

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 10, 2009

In the Matter of					
Boston Redevelopment Authority					

**OADR Docket No. 2008-128
Waterways Application No. W07-2172-N**

**MEMORANDUM OF LAW
OF THE BOSTON REDEVELOPMENT AUTHORITY**

I. PROCEDURAL BACKGROUND

This is an appeal of a Written Determination the Department of Environmental Protection (“DEP”) issued on September 17, 2008 for Waterways Application # W07-2172-N (“Written Determination”). The Boston Redevelopment Authority (“BRA”) is the owner of Long Wharf and the site at issue, which is the Long Wharf Pavilion/Massachusetts Bay Transportation Authority (“MBTA”) vent structure located at the seaward end of Long Wharf (the “Site”). On December 4, 2007, the BRA submitted an application to the DEP for a Nonwater Dependent M.G.L. c. 91 License to redevelop the Site into a waterfront restaurant with public facilities (the “Application”). In its Written Determination, the DEP correctly found that the BRA’s Application complied with all relevant Waterways Regulations, all necessary conditions of the City of Boston Municipal Harbor Plan, and all applicable Coastal Zone Management policies. The DEP therefore found that the project serves a proper public purpose which provides greater benefit than detriment to the rights of the public. The BRA seeks a decision from the Commissioner of the DEP upholding the Written Determination.

II. FACTS

The pre-filed testimony of the BRA's witnesses, Richard McGuinness, Larry Mammoli, and Mark Donahue, is incorporated herein by reference. The following is a summary of the factual background presented in the BRA's Pre-Filed Testimony.

A. History of Long Wharf

Since its construction in 1711, Long Wharf has been the historic gateway to Boston and a vital commercial center. *See* Exhibit 1, Pre-filed Testimony of Richard McGuinness ("McGuinness") ¶¶ 7-11. For almost three centuries, public establishments have been encouraged at Long Wharf as the place of landing and official reception of arrivals to Boston. Among the first public establishments built on Long Wharf in the 1700s was the Crown Coffee House at the landward end and the Bunches of Grapes Tavern at the seaward end. Ex. 1, McGuinness ¶ 12. From the 1800s to the present, Long Wharf has evolved from a commercial trading and fishing center to a vibrant marina with public access for water transportation and other water-related uses. *Id.* ¶¶ 13-18.

Exhibits 4-8 are photographs of Long Wharf which depict its evolution from the late 1800s through the present. Exhibit 4 is a view of Long Wharf from the land which gives a sense of the heavy shipping traffic the Wharf serviced. Exhibits 5A and 5B from the 1930s shows warehouses around the perimeter of Long Wharf and virtually no public space. *Exhibit 6 shows Long Wharf around 1980 prior to the construction of the Marriott Hotel. Pedestrian access has been revived but marina use around Long Wharf is relatively minimal. Exhibit 7 shows Long Wharf in 1988 with expanded marina uses and underutilized pedestrian access along the south side of the Wharf. Exhibit 8 depicts present-day Long Wharf with a full perimeter Harbor Walk and a vibrant marina.

At present, Long Wharf is the launch site for ferries to Charlestown, South Boston, the Harbor Islands, Salem, Quincy, Provincetown, numerous sightseeing cruise vessels, and whale watch tours. There is also an active marina with a mooring field and a blue line subway stop servicing Long Wharf. Other commercial uses in the vicinity include the New England Aquarium, Marriot Long Wharf and several restaurants. *Id.*, ¶ 19; Exhibit 8, aerial photograph 3/30/08.

B. General Planning Context

The City of Boston has invested substantial resources over the past four decades in planning the city’s waterfront and the Long Wharf area. The following plans pertain to establishing uses at Long Wharf:

i. Urban Renewal Plan 1970 This document defines the first planning process for the redevelopment and revitalization for the waterfront, including Long Wharf. It describes the city’s intent to maintain commercial activity at Long Wharf and the overall goals of stimulating development of the area, upgrading the pattern of land uses, and providing an environment suitable to needs of contemporary real estate development. Exhibit 13.

ii. Long Wharf Master Plan 1981 This document describes the planning process for Long Wharf. It provides strategies for revitalization by developing parcels with commercial uses along with public access pathways to the water. Exhibit 15.

iii. Municipal Harbor Plan 1990 This document provides detailed planning and zoning for all Boston waterfront areas except East Boston and the Boston Harbor Islands. It provides substitutions to the standards set by Massachusetts General Laws Chapter 91. It articulates the overarching goal that “[p]rojects proposed in the area from the Fort Point Channel

to and including Long Wharf will be required to include business activities that will attract visitors and residents to the waterfront. These include water-dependent uses such as water transportation facilities, as well as uses such as *restaurants . . .*” Exhibit 16, p. 14 (emphasis added).

iv. Boston Inner Harbor Passenger Water Transportation Plan 2000 This document outlines existing conditions and future expansion of inner harbor water passenger and transportation needs. It includes an action plan for infrastructure improvements and demonstrates the city’s commitment to maintaining Long Wharf as a berthing/terminal area. Exhibit 18.

v. Crossroads Initiative (www.bostoncrossroads.com) This is the City of Boston’s plan to reunite neighborhoods that were once separated by the Central Artery. It will revitalize thirteen streets that will cross the new Rose Kennedy Greenway and thereby connect downtown with the Harbor. Public process regarding the Crossroads Initiative included a series of public meetings, including community meetings with the North End Waterfront Association. Plans used during this public process included those for Doc’s Restaurant at the end of Long Warf and a Crossroads destination. Exhibit 23.

vi. State Street and Long Wharf Interpretive Plan 2007

This plan intends to reestablish the historic link from State Street to the sea through interpretative elements such as educational signs and hands-on exhibits. This investment demonstrates the city’s commitment to maintaining the historic elements of Long Wharf, and to providing outreach to the public regarding the Wharf’s history. Exhibit 26.

vii. Boston Harborwalk Initiative (www.bostonharborwalk.com)

This is the partnership between the city, the Boston Harbor Association and the Boston Foundation to ensure that waterfront walkways, mandated under the Waterways Regulations, are created, maintained, and utilized. The BRA began the Harborpark planning process for the waterfront in the early 1980s with the goal of creating a continuous 47-mile waterfront walkway along Boston Harbor.¹ The Harborwalk connects the city's neighborhoods to its Harbor, leading to recreational, cultural, and historic attractions, and direct connections to public transit, including water transportation facilities. Over 38 miles of Harborwalk have been completed or are under construction. Ex. 1, McGuinness ¶ 23. This initiative highlights the city's commitment to ensuring public access to the water and along its waterfront. Exhibit 27.

All planning efforts for Long Wharf have always included commercial uses, consistent with the manner in which Long Wharf has been used for almost three centuries.

C. Long Wharf is the Hub of Boston's Water Transportation System

The BRA applied for state funding to finance in part a comprehensive, multi-year program known as the *Central Wharf and Long Wharf Water Transportation Improvement Project*. The purpose of the project is to expand the capacity and improve the quality of water transportation infrastructure at this key downtown terminal. Exhibit 2, Pre-filed Testimony of Lawrence Mammoli ("Mammoli"), ¶ 3. Comparative data for water transit riders passing through Long and Rowes Wharves shows that total ridership grew from an estimated 550,000 passengers in 1988 to 1.4 million passengers in 1998. Estimated annual volume for the number of passengers passing through the downtown terminals in 2010 is 3.8 million. Exhibit 3, Pre-filed

¹ The planning chronology and goals of the Harborwalk Initiative are described in Ex. 1, McGuinness ¶ 23.

Testimony of Mark Donahue (“Donahue”), ¶ 5; Exhibit 25, Central Wharf and Long Wharf Water Transportation Improvement Project: Long Wharf North Terminal Extension, Application for State Bond Funds Fiscal Year 2006 (“2006 Application”). The primary goals of the transportation project at Long Wharf have been defined as:

- a. Maximize public access to and along the entire waterfront area while preserving much of the original form and character of the area.
- b. Promote active water dependent uses such as public landings, commuter ferries, commercial boating activities, and water taxi facilities.
- c. Anticipate growth of these boating activities and provide an orderly program for their expansion, considering both waterside and landside space and functional needs.
- d. Provide additional terminal sites and berthing capacity to sustain anticipated ferry growth.
- e. Improve linkages among different ferry services to facilitate passenger transfers.
- f. Preserve and enhance environmental and navigational conditions of the harbor.

Exhibit 25, 2006 Application.

In the past ten years the BRA has completed a number of improvement projects in the Long Wharf area to enhance water transportation and public access. Ex. 2, Mammoli ¶ 8. In 2003, the City received an Excellence in Universal Design Award for its stewardship and “people friendly” design of Long Wharf from an international organization known as the Adaptive Environment Group. Exhibit 22, Excellence in Universal Design Award 2003. BRA

planning has proceeded on the principle that existing and planned open spaces in the Long Wharf vicinity provide special opportunities for harbor-oriented recreation and pedestrian connections.

Ex. 1, McGuinness ¶ 33.

D. Long Wharf Pavilion

In 1983 the Department of Environmental Quality Engineering authorized the MBTA to construct an emergency egress and ventilation shaft for the Blue Line at the seaward tip of Long Wharf, to be combined with a shade pavilion. At the same time, the BRA received authorization and undertook renovations to the plaza area surrounding the vent structure. Ex. 3, Donahue, ¶ 6.

E. Redevelopment of Long Wharf Pavilion for Year-Round Use

In 2000 the BRA began focusing on activating the Long Wharf Pavilion area year-round. The BRA began a series of meetings with interested parties, abutters, users of the waterfront, public agencies, and elected officials to explore the idea of reuse of the MBTA vent structure. Ex. 3, Donahue, ¶ 7. One of the goals of a restaurant at the end of Long Wharf is to winterize the Site and provide year-round use. At present, the Pavilion is not fully utilized for approximately eight months out of the year. *Id.* ¶ 15. The Site currently is not a secure destination, as indicated by the volume of reports of criminal or suspicious behavior to the Boston Police Department and Municipal Protective Services. *Id.* ¶ 16. The BRA seeks to improve security by activating the Site with a public presence and retaining a private entity to monitor security and add lighting. *Id.*

F. Project Consistency with Planning Criteria

The restaurant concept as a re-use of the MBTA vent structure meets the goals articulated in both the Urban Redevelopment Plan and the Long Wharf Master Plan, as follows:

- a. The BRA envisions that an enlivened Long Wharf, like the Harborwalk, will bring the activity of the city back to the harbor and the beauty and history of the harbor into the city. Licensing funds from the project will be used towards the installation of designed interpretive signage explaining the history of the Wharf, including the importance of the Wharf for commercial uses by North End and city-wide fishing groups.
- b. The BRA seeks to sensitively blend quality urban design with the architectural character of the neighborhood, provide street level activity that enhances the public realm, and provide quality commercial opportunities to city residents across a variety of income ranges.
- c. Rejuvenating the end of Long Wharf through redevelopment of the Pavilion with seats and tables, refreshment, and restroom facilities will promote and enhance the use of existing water transportation by making the area a destination.
- d. Approximately 25,915 square feet of area at the seaward end of Long Wharf will be preserved as open space and continue to be used as a public plaza. Seasonal outdoor dining will occupy approximately 2,586 square feet. At the southeastern portion of the wharf there will be eighteen seasonal shaded tables for public use, independent of patronage of the restaurant. These amenities are intended to enhance the existing water dependent uses.

Ex. 1, McGuinness ¶ 34.

The project complies with the Municipal Harbor Plan (MHP) mandates as follows:

- a. The restaurant is designed to attract visitors and residents to the waterfront, as mandated in the MHP. An implementation strategy to encouraging year-round pedestrian use along the waterfront that is included in the MHP is the use of ground-level buildings and spaces in buildings to attract pedestrians. This project aims to attract pedestrians to the waterfront through the reuse of the underutilized vent structure. It will create a place for those to meet and be sheltered in during the colder months as well as to sit and enjoy the outdoor space in the warmer months.
- b. The entire restaurant is considered a Facility of Public Accommodation (FPA).² This meets the one hundred percent FPA mandate by the Secretary of Environmental Affairs in her decision on the Municipal Harbor Plan. Exhibit 16, Decision of Secretary of Executive Office of Environmental Affairs 5/22/91 (“EOEA Decision”), p. 31.
- c. As defined by MHP, the restaurant as FPA will promote water-dependent uses at the Wharf by providing the following accessory uses to these water-dependent uses: public restrooms, public seating, and shelter for water transit users.
- d. The view corridors to the harbor from significant streets in the North End and Downtown will be maintained as the existing footprint, height, form, and

² Boston Redevelopment Authority, Harborpark Plan: City of Boston Municipal Harbor Plan (City of Boston, MA, 1990), 54.

character of the Pavilion structure will be maintained. *See* Exhibit 12, Design “Mock-up” Images of Restaurant Project.

- e. There will be no total reduction of the Water-Dependent Use Zone (WDUZ), as required in the Waterways Regulations and substitute provisions of the MHP. In fact, an additional 3,135 square feet of WDUZ setback area is proposed.
- f. The project will create job opportunities, an affordable dining establishment for residents and visitors, public amenities that currently do not exist (public shaded seating and restrooms) and a destination location to attract residents and visitors to the waterfront.

Ex. 1, McGuinness ¶ 38.

G. The Written Determination of the Department of Environmental Protection Pursuant to M.G.L. Chapter 91.

The DEP’s Written Determination should be upheld in its entirety. After two days of public hearing, the DEP found that the project serves a proper public purpose with greater public benefit than public detriment to the rights of the public in tidelands. DEP specifically determined that the project as conditioned:

- a. complies with all applicable standards of the Waterways Regulations, including the special standards for non-water dependent use projects at 310 CMR 9.51-53.
- b. complies with all of the requirements, modifications, limitations, qualifications, and conditions set forth in the Decision on the City of Boston Municipal Harbor Plan approved by the Secretary of Environmental Affairs on May 22, 1991.

- c. “will promote public use or other water-dependent activity in a clearly superior manner” and there is no reduction in the total amount of setback area.

The Department further concluded that:

- g. Enclosing the existing structure for restaurant use will attract more people to the end of Long Wharf over a longer period of time, thereby providing a more secure and attractive year-round destination without interfering with the important functions performed for the subway system that runs underground.
- ii. Given that there is no parking associated with the project, the restaurant will service only the pedestrian public and other persons utilizing the existing water dependent uses.
- iii. Shaded seating with excellent views of the Harbor will continue to be available to the general public, in a location reflective of the public comment received, along with the welcome addition of accessible restrooms.
- iv. The restaurant operator is expected to be an active steward of the surrounding open space, performing routine maintenance of the pedestrian amenities, including keeping the binoculars in good working order and picking up trash on a daily basis.
- v. The reconfigured Water Dependent Use Zone includes approximately 3,135 square feet more area than required by 310 CMR 9.51 (3) (c) and the additions are no closer to the water than the existing structure (over 28 feet).

H. The Petitioners Live Far From the Project and Cannot Reach the Project on Foot Without Walking Through Other Waterfront Parks.

As Exhibit 9 depicts, none of the Petitioners are abutters. They all live in the North End of Boston, far from Long Wharf. None of the Petitioners can see or hear the proposed restaurant from where they live.³ Most of the Petitioners live much closer to Puopolo Playground, Langone Park and the new Rose Kennedy Greenway. All of the Petitioners must walk through Christopher Columbus Park to reach Long Wharf. Other parks in Boston which provide seats, shade, and waterfront views in proximity to the petitioners are Lewis Wharf, Battery Wharf, Sargent's Wharf, and Copp's Hill Terrace. *See* Exhibits 11A – 11H; Ex. 3, Donahue ¶ 19.

III. ARGUMENT

A. Whether The Project Serves A Proper Public Purpose In Compliance With 310 CMR 9.31(2)(b)1-2?

In relevant part, 310 CMR 9.31(2)(b)1-2 states that the Department shall presume the project serves a proper public purpose if the following conditions are met:

1. the project conserves and utilizes the capacity of the site to accommodate water-dependent use as defined by 310 CMR 9.51 and 9.52
2. the project activates tidelands for public use as defined by 310 CMR 9.53
3. the project complies with Coastal Zone Management policies under 310 CMR 9.54

The pre-filed testimony of the BRA amply demonstrates that the project satisfies each of these conditions.

³Selma Ruttenberg lives in Harbor Towers but is not a petitioner. She did not file a comment during the public comment period or sign the Notice of Claim. Therefore, Ms. Ruttenberg is a non-party witness whose observations are not probative of any issue before OADR.

1. The project satisfies 310 CMR 9.51 by conserving and utilizing the capacity of the site to accommodate water-dependent use in accordance with the Municipal Harbor Plan.

a. 310 CMR 9.51

Under § 9.51, the Department must adhere to the greatest reasonable extent to the guidance in the Municipal Harbor Plan (“MHP”). According to the MHP, the Pavilion is an underutilized site. The project will meet MHP mandates and create a superior use by revitalizing an underutilized structure with the use of private funds. This project will create a destination location to attract residents and visitors to the waterfront year-round, public amenities that currently do not exist (public shaded seating and restrooms), an affordable dining establishment for residents and visitors, and permanent job opportunities. Ex. 2, Mammoli ¶ 14(a); Ex. 1, McGuinness ¶38(f), 38(g).

One implementation strategy to encouraging year-round pedestrian use along the waterfront included in the MHP is the use of ground-level buildings and spaces in buildings to attract pedestrians. That is precisely what this project does, by attracting pedestrians to the waterfront through the reuse of an existing structure on the existing footprint; creating a place to meet and be sheltered during the colder months, as well as to sit and enjoy the outdoor space in the warmer months. Further, through the creation of a partnership with the tenants, the project also will generate capital investment that will allow for improvements to the adjacent open space. Ex. 2, Mammoli ¶ 14(b); Ex. 1, McGuinness ¶38(a).

The entire restaurant is considered a Facility of Public Accommodation (FPA), which meets the 1991 mandate by the Secretary of Environmental Affairs that the entire ground floor of buildings containing nonwater-dependent uses be devoted to FPA. Ex. 1, McGuinness ¶38(e); Exhibit 16, EOEa Decision, p. 17. As a mandated FPA according to the MHP, the restaurant

will promote water-dependent uses at the Wharf by providing accessory uses to water-dependent uses including public restrooms, public seating, and shelter for water transit users. Ex. 1, McGuinness ¶38(b).

The MHP allows for “a reconfiguration of setback distances along the ends and sides of wharves” if the reconfiguration “promotes public use or other water dependent activity in a clearly superior manner” and if no overall reduction of total setback area occurs. Ex. 16, EOE Decision, p. 32. There will be no total reduction of the Water-Dependent Use Zone (WDUZ), as required in the Waterways Regulations and substitute provisions of the MHP. In fact, an additional 3,135 square feet (approximate) of WDUZ setback area is proposed. Ex. 2, Mammoli ¶ 16; Ex.1. McGuinness ¶ 38(h).

The project complies with all other relevant MHP mandates. The proposed design does not adversely impact the planned view corridor from the Old State House at Washington and State Streets down to Long Wharf. The proposed design has absolutely no effect on sight lines to the water from the Harborwalk. The existing footprint and height of the vent structure will be maintained, and existing open views through the structure will be preserved through the use of windowed walls. Ex. 1, McGuinness ¶¶ 36, 38(c). Further, the form and character of the existing structure will be preserved, as the height and scale will be unchanged. Only the massing of the building will be slightly altered to accommodate a kitchen in the expansion area. Ex. 1, McGuinness ¶38(a); Exhibit 12, Design “Mock-up” Images of Restaurant Project.

b. 310 CMR 9.51(1)

In regard to 310 CMR 9.51(1)⁴, the project does not conflict with any water-dependent facility on or near the project site. The BRA carefully considered how the restaurant re-use will complement existing water transportation uses and has addressed the seven criteria specified in 310 CMR 9.51(1)(a) – (g).

First, the restaurant use will not appreciably increase noise levels at the end of Long Wharf as required by 310 CMR 9.51(1)(a). Surrounded by an active marina, ferries to the Harbor Islands, the Long Wharf MBTA water shuttle, the Provincetown express, sight seeing cruise vessels, and whale watch tours, the end of Long Wharf is very loud a majority of the time.⁵ Ex. 1, McGuinness ¶ 37; Ex. 2, Mammoli ¶ 18. Second, under 310 CMR 9.51(1)(b) and (1)(d), the BRA specified the type of equipment, accessory services to be utilized, and the traffic flow at the Site in view of the fact that Long Wharf is the hub of Boston’s water transportation system. See Exhibit 24, Request for Proposals for Long Wharf Pavilion Café/Restaurant Re-Use August 2006 (“BRA 2006 RFP”), pp. 5, 11, Appendix B. In regard to 310 CMR 9.51(1)(c) and (1)(e), the project will support water-dependent uses in keeping with the major re-development objective of re-establishing Boston’s traditional thoroughfare to the sea and the historic connection to the Harbor. *Id.* p. 6.

The project meets requirements for public infrastructure under 310 CMR 9.51(1)(g) because, as noted previously, the entire restaurant is considered a Facility of Public Accommodation. Ex. 1, McGuinness ¶38(e). In terms of security under 310 CMR 9.51(1)(f), the

⁴ The other subsections of 9.51 are not applicable. 310 CMR 9.51(2) applies only to new structures. 310 CMR 9.51(3) applies in the absence of a municipal harbor plan. 310 CMR 9.51(4) applies to projects located on a Great Pond, and 310 CMR 9.51(5) applies to projects in Designated Port Areas.

⁵ In addition to the noise of boat engines, the United States Coast Guard requires vessels to blast the horn three times when leaving the fairways from either side of Long Wharf or when entering into the harbor. Ex. 2, Mammoli ¶ 18.

project site currently is not a secure destination, as indicated by the spate of Boston Police Department Area A-1 reports and Municipal Protective Services Incident reports. Ex. 3, Donahue ¶ 16. The project will improve security by activating the site with a public presence, and the BRA will add lighting and retain a private entity to monitor security. *Id.*

2. The project is in compliance with 310 CMR 9.52 by utilizing the shoreline for water-dependent purposes.

In relevant part, 310 CMR 9.52 requires that a non-water dependent use project on tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. The regulations further require that facilities in a water-dependent use zone (a) generate water-dependent activity appropriate for the project site, including the use of “waterfront boardwalks” and “esplandades for public recreation” and (b) include a pedestrian access network. 310 CMR 9.52(1).

The project meets all of the criteria of this regulation because of the BRA’s careful planning to integrate this project into the Harborwalk. The Boston Harborwalk Initiative is the centerpiece of the City’s harbor agenda to provide public access to the waterfront. The BRA began the Harborpark planning process for the waterfront in the early 1980s with the goal of creating a continuous 47-mile waterfront walkway along Boston Harbor. The Harborwalk connects the city’s neighborhoods to its Harbor, leading to recreational, cultural, and historic attractions, and direct connections to public transit, including water transportation facilities. Ex. 1, McGuinness ¶ 23.

The proposed project does not interfere with the Harborwalk in any way, which runs the full perimeter of Long Wharf. In fact, the project maintains more than twice as much open space for Harborwalk (25 feet) than what is mandated (12 feet). Ex. 1, McGuinness ¶ 41; Exhibit 9, aerial photograph of Downtown Waterfront February 4, 2009 with overlay. The proposed

restaurant provides amenities which currently do not exist for Harborwalk users, water ferry riders, and visitors from vessel tie-ups. The BRA will further encourage use of these vessels through the operation of a dock-side respite close to the Site. Passengers then will be able to wait for their water transportation inside the restaurant or under outdoor sheltered seating.

It is important to note that the Boston Harbor Association, the chief proponent of the Harborwalk, substantiated the project's synergistic effect on water-dependent uses in their project support letter dated March 10, 2008 to the Department of Environmental Protection during the written comment period.

The project also will be an important facet of the new "Norman B. Leventhal Walk to the Sea," which the city dedicated in September 2008. This is a wayfinding path from the top of Beacon Hill, the highest point on the Shawmut Peninsula, to Boston's furthest projection into the harbor, Long Wharf. Ex. 1, McGuinness ¶ 32; Ex. 3, Donahue ¶ 14. The proposed restaurant provides retail opportunities which will be a destination for pedestrians on the Walk to the Sea. By supporting and enhancing all these water-dependent uses, the project effectively utilizes the shoreline for water-dependent purposes as 310 CMR 9.52 requires.

3. The project is in compliance with 310 CMR 9.53 by activating tidelands for public use.

The project complies with the additional standard for activating Commonwealth tidelands for public use. The redevelopment primarily occurs within the footprint of the existing vent structure with the addition of only 1,225 square feet to accommodate building design. Ex. 2, Mammoli ¶ 20. Approximately 25,915 square feet of area at the seaward end of Long Wharf will be preserved as open space and continue to be used as a public plaza. Seasonal outdoor dining will occupy approximately 2,586 square feet. At the southeastern portion of the wharf there will be eighteen seasonal shaded tables for public use, independent of patronage of the

restaurant. Ex. 1, McGuinness ¶ 34. These amenities all enhance the existing water-dependent uses.

Second, 310 CMR 9.53(2) sets a standard for maintaining public activity on a site on a year-round basis. One of the major re-development goals of this project is to winterize the Site because at present, the Pavilion is not fully utilized for approximately eight months out of the year. Ex. 3, Donahue ¶ 15. Equally important, the Site currently is not a secure destination, as indicated by the numerous reports of criminal and suspicious activity to the Boston Police Department and Municipal Protective Services. *Id.*, ¶ 16. Although residents and visitors can walk to the end of Long Wharf during any season, there is no destination to go to or warm place to retreat to during inclement weather.

In accordance with 310 CMR 9.53(2)(b), the project will maintain existing exterior open spaces for public use including the Harborwalk, the vast majority of the plaza, and the benches. The project will include additional exterior enhancements, such as sheltered seating and tables, historic interpretive exhibits, and binoculars. In compliance with 310 CMR 9.53(2)(c), water transportation riders, Harborwalk users, and Walk to the Sea users will be directed to the building for the use of public restrooms as facilities of public accommodation.

Third, under 310 CMR 9.53(3), the project complies with applicable city and state plans, decisions by the Secretary of Environmental Affairs, and is consistent with memoranda of understanding between regulatory authorities. The BRA envisions that an enlivened seaward end of Long Wharf, like the Harborwalk, will bring the activity of the city back to the harbor and the beauty and history of the harbor into the city. Ex. 1, McGuinness ¶ 34(a). Further, activating the Pavilion is one facet of the Crossroads Initiative, to enhance connections between districts across the Greenway. State Street through the end of Long Wharf is Boston's traditional

thoroughfare to the sea and a designated Crossroad, providing an essential pedestrian link and visual connection between the Old State House, the financial district, the Wharf District Parks and the Harborwalk. Ex. 1, McGuinness ¶ 39. Thus, the project is an excellent means of activating the tidelands for public use.

4. The project complies with Coastal Zone Management policies under 310 CMR 9.54.

The Massachusetts Office of Coastal Zone Management issued its determination in support of the project on November 12, 2007. In regard to the proposed expansion and reconfiguration of the water-dependent use zone, CZM found: “Given its location on Long Wharf, adjacent to the existing Harborwalk and open space, the expanded and reconfigured setback area will promote water-dependent activity on and adjacent to the project site.” Exhibit 29, Office of Coastal Zone Management Memorandum 11/12/07.

B. The DEP Correctly Found That the Project Serves a Proper Public Purpose and This Presumption Can Be Overcome Only By a Municipal, State, Regional or Federal Agency.

As conclusively demonstrated by the record in this matter and explained at length *supra*, the project complies with all the standards of 310 CMR 9.31(2)(b). Therefore, the regulations require that the Department shall presume the project serves a proper public purpose which provides greater benefit than detriment to the rights of the public. 310 CMR 9.31(2). This presumption may be overcome only if:

a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting.
310 CMR 9.31(3)(b).

Thus, under the governing regulations there is no evidence before OADR to overcome the presumption that the project serves a proper public purpose.

C. Whether the Project Provides Reasonably Direct Public Non-Water Related Benefits In Compliance With 310 CMR 9.53(3)(d)?

The project indisputably provides reasonably direct public non-water related benefits in compliance with the 310 CMR 9.53(3)(d) because it reutilizes idle waterfront property and creates permanent jobs on-site. On January 22, 2008, the City of Boston Board of Appeal granted variances from the zoning code to permit a change of occupancy for the Pavilion to a restaurant. The project did not require any variances from the numerical standards or substantive provisions of MHP under 310 CMR 9.34(a)(2). Ex. 1, McGuinness ¶ 45. The Board of Appeal findings address the concerns of 310 CMR 9.53(3)(d) regarding direct and indirect public benefits:

- a. “The property site has been the subject of much study and planning by the City of Boston and the BRA for the purpose of connecting the waterfront to the neighborhood and streets surrounding the new Rose Kennedy Greenway.” Exhibit 31, Decision of Board of Appeal dated 1/2/08, p. 2.
- b. The granted zoning relief will allow redevelopment of the MBTA vent structure “into a reasonably priced neighborhood concept at this location, with sit-down dining, outdoor seating, live entertainment and take-out food service in a manner that is consistent with and complimentary to the immediate and surrounding neighborhoods.” *Id.*, p. 3.
- c. The grant of relief is in the public interest because the project enjoys broad community support from the North End Residents’ Association, the Wharf District Task Force, the Mayor’s Office of Neighborhood Services, District City

Councilor LaMartina, and certain residents of the surrounding residential buildings. *Id.*, p. 10.

- d. The proposed project serves a proper public purpose because it complies with Chapter 91 requirements for conserving and utilizing the capacity of the site to accommodate water-dependent use. The project maintains visual access to the water; provides access for fishing and walking along the water's edge, and exceeds regulatory standards for open space areas. *Id.*, p. 11.
- e. "The proposed project is entirely consistent with the applicable Urban Design Guidelines . . . [and] the planning goals and objectives of the City and the BRA to reengage the subject property with the Boston waterfront and its immediate neighborhoods." *Id.*, p.
- f. "All conditions required for the granting of a Variance under Article 7, Section 7-3 of the Zoning Code have been met and varying the terms of the Zoning Code as outlined above will not conflict with the intent and spirit of the Zoning Code." *Id.*, p. 14.

D. Whether the Project Complies With Condition No. 5 of the EOEEA Secretary's Decision on the 1991 Boston Harbor Plan Because It Will Promote Public Use of Other Water-Dependent Activity on the Seaward End of Long Wharf in a Clearly Superior Manner?

The reconfiguration of setback distances required for this project will promote public use or other water-dependent activities in a "clearly superior manner" as required by the 1991 EOEA decision. Ex. 16, EOEA Decision p. 32. The proposed use is superior to the current use of the Site for several reasons. First, the vent structure is not being utilized as it is intended or on a year-round basis. Because the Pavilion is hidden from public sight, vagrancy and criminal uses

frequently occur, making it an unsafe place to be at night. *See* Ex. 3, Donahue ¶ 16. The Pavilion currently does not include adequate seating and is too open to weather to be used consistently for approximately eight months of the year. *See* Exhibit 10, photographs of pavilion exterior and interior circa 2006. The investment of public and private funds to the Pavilion will create a safer environment and uses that enhance existing water-dependent activities.

Over the years, the City has invested millions of dollars for improvements to Long Wharf to improve public access. These projects include stabilization work on various parts of the Wharf, the creation of additional open space at the Wharf, the expansion and maintenance of the Harborwalk, and improvements to water transportation at the Wharf. *See* Ex. 2, Mammoli ¶¶ 3-8. The City has consistently focused its urban design efforts and investment to provide residents with parks, open space, and public access to the waterfront. Ex. 3, Donahue ¶ 17. An important focus in the planning of this project has been on ways to enhance open space uses at Long Wharf, by creating public seating, making improvements to existing seating and uses (e.g. adding tables and chairs for the public use and binoculars for waterfront viewing), and ensuring that proper maintenance of the open space will be completed by a year-round tenant. Total open space at the end of Long Wharf will be more than 78% of the entire lease area abutting the Harborwalk⁶ and an additional 3,135 square feet of WDUZ setback area is proposed. When one takes into consideration the decades-long, comprehensive waterfront planning process, and the combination of Long Wharf uses, including Harborwalk, water transportation services, hotel, and

⁶ In its Written Determination Finding 2, the DEP determined that of the approximately 33,155 square foot lease area, the existing structure occupies approximately 3,430 square feet, the proposed additions occupy approximately 1,225 square feet, and the seasonal outdoor dining occupies approximately 2,586 square feet, leaving 25,915 square feet reserved for public open space.

open space, there can be no question that the project satisfies EOEAs “clearly superior manner” standard.

E. Whether the Project Meets the Requirements of 310 CMR 9.34(2)(b) and 310 CMR 9.51(3)(c)?

Under 310 CMR 9.34(2)(b)(1)⁷, the setback requirements set forth in 310 CMR 9.51(3)(c) are waived and substituted with the alternative setbacks of MHP. The project unequivocally satisfies MHP standards and setbacks. The proposed amount of open space of approximately 25,915 square feet of area at the seaward end of Long Wharf is 3,135 square feet more area than required by 310 CMR 9.51(3)(c). DEP Written Determination Finding 2. None of the proposed additions will be closer to the water than the closest point of the existing structure, and all of the proposed additions will be at least twenty-eight feet from the water. Ex. 2, Mammoli ¶ 21. The proposed design of the restaurant will complement the surrounding open space and the other buildings on Long Wharf. *Id.* ¶ 23. The proposed use will complement existing public and commercial uses. *Id.* ¶ 24. The proposed use does not include any expansion of the limited area available for vehicular parking. *Id.* ¶ 25.

F. Whether the Project Meets the Requirements of 310 CMR 9.51(2)(b) Regarding Public Views of the Water?

The project fully complies with the requirement of 310 CMR 9.51(2) to consider the effect of the proposed design on public views of the water and along sight lines emanating from public ways. The maintenance of view corridors to the harbor from significant streets in the North End and Downtown also is a specific MHP mandate. Ex. 1, McGuinness ¶ 26(d). The City worked to ensure that the project will not adversely impact the planned view corridor from

⁷ 9.34(2)(b)(2) and (3) require consistency with CZM guidelines. This is addressed in Argument § A.4 *supra*.

the Old State House at Washington and State Streets down to Long Wharf, or sight lines to the water from the Harborwalk. *See* Ex. 24, BRA 2006 RFP, App. B; Ex. 9, aerial photograph of Downtown Waterfront with overlay. Any changes to water views will be de minimis. The project will utilize the footprint of the columned vent structure to ensure that existing open views through the Pavilion will be maintained through the use of windowed walls. Ex. 1, McGuinness ¶ 36; Ex. 2, Mammoli ¶ 18. Further, view corridors to the harbor from significant streets will be unaffected because the height of the Pavilion will be unchanged. Ex. 1, McGuinness ¶ 38(a).

G. Whether the Project Complies with the Historic Resource Requirements of 310 CMR 9.33(1)(i)?

On November 15, 2007, the Massachusetts Historical Commission issued a determination in support of compliance with M.G.L. Ch. 9 §§26-27C, and Massachusetts Environmental Policy Act 301 CMR § 11. MHC found that “the project will have no adverse effect as defined by 36 CFR 800.5(b) and 950 CMR 71.07(2)(b)(2) on the Custom House Block or the Long Wharf and Custom House Block Historic District.” Exhibit 30, Massachusetts Historical Commission Letter dated 11/15/07; Ex. 1, McGuinness ¶ 44. It is important to note that over the past three centuries, Long Wharf has been the gateway to the city with ever-changing commercial uses. The seaward end of Long Wharf cannot fairly be characterized as a quiet contemplative spot with literally millions of water transportation passengers traversing Long Wharf each year. The proposed restaurant use reinstates one of the first uses at Long Wharf in the early 18th century – a tavern at the seaward end of the Wharf.

H. Whether Petitioners Have Standing?

Petitioners do not have standing in this matter for two reasons. First, Petitioners have filed as ten residents of the Commonwealth, pursuant to M.G.L. c. 30A §10A. This statute requires that the petitioners' intervention be limited to the issue of damage to the environment as defined in M.G.L. c. 214 § 7A, and the elimination or reduction thereof. Much of the testimony goes beyond the statutory scope and therefore should be disregarded.

Second, and more significant, no regulation within 310 CMR 9.00 permits or contemplates the type of challenge Petitioners herein assert. Under 310 CMR 9.31(3)(b) *only* an agency may present evidence to rebut the presumption that a project serves a proper public purpose if it complies with all requirements of 310 CMR 9.00. *Only* an agency charged with protecting the public interest may make a clear showing that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to public interest. 310 CMR 9.31(3)(b). None of the Petitioners' testimony is probative of any point pending before OADR because it is not a matter of individual discretion as to what constitutes a proper public purpose. OADR should dismiss Petitioners' claims in their entirety on this basis.

I. Whether the Project Provides Greater Benefit Than Detriment to the Rights of the Public in Tidelands in Accordance with 310 CMR 9.31(2)(b)?

Please see Argument §§ A, B *supra*.

J. An Expedited Decision is Critical in this Matter.

As the record amply demonstrates, there is a high likelihood of the Commissioner upholding the Written Determination of DEP. The delay in the commencement of the project from September 17, 2008 to present has placed the financial viability of the project at risk. Any further delay will be extremely detrimental, given the need to maintain financing commitments and the start of the construction season this spring. Ex. 1, McGuinness ¶ 42. Given all the facts

and circumstances, the detriment to the city and its designated developer far outweigh the asserted injuries to Petitioners' view or enjoyment of the area. The BRA respectfully requests that OADR and the Commissioner expedite the decision in this matter.

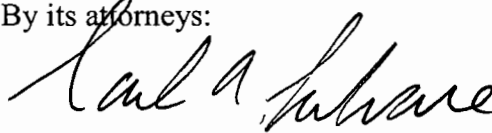
IV. CONCLUSION

Long Wharf is a celebrated gateway to the city for visitors arriving by boat, as a junction point for the Harborwalk, as a destination for the new Walk to the Sea, and as a starting point for excursions to the Harbor Islands. For almost three centuries, commercial and public uses have abounded at Long Wharf. The seaward end of Long Wharf has never been a quiet or contemplative space, from its earliest use as a tavern to its present use as a transit point for marine facilities which accommodate millions of water transportation passengers each year. By re-using the existing vent structure as a restaurant, and providing shaded seating and restrooms to the public, the project is ideally designed to promote public use and support existing water-dependent activities.

For all the reasons stated herein, the Commissioner should uphold the Written Determination of the DEP.

Respectfully submitted,

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