaining is to be reserved for future acquisition of conservation land or park land, or capital improvements to conservation land or park land in accordance with M.G.L. Chapter 44 §63. Projects funded locally through the Community Preservation Act (M.G.L. Chapter 44B) shall deposit any such proceeds into the Community Preservation Act fund to be expended only for future land conservation or park projects, consistent with the purposes of the Self-Help or Urban Self-Help grant program. Similarly, Cape Cod Land Bank communities shall deposit any such funds into the Land Bank Fund to be expended only for future land conservation projects, consistent with the purposes of the Self-Help grant program.

Expenditures from this special account, while restricted in use, must still be approved by city council or town meeting. This special account is not necessarily the conservation commission's Conservation Fund since there is no provision authorizing the deposit of proceeds of a sale of conservation land, or an interest in such land, into the fund. Furthermore, another town board such as the board of selectmen acting as the park commissioners could authorize an expenditure from this special account provided that the expense is restricted to the acquisition of conservation land or park land, or capital improvements to conservation land or park land.

This policy is predicated on M.G.L. Chapter 44, §63: Sale or other disposal of realty; disposition of proceeds.

MASSACHUSETTS GENERAL LAWS CHAPTER 44. MUNICIPAL FINANCE

MISCELLANEOUS PROVISIONS

Chapter 44: Section 63: Sale or other disposal of realty; disposition of proceeds

Section 63. Whenever the proceeds of the sale or other disposal of real estate, including the taking by eminent domain by another governmental unit, but other than that acquired through tax title foreclosure, by a city, town, or district, exceed five hundred dollars, the same shall be applied to the payment of indebtedness incurred in acquiring such real estate or shall be added to the sinking fund, if any, from which said indebtedness is payable, or if no such indebtedness is outstanding may be used for any purpose or purposes for which the city, town or district is authorized to incur debt for a period of five years or more or be applied to the payment of indebtedness incurred under clause (3) of section seven, except that the proceeds of a sale in excess of five hundred dollars of any park land by a city, town, or district shall be used only by said city, town, or district for acquisition of land for park purposes or for capital improvements to park land.

Attachment C. McIntosh affidavit

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

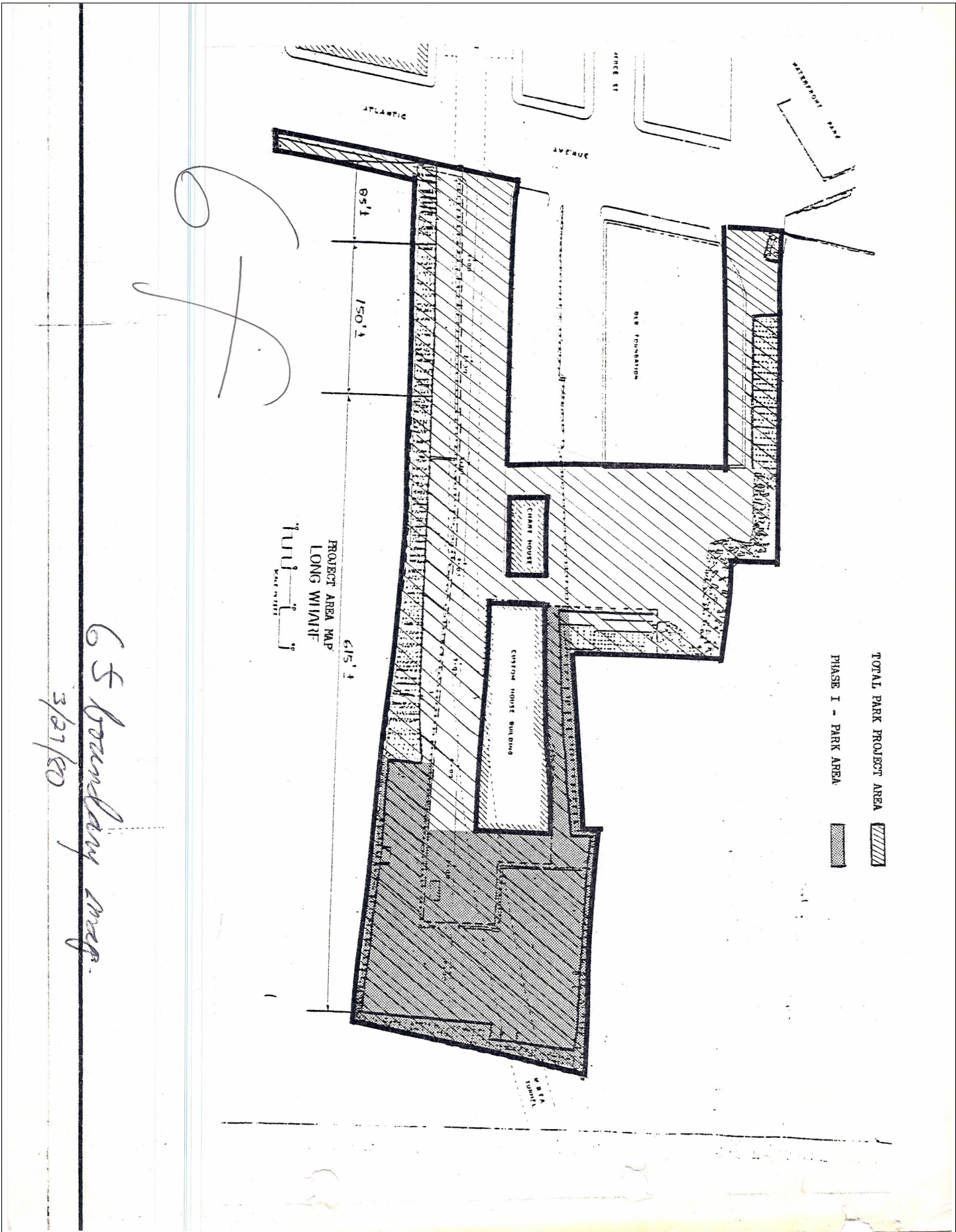
Affidavit of Robert W. McIntosh

1. My name is Robert W. McIntosh. The statements sworn to herein are stated from my own personal knowledge.
2. I live at 29 Atlantic Avenue, Beverly, MA 01915.
3. From January 1979 to May 1981, I was the regional director for the northeast region of the Heritage Conservation and Recreation Service (HCRS) in the US Department of the Interior.
4. At that time, HCRS administered the Land and Water Conservation Fund (LWCF).
5. The LWCF provides financial grants to states and their political subdivisions for the acquisition of open space and the development of outdoor recreation facilities.
6. Since June 1981, the National Park Service (NPS), also a bureau within the Department of the Interior, has administered the LWCF.

7. During my tenure as regional director of the HCRS, the BRA/state had extensive discussions with the HCRS regional staff regarding the eligibility of LWCF funds for the Long Wharf redevelopment.
8. I use the term BRA/state because of the nature of the LWCF grants. They are grants from the federal government to a state, which represents the particular project (here, Long Wharf) to the federal government. Thus, the state is the direct recipient of the grant; the state, in turn, transferred the funds to the BRA, the local proponent of the project.
9. The regional staff and I were very pleased to participate in discussions regarding the funding of this project, especially in combination with a LWCF grant for Christopher Columbus Park, as they provided needed open space at the water's edge.
10. BRA/state and HCRS staff explored where and under what conditions LWCF funds would be eligible given the commercial development also envisioned for Long Wharf.
11. This exploration concluded with a determination that only the areas of the wharf that were to be dedicated to public open space would be eligible.
12. Eventually LWCF funds were provided for the project.
13. I learned about the proposed restaurant development on Long Wharf and about the current litigation from an article in the *Boston Globe* ("Development plan pits North End residents vs. officials," October 10, 2012).
14. Noting that there was no mention of the LWCF project in the article and thinking that the location of the proposed development was in the LWCF project area, I emailed the NPS LWCF program manager and asked for a copy of the LWCF 6(f) map to make sure that my memory was correct.

15. In response, I received the attached plan entitled "6(f) boundary map," dated 3/27/1980.
16. The LWCF 6(f) area is the dark shaded area on the attached plan and marked in the legend as "Phase I – Park Area." It contains the eastern (seaward) end of the wharf and a part of what is now the Harborwalk.
17. The plan is called the 6(f) map because it shows the area protected under section 6(f) of the federal LWCF Act (36 CFR 59.3).
18. The current shade pavilion, the site of the proposed restaurant, is within the 6(f) boundary of the LWCF project.
19. Over 30 years later, the state has a continuing obligation to monitor LWCF projects to assure that the existing use is consistent with the project agreement.
20. Clearly, the provisions of 6(f) would apply with this proposed conversion of use.

Signed under the penalties of perjury this 10th day of May, 2013,



65 boundary map
3/27/00