

# Commonwealth of Massachusetts

Suffolk, S.S.

Superior Court Civil No.

Sanjoy Mahajan, Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot,  
*Plaintiffs*

v.

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

## Complaint

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

## Parties

3. PLAINTIFFS, all inhabitants of the Commonwealth of Massachusetts and of Boston’s North End neighborhood, are as follows:
  - a. Sanjoy Mahajan of 5 Jackson Ave Unit 2, Boston MA 02113
  - b. Victor Brogna of 120 Commercial St Apt 5, Boston MA 02109
  - c. David Kubiak of 5 Cleveland Place Apt 3, Boston MA 02113
  - d. Stephanie Hogue of 7 Henschman St., Apt 402, Boston MA 02113
  - e. Mary McGee of 46 Snow Hill St., Boston MA 02113

- f. Anne M. Pistorio of 72 North Margin St., Boston MA 02113
  - g. Thomas Schiavoni of 46 Snow Hill St., Boston MA 02113
  - h. Pasqua Scibelli of 19 Wiget St, Boston MA 02113
  - i. Robert Skole of Lincoln Wharf 715, 357 Commercial St, Boston MA 02109
  - j. Patricia Thiboutot of 100 Fulton St., Boston MA 02109
- 4. DEFENDANT, Massachusetts Department of Environmental Protection, is a state agency established by G.L. c.21A, which has regulatory authority over activities pursuant to G.L. c.91. The Department’s headquarters are located at One Winter Street, Boston, MA 02108.
  - 5. DEFENDANT, Boston Redevelopment Authority, is a public entity created by statute for planning and development in the city of Boston. BRA headquarters are at Boston City Hall, Floor 9, City Hall Plaza, Boston MA 02201.

## **Jurisdiction and venue**

- 6. The Court has jurisdiction over the subject matter of this action pursuant to G.L. c.30A s.14(1), G.L. c.214 s.1, and G.L. c.249 s.5.
- 7. Venue for this action lies in Suffolk County in accordance with G.L. c.30A s.14(1)(c).
- 8. Plaintiffs have properly filed this complaint within thirty days of the receipt of the Department’s final decision issued by DEP Commissioner Laurie Burt on January 29, 2010.

## **Background and statement of facts**

- 9. The park at issue is located at the seaward (eastern) end of Long Wharf in Boston Harbor. The park is utilized extensively by residents and visitors to enjoy marine sights and sounds and for other passive-recreation purposes. It is unique among the wharves and parks in the downtown/waterfront area in the combination it provides of expansive harbor views — surrounded on three sides by water — and a spacious, quiet public space in which to enjoy them.
- 10. The park at Long Wharf is designated ‘Protected Open Space’ in the City of Boston Parks Department *Open Space Plan 2002—2006* and in its draft *Open Space Plan 2008—2012*. On both plans, Long Wharf is marked as subject to Article 97 of the Amendments to the Massachusetts Constitution (hereafter Article 97), the Land and Water Conservation Fund (LWCF), Chapter 91, and the Wetlands Protection Act.
- 11. The BRA sought a Chapter 91 license allowing it to enclose and expand the current shade structure in the park, in order to construct a late-night restaurant and bar with takeout service and outdoor table service.

12. The Executive Office of Environmental Affairs (“EOEA”) Article 97 Land Disposition Policy (February 19, 1998) mandates that the EOEA and its agencies shall not change the control or use of any right or interest in Article 97 land unless the change has been approved by a two-thirds vote of the Massachusetts Legislature.
13. The proposed change in the control (by lease) and in the use of the park was, among other substantive procedural deficiencies, not approved by the Legislature.
14. On or about September 17, 2008, DEP granted the BRA a Chapter 91 waterways license to construct a 4,655 square-foot restaurant and bar in this park.
15. The BRA had been granted 14 zoning variances by the Boston Zoning Board of Appeals to allow for, among other permissions, live entertainment, take-out service, and food and alcohol service until 1am at the proposed restaurant.
16. Numerous restaurants and bars exist within 1 mile of the park.
17. The restaurant-and-bar proposal with its substantive variances did not conform to the requirements of the City of Boston Municipal Harbor Plan.
18. On or about October 9, 2008, pursuant to G.L. c.30A s.10A, the plaintiffs, as ten residents of the Commonwealth and of the City of Boston alleging damage to the environment, appealed the DEP’s decision to award the BRA the Chapter 91 license.
19. The DEP held a hearing on the appeal on February 24, March 2, and March 9, 2009.
20. On or about January 29, 2010, the DEP issued a final decision affirming the grant of the Chapter 91 license for construction of a restaurant and bar.
21. The plaintiffs, who were all parties to the DEP proceeding, are aggrieved by the Department’s final decision.

## **Cause of action**

22. The DEP’s final decision is contrary to its own regulations, is based upon errors of law and unlawful procedure, is unsupported by substantial evidence, and is arbitrary, capricious, and an abuse of discretion. Among other reasons:
  - a. DEP acted in excess of its statutory authority and unconstitutionally in violation of Article 97 and of Article 30 of the Massachusetts Declaration of Rights (Separation of Powers) when it issued a decision approving a change in use and control that lacked the required two-thirds vote of the Legislature;
  - b. The decision failed to find that the project violated the Municipal Harbor Plan because of the substantive variances required; improperly credited the project with benefits provided by pre-existing projects; and failed to consider the effect of the project on view corridors from sites of “concentrated public activity;”

## Prayer for relief

23. Plaintiffs request that the Court find that the Department's decision was contrary to its own regulations, was in violation of constitutional provisions, was based upon errors of law, was made upon unlawful procedure, was unsupported by substantial evidence, and was arbitrary, capricious, and an abuse of discretion.
24. Plaintiffs request that the Court declare the Department's final decision with respect to the issuance of a Chapter 91 Waterways permit to be null and void and in violation of constitutional and statutory provisions.
25. Plaintiffs request that the Court declare that the defendants failed to follow the proper procedure for changes in a park, usurped Legislative authority, and violated Article 97 of the Amendments to the Massachusetts Constitution.
26. Plaintiffs request such other relief at law or in equity as the Court may allow, including the recovery of costs and award of attorney fees.

Respectfully submitted,  
by their attorney,

*Dated: February 26, 2010*

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