

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO: SJC-11134

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SANJOY MAHAJAN et al.,

Plaintiffs-Appellees

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,

and BOSTON REDEVELOPMENT AUTHORITY.

Defendants-Appellants

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Appeal from the Massachusetts Superior Court for  
Suffolk County; Civil Action No. 2010-00802-B

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**Brief of Appellant Boston Redevelopment Authority**

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Denise A. Chicoine (BBO# 564152)  
dchicoine@elcpc.com

Debra C. Leggett (BBO# 633456)  
dleggett@elcpc.com

Patrick A. Leeman (BBO# 678876)  
pleeman@elcpc.com

ENGLANDER, LEGGETT & CHICOINE P.C.  
44 School Street, Suite 800  
Boston, MA 02108  
Tel. (617) 723-7400

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**STATEMENT OF THE ISSUES PRESENTED**

1. Whether land taken or acquired pursuant to M.G.L. Chapter 121B for urban renewal purposes is subject to Article 97 of the Amendments to the Massachusetts Constitution?
2. Whether the Superior Court erred in granting the extraordinary remedy of mandamus?
3. Whether a final decision of the Massachusetts Department of Environmental Protection affirming the issuance of a M.G.L. Chapter 91 waterways license to the Boston Redevelopment Authority should be upheld?

## STATEMENT OF THE CASE

This case involves the Boston Redevelopment Authority's ("BRA") exercise of urban renewal powers to redevelop an underutilized vent structure at the seaward end of Long Wharf into a waterfront restaurant with public facilities. Throughout the administrative and Superior Court proceedings, Appellees have erroneously claimed that Article 97 of the Amendments to the Massachusetts Constitution ("Article 97") applies to the land at issue, requiring a two-thirds vote of the legislature to authorize any change in use or other disposition. The relationship between the urban renewal statute and Article 97 presents a novel question of law integral to urban renewal planning statewide. This Court should preserve the goals of urban renewal by declaring that the use or disposition of land taken or acquired for urban renewal is a public purpose distinct from the public purpose of Article 97, which pertains to the conservation of natural resources.

### **I. THE SUPERIOR COURT PROCEEDINGS.**

The Superior Court proceedings in this case began as an action seeking judicial review under M.G.L. ch.

30A § 14. Complaint, Record Appendix ("RA") 2015-2018. The agency action in question is a Final Decision by the Massachusetts Department of Environmental Protection ("DEP") affirming the issuance of a M.G.L. ch. 91 waterways license to the BRA (the "Chapter 91 License"). Final Decision, RA2006; Complaint ¶ 1, RA2015.

Appellees are ten residents of Boston's North End neighborhood ("the Resident Appellees"). Id. at ¶ 3, RA2015-2016. The Superior Court complaint sought declaratory relief under M.G.L. ch. 231A to invalidate the Chapter 91 License, and relief by way of mandamus under M.G.L. ch. 249 § 5 to compel the BRA and DEP to comply with Article 97. Complaint, RA2015-2018.

The BRA and the Resident Appellees filed cross-motions for Judgment on the Pleadings. See Memorandum of Decision and Order, RA2378. In a Memorandum of Decision and Order dated June 10, 2011, Superior Court Judge Elizabeth M. Fahey allowed the Resident Appellees' Motion for Judgment on the Pleadings and denied the BRA's Cross-Motion for Judgment on the Pleadings. Id. Judge Fahey vacated DEP's Final Decision and voided the Chapter 91 License "[i]n light

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of the restrictions under Article 97." Id. at RA2389.

The Superior Court did not address the issue of whether the Chapter 91 License was otherwise properly issued. Id. at RA2378-2389.

## II. STATEMENT OF FACTS.

### A. Functions of the BRA.

The BRA is both a "redevelopment authority" created pursuant to M.G.L. ch. 121 § 26QQ, the precursor statute to M.G.L. ch. 121B § 4, and an "urban renewal agency" under M.G.L. ch. 121B § 9. The BRA also serves as the planning board for the City of Boston and monitors private development under M.G.L. ch. 121A. See St. 1960, ch. 652. A thorough comparison of the BRA's role in M.G.L. ch. 121A urban redevelopment projects versus its role as an urban renewal agency in M.G.L. ch. 121B urban renewal projects appears in Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 50-53 (1977). The claims in this case involve the BRA's role as an urban renewal agency.<sup>1</sup> ✓

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<sup>1</sup> The BRA also believes that it is not subject to Article 97 in its role as a redevelopment authority. ✓

**B. Powers and Duties of the BRA Under the Urban  
Renewal Statute.**

The BRA's urban renewal powers and duties are enumerated throughout M.G.L. ch. 121B, most notably in § 11 and §§ 45-57A. The legislative goal of M.G.L. ch. 121B is to eliminate decadent, substandard, or blighted open areas in urban settings and to promote sound community growth. M.G.L. ch. 121B § 45; see M.G.L. ch. 121B § 1 (defining decadent, substandard, and blighted open areas). The tools of urban renewal, including land assembly, title confirmation, public financial assistance, and development and design controls, enable the BRA to guide private sector development initiatives toward areas in need. See M.G.L. ch. 121B §§ 46-57A. One of the most significant resources available to urban renewal agencies such as the BRA is the power of eminent domain. M.G.L. ch. 121B defines the purposes for which the BRA may take land by eminent domain. The chapter states in relevant part:<sup>2</sup>

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<sup>2</sup> The full text of each of these sections and other relevant constitutional provisions, statutes, and regulations appears in the addendum.

M.G.L. ch. 121B § 11

Each operating agency shall have the powers... (d) To take by eminent domain any property, real or personal, or any interest therein, found by it to be necessary or reasonably required to carry out the purposes of this chapter... (emphasis added)

M.G.L. ch. 121B § 45

It is hereby declared...that the acquisition of property for the purpose of eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by urban renewal agencies... are public uses and purposes for which public money may be expended and the power of eminent domain exercised... (emphasis added)

M.G.L. ch. 121B § 47

Notwithstanding any contrary provision of this chapter, an urban renewal agency may...take by eminent domain, as provided in clause (d) of section eleven...or acquire by purchase, lease, gift, bequest or grant, and hold, clear, repair, operate and, after having taken or acquired the same, dispose of land constituting the whole or any part or parts of any area which,...it has determined to be a decadent, substandard or blighted open area and for which it is preparing an urban renewal plan... (emphasis added)

**C. The Land at Issue.**

The land at issue in this case is the pavilion area located at the seaward end of Long Wharf on which

there is a Massachusetts Bay Transportation Authority ("MBTA") vent structure<sup>3</sup> (the "Long Wharf Pavilion"). Recommended Final Decision ("RFD"), RA1980; BRA's Request for Proposals for Long Wharf Pavilion Café/Restaurant Re-Use, RA0911-0912. Pursuant to the terms of the Downtown Waterfront-Faneuil Hall Urban Renewal Plan dated April 15, 1964 as amended ("1964 Urban Renewal Plan"), the BRA acquired the Long Wharf Pavilion in 1970 as part of a larger eminent domain taking of Long Wharf ("1970 Order of Taking").<sup>4</sup> RFD, RA1977; Memorandum of Decision and Order, RA2379. The legal description of Long Wharf in the 1970 Order of Taking excludes existing buildings and is subject to easements for a six-foot "pedestrian walkway" and access to the existing buildings. 1970 Order of

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<sup>3</sup>In 1983, the Department of Environmental Quality Engineering (now DEP) 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. Pre-Filed Testimony of Mark Donahue ¶ 6, RA0428-0429. At the same time, the BRA undertook renovations to the plaza area surrounding the vent structure. Id.

<sup>4</sup>The 1970 Order of Taking is recorded with the Suffolk County Registry of Deeds at Book 8378, Page 559 (RA0512-0518) and incorporated an Order of Taking dated February 4, 1965 that is recorded with the Suffolk County Registry of Deeds at Book 7929, Page 440. RA0519-0522.

Taking, RA0515-0517. The 1970 Order of Taking does not include a conservation restriction or any reference to natural resources, parkland, or open space. Id. at RA0512-0518.

**D. History of Long Wharf.**

Since its construction three hundred years ago in 1711, Long Wharf has had an array of ever-changing commercial uses as the oldest continuously operated wharf in the nation and the historic gateway to Boston from the sea. State Street and Long Wharf Interpretive Plan (2007), RA1006-1037; Pre-Filed Testimony of Richard McGuinness ("McGuinness Testimony") ¶¶ 7-8, RA0398; RFD, RA1970. Long Wharf has been the site of notable events in American history and is a designated National Historic Landmark.<sup>5</sup> McGuinness Testimony ¶¶ 7, 15, RA0398-0400; RFD, RA1970. In the late nineteenth century and early twentieth century, there were active

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<sup>5</sup> In 1726 the notorious pirate William Fly was brought up the wharf in chains and hung above the wharf after his trial. McGuinness Testimony ¶ 15, RA0400. British troops landed on Long Wharf in 1768 to enforce the tax acts and evacuated from Long Wharf in 1776. Id. In 1854, the fugitive slave Anthony Burns was brought down Long Wharf to a steamer taking him back to slavery in Virginia. Id. Downtown Boston shut down, as tens of thousands protested, and some historians view the Civil War as starting that day. Id.



warehouses along the perimeter of Long Wharf to service heavy shipping traffic. McGuinness Testimony ¶ 18, RA0400; Boston Society Photograph of Long Wharf in the late 19<sup>th</sup> Century, RA0433; Aerial Photographs of Long Wharf circa 1930s, RA0434-0435. During this same period, Long Wharf was vital to Boston's fishing industry. McGuinness Testimony ¶ 17, RA0400. Italian immigrants who settled in the North End operated from the pier, sold their catch to stores on Atlantic Avenue, and sold directly to customers on Long Wharf. Id. By the 1960s, however, the warehouses were shuttered and Long Wharf had deteriorated significantly. See National Register of Historic Places Registration Form, RA2339.

**E. 1964 Urban Renewal Plan.**

The BRA has held and maintained Long Wharf, including the Long Wharf Pavilion, for urban renewal purposes since 1970.<sup>6</sup> In accordance with the legislative goal of M.G.L. ch. 121B, the 1964 Urban Renewal Plan provides:

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<sup>6</sup> The 1964 Urban Renewal Plan specified a forty-year effective period. In 2004, the 1964 Urban Renewal Plan was extended to April 30, 2015. Amendments to the 1964 Urban Renewal Plan, RA0508.

The basic goal of urban renewal action in the Downtown Waterfront-Faneuil Hall Area is to stimulate and to facilitate development efforts in the area, by eliminating those severe conditions of blight, deterioration, obsolescence, traffic congestion and incompatible land uses which hinder private investment in new development without the aid of governmental action, in order to (1) revitalize a key portion of downtown Boston;... (3) establish a functional connection between the area and its surrounding districts...

1964 Urban Renewal Plan § 201, RA0473. The 1964 Urban Renewal Plan also includes the following objectives for Long Wharf:

- a. Eliminate obsolete and substandard building conditions which are a factor in spreading blight to adjacent areas.
- b. Promote the preservation and enhancement of buildings in the project area, which have architectural and historical significance.
- c. Create an area with a mixture of land uses compatible with living, working, and recreational opportunities.
- d. Create an area for the development of marine or marine-oriented activities designed to stimulate tourism and symbolize the importance of Boston's historic relationship to the sea.

- e. Provide public ways, parks and plazas, which encourage the pedestrian to enjoy the harbor and its activities.
- f. Provide maximum opportunity for pedestrian access to the water's edge.
- g. Establish a relationship between buildings, open spaces, and public ways, which provides maximum protection to the pedestrian during unfavorable weather conditions.
- h. Create an unobstructed visual channel from the Old State House at Washington and State Streets down to Long Wharf and the harbor beyond.
- i. Retain Long Wharf's historic position as the farthest projection of land into the harbor.

1964 Urban Renewal Plan §§ 201-204, RA0473-0477.

**F. 1990 Municipal Harbor Plan.**

The land at issue is also subject to the City of Boston's Municipal Harbor Plan (the "1990 Municipal Harbor Plan"), which governs planning for all waterfront areas. 1990 Municipal Harbor Plan, RA0524-0627; McGuinness Testimony ¶ 24, RA0405. Pursuant to municipal harbor planning regulations set forth at 301 C.M.R. §§ 23.00, the Secretary of the Executive Office of Environmental Affairs ("EOEA", now "EOEEA") issued

a decision on May 22, 1991 approving the 1990 Municipal Harbor Plan, subject to certain requirements and conditions. See 1991 Decision on the 1990 Municipal Harbor Plan, RA0628-RA0667. This decision established "a joint venture of the state and the City, with the former establishing the basic regulatory framework and the latter providing a more detailed plan with harbor-specific guidance for DEP's review of ch. 91 license applications." Id. at RA0631.

The goals of the 1990 Municipal Harbor Plan and the objectives of the 1964 Urban Renewal Plan are consistent. See McGuinness Testimony ¶¶ 21, 24-26, RA0402, RA0405-0407; 1964 Urban Renewal Plan §§ 201-204, RA0473-0477; 1990 Municipal Harbor Plan, RA0533-0534, RA0544-0546. Among other objectives, the 1990 Municipal Harbor Plan calls for the activation and revitalization of Boston's underutilized shoreline by promoting growth through private investment and appropriate urban design that will bring a balanced mix of public uses. See 1990 Municipal Harbor Plan, RA0533. The 1990 Municipal Harbor Plan also includes certain mandates for development on Long Wharf. Id. at RA0546, RA0588. Specifically, projects proposed at

Long Wharf must include business activities that will attract visitors to the waterfront, such as water transportation facilities, restaurants, cafes, hotels, and cultural facilities.. RA0546.

**G. Urban Renewal of Long Wharf.**

Over the past four decades, in its role as the city's urban renewal agency, the BRA has invested substantial resources in planning and redeveloping Boston's waterfront and the Long Wharf area in particular. See McGuinness Testimony ¶ 6, RA0397. The goals of the BRA's Long Wharf Master Plan (1979) are consistent with the objectives of the 1964 Urban Renewal Plan. Id. at ¶ 34, RA0409. The Long Wharf Master Plan describes the planning process for Long Wharf, with an aim to develop commercial uses along with public access to the water. McGuinness Testimony ¶ 22, RA0402-0403; Summary of Long Wharf Master Plan, RA0523. The BRA has sought to design and construct projects on Long Wharf that maximize public access to the water and waterfront view corridors. Pre-Filed Testimony of Lawrence Mammoli ("Mammoli Testimony") ¶ 12, RA0423. The centerpiece of BRA's efforts to provide public access to the waterfront is the Boston

HarborWalk Initiative (the "Harborwalk"), a pedestrian walkway that connects Boston's neighborhoods to the harbor. McGuinness Testimony ¶ 23, RA0403-0404.

i. Improvements to water transportation infrastructure at Long Wharf.

Over the years, there has been an increasing demand for ferry services, public berthing space, and expanded terminal facilities along the downtown waterfront. Mammoli Testimony ¶¶ 3-4, RA0418. The BRA has been engaged in a comprehensive, multi-year project to expand capacity, enhance intermodal access to the waterfront, and improve the water transportation infrastructure at Long Wharf as a key downtown terminal. Id. at ¶ 8, RA0419-0422. Since 1996, the BRA has sought and expended millions of dollars in the Long Wharf area in connection with this project, including stabilization and remediation of piers and improvements to the HarborWalk areas on Long Wharf. Id.

ii. Long Wharf today.

Currently, Long Wharf is a "recreational and cultural center with hotel, boat landings, restaurants, shops, offices, and residences," as well

as an MBTA subway stop. RFD, RA1970. Long Wharf also serves as the hub of Boston's water transportation system. Mammoli Testimony, RA0418. It is the launch site for ferries to Charlestown, South Boston, the Harbor Islands, Salem, Quincy, Provincetown, numerous sightseeing cruise vessels, and whale watch tours. McGuinness Testimony ¶ 19, RA0401. In 2010, ninety percent of Boston Harbor water transit riders used the core terminals from Long Wharf to Rowes Wharf, an estimated annual volume of 3.8 million passengers. Pre-Filed Testimony of Mark Donahue ("Donahue Testimony") ¶ 5, RA0427. The BRA's vision and stewardship has transformed Long Wharf from a dilapidated pier that hampered use of the entire area to a bustling marina and pedestrian destination that is one of the gems of Boston's waterfront. Compare Aerial Photographs of Long Wharf circa 1930's, RA0434-0435 and Photograph of Long Wharf 1988, RA0438 with Adaptive Environments' Award for Excellence in Universal Design (2003), RA0884-0889; Crossroads Initiative Pamphlet (2005), RA0890-0905; Excerpts from the Boston HarborWalk Initiative website, RA1038-1053; Aerial Photograph of Downtown Waterfront dated March

30, 2008, RA0439.

**H. Proposed Re-Use of the Long Wharf Pavilion.**

In carrying out its statutory duties as Boston's urban renewal agency, the BRA seeks to redevelop the Long Wharf Pavilion "to fulfill the urban renewal goal of stimulating tourism and establishing a relationship between buildings, open spaces, and public ways, which provides maximum protection to the pedestrian during unfavorable weather conditions." McGuinness Testimony ¶¶ 21-22, 35, RA0401-0402, RA0411. At present, the Long Wharf Pavilion is not being utilized in accordance with the mandates of the 1990 Municipal Harbor Plan. McGuinness Testimony ¶ 38, RA0411-0413; Mammoli Testimony ¶ 14, RA0423. Despite the high volume of water transit users and other pedestrians in the vicinity, the Long Wharf Pavilion has no facilities or formal seating and is too open to weather to be used consistently throughout the year.

Id.

In 2000, the BRA began focusing on activating the Long Wharf Pavilion year-round. Donahue Testimony ¶ 7, RA0428. The Revised Long Wharf Master Plan (2000) included a revised site plan designating the Long



Wharf Pavilion as a "potential adaptive re-use." Id.  
at ¶ 8, RA0428; McGuinness Testimony ¶ 28, RA0407.

The BRA initiated a series of meetings with interested parties, abutters, users of the waterfront, public agencies, and elected officials to explore re-use of the MBTA vent structure. Donahue Testimony ¶ 7, RA0428. Based on input from a six-year collaborative and comprehensive process, the BRA issued a request for proposals for re-use of the Long Wharf Pavilion as a café/restaurant. Donahue Testimony ¶¶ 7-8, RA0428-0429. After carefully weighing various proposals, the BRA designated a developer. Id.

The proposed redevelopment involves enclosing and constructing a small addition to the existing MBTA vent structure. Chapter 91 License Application, RA0055-0058; compare current views of the Long Wharf Pavilion, RA0441-0446 with proposed redevelopment mock-up images, RA0464-0465. In addition to an affordable dining establishment, the proposed redevelopment includes shaded seating, restrooms, and several sets of binoculars, all available to the public independent of patronage of the restaurant. McGuinness Testimony ¶¶ 34-38, RA0409-0413; Donahue

Testimony ¶ 20, RA0432. The redevelopment leaves more than 78% of the area as public open space.<sup>7</sup> None of the proposed additions will be closer to the water than the existing structure, and all are at least twenty-eight feet from the water. Mammoli Testimony ¶ 21, RA0425. 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 or sight lines to the water from the HarborWalk. McGuinness Testimony ¶ 36, RA0411; Mammoli Testimony ¶ 17, RA0424. Existing open views will be maintained through the use of windowed walls between the columns of the existing structure. McGuinness Testimony ¶ 36, RA0411.

The restaurant concept as a re-use of the MBTA vent structure meets many of the objectives articulated by the 1964 Urban Renewal Plan. Donahue Testimony ¶ 10, RA0429. The project also complies with the 1990 Municipal Harbor Plan and other

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<sup>7</sup> Of the approximate 33,255 sq. ft. Long Wharf Pavilion area, the existing structure occupies approximately 3,430 sq. ft., the proposed additions will occupy approximately 1,225 sq. ft., and the proposed seasonal outdoor dining will occupy approximately 2,586 sq. ft. Chapter 91 License Application, RA0056.

applicable city and state plans as well as written memoranda of understanding and decisions by the Secretary of the EOEEA. Mammoli Testimony ¶ 14, RA0423-0424.

Other agencies have exercised oversight in regard to the proposed redevelopment. The Massachusetts Office of Coastal Zone Management approved the expansion and reconfiguration of the water-dependent use zone setback area. Memorandum dated November 12, 2007, RA1056-1057. In a letter dated November 15, 2007, the Massachusetts Historical Commission issued a determination finding that the proposed project would have no adverse effect. RA1058. The City of Boston Zoning Board of Appeal also granted variances from the Boston Zoning Code to permit the operation of a restaurant at the Long Wharf Pavilion. RA1060-1074.

### **III. THE DEP PROCEEDINGS.**

In 2007, the BRA applied to DEP for the Chapter 91 License because the Long Wharf Pavilion is located on filled tidelands. See Chapter 91 License Application Documents, RA0033-0068. On September 17, 2008, DEP issued a Written Determination pursuant to M.G.L. ch. 91 and the "Waterways Regulations" set

forth at 310 C.M.R. §§ 9.00 approving the BRA's application for the Chapter 91 License for a nonwater-dependent use project, subject to certain conditions. Written Determination, RA0069-0078. For example, a special condition of the Chapter 91 License requires the BRA to be an active steward of the surrounding open space, to perform routine maintenance of the public amenities, and to ensure that trash is removed on a daily basis. Written Determination, Special Condition #5, RA0075.

The Resident Appellees filed an appeal with DEP's Office of Appeals and Dispute Resolution ("OADR") on October 9, 2008. Notice of Claim, RA001-0011. Not one of the Resident Appellees lives close enough to Long Wharf to see or hear the proposed redevelopment from his or her residence. See Aerial Photograph of Downtown Waterfront and the North End with overlay dated February 4, 2009, RA0440.

On January 29, 2010, the DEP Commissioner adopted the Recommended Final Decision ("RFD") of OADR<sup>8</sup>

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<sup>8</sup> The DEP Commissioner declined to adopt the portions of the RFD regarding the Resident Appellees' lack of standing because she found that their claims failed on the merits. Final Decision, RA2006.

affirming the Chapter 91 License. Final Decision, RA2006. The hearing officer conducted three days of hearings, a site view, and engaged in a careful review of an extensive record. RFD, RA1975. Thus, after an exhaustive analysis spanning three years, DEP concluded that the issuance of the Chapter 91 License complied with all relevant Waterways Regulations and all requirements and conditions of the 1990 Municipal Harbor Plan. RFD, RA1969-2005; Final Decision, RA2006.

#### **SUMMARY OF ARGUMENT**

The Superior Court erred in finding that the Long Wharf Pavilion is subject to Article 97 because the BRA took it by eminent domain for urban renewal purposes. Pp. 23-31. M.G.L. ch. 121B empowers urban renewal agencies to take land or easements by eminent domain for the purpose of eliminating blighted, substandard, or decadent open areas. Pp. 23-27. Urban renewal is a public purpose distinct from Article 97, which is focused on the conservation of natural resources. Pp. 23-31. Regardless of the use to which land is put under an urban renewal plan, it is not within the ambit of Article 97. Pp. 25-27. Requiring urban renewal agencies to seek specific legislative

authorization under Article 97 is not contemplated by Article 97 and would thwart the objectives of the urban renewal statute. Pp. 23-31.

Also, the Superior Court erred in granting the extraordinary remedy of mandamus to the Resident Appellees. Pp. 31-38. Mandamus is not an appropriate remedy in this case because the BRA does not have the power to take under Article 97. Pp. 31-34. The Resident Appellees lack standing to seek relief by way of mandamus because the public duty doctrine is inapplicable here and they do not have a particularized harm different from that of the general public. Pp. 34-38. Moreover, the Massachusetts Appeals Court recently held that the public duty doctrine should not be utilized in an ordinary land use controversy. Pp. 35-37.

This Court should affirm the issuance of the Chapter 91 License because both BRA and DEP provided overwhelming and uncontroverted evidence demonstrating that the proposed project fully complies with all requirements of the Waterways Regulations. Pp. 38-47. DEP's Final Decision is correct as a matter of law and the Chapter 91 License should be reinstated. Id.

## ARGUMENT

- I. THE SUPERIOR COURT INCORRECTLY DETERMINED THAT THE LONG WHARF PAVILION IS SUBJECT TO ARTICLE 97 BECAUSE THE BRA TOOK LONG WHARF PURSUANT TO M.G.L. CHAPTER 121B FOR URBAN RENEWAL PURPOSES, A STATUTORY SCHEME INDEPENDENT OF ARTICLE 97.

- A. The Boston Redevelopment Authority Does Not Have Statutory Authority to Take Land for Article 97 Purposes.

The BRA acquired Long Wharf for the purposes stated in M.G.L. ch. 121B, pursuant to the 1964 Urban Renewal Plan. The Massachusetts Appeals Court has concluded that land held for urban renewal purposes is a public purpose distinct from land held for "conservation, open space, parks, recreation, water protection, [or] wildlife protection" purposes. Aaron v. Boston Redevelopment Authority, 66 Mass.App.Ct. 804, 808-810 (2006) (construing M.G.L. ch. 260 § 31). This Court has ruled that land not held for the specific purpose of conservation is not subject to Article 97. Bd. of Selectmen of Hanson v. Lindsay, 444 Mass. 502, 509 (2005).

The purpose of Article 97 is the preservation of natural resources and the establishment of the rights of Massachusetts citizens to a clean environment. Article 97 provides in relevant part:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose...Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by two thirds vote, taken by yeas and nays, of each branch of the general court. (emphasis added)

art. 49 of the Amendments to the Massachusetts Constitution, as amended by art. 97 of the Amendments. By its plain language, the two-thirds vote requirement of Article 97 is applicable only to land or easements "taken or acquired" for the stated purposes, namely "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." Newburyport Redev. Authy. v. Com., 9 Mass.App.Ct. 206, 232-233 (1980).

The BRA has the power to take by eminent domain, for the purpose of urban renewal, land that is determined to be substandard, decadent, or a blighted open area. See M.G.L. ch. 121B §§ 11, 45-47;



Benevolent & Protective Order of Elks Lodge, No. 65 v.

Planning Bd. of Lawrence, 403 Mass. 531, 539-540

(1988). The BRA is not empowered by statute to take for the purposes stated in Article 97 because, in enacting M.G.L. ch. 121B, the legislature explicitly limited the purposes for which urban renewal agencies may exercise the power of eminent domain. See M.G.L. ch. 121B §§ 11, 45, and 47 quoted supra. In direct contrast to Article 97, M.G.L. ch. 121B provides an urban renewal agency the flexibility to engage in:

...the acquisition, planning, clearance, conservation, rehabilitation or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, recreational, educational, hospital, business, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces...

M.G.L ch. 121B § 45. In accordance with the unequivocal language of M.G.L. ch. 121B § 45, all these means of redevelopment are authorized as "incidental" to the purposes of the urban renewal statute and urban renewal plans created in conformity therewith. Benevolent & Protective Order of Elks, 403 Mass. at 551-552; cf. Papadinis v. City of Somerville, 331 Mass. 627, 632 (1954) (construing former M.G.L. ch.

121 § 26KK). This means that the particular use to which land taken or acquired for urban renewal purposes is eventually put (or proposed to be put) is secondary to the purpose of the taking. See M.G.L. ch. 121B §§ 11, 45 quoted supra.

The Superior Court erred in finding that the 1964 Urban Renewal Plan "served Article 97 purposes." Memorandum of Decision and Order, RA2383-2384. The Superior Court cited references in the 1964 Urban Renewal Plan regarding: (i) the provision of public ways, parks, and plazas; (ii) encouraging pedestrian activity at the harbor; and (iii) establishing open spaces. An examination of the 1964 Urban Renewal Plan reveals that these objectives are among the many that the BRA identified as incidental to the basic goals of urban renewal action in the area, which include revitalizing the waterfront and connecting it with the rest of downtown. RA0473-RA0477. These incidental objectives cannot change the fundamental nature of the initial taking, which was for the elimination of blight under M.G.L. ch. 121B, not the protection of

natural resources under Article 97.<sup>9</sup> See id.; 1970 Order of Taking, RA0512-0518; 1965 Order of Taking, RA0519-0522.

**B. Applying Article 97 to Lands Taken for Urban Renewal Purposes Would Undermine the Objectives of M.G.L. ch. 121B.**

The BRA's power and duty to implement urban renewal plans and engage in urban renewal projects are integral to its function as an urban renewal agency. See e.g. M.G.L. ch. 121B § 45. This Court declared forty years ago that the "primary responsibility for representing the public interest" in urban renewal projects "and for supervising the execution [of urban renewal plans is] vested in the BRA." Comm'r of Dept. of Community Affairs v. Boston Redevelopment Authority, 362 Mass. 602, 613 (1972). The General Court created urban renewal agencies such as the BRA to develop expertise in urban planning, design, and redevelopment because it would be unwieldy,

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<sup>9</sup> For this reason the BRA does not address whether the Chapter 91 License is a change in use or other disposition of land for Article 97 purposes. If the Court is inclined to consider this issue, the BRA requests the opportunity to submit authorities which demonstrate that the Chapter 91 License is not a change in use or disposition of land for Article 97 purposes.

impractical, and likely unwise, for the state legislature and governor to participate directly in the planning, design, and redesign of urban renewal projects in individual communities all across the Commonwealth. See id. at 611-615. The policy decision to vest discretion in specialized urban renewal agencies is borne out by the General Court's findings that "the menace of such decadent, substandard or blighted open areas is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided." M.G.L. ch. 121B § 45.

It is not possible for any urban renewal agency to always accurately predict the future and to unerringly create plans that will meet the needs of a changing city for decades to come, or to precisely achieve results from a particular form of redevelopment. Thus, the 1964 Urban Renewal Plan, similar to all such urban renewal plans, contains provisions for the BRA to make changes to and modify urban renewal projects as circumstances warrant. 1964 Urban Renewal Plan § 1101, RA0505. In the case of

Long Wharf, it would have been impossible in 1970 to predict that Long Wharf, once integral to the Commonwealth's fishing and shipping industries, would transform into Boston's water transportation hub with an exponentially increasing demand for ferry services, public berthing space, and expanded terminal facilities. The BRA's goals for Long Wharf are not counter to Article 97. For example, the planning objectives of the 1990 Municipal Harbor Plan and the Long Wharf Master Plan include the revitalization of the shoreline, the preservation of waterfront view corridors, and the creation of parks and plazas. These matters are appropriately the focus of beneficial urban design, as well as being related to natural resources.

However, land held for urban renewal does not come within the ambit of Article 97 simply because its present use is as a park or open space. Such a determination, as the Superior Court made in this case, confuses the goals of the statute with the constitutional provision addressing the conservation of natural resources and interferes with an urban renewal agency's expertise to determine the best

manner to eliminate blight and effectuate beneficial urban design as conditions change over time. Comm'r of Dept. of Community Affairs recognized that forcing the BRA to obtain approval of an agency of the executive branch for every change in an urban renewal plan would result in an administrative morass and would completely thwart the objectives of the statutory scheme.<sup>10</sup> 362 Mass. at 615. Requiring the BRA to seek specific authorization by a two-thirds vote of each branch of the legislature would be far more onerous. See id. To insert the legislative process into decision-making regarding land taken for urban renewal is micro-managing that is not contemplated by Article 97 and that would undoubtedly inhibit urban renewal initiatives throughout the Commonwealth.

Therefore, this Court should preserve the goals of the urban renewal statute by confirming the distinction that the Appeals Court recognized in Aaron

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<sup>10</sup> Regulations enacted in 1996 require the Department of Housing and Community Development to approve any "major plan changes" to existing urban renewal plans. 760 C.M.R. 12.03; see Central Steel Supply Co., Inc. v. Planning Bd. of Somerville, 447 Mass. 333, 339-340 (2006).

v. Boston Redevelopment Authority: the use or disposition of land taken or acquired for urban renewal is a public purpose independent of the conservation of natural resources. 66 Mass.App.Ct. at 810.

**II. THE SUPERIOR COURT ERRED IN GRANTING THE EXTRAORDINARY REMEDY OF MANDAMUS UNDER THE PUBLIC DUTY DOCTRINE.**

"Relief in the nature of mandamus is extraordinary, and is granted in the discretion of the court where no other relief is available."<sup>11</sup> Murray v. Com., 447 Mass. 1010, 1010 (2006). The Superior Court erred in granting relief by way of mandamus under the

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<sup>11</sup> The Superior Court correctly noted that there is no private right of action under Article 97. In Chase v. Trust for Public Land, the Land Court squarely addressed and rejected the proposition that a private citizen may invoke Article 97 to obtain judicial review of an agency decision affecting conservation of land. 2008 WL 642635 \*5 (Mass. Land Ct. 2008). The holding is consistent with Enos v. Sec'y of Env'tl. Affairs, where this Court rejected the plaintiffs' claim that their Article 97 constitutional right to clean air and clean water conferred standing to challenge the Secretary of Environmental Affairs' action. 432 Mass. 132, 142 and n.7 (2000). It is also worth noting that private citizens lack standing to challenge the decisions of the BRA made in the administration of urban renewal plans under M.G.L. ch. 121B. St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority, 429 Mass. 1, 10-11 (1999); see also Benevolent & Protective Order of Elks, 403 Mass. at 536-537.

public duty doctrine because the BRA does not have a clear and unequivocal duty to seek legislative approval under Article 97 for any urban redevelopment. Because the public duty doctrine does not apply, the Resident Appellees were required to demonstrate standing, which they are utterly unable to do.

**A. The Public Duty Doctrine is Inapplicable Because the BRA Does Not Have a Clear and Unequivocal Duty to Comply with Article 97.**

The public duty doctrine potentially allows an individual or group of citizens who do not have a particularized harm to bring an action in the nature of mandamus to "enforce a public duty of interest to citizens generally." Anzalone v. Admin. Office of the Trial Court, 457 Mass. 647, 655 (2010) quoting Nickols v. Comm'rs of Middlesex County, 341 Mass. 13, 18 (1960). In accordance with this doctrine, mandamus is available only to compel a public official to perform a specific, non-discretionary act which the official has a legal duty to perform. Anzalone, 457 Mass. at 655. Massachusetts courts have always limited the public duty doctrine to the enforcement of clear and unequivocal duties, such as election officials' duty to count ballots correctly, Brewster



v. Sherman, 195 Mass. 222, 225 (1907), or the Secretary of the Commonwealth's duty to omit from the ballot an initiative question which described the proposed law inaccurately. Brooks v. Sec'y of Com., 257 Mass. 91, 93-94 (1926).

No court in the Commonwealth has explicitly applied the public duty doctrine to Article 97. Cf. Tax Equity Alliance for Mass. v. Comm'r of Rev., 423 Mass. 708, 714 (1996) (public duty doctrine cannot be invoked for broad purposes). Although courts permitted actions in the nature of mandamus in Toro v. Mayor of Revere, 9 Mass.App.Ct. 871, 871 (1980) and Robbins v. Dept. of Pub. Works, 355 Mass. 328, 332 (1969), these cases are distinguishable from the facts presented here. First, neither Toro nor Robbins involved land taken, acquired, or held for urban renewal purposes. Robbins involved the transfer of "wetlands of considerable natural beauty" located in the Neponset River Reservation from the Metropolitan District Commission to the Department of Public Works for the purpose of constructing a highway. 355 Mass. at 329-330. In Toro, the Massachusetts Appeals Court held that if, as alleged, the city council conveyed

land to the conservation commission to maintain and preserve it for the use of the public for conservation purposes, a later transfer by the city to a private party without compliance with Article 97 would be illegal. 9 Mass.App.Ct. at 871.

In contrast, urban renewal agencies such as the BRA have no clear and unequivocal duty under Article 97 to obtain an affirmative two-thirds vote of each branch of the legislature before changing the use or otherwise disposing of land taken, acquired, or held for urban renewal purposes. Here, the BRA, acting pursuant to the legislative authority granted it by the urban renewal statute, seeks to redevelop the Long Wharf Pavilion, which it has held and maintained for urban renewal purposes since the eminent domain taking in 1970.

**B. Courts Must Rigorously Enforce the Particularized Harm Requirement of Standing When Considering Requests For Mandamus Relief.**

In considering requests for mandamus, standing is of critical significance. Courts must enforce the "concrete and particularized harm" requirement of standing rigorously and construe it narrowly. Perella

v. Mass. Turnpike Authy., 55 Mass.App.Ct. 537, 540 (2002) quoting Alliance, AFSCME/SEIU, AFL-CIO v. Com., 427 Mass. 546, 549 (1998). "From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government." Doe v. Governor, 381 Mass. 702, 704 (1980). "Standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy...the plaintiffs' interests must come within the 'zone of interests' protected by [the statute]...[and] the defendant must additionally have violated some duty owed to the plaintiffs." Enos v. Sec'y of Env'tl. Affairs, 432 Mass. 132, 135-136 (2000).

"Because the 'public duty' doctrine is in such obvious tension with our general jurisprudence requiring a rigorous application of the doctrine of standing, we are unwilling to extend it into new territory." Perella, 55 Mass.App.Ct. at 540 quoting Alliance, 427 Mass. at 550. In Gettens v. Bldg.

Inspector of Sterling, a 2011 decision issued by the Massachusetts Appeals Court pursuant to Rule 1:28, a plaintiff brought an action in the nature of mandamus alleging that the building inspector had a nondiscretionary duty to deny an occupancy permit to the owners of a house because of zoning noncompliance. 78 Mass.App.Ct. 1126, 1126 (2011). Affirming dismissal of the complaint for lack of standing, the Court discussed the importance of standing in mandamus actions. Id. The "established principle" is that those seeking such relief either suffer or be in danger of suffering a legal harm. Id. The Court explained that the plaintiff did not allege that he was or would be personally harmed by the building inspector's approval of the occupancy permit. Id. The plaintiff argued that he had standing to seek relief in the nature of mandamus by invoking the public duty doctrine. 78 Mass.App.Ct. at 1126. The Appeals Court wisely disagreed:

Whatever the continued viability of that doctrine in other contexts, we disagree with the plaintiff's contention that - in an ordinary land use controversy such as is present here - the doctrine relieves him of having to demonstrate a specific interest in the outcome in order to supply him standing

(internal citations omitted).

Id. The Gettens opinion also noted that the plaintiff lived two miles from the land at issue. Id.

Here, the only evidence in the record regarding standing is the Resident Appellees' characterization of the project as a "late-night destination" and the noise they fear it may generate. See Pre-Filed Testimony of Victor Brogna, RA0158-0159; Pre-Filed Testimony of Mark Paul, RA0171; Rebuttal Testimony of Sanjoy Mahajan, RA1186. Such claims are inadequate to confer standing, as they are speculative and remote. Massachusetts courts have consistently rejected similar claims about views and noise raised by actual abutters in Hertz and Higgins, whereas the Resident Appellees can neither see nor hear the Long Wharf Pavilion from where they live in the North End. Hertz v. Sec'y of EOEEA, 73 Mass.App.Ct. 770 (2009); Higgins v. DEP, 64 Mass.App.Ct. 754 (2005). As with the plaintiffs in Higgins, the fact that the Resident Appellees may frequent Long Wharf, or even view it as an extension of their backyard, does not amount to an injury that is "different either in kind or magnitude, from that suffered by the general public." 64

Mass.App.Ct. at 756-57; 310 C.M.R. 9.02.

The use of mandamus in this matter creates a dangerous and broad precedent, permitting any Massachusetts citizen, regardless of injury, to derail any urban renewal project involving land which may be characterized as related to "natural resources." Accordingly, the ruling of the Superior Court should be reversed.

**III. THIS COURT SHOULD AFFIRM DEP'S FINAL DECISION AND REINSTATE THE CHAPTER 91 LICENSE.**

The Superior Court erred in denying the BRA's Cross-Motion for Judgment on the Pleadings because it should have affirmed DEP's Final Decision pursuant to M.G.L. ch. 30A § 14.

**A. Standard of Review.**

The Supreme Judicial Court has jurisdiction to hear this appeal pursuant to M.G.L. ch. 30A § 15. This statute requires this Court to conduct an independent review of DEP's Final Decision affirming the issuance of the Chapter 91 License to the BRA pursuant to the standards set forth in M.G.L. ch. 30A § 14. See M.G.L. ch. 30A § 15; So. Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n,

377 Mass. 897, 903 (1979). This Court may set aside or modify the Final Decision only if it determines that the substantial rights of a party may have been prejudiced because the Final Decision is:

- (a) unconstitutional;
- (b) in excess of DEP's statutory authority or jurisdiction;
- (c) based upon an error of law;
- (d) made upon unlawful procedure;
- (e) unsupported by substantial evidence;
- (f) unwarranted by facts found by the court on the record as submitted; or
- (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

M.G.L. ch. 30A § 14(7). In conducting this review, the Court's role is not to make a *de novo* determination of the facts found by DEP or to substitute its judgment for that of the agency.

Vaspourakan Ltd. v. Alcoholic Beverages Control

Comm'n, 401 Mass. 347, 351 (1987). Rather, "[t]he Court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority

conferred upon it." M.G.L. ch. 30A § 14(7). In addition, as the party challenging the Final Decision, the Resident Appellees bear the burden of establishing its invalidity. Fisch v. Bd. of Reg. in Med., 437 Mass. 128, 131 (2002).

**B. DEP's Final Decision Was Comprehensive and Correct As a Matter of Law.**

DEP's Final Decision should be affirmed in its entirety as it is supported by substantial evidence and in accordance with law. The DEP Commissioner explicitly adopted the substance of the Office of Appeals and Dispute Resolution's ("OADR") Recommended Final Decision ("RFD"). Final Decision, RA2006. DEP specifically found that the Resident Appellees' evidence was "summary in nature" and in "stark contrast to the detailed and credible evidence presented by the BRA and [DEP.]" Id. Throughout the RFD, OADR noted that the evidence put forth by the Resident Appellees, in essence merely restated the vague "harm" that the Resident Appellees believed they would suffer. RFD, RA1981, RA1984. An examination of the overwhelming evidence presented to and relied upon by DEP demonstrates that the project, as conditioned,



fully conforms to the 1990 Municipal Harbor Plan and complies with all relevant Waterways Regulations.

- i. The project serves a proper public purpose which provides greater benefit than detriment to the public.

DEP can only grant a waterways license pursuant to M.G.L. ch. 91 if the project serves a proper public purpose that provides greater benefit than detriment to the rights of the public in tidelands. 310 C.M.R. 9.31(2). Where, as here, the project concerns a nonwater-dependent use, DEP presumes that this requirement is met if the project complies with the Waterways Regulations regarding the standards "for conserving and utilizing the capacity of the project site to accommodate water-dependent use" and "for activating Commonwealth tidelands for public use." 310 C.M.R. 9.31(2)(b)(1); see 310 C.M.R. 9.51-9.53. This presumption can be rebutted only through evidence that the basic requirements set forth in 310 C.M.R. 9.31(1) have not been met or an agency making a clear showing that requirements beyond those in the Waterways Regulations are necessary to prevent overriding detriment to a public interest. 310 C.M.R. 9.31(3).

Here, undisputed factual findings in the RFD

support the conclusion that the project served a proper public purpose and provided a greater public benefit than detriment. See RFD, RA1976-1981, RA1999-2005. Further, the project provides reasonably direct public nonwater-related benefits in accordance with 310 C.M.R. 9.53(3)(d). See RFD, RA1981-1985. DEP considered the comprehensive record addressing the history of Long Wharf and BRA planning initiatives for the revitalization of the downtown waterfront area and Long Wharf in particular. RFD, RA1977-1981, RA2000-2003. Specifically, DEP focused on the comprehensive, multi-year, multi-million dollar program to expand the capacity and improve the quality of water transportation infrastructure at Long Wharf. Id. at RA2001-2003.

DEP placed much emphasis on the fact that the project winterizes the MBTA vent structure and allows for year-round use, instead of only the current sporadic seasonal use. RFD, RA 1979-1981, RA 2003-2004. DEP observed that the project will create job opportunities, an affordable dining establishment, and a pedestrian waterfront destination. Id. at RA2003. Significantly, the project will create year-round

public amenities that do not currently exist, including public restrooms and public shaded seating. Id. DEP also found that the majority of the site will remain as open space and that the redevelopment will reinvigorate the HarborWalk for utilization of water-dependent purposes. RFD, RA1982. Moreover, DEP indicated that through the creation of a partnership with the tenant developer, the BRA will both revitalize an underutilized structure and generate capital investment that will allow for further improvements to adjacent open space. RFD, RA2003-2004.

DEP found that "[t]he hearing record is replete with evidence that the project is consistent with the Boston HarborWalk Initiative, [the 1990] Municipal Harbor Plan,...[and the] Revised Long Wharf Master Plan, 2000[.]" Id. at RA1978. Overall, DEP determined that that the project's restaurant concept as a re-use of the MBTA vent structure articulates both the objectives of the 1964 Urban Renewal Plan and the intent of M.G.L. ch. 91. Id. at RA1979, RA2000.

- ii. The project complies with the 1990 Municipal Harbor Plan and promotes public use of other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner.

Pursuant to the requirements set forth at 310 C.M.R. 9.34(2)(b)(1) and 310 C.M.R. 9.51(3)(c), DEP found that the project unequivocally conforms to the 1990 Municipal Harbor Plan and meets the substituted setbacks distances and other mandates contained therein. RFD, RA1989-1992. Additionally, the project complies with all other applicable city<sup>12</sup> and state plans as well as written memoranda of understanding and decisions by the Secretary of EOEEA. Id. at RA1991. DEP determined, based on the well-pleaded factual averments and the testimony that illuminated and supplemented those facts, that the project complies with Condition No. 5 of the EOEA Secretary's decision on the 1990 Municipal Harbor Plan because it will promote public use of other water-dependent activity on the seaward end of Long Wharf in a clearly

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<sup>12</sup> Although the project required zoning relief, the project nonetheless complies with 310 C.M.R. 9.34(2)(a)(2) because it did not require any variances from the substantive provisions of the 1990 Municipal Harbor Plan. Pre-filed Direct Testimony of Andrea Langhauser ¶ 34, RA0221-0222.

superior manner. RFD, RA1985-1989.

DEP's analysis of these issues included the following factual findings. First, approximately 25,915 square feet at the seaward end of Long Wharf will be preserved as open space. Id. at RA1987. Moreover, none of the proposed additions will be closer to the water than the closest point of the existing structure. Id. In fact, all of the proposed additions will be at least twenty-eight feet from the water. Id. DEP highlighted that the project proposes to add approximately 3,135 square feet to the water dependent use zone setback area. RFD, RA1983, RA1991. Also, there will be eighteen shaded tables for public use independent of patronage of the restaurant that will be arranged in a way that does not obstruct the view corridor from State Street. RFD, RA1987-1988. Equally important, the proposed design will complement the surrounding open space and the other buildings on Long Wharf, as well as the existing public and commercial uses. Id. at RA1987. DEP concluded that the project will promote water-dependent activity by bringing the pedestrian public to the seaward end of Long Wharf and serving those who utilize water

transportation services. Id. at RA1987-1988.

- iii. The project meets all requirements regarding public views of the water and historic resources.

Under 310 C.M.R. 9.52(2)(b), if the project includes new structures, such structures must be developed to protect the utility and adaptability of the site for water-dependent purposes. To satisfy this regulatory requirement, it is necessary to assess the effect of the layout and configuration of these new structures insofar as they may affect existing and potential public views of the water and other objects of scenic, historic, or cultural importance to the waterfront. See 310 C.M.R. 9.52(2)(b). Here, DEP conducted a site view and carefully examined the design of the structure and proposed uses to determine that the project complies with the requirements of 310 C.M.R. 9.51(2)(b). See RFD, RA1975, RA1992-1993. DEP cited the use of windowed walls between the columns of the existing structure, and the fact that the height, scale, and massing of the building will not change. Id. at RA1992-1993. Significantly, DEP found that the project does not adversely impact the sight lines from the State Street corridor or interfere with the

HarborWalk in any way. Id.

DEP also determined that the project complies with the historic resource requirements of 310 C.M.R. 9.33(1)(i). RFD, RA1993-1994. The letter from the Massachusetts Historic Commission dated November 15, 2007, finding that the project creates no adverse impact, is prima facie evidence. RA1058. DEP credited BRA testimony that it sought to design and construct projects on Long Wharf that maximize public access to the water and waterfront view corridors. RFD, RA1993. DEP also observed that the project was designed to blend with the existing architectural character of the vicinity and that licensing funds from the project will go towards the installation of interpretive signage that will explain the history of Long Wharf. Id. at RA1994.

Therefore, DEP's thoughtful analysis, which highlights the myriad benefits the project will confer on public rights in tidelands, should be upheld as it is manifestly correct.

### CONCLUSION

This Court should determine that the land at issue is not subject to Article 97 because the BRA took it for urban renewal purposes under M.G.L. Chapter 121B and should reinstate the Chapter 91 License. This Court should reverse the Superior Court's grant of mandamus to compel the BRA to comply with Article 97 because the BRA does not have the power to take land under Article 97 and, regardless of the use to which the land is put under an urban renewal plan, such land is not within the scope of Article 97. Additionally, the Resident Appellees lack the requisite standing to maintain an action in the nature of mandamus. Lastly, this Court should affirm DEP's Final Decision because it is the product of a careful and comprehensive analysis by the agency charged with administering Chapter 91.



Respectfully submitted,  
Boston Redevelopment Authority

By its attorneys,



Denise A. Chicoine (BBO# 564152)  
Debra C. Leggett (BBO# 633456)  
Patrick A. Leeman (BBO# 678876)  
ENGLANDER, LEGGETT & CHICOINE P.C.  
44 School Street, Suite 800  
Boston, MA 02108  
Tel. (617) 723-7400

Date: February 17, 2012

Certificate of Compliance  
Pursuant to Mass. R. A. P. 16(k)

I, Denise A. Chicoine, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

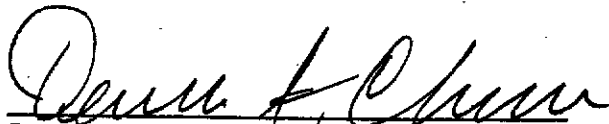
Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations, etc.);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).



Denise A. Chicoine (BBO# 564152)  
dchicoine@elcpc.com

ENGLANDER, LEGGETT & CHICOINE P.C.  
44 School Street, Suite 800  
Boston, MA 02108  
Tel. (617) 723-7400