

November 26, 2008

Case Administrator  
Mass. Department of Environmental Protection  
One Winter Street, 2nd Floor  
Boston MA 02108

## **Notice of Claim**

Dear Mass. DEP:

Pursuant to 310 CMR 1.01(6)(b), this notice of claim states, in Section 7.1, the facts that are grounds for the request; states, in Section 7.3, the relief sought; and states, in Section 7.2, why the decision is not consistent with applicable laws and regulations (marked in **boldface**).

Pursuant to 310 CMR 9.17(3), this notice of claim includes the required information divided as follows:

### **1 Waterways Application number**

#W07-2172N.

### **2 Contact information for the applicant**

Boston Redevelopment Authority, 22 Drydock Avenue, Boston MA 02210

### **3 Address of the project**

80 Long Wharf, Boston Harbor, Boston, Suffolk County.

### **4 Contact information for the parties filing the request**

Due to its length, this information is placed on the final page of this notice.

### **5 Facts demonstrating 'person aggrieved'**

The requesting parties are all Mass. residents who filed comments within the public comment period, as confirmed on p. 2 of the written decision.

### **6 Clear statement of request**

**We request a formal adjudicatory hearing.**

## 7 Grounds, objections, and relief sought

This section sets out the facts that are grounds for the proceeding, the specific objections to the written decision, and the relief sought.

### 7.1 *Facts that are grounds for the proceeding*

Decades ago, the Boston harbor reeked with pollution. To clean the harbor, the public, partly through increased water and sewer charges, paid billions of dollars. The striking results are visible from the seaward end of Long Wharf. It is an area long open to, and used by the general public for no fee. A place of quiet repose, the seaward end provides sweeping, almost 270° vistas of the harbor. These vistas are available along the Harborwalk as well as on the raised area. The seaward end is a rare combination: a stunning, contemplative, non-commercial spot on the waterfront of a busy city.

Reflecting its beauty and age, Long Wharf is a National Historic Landmark. It stood at the end of what was then King Street, a name that bespeaks the pre-revolutionary origin of the wharf and area.

The applicant, the Boston Redevelopment Authority (BRA), requests authorization to enclose and extend the public shade structure at the seaward end of Long Wharf. The BRA then intends to lease the space to the Eat, Drink, Laugh Restaurant Group to construct what Mayor Menino calls a ‘restaurant concept’, in particular Doc’s Long Wharf.

Doc’s Long Wharf will include takeout service, indoor dining, and outdoor dining. In December 2007 the operators applied for and received licensing-board approval to serve food and alcohol seven days a week until 1am.

Other restaurants in the vicinity include Tia’s and other restaurants/bars in the Marriott Long Wharf Hotel, the Living Room, Legal Seafood, Sel de la Terre, the Sail Loft, the Chart House, Joe’s American Bar and Grill (right on the harbor), and the numerous establishments in the Quincy Market/Faneuil Hall area. Nearby public restrooms include those in the Marriott, by the ticket booths, and at Joe’s American Bar and Grill.

This project is one of many along the Boston Harbor where the BRA owns land that it tenders to private parties. Peter Gori, project manager at the BRA, was quoted in the *Boston Globe* on this project: ‘... we’re looking at this as a business proposition...’ [‘BRA took short view’, 9 March 2008].

### 7.2 *Objections to the written decision*

This section details specific objections to the written decision. Text in italics marks direct quotes from the decision accompanied by page on which the quote can be found.

1. *The use is intended to complement the existing public and commercial uses. [p. 1]* Many restaurants exist in the vicinity, including the Chart House, Legal Seafood, the Living Room, Tia’s, and – also on the waterfront – Joe’s American Bar and Grill. Adding a restaurant and bar does not complement existing uses. It unnecessarily supplements the commercial uses and, as detailed below, harms the public uses.
2. *... thereby providing a more secure and attractive year-round destination [p. 2].* This statement justifies a nonwater-dependent use by citing an indirect and theoretical nonwater-dependent benefit – disallowed from consideration by **310 CMR 9.53(3)(d)**: ‘[T]he Department shall consider

only those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical.’ Furthermore, the application did not include an analysis of alternatives that could provide direct benefits without removing or encroaching on an existing, beneficial public uses.

Even were the alleged indirect benefit legally proper to consider, the benefit itself is highly disputable. The area is already a secure and attractive year-round destination; indeed, it is among the most beautiful on the Boston Harbor. Enclosing the shade structure and blocking the sweeping, all-points harbor vista makes the area less attractive, as would the increased litter and noise from a restaurant with late-night alcohol service.

Such a restaurant and bar also increases the number of inebriates, making the area less secure for sober visitors and for the inebriates themselves should they stumble into the harbor. Such events are a personal tragedy and a liability hazard. Will the hazard pass to the public via the BRA?

This project therefore fails the ‘proper public purpose’ requirement of **310 CMR 9.31(2)**, in particular of **310 CMR 9.31(2)(b)(1)** applying to nonwater dependent uses.

3. *... more people will be attracted to the end of Long Wharf over a longer period of time...* [p. 2] The theory seemingly behind this statement is that one should multiply the number of users by the value of the location and should maximize the product. That dubious theory justifies destroying intangible values such as historical worth or open space. Is it worth running a superhighway across the Grand Canyon, or through a historical city center, to vastly increase the number of users? A regulatory theory that produces such nonsensical conclusions cannot be trusted to uphold the public interest.

The North End and downtown waterfronts do not need more restaurants – and no evidence of this need is presented in the application or written decision – but it does need more parks and quiet contemplative areas, as shown in the neighborhood-by-neighborhood studies on density and open space. The proposed project goes in exactly the wrong direction.

4. *... welcome addition of accessible restrooms.* [p. 3] Nearby public restrooms include those by the ticket booth and in the Marriott. If the Marriott restrooms are not clearly marked for public use, a sign provides a cheaper remedy than a new restaurant. If the Marriott restrooms are not handicapped accessible, then city, state, and federal funds could help that operator defray the costs of conversion; there is no need to privatize another section of Long Wharf.

Furthermore, the proposed restrooms in Doc’s Long Wharf provide only encumbered public access. They can be accessed only through the same entrance used by the paying patrons and through an interior area used for restaurant operations.

5. *Shaded seating with excellent views of the Harbor will continue to be available to the general public...* [p. 3]. This argument ignores the detriment to the harbor views and to the considerable open space provided and used for large public gatherings (e.g. fireworks displays). The public now enjoys sweeping, almost 270° vistas of the harbor from the entire seaward end of Long Wharf. The proposed enclosed structure would obstruct those views from many points now enjoying the vista. This public detriment is not addressed in the written decision (nor in the 12/18 June 2008 response from the BSC Group).
6. *... picking up trash on a daily basis.* [p. 3] This argument for the license offends the spirit of the clean-hands doctrine. A restaurant and bar, especially with takeout facilities, would itself

contribute to the trash problem. The restaurant's picking up trash argues not for approving the change of use but rather for the hazards of doing so.

7. *...the additions are no closer to the water than the existing structure (over 28 feet). [p. 3]* This argument incorrectly compares the existing *open* structure available to all with the proposed *enclosed* structures available only to paying customers.

Furthermore, the argument suggests that if one corner of the existing structure is 28 feet from the water, the applicant is free to enclose all areas more than 28 feet from the water. An argument that justifies such an extensive taking justifies nothing.

8. *The outdoor dining areas have been designed to retain the existing sight line emanating from State Street, the nearest public way. [p. 3]* The implication is that retaining this sight line is sufficient to preserve the public's rights. However, the public also has access to the Harborwalk, from where the sight lines would be interrupted. Preserving sight lines from State Street is necessary but not sufficient for preserving the public's rights.

The DEP Application Completeness Review (sent to the BRA, dated 18 March 2008) prefigured this point: The DEP requested that the applicant 'adequately demonstrate that view corridors... along expanded Harborwalk will not be impeded.' No such demonstration was forthcoming in the response (letter from the BSC Group, dated variously 12 and 18 June 2008). Nor does the DEP's written decision mention this, its own requirement.

9. *The reconfiguration will 'promote public use ... in a clearly superior manner'. [p. 2]* By causing detriment to the public, public use is not promoted at all, let alone in a superior manner or a clearly superior manner. The current park-like, water-dependent uses would be curtailed by the outdoor restaurant seating and by the enclosed, privatized restaurant space.

The **1991 Municipal Harbor Plan (MHP)** standard of 'promot[ing] public use... in a clearly superior manner' is therefore not met, and the project cannot reconfigure building setback distances. The superior (i.e. unique) public use of the existing wharf end would be diminished by a restaurant and bar – a use that presently exists in many areas along and adjacent to Long Wharf.

The applicant, the BRA, is here acting as a public agency and a private landlord: Peter Gori is quoted as calling the project a 'business proposition'. This conflict of interest between protecting the public interest and generating income is a pattern in projects on BRA-owned land throughout the Boston Harbor. The MHP clearly-superior-manner standard should therefore be applied especially stringently to this proposal.

10. The proposed use, as a restaurant and bar, except by serving seafood, takes no notice the historic nature of Long Wharf, let alone enhances our appreciation of this history.
11. The decision ignores **Article 97 of the Mass. constitution**. The attached comment letter from Victor Brogna details the specific legal reasons that Article 97 legislation is required. The response from Kenneth Fields of the BSC group (dated variously 12 and 18 June 2008) did not address the substantive issues in Victor Brogna's letter. The response instead paints numerous herrings red – for example with the irrelevant point about the area being 'hardscape concrete and brick' (p. 5 of Kenneth Field's letter). The Harborwalk is no different. Could it therefore be converted to private use without Article 97 legislation?

In approving the Municipal Harbor Plan, the Secretary of Environmental Affairs warned us about the dangers of privatization: 'The Waterways regulations make it clear that the threat of undue privatization of interior spaces at and near the water's edge is inimical to [the interests

of the broader public].’ (**Secretary’s Decision, 22 May 1991, p. 25**). The proposed project is an example; and Article 97 is a tool for the public to safeguard its interests.

### 7.3 *Relief sought*

Long Wharf consists of three important but distinct uses: water-transportation facilities, commercial establishments, and open public parkland. Most of this historic wharf, built for water-dependent purposes, is being used by the BRA for nonwater-dependent commercial use – the full scale of which went unmentioned in the written decision. This proposal expands only the dominant, nonwater-dependent commercial use of this historic wharf.

Instead let the BRA return to the public with a project to expand and enhance the existing public experience at the end of Long Wharf. Regarding its current proposal, we respectfully request that the DEP reverse the following findings:

1. that the question of Article 97 legislation is irrelevant to this license.
2. that the project (and reconfiguration of setback distances) ‘will promote public use...in a clearly superior manner.’ [finding 5]
3. that ‘the project complies with all applicable standards of the waterways regulation . . . including the special standards for nonwater-dependent use projects at 310 CMR 9.51–9.53.’ [finding 5]
4. that ‘by enclosing the shade structure for restaurant use [will provide] a more secure and attractive year-round destination. . .’ [finding 5]
5. that the project ‘provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b).’ [finding 6]

We request that the DEP reverse the decision to approve this project. Rejecting this project is necessary for Long Wharf to remain a quiet, non-commercial space of outstanding beauty on the Boston waterfront.

## 8 **Copy sent to applicant and municipal official**

A copy of this notice has been sent to the applicant and to Mayor Menino of Boston.

## Signed

**Sanjoy Mahajan**

5 Jackson Ave Unit 2  
Boston MA 02113  
617.227.0728 (phone)  
206.338.5770 (fax)  
sanjoy@mit.edu

**Victor Brogna**

Suite 5-3  
120 Commercial St  
Boston MA 02109

**Stephanie Hogue**

7 Henschman 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

**Mark Paul**

61 Prince St  
Boston MA 02113

**Naomi Paul**

61 Prince 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