

12 January 2009

Anne Hartley, OADR Case Administrator
Mass. Department of Environmental Protection
One Winter Street
Boston MA 02108

Memorandum of law / OADR 2008-128 / In the matter of BRA

Dear Ms Hartley:

In accordance with the schedule in the Pre-screening conference report and order dated 15 December 2008 (the Report) and ruling of 9 January 2009, here is our memorandum of law to accompany the pre-filed witness testimony. The memorandum addresses, in order, the issues for resolution identified by Presiding Officer Coles-Roby (pp. 3–4 of the Report). The statements of fact in this memorandum are supported by the attached witness testimony.

1 Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2?

The Chapter 91 regulations require that ‘any project on tidelands’ 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)]. The subparagraphs further define the standard; in particular, nonwater-dependent use projects must comply with:

... the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 CMR 9.51 through 9.52; and compl[y] with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53 [310 CMR 9.31(2)(b)(1)].

The site is currently activated for water-dependent use, and it is unique in material ways. It is a park and is used as such by the public. Even during these bitter winter days with ice on the ground, one can find a dozen people enjoying the views. And in the summer, it is very heaven. In all seasons, it is quiet – yet centrally located. It offers panoramic vistas of the harbor and East Boston. It is rich in history. And it is a large open, public space free of condos or other privatized spaces.

No other wharf – including Fosters, Rowes, India, Central, Commercial, Lewis, Sargents, Union, and Lincoln – offer both the views provided by Long Wharf and its large park-like setting. Because of this large public space, one does not feel like an intruder – in contrast to the pedestrian experience along much of the Harborwalk. For an example of this problem, walk along Rowes Wharf and read the private-property signs posted on the raised blocks just where one would like to pause and enjoy the views.

Rather than utilizing and conserving this outstanding capacity of Long Wharf to accommodate water-dependent use, as required by the regulations, the project shrinks the capacity. Enclosing

the open shade structure would significantly reduce the sweeping vistas and fragment the contiguous open space. The outdoor seating would annex part of the public space, reserving the best views of the harbor, now available to all comers, for the restaurant patrons. And the restaurant and bar with a 1.00am closing would produce noise, garbage, and rats.

The subparagraph quoted above [310 CMR 9.31(2)(b)(1)] incorporates the provisions of 310 CMR 9.51, 310 CMR 9.52, and 310 CMR 9.53 by reference. How the project fails the requirements of 310 CMR 9.51 is discussed in Section 4. How the project fails the requirements of 310 CMR 9.53 is discussed Section 2.

It also fails the requirements of 310 CMR 9.52. Those provisions require projects on a site with a water-dependent use zone to include

...one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances [310 CMR 9.52(1)(a)][.]

The proponent not shown that the project contains such a facility. Furthermore, the scope of qualifying facilities are narrowed by the following subparagraphs [310 CMR 9.52(1)(a)1–2] requiring the Department to ‘give particular consideration’ to:

1. facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a); and
2. facilities for which a demonstrated need exists in the harbor in question and for which other suitable locations are not reasonably available[.]

A restaurant and bar does not promote ‘active use of the project shoreline’ (the seaward end of Long Wharf). Nor is there a need for a restaurant and bar at that location: Many exist nearby, such as those in the Quincy Market area. In short, the project fails to meet the incorporated requirements, and therefore fails to meet the requirements of 310 CMR 9.31(2)(b)(1) itself.

The project cannot then serve a proper public purpose.

2 Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d)?

The regulations require that the project ‘not detract from the provision of water-related public benefits’ [310 CMR 9.53(3)]. As described in Section 1, the project reduces the provision of water-related public benefits. In particular, it would drive away water-dependent users who, for 20 years, have come to Long Wharf for the respite, open space, panoramas; and would replace them with nonwater-dependent users coming to a late-night restaurant and bar.

Furthermore, in evaluating the benefits of the project, the regulations require that the Department consider *only*

...those nonwater-related benefits accruing to the public in a manner that is reasonably direct, rather than remote, diffuse, or theoretical. Examples of direct public benefits include meeting a community need for mixed-income residential development, creating a large number of permanent jobs on-site, and reutilizing idle waterfront properties. Corresponding examples of indirect public benefits include increasing the general supply of market-rate housing, improving overall economic conditions, and expanding the property tax base of a municipality [310 CMR 9.53(3)(d)].

The Department justifies the project with the statement that it will provide a 'more secure and attractive year-round destination' [Written Determination, 17 Sept 2008, finding 5]. This claimed benefit fails the direct-benefit test in two ways. First, because the contention is unsubstantiated, the benefit falls into the category of theoretical rather than direct. Second, the contention cannot be true: Long Wharf, already one of the most attractive sites along the harbor, would have its attractiveness severely compromised by a late-night restaurant and bar generating noise, garbage, and rats.

Third, even if the contention were true, the claimed benefit fits with the examples in the regulations of 'indirect public benefits' rather than with the examples of 'direct public benefits'. For example, the project could not reutilize idle waterfront property, because that area is already used extensively by the public.

3 Whether the project complies with Condition No. 5 of the EOEEA [sic] Secretary's decision on the 1991 Boston Harbor Plan because it will promote public use or other water-dependent activity on the seaward end of Long Wharf in a clearly superior manner?

To comply with Condition 5, a project must promote public use or other water-dependent activity in a *clearly superior manner*. However, the project has several significant impacts on public use and water-dependent activity that disqualify it from meeting this test. Enclosing the open shade structure would significantly reduce the sweeping vistas and fragment the contiguous open space. The outdoor seating would annex part of the public space, reserving the best views of the harbor, now available to all comers, for the restaurant patrons. And the restaurant and bar with a 1.00am closing (and midnight on the outdoor patio) would produce noise, garbage, and rats; although the proponent has a plan for managing garbage, the proponent is the source of it.

Furthermore, the numbers generating the disruption will be large:

- a. 88 interior seats; and
- b. 176 exterior spots for seating and standing.

The result is formal restaurant accommodation for 264; and this number does not include additional numbers waiting to be accommodated in the restaurant or outdoor patio, nor those waiting for takeout service. The potential is easily over 300 patrons. The proponent has not demonstrated a plan for noise control, nor one for rat control – an increasingly significant issue in this neighborhood.

The noise, garbage, rats, and other impacts from these numbers would drive away water-dependent users, who go now for the scenic, historic, and esthetic qualities of the unique Long Wharf environment. This project is an inferior use, and does not meet the MHP standard.

Further support for this reasoning comes from the Secretary's decision [p. 25]:

I am also mindful that the accommodation of local private development objectives cannot become the primary purpose for the utilization of state tidelands, and must be kept in balance with the need to protect the broader public for whom such lands are held in trust by the Commonwealth. The Waterways regulations make it clear that the threat of undue privatization of interior spaces at or near the water's edge is inimical to those interests.

4 Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)?

When a project conforms to the municipal harbor plan, the Department shall apply the use limitations numerical standards from the plan rather than those in the CMR [310 CMR 9.34(2)(b)(1)]. However, as described in Section 3, the project fails the 'clearly superior manner' test. Furthermore, the project fails to meet the requirements of the MHP because it fails the test of 310 CMR 9.34(2)(a)(2):

the Department shall not find the requirement 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 MGL c. 91 or 310 CMR 9.00.

This project required a variance:

Change the legal occupancy to a restaurant. . . A takeout, allowing outdoor seating and patio use until midnight. Also, allow live entertainment. [City of Boston ZBA hearing on 22 January 2008, granted by decision on 7 March 2008]

Furthermore, according to the MEPA certificate, the project requires a 'compliance approval or variance from the Article 25 Flood Hazard District from the Boston Zoning Board of Appeals' [p. 2 of the Certificate]. The proponents have not presented evidence of this approval or variance. And if they had got a variance, its receipt would only strengthen the argument that the project does not comply with the MHP.

For two substantive reasons (needing variances and not meeting the 'clearly superior manner' test) the project fails to comply with the MHP. Therefore it must follow the dimensional regulations of 310 CMR 9.51(3)(c). Those regulations require that 'new or expanded buildings for nonwater-dependent use' not be located in a water-dependent use zone. This extent of this zone is defined in 310 CMR 9.51(3)(c)(2):

along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet.

The distance from the base to end of Long Wharf is roughly 400 feet. Therefore the water-dependent use zone extends roughly 100 feet from the seaward end of Long Wharf, whereas the to-be-enlarged and -enclosed shade structure is located only 28 feet from the seaward end. This analysis is confirmed by p. 13 of the Written Determination (17 September 2008), which shows the reconfigured shade structure extending east across the dotted line marking the boundary of the water-dependent use zone.

The conclusion is that the project fails to meet the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)(2).

5 Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water?

The regulations require 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 [310 CMR 9.51(2)].

The project, however, would create significant incompatibility in design. The paragraph quoted above continues 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 [310 CMR 9.51(2)(b)].

The only viewshed considered in the Chapter 91 Written Determination (17 September 2008) was from State Street toward the water. No views on or from Long Wharf were considered. However, the regulations also expressly require considering sight lines from ‘other areas of concentrated public activity’ [310 CMR 9.51(2)(b)] – which includes the entire Harborwalk and pavilion at the end of Long Wharf.

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. The proposed restaurant and bar severely degrades ‘views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront’ [310 CMR 9.51(2)(b)]. Enclosing and filing up 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.

The project’s proposed non-water dependent structure would greatly diminish the panoramic vistas offered to the Long Wharf park visitor. The project therefore fails to meet the requirement of 310 CMR 9.51(2)(b).

6 Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i)?

The regulations state that ‘All projects must comply with applicable environmental regulatory programs of the Commonwealth’ [310 CMR 9.33(1)], then lists historical protection statutes non-exhaustively (via an ‘including but not limited to’). The right of the people to the historic qualities of the environment is declared a public purpose by Article 97 of the Massachusetts Constitution, and is a core purpose of the Waterways regulations:

[The general purposes served by 310 CMR 9.00 are to:]... foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution. [310 CMR 9.01(2)(b)]

Long Wharf is, as befits its significance, a National Historic Landmark. Boston was the leading colonial port, and Long Wharf was the center of the colonial trade. The immense length (1586 feet) allowed large ships to dock and unload goods without needing small boats to shuttle back and forth. The Long Wharf warehouses therefore became a prominent Boston marketplace. The Wharf also has significant military history during the Revolution.

A thought-provoking part of Long Wharf’s history is set out in an interpretative wall exhibit in the lobby of the Marriott Hotel – required as part of the Chapter 91 license for the hotel. The exhibit explains that the proprietors of Long Wharf in 1715 (when State Street was still King Street)

drew up a deed making the area except for their store lots common property ‘for the use of the inhabitants of Boston forever’ (quotes in the exhibit). A late-night restaurant and bar that drives away water-dependent users with noise, garbage, and rats and that severely compromises historic views is not how the original builders of Long Wharf would have imagined its future. And it is inconsistent with protecting the historic significance of Long Wharf – a declared public purpose of the Constitution and Waterways regulations.

7 Whether the petitioner has standing?

On standing, MGL c. 30A s. 10A states:

...not less than ten persons may intervene in any adjudicatory proceeding as defined in section one, in which damage to the environment as defined in section seven A of chapter two hundred and fourteen, is or might be at issue; provided, however, that such intervention shall be limited to the issue of damage to the environment and the elimination or reduction thereof. . .

We are a group of 12. And our intervention is grounded in ‘damage to the environment’ – statutorily defined in MGL c. 214 s. 7A as

...any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally.

This definition is broad and expansive. For example, it includes not only damage but also the milder term ‘impairment’. It includes not only actual damage but also ‘probable’ damage. The statute continues this inclusive approach with a long list of possible damages:

Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites.

In this list, particularly germane kinds of damage include ‘excessive noise’ and particularly germane areas to be protected include ‘open spaces, natural areas, parks or historic districts or sites.’ Long Wharf is an open space, a historic site, and is ‘public waterfront parkland’ [ENF Certificate EEA #14119, 26 November 2007, p. 3].

Furthermore, the phrase ‘not be limited to’ makes the list expressly not exhaustive. A further source for the definition of environment is the broad definition given by Article 97 of the Massachusetts Constitution:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

As a constitutional amendment, Article 97 governs any statutory provisions, and its broad definition of environment is therefore automatically part of the definition in MGL c. 214 s. 7A. Furthermore, it is an express part of the definition because MGL c. 214 s. 7A includes impairment of natural resources, and those are defined inclusively by Article 97.

As the Attorney General’s opinion on Article 97 states:

If land is misused a portion of the public’s natural resources may be forever lost, and no less than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond

existing law and much to the benefit of our natural resources. . . [Rep. A.G. Pub. Doc. No. 12, at 148 (1973)].

This 'new range of protection' arises not only through the new requirement of a two-thirds vote of the legislature – a requirement that this project would also have to meet before it can start – but also by reinforcing the already existing procedures with a broad definition of environment.

The issues for resolution in this appeal are environmental. In particular, we are alleging that this project would:

1. produce 'excessive and unnecessary noise', an environmental issue mentioned expressly in MGL c. 214 s. 7A and Article 97;
2. damage a historic site, an environmental issue mentioned expressly in MGL c. 214 s. 7A and Article 97;
3. damage public open space and parkland, items protected by MGL c. 214 s. 7A and Article 97;
4. damage Long Wharf's outstanding scenic quality, an issue mentioned expressly in Article 97;
5. potentially damage the environment in time of flood. The project is located in a flood zone subject to coastal storm flowage. The Secretarial Certificate dated 26 November 2007 requires that the proponent provide information 'regarding the adequacy of proposed flood mitigation in light of projected sea level rise, in conjunction with 310 CMR 9.37(2)(b)(2).' This additional analysis has not been included in Departmental decision documents. Damage to the environment from coastal flooding includes release of hazardous materials from within the restaurant structure, and wind and wave driven debris. Prevention of such environmental damage is a purpose of MGL c. 214 s. 7A and Article 97.

Affidavits of representation are included with this filing of testimony. In addition, from the other intervenors with email access, petitioner has email confirmation of the same (and has it by telephone from the others).

Furthermore, it is a settled principle of the courts that the issue of standing is not to be narrowly construed [*Marashlian v. Zoning Bd. of Appeal of Newburyport*, 421 Mass. 719, 722 (1996)]. For that reason and the preceding ones, the petitioners have standing.

8 Whether the project provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b)?

For the reasons set forth above, the project does not provide greater benefit than detriment to the rights of the public.

As argued in Section 1, the project does not conserve the capacity for water-dependent use, a requirement of 310 CMR 9.31(2)(b)(1). Furthermore, 310 CMR 9.31(2)(b)(1) incorporates the provisions of 310 CMR 9.51, 310 CMR 9.52, and 310 CMR 9.53 by reference. How the project fails the requirements of 310 CMR 9.51 was discussed in Section 4. How the project fails the requirements of 310 CMR 9.51 was discussed in Section 1.

How the project fails the requirements of 310 CMR 9.53 was discussed Section 2. As argued there, the project does not provide the public with non-water related benefits of a reasonably direct kind, and these benefits are the only kind permissible to consider when judging the balance between public benefit and detriment.

As argued in Section 3, the project does not meet the ‘clearly superior manner’ test that accompanies the Boston MHP. Therefore, as argued in Section 4, it is subject to the dimensional requirement of the 310 CMR 9.00 regulations – and it fails to meet them.

As argued in Section 5, the project harms public views of ‘the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront’ [310 CMR 9.51(2)(b)], thereby failing to meet the requirements of 310 CMR 9.51(2)(b).

This project is incompatible with the many regulatory provisions mentioned above. Worse, it is incompatible with the very purposes of the regulations. Those regulations, in 310 CMR 9.01(2)(b), list one of the five purposes as

[to] ... preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose;

The project is, by agreement, nonwater-dependent. So it cannot meet the test of 310 CMR 9.01(2)(b) unless it ‘serve[s] a proper public purpose’. As argued in Section 1, the project does not serve a proper public purpose, and therefore should be rejected.

Furthermore, the argument for rejecting the project is even stronger than the narrow grounds cited in Section 1. The regulations, in 310 CMR 9.01(2)(e), incorporate by reference the protection of the environment according to Article 97 of the Massachusetts Constitution:

[The general purposes served by 310 CMR 9.00 are to:]... foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution.

The legal deficiencies of this project are evident by comparing it with this regulatory provision: (1) A late-night restaurant and bar would create ‘excessive and unnecessary noise’; and (2) Enclosing the structure and annexing a significant piece of the pavilion for privatized seating would degrade and damage the scenic, historic, and esthetic qualities of the beautiful environment at the end of Long Wharf.

Signed under penalty of perjury,



Sanjoy Mahajan