

# 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*

## 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 Henschman 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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**Victor Brogna**  
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46 Snow Hill St  
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**Thomas Schiavoni**  
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**Pasqua Scibelli**  
19 Wiget St  
Boston MA 02113

**Robert Skole**  
Lincoln Wharf 715  
357 Commercial St  
Boston MA 02109

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



## **Attachment A. Skole affidavit**



# Commonwealth of Massachusetts

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*Plaintiffs*

v.

Massachusetts Department of Environmental Protection  
and  
Boston Redevelopment Authority,  
*Defendants*

## 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 B. Brogna affidavit**



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v.

Massachusetts Department of Environmental Protection  
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 C. Mahajan affidavit**



## Commonwealth of Massachusetts

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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**

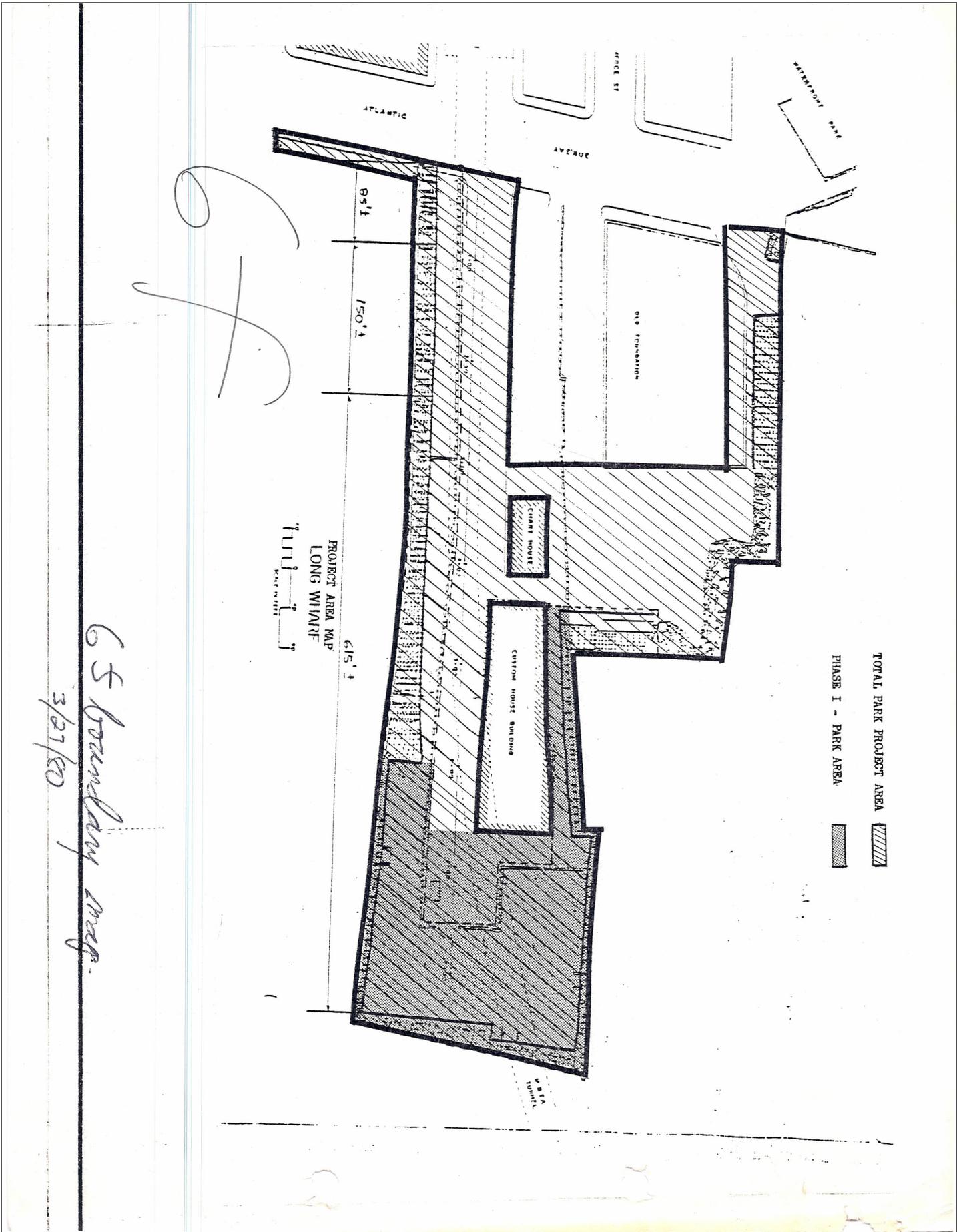
1. My name is Sanjoy Mahajan. I am one of the plaintiffs in this case. The statements sworn to herein are made of my own personal knowledge, except where I indicate that they are based on information and belief and as to that statement I believe it to be true.
2. From May 2008 until December 2011, my 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. LWCF 6(f) boundary map**







## Attachment E. 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 darkened [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



## **Attachment F. 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.

Lawyer {

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.

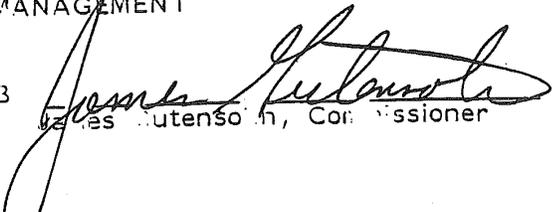
Approved as to Form:

  
9557 James S. Bass  
Attorney General  
Commonwealth of Massachusetts

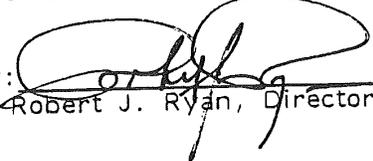
Approved as to Form:

  
Chief General Counsel  
Boston Redevelopment Authority

DEPARTMENT OF ENVIRONMENTAL  
MANAGEMENT

3   
James H. Tutensohn, Commissioner

BOSTON REDEVELOPMENT AUTHORITY

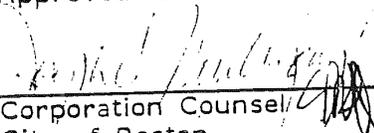
By:   
Robert J. Ryan, Director

Agreement Approved:

CITY OF BOSTON

BY:   
Raymond L. Flynn, Mayor  
City of Boston

Approved as to Form:

  
Corporation Counsel  
City of Boston

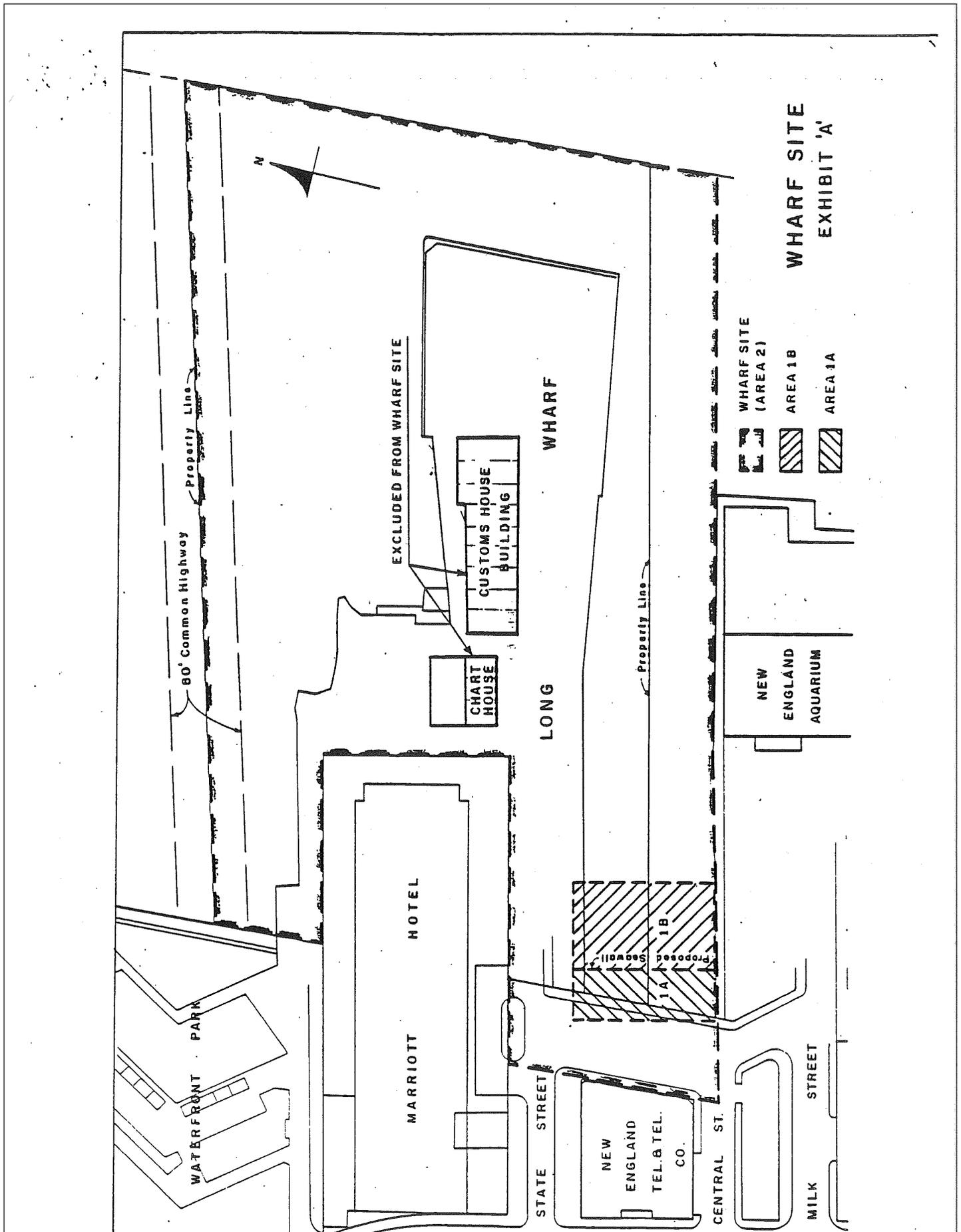


EXHIBIT B

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

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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

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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.

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