

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

November 10, 2008

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In the Matter of  
Boston Redevelopment Authority

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

**SCHEDULING ORDER**

1. In this case, the Petitioner Sanjoy Mahajan has appealed a chapter 91 Waterways Permit that the Boston Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Applicant Boston Redevelopment Authority on September 17, 2008 (“the Permit”) concerning its proposed project at the seaward end of Long Wharf in Boston, Massachusetts (“the Site”). According to the Permit, the Applicant owns a shade structure at the Site; the primary purpose of the shade structure “is to provide fresh air, ventilation and emergency egress for the MBTA subway tunnel running below the [Site]”; and the Applicant proposes “to enclose and construct a small addition to the shade structure, which will then be leased for restaurant use.” The proposed name of the restaurant is “Doc’s Restaurant at Long Wharf.”

2. I am issuing this Scheduling Order (“the Order”) in my capacity as a Presiding

Officer of OADR<sup>1</sup> to secure the just and speedy determination of this appeal in accordance with the requirements of 310 CMR 1.01. **This Order informs the parties to this appeal of the dates of the Pre-Screening Conference and Hearing. See ¶¶ 3 and 10 of this Order.** The issuance of this Order does not necessarily mean that the Petitioner has filed this appeal in accordance with the requirements of 310 CMR 1.01. At a later date, a Presiding Officer may vacate, modify, or stay this Order if he or she recommends that the appeal be dismissed or stayed on his or her initiative, or in response to a motion filed by a party to this appeal. See 310 CMR 1.01(5)(a)2; 310 CMR 1.01(5)(a)3; 310 CMR 1.01(5)(a)15.d; 310 CMR 1.01(5)(a)15.f; 310 CMR 1.01(6)(h).<sup>2</sup>

3. A Presiding Officer will conduct a Pre-Screening Conference with the parties to this appeal at **10:00 a.m., Tuesday, November 25, 2008**, in the Department's Boston Office, One Winter Street, Massachusetts 02108 to determine the appeals' potential amenability to

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<sup>1</sup> OADR is separate and independent of MassDEP's program offices, Regional Offices, and Office of General Counsel ("OGC"). OADR is staffed by a Case Administrator, an Administrator of Alternative Dispute Resolution ("ADR"), and Presiding Officers. A Chief Presiding Officer, who reports to MassDEP's Commissioner, supervises Presiding Officers and other OADR staff.

Presiding Officers in OADR are experienced attorneys at MassDEP appointed by MassDEP's Commissioner to serve as neutral hearing officers, and are responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(1)(a); 310 CMR 1.01(1)(b); 310 CMR 1.01(5)(a)15. Under 310 CMR 1.03(7), Ex Parte communications between OADR's Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited and all MassDEP staff involved in the appeals process are informed of these requirements. Additionally, Recommended Final Decisions of Presiding Officers in appeals are subject to review by MassDEP's Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the appeal process at MassDEP will be fair and will result in unbiased decision-making.

<sup>2</sup> Under 310 CMR 1.01(5)(a)2 and 310 CMR 1.01(5)(a)15.f, a Presiding Officer may recommend dismissal of an appeal on various grounds, including lack of standing, lack of jurisdiction, mootness, untimeliness, or "where the record discloses that the proposed project, activity has been denied by a local, state or federal agency or authority pursuant to law other than that relied on by the Department in the decision appealed from, and such denial has become final." Under 310 CMR 1.01(5)(a)3; 310 CMR 1.01(5)(a)15.d; and 310 CMR 1.01(6)(h), the Presiding Officer may stay the proceedings in an appeal "where the failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause." Accordingly, the parties to this appeal are directed to inform me as soon as possible of any ground warranting dismissal or a stay of this appeal.

settlement through alternative dispute resolution or other means.<sup>3</sup> At the Pre-Screening Conference, the Presiding Officer will also identify the issues for resolution in this appeal in accordance with ¶¶ 4-9 of this Order.

If any party to this appeal has a scheduling conflict that will prevent the party from attending the scheduled Pre-Screening Conference, that party must inform the other parties to this appeal and OADR's Case Administrator in writing of that scheduling conflict within seven (7) calendar days of the date of this Order. Within the same period, all of the parties must confer and inform OADR's Case Administrator in writing that they are amenable to re-scheduling the Pre-Screening Conference to (the Tuesday before the original Pre-Screening Conference date), or must propose three alternative dates to me that are no later than 14 days after the original date of the Pre-Screening Conference.

All written notifications to OADR required by this Order must be made through Anne Hartley, OADR's Case Administrator, by (1) forwarding an electronic mail message to Ms. Hartley at [Anne.Hartley@state.ma.us](mailto:Anne.Hartley@state.ma.us), or (2) written correspondence to Ms. Hartley by hand delivery at OADR or facsimile delivery at (617) 574-6880.

**4. All parties to this appeal are required to attend the Pre-Screening Conference, and the parties should be prepared to fully discuss their respective positions in the appeal at the Conference.** The failure of any party to attend the Pre-Screening Conference, to participate in the Conference in good faith, or to comply with any requirements of this Order

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<sup>3</sup> See footnote 1, at p. 2 of this Order. Under 310 CMR 1.01(5)(a)15, the authority of Presiding Officers to prescreen appeals includes the power to conduct prescreening conferences with the parties to an appeal to discuss potential settlement of the appeal, identify the issues in an appeal, and to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions." Presiding Officers are also authorized to conduct simplified hearings of appeals in accordance with 310 CMR 1.01(8)(a), and issue recommended final decisions for dismissals of appeals. 310 CMR 1.01(5)(a)15.

will result in the imposition of appropriate sanctions on that party pursuant to 310 CMR 1.01(10).<sup>4</sup>

5. Prior to the Pre-Screening Conference, the parties to this appeal shall confer to discuss the possibility of settlement of this appeal, and the amenability of this appeal to mediation or other forms of alternative dispute resolution. It shall be the responsibility of the Petitioner to initiate settlement discussions at least ten (10) calendar days prior to the Pre-Screening Conference. The settlement discussions may be conducted in person, or by telephone.

6. Prior to the Pre-Screening Conference, the parties to this appeal may request the assistance of a Department mediator to facilitate their settlement discussions. The request should be made in writing to Aprel McCabe, Administrator of OADR's ADR Program, by (1) forwarding an electronic mail message to Ms. McCabe at [Aprel.McCabe@state.ma.us](mailto:Aprel.McCabe@state.ma.us), or (2) written correspondence to Ms. McCabe by hand delivery at OADR or facsimile delivery at (617) 574-6880. I may also order the parties to attend an Alternative Dispute Resolution Information Session that will be facilitated by Ms. McCabe. Regardless of any referral to the

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<sup>4</sup> Possible sanctions under 310 CMR 1.01(10) include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);
- (d) striking the party's pleadings in whole or in part;
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

ADR Program, the Pre-Screening Conference will proceed as scheduled unless the appeal is settled prior to the Conference. See ¶¶ 7-9 of this Order.

7. No later than (3) business days prior to the scheduled Pre-Screening Conference, the Petitioner shall file a written statement with OADR confirming that it initiated and conducted settlement discussions with the other parties to this appeal in accordance with this Order. The Petitioner's statement shall set forth the time, date, location and duration of the settlement discussions; who was present for each party; and whether the parties reached a settlement of the appeal.

If the Petitioner's settlement statement reports that the appeal has been settled, the parties shall file fully executed settlement documents with me at the scheduled Pre-Screening Conference, or, at the parties' request, the Conference may be postponed for no more than ten calendar (10) days, so that the parties can prepare, execute, and file settlement documents for this appeal. If fully executed settlement documents are not filed with me by the rescheduled Pre-Screening Conference date, the Conference shall proceed on the rescheduled date. See ¶¶ 8-9 of this Order.

If the Petitioner's settlement statement reports that the appeal has not been settled, I may order the parties to attend an Alternative Dispute Resolution Information Session that will be facilitated by Ms. McCabe. See ¶ 6 of this Order. Regardless of any referral to the ADR Program, the Pre-Screening Conference shall proceed as scheduled. See ¶¶ 8-9 of this Order.

If the Petitioner's settlement statement reports that the appeal has not been settled, the Petitioner shall, simultaneously with its report, file a Pre-Hearing Statement with OADR containing the information set forth in ¶ 8 of this Order. All other parties to this appeal shall file their respective Pre-Hearing Statements as soon as possible thereafter, but no later than one

(1) business day prior to the Pre-Screening Conference.

8. Unless this appeal has been settled in accordance with ¶ 7 of this Order, the Pre-Screening Conference shall proceed as scheduled on the original Conference date or no later than ten (10) calendar days from the Conference date. At the Pre-Screening Conference, the Presiding Officer will identify the issues for resolution in the appeal, and the parties should be prepared to fully discuss their respective positions in the appeal. In accordance with the schedule set forth in ¶ 7 of this Order, each party shall file a Pre-Hearing Statement with OADR containing the following information:

- (1) a brief summary of the Permit being appealed in this case;
- (2) a brief summary of the final relief that the party seeks in this appeal;
- (3) a list of disputed relevant facts for resolution in this appeal and the party's position on each issue (what the party expects to prove at the Hearing on the appeal);
- (4) a list of legal issues for resolution in this appeal, and the party's position on the issue;
- (5) the names and addresses of each party's witnesses, including expert witnesses, who will be filing Pre-filed Testimony.<sup>5</sup>

At the Pre-Screening Conference, the parties shall be prepared to discuss their list of potential witnesses for the Hearing, and should determine by the Conference date the availability of their potential witnesses for the scheduled Hearing.

9. If this appeal is not resolved at the Pre-Screening Conference, the Presiding Officer will issue a Pre-Screening Conference Report and Order to the parties to this appeal

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<sup>5</sup> The only witnesses who will be permitted to testify at the Hearing are those individuals who have filed timely Pre-filed Testimony in the appeal. A party's failure to list a witness in the Pre-Hearing Statement may lead to an order precluding the testimony of that witness unless the party demonstrates good cause for having omitted the individual from the witness list.

within seven (7) calendar days after the Conference (“the Report”). The Report will contain a Statement of Issues setting forth the contested issues of material fact and legal issues to be resolved at the Hearing on this appeal. All subsequent Pre-filed Testimony in the appeal shall be limited to resolving those issues and shall not raise any additional issues. The schedule for filing Pre-filed Testimony will be set forth in the Report.

10. The Hearing on this appeal (“the Hearing”) has been scheduled for 9:00 a.m., Tuesday, February 24, 2009, in the Department’s Boston Office in One Winter Street, Boston, Massachusetts. The Hearing will be limited to one six hour day (hearing: 9:00 a.m. to 1:00 p.m.; lunch break: 1:00 p.m. to 2:00 p.m.; hearing: 2:00 pm to 4:00 p.m.), and its primary function will be the cross-examination of witnesses who have filed timely Pre-filed Testimony in this appeal. At the Hearing, the only witnesses who will be cross-examined are those individuals who have filed timely Pre-filed Testimony in this appeal. Their cross-examination will be limited to the matters asserted in their Pre-filed Testimony as to which there are disputed facts.

With respect to the decorum at the Hearing, the parties are directed to 310 CMR 1.01(13)(b)(2) which provides as follows:

All parties, authorized representatives, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action, including imposing sanctions as described at 310 CMR 1.01(10).<sup>6</sup>

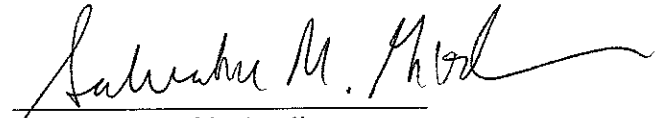
11. Within thirty (30) days after the Hearing, the Presiding Officer will issue a Recommended Final Decision for consideration by MassDEP’s Commissioner or her designee. MassDEP’s Commissioner or her designee will issue a final written decision in accordance with

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<sup>6</sup> See footnote 4, at p. 4 of this Order regarding the provisions of 310 CMR 1.01(10).

310 CMR 1.01(14)(b).

Date: 11/10/08

  
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Salvatore M. Giorlandino  
Chief Presiding Officer



**SERVICE LIST**

**Applicant:** Boston Redevelopment Authority  
c/o Mark Donahue, Deputy Director for Asset Management  
22 Drydock Avenue  
Boston, MA 02210  
Mark.Donahue.bra@CityofBoston.gov;

Legal representative: Kevin Morrison, Esq.  
General Counsel  
Boston Redevelopment Authority  
22 Drydock Avenue  
Boston, MA 02210  
Kevin.Morrison.bra@cityofboston.gov;

**Petitioner:** Sanjoy Mahajan  
5 Jackson Avenue, Unite 2  
Boston, MA 02113  
sanjoy@mit.edu;

Legal representative: None identified in Appeal Notice;

**Other Interested Party:** Doc's Restaurant at Long Wharf  
c/o Kenneth P. Fields, Esq.  
Senior Project Manager  
Tetra Tech EC  
133 Federal Street  
Boston, MA 02110  
Ken.Fields@tteci.com;

**The Department:** Andrea Langhauser  
MassDEP/Wetlands and Waterways Program  
One Winter Street  
Boston, MA 02108  
Andrea.Langhauser@state.ma.us;

Legal Representative: Deirdre Desmond, Senior Counsel  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108  
Deirdre.Desmond@state.ma.us

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Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, Massachusetts 02108;

Misael Garcia, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, Massachusetts 02108;

**OADR Alternative Dispute**

**Resolution Administrator:** Aprel McCabe  
MassDEP/OADR  
One Winter Street  
Boston, MA 02108.