Commonwealth of Massachusetts

Suffolk, S.S. Superior Court Civil No. SUCV2010-0802-H

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

v.

Massachusetts Department of Environmental Protection
and
Boston Redevelopment Authority,
Defendants

Plaintiffs' memorandum of law in support of motion to amend complaint

Plaintiffs submit the following memorandum in support of their motion to amend their complaint. In particular, plaintiffs explain here why the claims should be sustained.

I. The BRA's proposed restaurant and bar violates its covenant, purchased with $9 million of state funds, to preserve Long Wharf as public open space

On September 13, 1984, the BRA and the Commonwealth—acting through the Department of Environmental Management (DEM)[1]—executed an agreement regarding the redevelopment of Long Wharf. Agreement between the Commonwealth of Massachusetts Acting by and through the Department of Environmental Management and the Boston Redevelopment Authority Relative to Development and Management of Public Open Space

[1] The legal successor to the DEM is the Department of Conservation and Recreation (DCR). G.L. c. 21 §1.

on and Adjacent to Long Wharf, Boston (``BRA–DEM Agreement,'' Attachment F of plaintiffs' Amended Complaint). This agreement, authorized by Section 19A of Chapter 589 of the Acts of 1983, called for the DEM to provide the BRA with $9 million ($7 million from the legislature pursuant to the cited act, and $2 million that the DEM had available from previous legislative appropriations). BRA–DEM Agreement, pp. 1, 3. In return, the BRA agreed to

> execute and duly record in the Suffolk Registry of Deeds an easement, on behalf of the Commonwealth, placing a restriction for public open space use on the title of the Authority to the Wharf site, as described in Exhibit A, for the duration of this Agreement [99 years] ... .

Id., paragraph Q at p. 11.

The BRA further agreed to provide an annual maintenance fund of at least $100,000, adjusted annually for inflation; and to maintain Long Wharf, unless it turns over the responsibility to a suitably funded nonprofit entity. *Id.*, paragraph E at p. 13. The BRA's proposed lessee and restaurant-and-bar operator is not a nonprofit entity.

Furthermore, the agreement created on Long Wharf a conservation restriction:

> . . .a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition . . .."

G.L. c. 184 §31. The de-facto release of the conservation restriction, by constructing an unauthorized restaurant, violates G.L. c. 184 §32: ``No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value.''

II. The BRA proposed restaurant and bar violates federal regulations and law

In 1980, the City/BRA applied to the federal Land and Water Conservation Fund (LWCF)

for funds to reconstruct Long Wharf. Application for Federal Assistance (Attachment A). For this first phase of the project, the total project cost was $1,751,000; the LWCF awarded the City/BRA $825,000 (via the state). LWCF Agreement, dated May 15, 1981, between the Commonwealth and the Heritage Conservation and Recreation Service,[2] available in Tab 5, pp. 4–5, of Defendant BRA's Supplemental Filing to Dismiss Plaintiff's Article 97 Claims, (``BRA's Supplemental Filing,'' a very large black binder).

The City/BRA and the Commonwealth agreed to follow the LWCF provisions. LWCF agreement between the BRA and the Commonwealth, BRA's Supplemental Filing, Tab 5, pp. 2–3. The LWCF project-agreement general provisions provide that the "State agrees that the property described in the project agreement and the signed and dated project boundary map made part of that agreement is being acquired or developed with Land and Water Conservation Fund assistance ...and that, without approval of the Secretary, it shall ...be maintained in public outdoor recreation in perpetuity ...." LWCF Project Agreement General Provisions, in the BRA's Supplemental Filing, Tab 5, p. 8 (counting nonblank sides after the tab divider; paragraph II.B).[3]

This boundary map is also called the 6(f) map, in reference to the protection provided by Section 6(f)(3) of the LWCF Act of 1965:

> No property acquired or developed with assistance under this section shall, without the approval of the Secretary [of the US Department of the Interior], be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

The National Park Service (NPS) recently provided plaintiff Mahajan the 6(f) map (Attachment D of plaintiffs' Amended Complaint). On it, the dark shaded area (marked Phase 1) is the 6(f) protected area. Transmittal email from National Park Service (Attachment E of

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[2] This agency's functions are now handled by the National Park Service.

[3] Also available online at http://www.nps.gov/ncrc/programs/lwcf/forms/lwcf_general_provisions.frm.pdf

plaintiffs' Amended Complaint). The federal courts have ruled that a conversion includes ``instances in which [p]roperty interests are conveyed for non-public outdoor recreation uses'' (internal quote marks omitted). *Friends of the Shawangunks v. William Clark, Secretary, United States Department of the Interior*, 754 F.2d 446, 451 (1985). Conversions have to follow the extensive requirements set forth in 36 CFR 59.3 (Attachment B).

III. Long Wharf is protected under the doctrine of prior public use and by Article 97

The two public-trust doctrines, Article 97 and prior public use, are similar, and often turn on the same facts and result in almost the same legal conclusions. However, because the SJC in *Mahajan v. DEP*, 464 Mass. 604 (2013) ruled that Article 97 does not apply to Long Wharf, a holding that plaintiffs challenge with newly discovered documents, as explained below, it is particularly important in this case to analyze the applicability of each doctrine.

A fundamental similarity between the doctrines is that, under either doctrine, authorizing legislation must follow the principles enunciated in *Robbins v. Department of Public Works*, 355 Mass. 328 (1969). The substantive differences between Article 97 protection and protection under prior public use are as follows:

1. Article 97 protection requires that the land or easement be taken or acquired for natural-resources purposes. Article 97 (``Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of . . .''). Prior-public-use protection requires that the land be designated for one public use, which need not be the purpose for which the land was taken or acquired. *Robbins* at 330. Thus, land could be subject to prior public purpose but not to Article 97—for example, land held by a city in its corporate capacity that, without any legislative taking or acquisition, it dedicates to park use.
2. Article 97, perhaps in return for its more stringent requirement for applicability, requires a supermajority legislative vote. Article 97 (``laws enacted by a two thirds vote'').

Prior public use requires only a simple majority (``plain and explicit legislation''). *Robbins* at 330.

3. Article 97 protects against changes of use and dispositions, which are more general than changes of use. For example, a lease of Article 97 land, even if it did not change the use, requires an Article 97 vote. In contrast, prior public use protects only against changes of use inconsistent with the prior use.

Long Wharf is, for the reasons set forth in this section, protected under both doctrines. Although the SJC ruled in *Mahajan* that Long Wharf is not protected under Article 97, it did not have two crucial pieces of information from the BRA: the BRA–DEM agreement, and the correct LWCF 6(f) map. The BRA did not provide these documents to the SJC.[4] Instead, they were discovered through the researches of plaintiff Mahajan, but only following oral argument in the SJC. Affidavit of Sanjoy Mahajan (Attachment C of plaintiffs' Amended Complaint).

With this information, and based on the holdings in Mahajan, there are four moments when Long Wharf came under the protection of one or both public-trust doctrines, Article 97 or prior public use—with only one time and only one doctrine sufficient for a finding that mandamus lies against the BRA.

A. Long Wharf became public-trust land on May 15, 1981, when the BRA and the Commonwealth executed the LWCF agreement

Long Wharf became public-trust land on May 15, 1981, when the BRA and the Common-

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[4] The BRA–DEM agreement was signed by the BRA director and, plaintiffs believe, based on other documents in the state LWCF files, is in the Document Book of the Authority as Document No. 4440. Affidavit of Sanjoy Mahajan, paragraph 6 (Attachment C of plaintiffs' Amended Complaint). However, the BRA provided only the text of the act authorizing the agreement, commenting ``There is no legislative requirements set for the in the Act relative to open space.'' BRA's Supplemental Filing, Tab 8.

Plaintiffs further believe, based on the state LWCF files, that the LWCF 6(f) map is a copy of the map in BRA's proposal to the state and federal authorities for LWCF funds. Affidavit of Sanjoy Mahajan, paragraph 8.

wealth executed the LWCF agreement. This question was reached at oral argument before the SJC, but the SJC did not have full information: Only the incorrect LWCF map was available, and BRA counsel therefore argued that the project site—by which counsel meant only the restaurant/bar and outdoor seating area—was not on the (incorrectly) limited LWCF area. Transcript of oral argument, p. 9, lines 16–17 (Attachment C).

However, it is now known that the entire seaward end of Long Wharf, as well as a portion of the Harborwalk, is protected by the LWCF Act, by the associated federal regulations (36 CFR 59.1–4), and by the corresponding open-space restriction (discussed at pp. 2ff). This restriction is a dedication to one public purpose (to open space use), placing the seaward end of Long Wharf, including the entire project site, under the protection of the doctrine of prior public use.

The LWCF open-space restriction—the right of the public to use Long Wharf for ``public outdoor recreation in perpetuity''—is plainly an easement. By the language of Article 97 itself (``Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of . . .'') and of the *Opinions of the Justices to the Senate*, 383 Mass. 895, 918 (1981) (``. . .the two-thirds vote requirement . . .applies only to the disposal of lands and easements.''), the restriction may not be disposed of without an Article 97 vote. This conclusion is acknowledged by BRA's counsel. At oral argument before the SJC, BRA's counsel conceded that LWCF funding would trigger Article 97 protection:

> So a portion of Long Wharf is protected by Article 97 . . .And the . . .area is protected specifically in that scenario because of the acceptance of federal funds, under the Land and Water Conservation Fund . . ..

Transcript of oral argument, pp. 9 (line 15)–10 (line 2) (Attachment C).[5] The new informa-

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[5] The de-facto release of the LWCF conservation restriction, by constructing an unauthorized restaurant, violates G.L. c. 184 §32 on repaying state funds used in its acquisition (LWCF funds flow through the state, so the LWCF funds are also state funds).

Furthermore, even an Article 97 vote is insufficient to release the LWCF conservation restriction, because this restriction is a result of federal law and regulation and of a contract between the state and the federal government. States, except in exceptional circumstances

tion is that the protection portion includes the whole seaward end of the wharf, which includes the project site.

B. Long Wharf became public-trust land on September 13, 1984, with the execution of the BRA–DEM Agreement

Long Wharf also became public-trust land on September 13, 1984, with the execution of the BRA–DEM Agreement (discussed at pp. 1ff and available as Attachment F of plaintiffs' Amended Complaint). This agreement required the BRA to record an easement on its title to Long Wharf and on behalf of the Commonwealth for public open-space use.

For several reasons, this interest in land is an easement for Article 97 purposes. The first reason is the text of the agreement itself, which gives the Commonwealth, acting on behalf of the public, an easement for public open-space use. The second reason is the text of the act authorizing the agreement. The act authorizes the funds in order to construct the ``waterfront component of the Boston Harbor Islands State *Park*. . ..'' Acts of 1983, Chapter 589, Section 19A (emphasis supplied). The third reason is the legal character of the DEM. The DEM's enabling act provides:

> There shall be a department of environmental management, in this chapter called the "department''. It shall be the duty of said department to exercise general care and oversight of the natural resources of the commonwealth and of its adjacent waters; to make investigations and to carry on research relative thereto; and to propose and carry out measures for the protection, conservation, control, use, increase, and development thereof. ...
>
> The department shall also be concerned with the development of public recreation as related to such natural resources; and shall have control and supervision of such parks, forests, and areas of recreational, scenic, or historic significance as may be from time to time committed to it.

G.L. c. 21 §1, prior to 2009. Thus, the DEM cannot acquire any arbitrary easement; rather, it

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not present here, may not impair the obligation of contracts, especially their own contracts. U.S. Const., Art. I, 10, cl. 1 (``No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .''); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977) ("...[A] State is not free to impose a drastic impairment [on its own contract] when an evident and more moderate course would serve its purposes equally well.").

can acquire only easements consistent its purposes, which are all Article 97 purposes. By acquiring a conservation restriction, in particular an easement, from the BRA, that easement became subject to the two-thirds vote requirement of Article 97.

Separate from Article 97, the legislative appropriation for one public use (public open space)—being a ``a prior public or private grant restricted to a particular public purpose''—places Long Wharf under the protection of prior public use. *Muir v. Leominster*, 2 Mass. App. Ct. 587, 591 (1974).

C. Long Wharf became public-trust land in 1989, when the BRA dedicated Long Wharf Park

Long Wharf became public-trust land in 1989, when the BRA dedicated Long Wharf Park. This reasoning was discussed at oral argument before the SJC, but BRA's counsel argued that this park dedication applied only to a small part of Long Wharf, because the ``plaque does not define the boundaries of the area that is a park.'' Transcript of oral argument, pp. 11 (lines 9–11) (Attachment C). However, the dedication plaque contains the LWCF logo, the text ``Land and Water Conservation Fund,'' and the text ``National Park Service,'' which is the federal agency that administers the LWCF Act. Photo of Bronze Plaque at Long Wharf, in plaintiffs' Additional Exhibits and References Relevant to Article 97 Protection. A reasonable inference is that the dedication area is at least equal to the LWCF-funded area. Because LWCF funds applied to the entire seaward end of the wharf, including the project site, the entire seaward end of the wharf is part of the formally dedicated park area. Thus, following the test in *Muir v. Leominster* at 592 (``formal dedication by the city of this area as park land''), which is cited approvingly in *Mahajan* at 617, the site is protected under prior public use.

D. Long Wharf became impressed with public-trust status in 1970, when the BRA took it by eminent domain

In *Mahajan*, at 620, the SJC ruled that the language of a taking order alone is not necessarily determinative of Article 97's applicability. Rather, ``the ultimate use to which the land is

put may provide the best evidence of the purposes of the taking, notwithstanding the language of the original order of taking or accompanying urban renewal plan.'' *Ibid.* The SJC thereby declared new law regarding the interpretation of Article 97. However, the SJC had to apply the new law to the old information, without the benefit of the BRA–DEM Agreement or the correct LWCF 6(f) map.

With these documents, we know that the ultimate use at Long Wharf is public parkland. This use is the result of a $9 million legislative appropriation—$7 million of which was authorized by the statute that authorized the BRA–DEM agreement (discussed at pp. 7ff). This use is also the result of the LWCF funds and agreement between the state and federal government and between the BRA and the state to maintain the site for ``public outdoor recreation in perpetuity'' (discussed at pp. 5ff). The purpose of the taking for Article 97 purposes is further supported by the 1989 plaque dedicating Long Wharf Park (discussed at p. 8). The park use is also fully consonant with the BRA's accompanying urban-renewal plan, which, on the ``Proposed Land Use'' plan, designated Long Wharf as public open space. Map 2 of Exhibit B of the Downtown Waterfront–Faneuil Hall Urban Renewal Plan, in Exhibit 3 of plaintiffs' Additional Exhibits and References Relevant to Article 97 Protection. In sum, the ultimate use shows that the purpose of the original order of taking was for Article 97 purposes.

E. Long Wharf is public-trust land many times over

In summary, Long Wharf became public-trust land in six different ways:

1970 (taking)		*Article 97*
1981 (LWCF Agreement)	*Prior public use*	*Article 97*
1984 (BRA–DEM Agreement)	*Prior public use*	*Article 97*
1989 (park dedication)	*Prior public use*	

They are also listed out below:

a. At the time of the taking (1970), it came under the protection of Article 97.
b. Upon the execution of the BRA–DEM Agreement (1984), it came under the protection of Article 97 and prior public use.
c. Upon the execution of the LWCF Agreement (1981), it came under the protection of Article 97 and prior public use.
d. Upon dedication as Long Wharf Park (1989), it came under the protection of prior public use.

Any one of the six possibilities is enough for a finding that the BRA is acting ultra vires and that mandamus lies against it. The BRA and the DEP both argued to the Presiding Officer that ``jurisdiction to interpret and apply Article 97 lies with the courts of the Commonwealth.'' Record, p. 458. The public-trust requirements should be applied in the proceedings again before this Court.

IV. The DEP improperly granted a Chapter 91 license to the BRA

So much for the public-trust aspects of the case, which the SJC and this court have ruled are outside the Chapter 91 process. Plaintiffs now turn to the Chapter 91 aspects. Except for minor editing for flow, this section is mostly identical to the corresponding section in plaintiffs earlier brief accompanying their motion for judgment on the pleadings. The two substantive differences are as follows:

1. In view of the *Mahajan* court's holdings regarding DEP's relation to Article 97, plaintiffs no longer assert the argument that DEP is violating constitutional provisions (Article 97).
2. With the discovery of the correct LWCF boundary map, plaintiffs use that document to support the argument, made earlier, that DEP's license is inconsistent with its regu-

lations requiring DEP to take notice of relevant guidance from a state, local, or federal agency.

A. The Chapter 91 license is based on numerous errors of law

The Final Decision of the Commissioner of the Executive Office of Energy and Environmental Affairs (Record, p. 600), which adopted almost entirely the Recommended Final Decision of the Presiding Officer (Record, p. 563), were based on the several errors of law, discussed in turn in the following subsections.

1. DEP failed to consider crucial guidance from other agencies

310 CMR 9.53(3)(a) provides that

> the Department shall take into account *any guidance forthcoming from a state, federal, regional, or municipal agency* as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archaeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation. (emphasis supplied)

Such guidance includes the correct federal LWCF map, showing that Long Wharf was designated for public outdoor recreation in perpetuity.

2. The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from ``areas of concentrated public activity''

The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from ``areas of concentrated public activity.'' 310 CMR 9.51(2)(b).

From almost any location in the park on the end of Long Wharf, visitors now enjoy an approximately 270-degree panorama of Boston Harbor and nearby historic locations. Enclosing and filling the shade structure greatly reduces the zone where the public would enjoy 270-degree panoramas. And in the summer, the additional blockage from the outdoor seating and sun umbrellas shrink that zone to a few meager regions near the water.

Record, p. 610–615 and also the photographs at 605–609 and 636–637.

The Defendants try to overcome this problem by stating that the project will enclose the shade structure using windowed walls, a claim adopted by the Presiding Officer in the Recommended Final Decision. Record, p. 586. However, windowed walls surrounding an active restaurant significantly degrade the wide, expansive, see-through views currently available. (The windowed walls are shown on the plan at Record, p. 1297; on the obstructive effect of the windowed walls, as shown in the proponent's own renderings, see Mahajan rebuttal testimony at paras. 58–63, Record, p. 622–623.)

The Waterways regulations, at 310 CMR 9.51(2), provide that

> [i]f the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site.

The project, however, would create significant incompatibility in design. The regulations continue (310 CMR 9.51(2)(b)) by explaining what ``aspects of built form'' constitute such an incompatibility:

> the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity[.]

On this issue, the Recommended Final Decision contains several materially incorrect statements leading to the incorrect conclusion of regulatory compliance. Record, p. 586. The first incorrect statement is that the ``height, scale, and massing'' of the building will not change. *Ibid.* In fact, the building will be enlarged, thereby changing its scale; and the building will be enclosed, thereby changing its massing. Record, p. 38. The second incorrect statement is that the project does not interfere with the HarborWalk ``in any way.'' Record, p. 586. As discussed above, the views from the HarborWalk to the water through the structure will be significantly diminished.

Because the project's proposed nonwater-dependent structure would detrimentally affect views of the water from areas of concentrated public activity, including by greatly diminishing the panoramic vistas offered to the Long Wharf park visitor, on the Harborwalk and elsewhere, the project fails to meet the regulatory requirement of 310 CMR 9.51(2)(b). The contrary finding by the Presiding Officer was an error of law.

3. The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, does not comply with the Municipal Harbor Plan

The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, fails to comply with the Municipal Harbor Plan, and therefore that the project violates the Waterways regulations.

Because the proposed project is located in an area covered by the City of Boston Municipal Harbor Plan, the Waterways regulations require that the project comply with the Municipal Harbor Plan. 310 CMR 9.34(2)(a). The regulations provide stringent standards before the Department can find compliance with the Municipal Harbor Plan, including that

> the Department shall not find the requirement [of compliance with the Municipal Harbor Plan] has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of GL c. 91 or 310 CMR 9.00.

310 CMR 9.34(2)(a)(2). The Municipal Harbor Plan adopts the provisions of Boston Zoning Code (excluding only conditional uses and de-minimus variances). Secretary's Decision on the Municipal Harbor Plan, Section VI(b), p. 37 [this document is referred to by the Presiding Officer in the Recommended Final Decision (Record, p. 582)]. This project required 14 variances, many substantial, from the Boston Zoning Code and therefore from the Municipal Harbor Plan. Record, p. 659. The variances required include the following:

> Change the legal occupancy to a restaurant. . .A takeout, allowing outdoor seating and patio use until midnight. Also, allow live entertainment.

Record, p. 659, City of Boston ZBA hearing notice. Here is a further subset of the section titles of the variances, indicating their substantive nature: `Chapter 91 requirements' (42A-5), `Open space requirements' (42A-6), `Waterfront yard area requirements' (42A-7), and `Environmental protection and safety standards' (42A-9). The Zoning Board of Appeal written decision further describes that it granted variances ``from the dimensional, open space, environmental and design requirements cited for the project.'' Record, p. 129, 139.

Because the project needed substantive variances, the DEP is mandated by the regulations at 310 CMR 9.34(2)(a) to find that it does not comply with the Municipal Harbor Plan and therefore that it cannot go forward.

4. The Presiding Officer failed to rule that the project improperly encroaches on water-dependent use zone

The project fails because it does not meet the dimensional requirements of the regulations. Specifically, the regulations specify a water-dependent use zone in which ``new or expanded buildings for nonwater-dependent use'' shall not be located. 310 CMR 9.51(3)(c). This zone, shaded in gray on the map provided by the proposed lessee (Record, p. 36), includes a portion of the pavilion proposed for enclosure and expansion. Because the project is a nonwater-dependent use (Record, p. 49, Written Determination), it may not use the water-dependent use zone for new or expanded buildings.

The project, according to the Recommended Final Decision, circumvents this restriction via the Municipal Harbor Plan. The Municipal Harbor Plan indeed provides alternative setback distances, with which the project is argued to comply. However, as discussed in the Recommended Final Decision (Record, p. 585), the Municipal Harbor Plan distances are applicable only if the project ``promotes public use or other water-dependent activity in a clearly superior manner.'' The Presiding Officer incorrectly found that the project does so. Record, p. 582, 583, 585. A project that changes the use or control of LWCF-protected, prior-public-purpose, and Article-97 protected land without the mandated federal

and legislative authorization, and amounts to the de-facto release of several conservation restrictions, cannot reasonably be said to promote public use in a clearly superior manner.

Failing the clearly superior manner test, the project cannot use the Municipal Harbor Plan's setback distances. Instead, it must meet the dimensional requirements of 310 CMR 9.51(3)(c)—which it does not. Therefore, the project fails to meet the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)(2). The contrary finding by the Presiding Officer is an error of law.

5. The Presiding Officer failed to rule that the project does not serve a proper public purpose

The regulatory requirement is that the project must serve ``a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands.'' 310 CMR 9.31(2)(b) After a lengthy discussion of the Transportation Improvement Project, the history and funding of the HarborWalk, and much else, the Presiding Officer found that the project does indeed serve a proper public purpose. Record, p. 594–598. These basic findings of the Presiding Officer are irrelevant to, and do not support, the ultimate finding of proper public purpose. First, the HarborWalk and Transportation Improvement Project already exist, are not part of this project, and therefore cannot be counted among its public benefits. Nominal improvements, such as adding binoculars to the existing amenities on the HarborWalk, do not change this basic fact.

The regulatory presumptions (based on 310 CMR 9.31(2)) that the project serves a proper public purpose may be overcome 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). Here, a clear showing has been made by a federal agency (the NPS) that the LWCF restrictions and requirements are necessary to ``prevent overriding detriment to a public interest which said agency is responsible for protecting[.]'' As the DEP's

name implies, and its regulations provide, the DEP is responsible for protecting the environment. 310 CMR 9.01(2). The DEP therefore must find that the project does not serve a proper public purpose. The Presiding Officer's contrary finding is an error of law.

B. The Final Decision and the Recommended Final Decision were a result of unlawful procedure

The Final Decision (Record, p. 600) and the Recommended Final Decision (Record, p. 563) were a result of unlawful procedure and therefore should be reversed.

After the close of evidence in the case, Attorney Kenneth P. Fields, who represented the proposed restaurant operator in the proceedings, sent an ex-parte communication to the Presiding Officer. Record, p. 561. This communication was a flagrant and unlawful attempt to influence the Presiding Officer and the outcome of the proceedings, which is expressly prohibited by 310 CMR 1.03(7). The method of contact, coupled with its inaccurate factual content, was highly inappropriate and prejudicial. Attorney Fields' ex-parte communication, by virtue of its content, was an attempt to undermine the neutrality and independence of the Presiding Officer. The ex-parte communication also assumed an outcome favorable to the BRA and restaurant operator.

Of equal concern to the plaintiffs was the content of the OADR Case Administrator's response. Record, p. 561. Rather than informing Attorney Fields that his communication was inappropriate and would not be responded to, it instead gave him a corrected email address for the Chief Presiding Officer (Salvatore Giorlandino) and acceded to Mr. Fields' demands by establishing an immediate deadline for the issuance of a decision in a case involving several days of trial, multiple pleadings and memoranda, and a record exceeding over one thousand pages of documentary evidence (submitted at the insistence of the Defendant BRA over the objections of the plaintiffs). The response from the DEP's Office of Alternative Dispute Resolution gave the impression that Attorney Fields' assumption of a favorable outcome was warranted.

V. Conclusion

The Chapter 91 license is void for substantive errors of law: on views of the water, compliance with the Municipal Harbor Plan, the water-dependent use zone, and the proper-public-purpose requirement. Furthermore, the BRA is violating federal laws and regulations designed to protect open space and parkland, as well as its covenant to record an easement on behalf of the Commonwealth for public open-space use at Long Wharf. Finally, Long Wharf is public-trust land many times over. When the public has rights in land, those rights cannot be abrogated except by an express act of the legislature. See *Arno v. Commonwealth*, 457 Mass. 434 (2010). The relief prayed for in the amended complaint should be granted.

Respectfully submitted,

Plaintiffs, *Pro Se*

April 17, 2013

Sanjoy Mahajan
950 Massachusetts Ave, Apt 613
Cambridge MA 02139
617.849.0409
sanjoy@olin.edu

Victor Brogna
111 Atlantic Ave, Apt 310
Boston MA 02110

Stephanie Hogue
7 Henchman St Apt 402
Boston MA 02113

David A. Kubiak
5 Cleveland Place Apt 3
Boston MA 02113

Mary McGee
46 Snow Hill St
Boston MA 02113

Anne M. Pistorio
72 North Margin St
Boston MA 02113

Thomas Schiavoni
46 Snow Hill St
Boston MA 02113

Pasqua Scibelli
19 Wiget St
Boston MA 02113

Robert Skole
Lincoln Wharf 715
357 Commercial St
Boston MA 02109

Patricia Thiboutot
100 Fulton St
Boston MA 02109

Attachment A. LWCF application

OMB Approval No. 22-R0218

FEDERAL ASSISTANCE

2. APPLICANT'S APPLICATION	a. NUMBER	3. STATE APPLICATION IDENTIFIER	a. NUMBER 77030384
	b. DATE Year month day 19 80 3 24		b. DATE ASSIGNED Year month day 19 77 3 3

1. TYPE OF ACTION (Mark appropriate box)
- [ ] PREAPPLICATION
- [X] APPLICATION
- [ ] NOTIFICATION OF INTENT (Opt.)
- [ ] REPORT OF FEDERAL ACTION

Leave Blank

SECTION I—APPLICANT/RECIPIENT DATA

4. LEGAL APPLICANT/RECIPIENT

a. Applicant Name : Commonwealth of Massachusetts
b. Organization Unit : Executive Office of Environmental Aff
c. Street/P.O. Box : 100 Cambridge Street
d. City : Boston
e. County : Suffolk
f. State : MA
g. ZIP Code: 02202
h. Contact Person (Name & telephone No.) : Joel A. Lerner (617)727-1552

5. FEDERAL EMPLOYER IDENTIFICATION NO. NA

6. PROGRAM (From Federal Catalog)
a. NUMBER 15.400
b. TITLE Outdoor Recreation - Acquisition, Development and Planning

7. TITLE AND DESCRIPTION OF APPLICANT'S PROJECT

Long Wharf Reconstruction and Park

The proposed project is the first phase reconstruction of Long Wharf and the construction of a portion of a Long Wharf Park by the Boston Redevelopment Authority.
Boston Redevelopment Authority
City Hall, Boston, MA 02201

8. TYPE OF APPLICANT/RECIPIENT
A-State; B-Interstate; C-Substate District; D-County; E-City; F-School District; G-Special Purpose District; H-Community Action Agency; I-Higher Educational Institution; J-Indian Tribe; K-Other (Specify):
Enter appropriate letter: A

9. TYPE OF ASSISTANCE
A-Basic Grant; B-Supplemental Grant; C-Loan; D-Insurance; E-Other
Enter appropriate letter(s): A

10. AREA OF PROJECT IMPACT (Names of cities, counties, States, etc.)

11. ESTIMATED NUMBER OF PERSONS BENEFITING

12. TYPE OF APPLICATION
A-New; B-Renewal; C-Revision; D-Continuation; E-Augmentation
Enter appropriate letter: A

13. PROPOSED FUNDING

a. FEDERAL	$ 825,000 .00
b. APPLICANT	.00
c. STATE	.00
d. LOCAL	926,000 .00
e. OTHER	.00
f. TOTAL	$ 1,751,000 .00

14. CONGRESSIONAL DISTRICTS OF:
a. APPLICANT: NA
b. PROJECT: 08

16. PROJECT START DATE Year month day: 19 80 5 1
17. PROJECT DURATION: 40 Months
18. ESTIMATED DATE TO BE SUBMITTED TO FEDERAL AGENCY ▶ Year month day: 19 80 3 25

15. TYPE OF CHANGE (For 12c or 12e)
A-Increase Dollars; B-Decrease Dollars; C-Increase Duration; D-Decrease Duration; E-Cancellation; F-Other (Specify): NA
Enter appropriate letter(s):

19. EXISTING FEDERAL IDENTIFICATION NUMBER

20. FEDERAL AGENCY TO RECEIVE REQUEST (Name, City, State, ZIP code)
Heritage Conservation & Recreation Service, Philadelphia, PA19106

21. REMARKS ADDED
[ ] Yes [X] No

SECTION II—CERTIFICATION

22. THE APPLICANT CERTIFIES THAT ▶

a. To the best of my knowledge and belief, data in this preapplication/application are true and correct, the document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is approved.

b. If required by OMB Circular A-95 this application was submitted, pursuant to instructions therein, to appropriate clearinghouses and all responses are attached:

	No response	Response attached
(1) Executive Office of Community & Devel.	[ ]	[X]
(2) Metropolitan Area Planning Council	[ ]	[X]
(3)	[ ]	[ ]

23. CERTIFYING REPRESENTATIVE
a. TYPED NAME AND TITLE: John A. Bewick, State Liaison Officer
b. SIGNATURE: William M. Bick
c. DATE SIGNED Year month day: 19 80 3 25

SECTION III—FEDERAL AGENCY ACTION

24. AGENCY NAME

25. APPLICATION RECEIVED Year month day: 19

26. ORGANIZATIONAL UNIT

27. ADMINISTRATIVE OFFICE

28. FEDERAL APPLICATION IDENTIFICATION

29. ADDRESS

30. FEDERAL GRANT IDENTIFICATION

31. ACTION TAKEN
- [ ] a. AWARDED
- [ ] b. REJECTED
- [ ] c. RETURNED FOR AMENDMENT
- [ ] d. DEFERRED
- [ ] e. WITHDRAWN

32. FUNDING

a. FEDERAL	$ .00
b. APPLICANT	.00
c. STATE	.00
d. LOCAL	.00
e. OTHER	.00
f. TOTAL	$ .00

33. ACTION DATE ▶ Year month day: 19

34. STARTING DATE Year month day: 19

35. CONTACT FOR ADDITIONAL INFORMATION (Name and telephone number)

36. ENDING DATE Year month day: 19

37. REMARKS ADDED
[ ] Yes [ ] No

38. FEDERAL AGENCY A-95 ACTION

a. In taking above action, any comments received from clearinghouses were considered. If agency response is due under provisions of Part I, OMB Circular A-95, it has been or is being made.

b. FEDERAL AGENCY A-95 OFFICIAL (Name and telephone no.)

424-101

STANDARD FORM 424 PAGE 1 (10-75)
Prescribed by GSA, Federal Management Circular 74-7

Attachment B. 36 CFR § 59.3. Conversion requirements

(a) Background and legal requirements. Section 6(f)(3) of the L&WCF Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments in L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value.

(b) Prerequisites for conversion approval. Requests from the project sponsor for permission to convert L&WCF assisted properties in whole or in part to other than public outdoor recreation uses must be submitted by the State Liaison Officer to the appropriate NPS Regional Director in writing. NPS will consider conversion requests if the following prerequisites have been met:

(1) All practical alternatives to the proposed conversion have been evaluated.

(2) The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.

(3) The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted. Dependent upon the situation and at the discretion of the Regional Director, the replacement property need not provide identical recreation experiences or be located at the same site, provided it is in a reasonably equivalent location. Generally, the replacement property should be administered by the same political jurisdiction as the converted property. NPS will consider State requests to change the project sponsor when it is determined that a different political jurisdiction can better carry out the objectives of the original project agreement. Equivalent usefulness and location will be determined based on the following criteria:

(i) Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The property being proposed for substitution must then be evaluated in a similar manner to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site. This criterion is applicable in the consideration of all conversion requests with the exception of those where wetlands are proposed as replacement property. Wetland areas and interests therein which have been identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion regardless of the nature of the property proposed for conversion.

(ii) Replacement property need not necessarily be directly adjacent to or close by the converted site. This policy provides the administrative flexibility to determine location recognizing that the property should meet existing public outdoor recreation needs. While generally this will involve the selection of a site serving the same community(ies) or area

as the converted site, there may be exceptions. For example, if property being converted is in an area undergoing major demographic change and the area has no existing or anticipated future need for outdoor recreation, then the project sponsor should seek to locate the substitute area in another location within the jurisdiction. Should a local project sponsor be unable to replace converted property, the State would be responsible, as the primary recipient of Federal assistance, for assuring compliance with these regulations and the substitution of replacement property.

(iii) The acquisition of one parcel of land may be used in satisfaction of several approved conversions.

(4) The property proposed for substitution meets the eligibility requirements for L&WCF assisted acquisition. The replacement property must constitute or be part of a viable recreation area. Unless each of the following additional conditions is met, land currently in public ownership, including that which is owned by another public agency, may not be used as replacement land for land acquired as part of an L&WCF project:

(i) The land was not acquired by the sponsor or selling agency for recreation.

(ii) The land has not been dedicated or managed for recreational purposes while in public ownership.

(iii) No Federal assistance was provided in the original acquisition unless the assistance was provided under a program expressly authorized to match or supplement L&WCF assistance.

(iv) Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land so acquired.

In the case of development projects for which the State match was not derived from the cost of the purchase or value of a donation of the land to be converted, but from the value of the development itself, public land which has not been dedicated or managed for recreation/conservation use may be used as replacement land even if this land is transferred from one public agency to another without cost.

(5) In the case of assisted sites which are partially rather than wholly converted, the impact of the converted portion on the remainder shall be considered. If such a conversion is approved, the unconverted area must remain recreationally viable or be replaced as well.

(6) All necessary coordination with other Federal agencies has been satisfactorily accomplished including, for example, compliance with section 4(f) of the Department of Transportation Act of 1966.

(7) The guidelines for environmental evaluation have been satisfactorily completed and considered by NPS during its review of the proposed 6(f)(3) action. In cases where the proposed conversion arises from another Federal action, final review of the State's proposal shall not occur until the NPS Regional office is assured that all environmental review requirements related to that other action have been met.

(8) State intergovernmental clearinghouse review procedures have been adhered to if the proposed conversion and substitution constitute significant changes to the original Land and Water Conservation Fund project.

(9) The proposed conversion and substitution are in accord with the Statewide Comprehensive Outdoor Recreation Plan (SCORP) and/or equivalent recreation plans.

(c) Amendments for conversion. All conversions require amendments to the original project agreements. Therefore, amendment requests should be submitted concurrently with conversion requests or at such time as all details of the conversion have been worked out with NPS. Section 6(f)(3) project boundary maps shall be submitted with the amendment request to identify the changes to the original area caused by the proposed conversion and to establish a new project area pursuant to the substitution. Once the conversion has been approved, replacement property should be immediately acquired. Exceptions to this rule would occur only when it is not possible for replacement property to be identified prior to the State's request for a conversion. In such cases, an express commitment to satisfy section 6(f)(3) substitution requirements within a specified period, normally not to exceed one year following conversion approval, must be received from the State. This commitment will be in the form of an amendment to the grant agreement.

(d) Obsolete facilities. Recipients are not required to continue operation of a particular facility beyond its useful life. However, when a facility is declared obsolete, the site must nonetheless be maintained for public outdoor recreation following discontinuance of the assisted facility. Failure to so maintain is considered to be a conversion. Requests regarding changes from a L&WCF funded facility to another otherwise eligible facility at the same site that significantly contravene the original plans for the area must be made in writing to the Regional Director. NPS approval must be obtained prior to the occurrence of the change. NPS approval is not necessarily required, however, for each and every facility use change. Rather, a project area should be viewed in the context of overall use and should be monitored in this context. A change from a baseball field to a football field, for example, would not require NPS approval. A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would, however, require NPS review and approval. To assure that facility changes do not significantly contravene the original project agreement, NPS shall be notified by the State of all proposed changes in advance of their occurrence. A primary NPS consideration in the review of requests for changes in use will be the consistency of the proposal with the Statewide Comprehensive Outdoor Recreation Plan and/or equivalent recreation plans. Changes to other than public outdoor recreation use require NPS approval and the substitution of replacement land in accordance with section 6(f)(3) of the L&WCF Act and paragraphs (a) through (c) of this section.

Attachment C. Transcript of oral argument

Volume: I

Pages: 1-36

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Docket No. SJC-11134

* * * * * * * * * * * * * * * * * * *

SANJOY MAHAJAN & others,

Plaintiffs/Appellees

vs.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION & another,

Defendants/Appellants

* * * * * * * * * * * * * * * * * * *

TAPE TRANSCRIPTION

BEFORE: The Honorable Francis X. Spina
The Honorable Robert J. Cordy
The Honorable Margot Botsford
The Honorable Ralph D. Gants

DATE: November 5, 2012

LOCATION: John Adams Courthouse
One Pemberton Square
Boston, Massachusetts 02108

SHEA COURT REPORTING SERVICES
15 Court Square, Suite 920, Boston, Massachusetts 02108
(617) 227-3097

Botsford, that if you had taken -- if you take land for the purpose of redevelopment and then convey it to a conservation commission or parks and recreation, then that land becomes protected under Article 97. Do you agree with that?

MS. CHICOINE: Yes, Your Honor, absolutely.

JUDGE GANTS: Okay. So if there were to be -- now here, of course, there was a -- it's declared to be a park. You put a plaque on it. Should that be viewed as the equivalent of a conveyance in terms of the intention of the BRA to have that land be parkland?

MS. CHICOINE: It is not a conveyance, and it is, though, a park. So a portion of Long Wharf is protected by Article 97, and that is the Compass Rose area that is adjacent to this project site.

JUDGE BOTSFORD: Is that --

JUDGE GANTS: And it's protected because --

JUDGE BOTSFORD: Yeah.

MS. CHICOINE: And the Compass Rose area is protected specifically in that scenario

because of the acceptance of federal funds, under the Land and Water Conservation Fund, to create the Compass Rose. So that area is impressed with a special status, as is the Harbor Walk. And that is what the plaque, Long Wharf Park, refers to is --

JUDGE GANTS: So it's become -- is it within Article 97 or simply that you risk federal funding if you were to depart from what was a commitment to the federal government?

MS. CHICOINE: Well, there has not previously been really any statement of when urban renewal land and what uses become subject to Article 97, but it is classified that way by the Parks and Recreation Commission of the City of Boston that one protection, which does apply to one portion of Long Wharf, is Article 97.

JUDGE GANTS: Okay. So, now, BRA -- so, land conveyed for urban development can become Article 97 land if, one, it's conveyed to the Parks and Recreation, or second, if you accept federal funding with the commitment that it remain parkland? Is that sort of another addendum to when it can become Article 97 land?

MS. CHICOINE: I would say that it is, yes, a condition that would then alter its status as urban renewal land that can be modified.

JUDGE GANTS: Okay. Now, they will, I assume, come up and say there's a third addendum, which is when you put a plaque on it and say it is part of a park and you've declared it to be such. Why should there not be this third addendum?

MS. CHICOINE: Because the plaque does not define the boundaries of the area that is a park. And Long Wharf, you must recall, was built over three hundred years ago and has been the site of an array of commercial uses. There were deteriorating warehouses and fish-processing plants on Long Wharf until the BRA took stewardship of it.

And it was through the BRA's vision that it became a gem of the Boston waterfront, with pedestrian access and a bustling marina. And the ability to modify urban renewal land is what the BRA is charged with, under the urban renewal statute, to meet the city's evolving needs.

And I would say, just in closing, also that the Superior Court erred in this circumstance