

Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs
Department of Environmental Protection

OADR Docket Number : 2008-128
DEP Waterways File : W07-2172-N
In the Matter of : Boston Redevelopment Authority

Petitioners' proposed findings of fact and rulings of law

Proposed findings of fact

1. At the seaward (eastern) end of Long Wharf, Boston Harbor, the Applicant, the Boston Redevelopment Authority (BRA), has proposed an enclosed waterfront restaurant and bar with outdoor restaurant service and takeout service. *[DEP Written Determination, dated 17 September 2008]*
2. Under the Massachusetts Public Waterfront Act (c. 91), the BRA applied for and received a written determination dated 17 September 2008 from the Massachusetts Department of Environmental Protection (DEP). *[Written Determination]*
3. The written determination is being appealed by 12 petitioners, all residents of the City of Boston. The issues raised by the Petitioners include creation of excessive and unnecessary noise, damage to public open space and parkland, and damage to scenic quality. *[Notice of Claim dated 8 October 2008]*
4. Long Wharf is designated 'Protected Open Space' in the City of Boston Parks Department Open Space Plan 2002–2006 and in the draft 2008–2012 plan. *[Hearing Exhibits numbers 8 and 12]*
5. Both open-space plans list the following protections: Article 97 of the amendments of the Massachusetts Constitution (hereafter Article 97), the Land and Water Conservation Fund (LWCF), Chapter 91, and the Wetlands Protection Act. *[Hearing Exhibits numbers 8 and 12]*

6. The BRA's Deputy Director for Waterfront Planning was familiar with the 2002–2006 Open Space Plan and is acknowledged in the plan as a contributor. *[Hearing Exhibit number 12; cross-examination of Richard McGuinness]*
7. Even though the City inventoried the site as protected by Article 97, the BRA submitted an Environmental Notification Form (ENF) stating that no part of the project involved conversion of land held for Article 97 purposes. The ENF thus omitted a material fact that should have been considered in the MEPA process. *[Hearing Exhibits numbers 8 and 12; Environmental Notification Form, p.4]*
8. The Secretary of Energy and Environmental Affairs issued the ENF Certificate (26 November 2007) under the stated assumption that the ENF correctly described the project: 'The proposed project, *as described in the ENF*, requires no further review under MEPA.' (emphasis supplied) As the ENF failed to fully describe the project, the MEPA process could not provide an appropriate or adequate review of the proposal. *[ENF Certificate, p.4]*
9. The ENF was used in the DEP review. The defective ENF therefore contaminated also the DEP process. Andrea Langhauser, the primary author of the DEP's written determination was, during her review of the project, unaware that the project site was protected open space. *[cross-examination of Andrea Langhauser]*
10. In addition to being unaware of the open-space designation, Ms. Langhauser had no articulated standard for determining whether the project would promote public use or other water-dependent use in a 'clearly superior manner'. *[pre-filed testimony of Andrea Langhauser, para. 29; cross-examination of Andrea Langhauser]*
11. The BRA, at the hearing on 24 February 2009, incorrectly represented the Boston Parks Department's draft 2008–2012 Open Space Plan as being shown on the Parks Department website. The Boston Parks Department website shows instead the 2002–2006 plan. As stated in Finding 4, both plans show Long Wharf as 'Protected open space', protected by Article 97, the LWCF Act, Chapter 91, and the Wetlands Protection Act. *[cross-examination of Victor Brogna; cross-examination of Richard McGuinness; Hearing Exhibits numbers 8 and 12]*
12. The EOEA Article 97 Land Disposition Policy (19 February 1998) requires that 'all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist (monetary considerations notwithstanding).' No evidence of any such exploration has been submitted. *[rebuttal testimony of Victor Brogna, Exhibit 8]*

13. The BRA's own Downtown Waterfront-Faneuil Hall Urban Renewal Plan (8 April 1965), on the map showing 'Proposed Land Use', depicts Long Wharf as 'public open space'. *[BRA Exhibit 14; cross-examination of Richard McGuinness]*
14. In 1983, the BRA received c. 91 license number 988 for work at Long Wharf. The license permitted the BRA to 'renovate and maintain Long Wharf. . . in conformity with the accompanying License Plan No. 988'. On the license plan, the stated purpose is 'Passive Recreation'. *[ENF, attachment E]*
15. Long Wharf was renovated in the 1980's with funds from the federal LWCF and from other public agencies. *[Mahajan rebuttal testimony; letter dated 24 February 2009 from Melissa Cryan (Hearing Exhibit 14)]*
16. This renovation was part of a three-phase project, the first phase being to make a 'park at the east end'. The first phase was the only phase completed. *[BRA Exhibit 18; cross-examination of Lawrence Mammoli]*
17. The LWCF Act requires that the funded area, the so-called Section 6(f)(3) boundary, be dedicated to public outdoor recreation in perpetuity. The proposed restaurant and bar, however, included an area within the Section 6(f)(3) boundary that would not have been used for public outdoor recreation use. *[letter dated 24 February 2009 from Melissa Cryan (Hearing Exhibit 14)]*
18. The ENF was not circulated to all the interested public agencies as is required by state law [301 CMR 11.05(1) and 11.16(2)]. Specifically, EOEEA Conservation Services, administrator of the LWCF in Massachusetts, was not notified. *[letter dated 24 February 2009 from Melissa Cryan (Hearing Exhibit 14); rebuttal testimony of Victor Brogna]*
19. The BRA did not take any other steps to inform the LWCF State Liason Officer (SLO) of the proposed project or its encroachment into the LWCF boundary. The SLO learned of the proposed project because the Petitioners brought it to her attention. *[cross-examination of Richard McGuinness]*
20. Contrary to the LWCF requirements, the BRA has not acknowledged receiving the LWCF funding by erecting a permanent LWCF sign. The BRA also omitted the existence of LWCF funding from its submissions. *[letter dated 4 March 2009 from Melissa Cryan (Hearing Exhibit number 15); cross-examination of Richard McGuinness]*
21. The seaward end of Long Wharf, as indicated by the large aerial photograph and the site view, is unique among the wharves and parks in the downtown/waterfront area

in the combination it provides of expansive harbor views (surrounded on three sides by water) and a spacious, quiet public space in which to enjoy them. *[BRA Exhibit 8]*

22. Wave action prevents docking at the seaward end of Long Wharf. The large and therefore noisiest ferries dock toward the landward end of Long Wharf. *[pre-filed testimony of Lawrence Mammoli, para. 13; cross-examination of Lawrence Mammoli; site visit]*
23. Long Wharf is quiet and peaceful most of the time, even with the many boats and ships passing by. For example, during the site visit, even a supertanker sailing through the harbor and by Long Wharf created almost no noise. In the police reports referenced in the testimony of BRA witness Donahue, the only noise complaint was about a street performer at lunchtime, indicating that the location is generally very quiet. *[site visit; pre-filed testimony of Anne Pistorio; cross-examinations of Richard McGuinness, Lawrence Mammoli, and Mark Donahue; rebuttal of Sanjoy Mahajan]*
24. Doc's received 14 zoning variances, including for live entertainment and for food and alcohol service until 1am. *[BRA Exhibit 31]*
25. Doc's, as a restaurant and bar with outdoor seating, is likely to generate loud noise. *[pre-filed testimony and cross-examination of Mark Paul]*
26. Tia's, a restaurant at Long Wharf with outdoor seating and late-night food-and-bar service, is a source of loud noise. The noise spills a large distance into Christopher Columbus Park. *[pre-filed testimony of Mark Paul]*
27. Doc's is likely to be a source of similar noise pollution, because despite being smaller than Tia's it would generate noise within a smaller public space than Tia's does. *[pre-filed testimony of Mark Paul; site visit]*
28. For many years Victor Brogna has moored his sailboat at the Boston Waterboat Marina, only a few hundred feet from the proposed late-night restaurant and bar. Brogna testified as to the sporadic noise pollution from the 'booze cruise'. The proposed restaurant with all-alcohol service and 1am closing is likely to produce similar noise pollution even closer by and of longer duration. *[pre-filed testimony and cross-examination of Victor Brogna]*
29. Even on cold winter days, Long Wharf is used for the passive-recreation purpose for which it was intended *[pre-filed testimony of Mark Paul, Anne Pistorio, and Thomas Schiavoni]*.
30. The open space on Long Wharf was dedicated originally 'for the use of the inhabitants of Boston forever'. *[pre-filed testimony of Mark Paul]*

31. In keeping with its dedicated purpose, Long Wharf is utilized extensively by residents. *[pre-filed testimony of Anne Pistorio, Selma Rutenburg, Thomas Schiavoni, and Sanjoy Mahajan]*
32. The BRA submitted no pedestrian counts, usage studies, or other objective information to support its allegation that Long Wharf is currently underutilized. On the contrary, the BRA acknowledges that ‘the plaza area is a major tourist destination highlighted by a giant brass and marble compass rose’. *[BRA Exhibit 24, p.5; cross-examinations of Richard McGuinness and Andrea Langhauser]*
33. Long Wharf and the immediately adjacent area contain numerous eating and drinking establishments: Tia’s and Starbuck’s in the Marriott, Chart House, restaurant at the Aquarium, seasonal outdoor eateries near the Aquarium, Legal Seafood, Sel de la Terr, Emack and Bolio, Dog and Claw (seasonal), two stands on Long Wharf serving food and beverages, and takeout food at the 7–11. *[pre-filed testimony of Selma Rutenburg; site visit]*
34. The BRA, despite being the city planning agency, did not involve the North End Waterfront Residents Association (NEWRA) in the planning process that led to a restaurant being the only solicited use. After the restaurant plan was decided on, the BRA requested support from the NEWRA for the restaurant’s alcohol-license application, suggesting that development on Long Wharf is, indeed of concern to residents of the North End and the Waterfront. *[pre-filed testimony of Thomas Schiavoni; rebuttal testimony of Victor Brogna and Sanjoy Mahajan].*
35. NEWRA, at its monthly meeting on 13 December 2007, voted to oppose the plans for a late-night bar and restaurant with live entertainment and 7-day all-alcohol service. *[pre-filed testimony of Victor Brogna and Sanjoy Mahajan]*
36. Doc’s sought, and was granted, variances and licensing approval for live entertainment with alcohol service until 1:00am (midnight on the patio). *[BRA Exhibit 31; pre-filed testimony of Mark Paul and Victor Brogna]*
37. The project required 14 variances, many substantial. Here is a small subset of the section titles: ‘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.’ Nothing in the grant of variances restricts

the restaurant to being an 'affordable' restaurant. *[BRA Exhibit 31; rebuttal testimony of Sanjoy Mahajan]*

38. DEP did not determine that the variances were de minimus. *[Written Determination]*
39. The ENF, signed by witness Mammoli, did not disclose that the project required variances, even though the form contained a direct question on this subject. This failure to disclose was another omission of a material fact. *[ENF, p.5; cross-examination of Lawrence Mammoli]*
40. Many users of Long Wharf go there to enjoy marine sights and sounds. An example is passing boats such as the Provincetown ferry, which passes by a few times a day in season for a few minutes each time. *[pre-filed testimony of Thomas Schiavoni and Anne Pistorio; cross-examinations of Richard McGuinness]*
41. In addition to noise, the proposed restaurant and bar with takeout service, will generate trash. BRA offered no evidence that the current water-dependent users would not be driven away by the noise and trash from the restaurant use. *[cross-examination of Andrea Langhauser; site visit; rebuttal testimony of Sanjoy Mahajan]*
42. The Harborwalk is not part of the Doc's project. The Doc's project therefore does not include a facility that generates 'water-dependent activity'. *[cross-examination of Andrea Langhauser]*
43. The Doc's project includes enlarging and enclosing the shade pavilion (enlarged by 1225 square feet), and setting out seasonal outdoor seating on the plaza. The public currently has well-shaded seating under the pavilion. *[ENF; site visit]*
44. Enclosing the shade structure would significantly degrade views, from the plaza and the Harborwalk, of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront. The windowed walls shown in the BRA's own mock-up photos [BRA's Exhibit 12] do not afford a view through the structure. Even if they did, they would provide a view primarily of restaurant activity within. The use of windowed walls therefore does not mitigate the loss of expansive water views that the public now enjoys, including through the shade structure. *[pre-filed testimony of Thomas Schiavoni; rebuttal testimony of Sanjoy Mahajan; site visit; BRA Exhibit 10 photos]*
45. Persons walking on the Harborwalk can currently see through the shade structure to marine views on the other side. The enclosed structure would block, and therefore

degrade, those views. *[pre-filed testimony of Thomas Schiavoni; rebuttal testimony and cross-examination of Sanjoy Mahajan; site visit]*

46. Enclosing the shade structure would also remove the well-shaded seating that the public currently enjoys. *[site visit]*

47. The proposed public umbrella-table seating will not provide shade commensurate with the current shade structure. As was apparent during the site visit, the sun umbrellas on the north side of Long Wharf, which were claimed to be the same as the umbrellas for the new public seating, provide almost no shade because the umbrellas are so high. *[site visit]*

48. No evidence was offered that the restaurant's outdoor-seating umbrellas will be see-through and shadeless like those on the north side of Long Wharf. Lower and wider umbrellas providing shade to restaurant patrons will significantly block sight lines to the water and to other objects of scenic, historic or cultural importance to the waterfront. *[pre-filed testimony of Sanjoy Mahajan]*

49. The addition of public restroom facilities does not provide a justification for the project. There are already several public restroom facilities in the area: the Marriott, and two sets of public toilets, one on the south and one on the north side of the wharf. *[BRA Exhibit 26; site visit]*

50. The BRA has contended that the project is needed to improve public safety on Long Wharf and has provided police incident reports from March to December 2008 to support its claim. A review of the police reports indicates that, during that time, officers responded to one complaint from a citizen (street musicians performing at lunch time). The remaining incidents, all of which were reported during routine daily visits to the site by police officers, include 135 instances of skateboarding; 89 instances of homeless people sleeping; 1 graffiti; 7 broken or missing chains across the fire access; 1 drug paraphernalia; 7 parking violations; 1 man fishing; and 1 person depositing a lighted cigarette in a planter. There were no reports of crimes against a person or of violence. *[rebuttal testimony of Sanjoy Mahajan; pre-filed testimony and cross-examination of Mark Donahue]*

51. Of the comment letters received by the Department, 9 were in support and 13 were opposed to the project. *[pre-filed testimony of Andrea Langhauser; Written Determination]*

52. Among the many inaccuracies put forward by the BRA regarding the site and project, one was that Long Wharf had a tavern at its seaward end in the 1700's. There was

no tavern at the seaward end in the 1700's. *[pre-filed testimony of Richard McGuinness; rebuttal testimony of Sanjoy Mahajan]*

53. In addition to being the city-planning agency, the BRA is also the landowner and development authority. *[pre-filed testimony of Richard McGuinness and Mark Donahue; cross-examination of Andrea Langhauser]*

54. According to Mark Donahue, Deputy Director for Asset Management, the BRA seeks to maximize the value of its property. *[pre-filed testimony of Mark Donahue]*

Proposed rulings of law

1. The petitioners satisfy the residency, procedural, and substantive requirements for standing to file this appeal. [MGL c. 30A s. 10A] and [MGL c. 214 s. 7A]
2. The petitioners are alleging several damages or impairments to the environment: excessive and unnecessary noise; damage to public open space and parkland; and damage to scenic quality. *[MGL c. 30A s. 10A and MGL c. 214 s. 7A]*
3. In addition to being a member of the residents group, Victor Brogna has standing as a person who may suffer an injury different in kind or magnitude from that suffered by the general public. *[310 CMR 9.02]*
4. The Massachusetts Department of Environmental Protection is charged with, among other responsibilities, administration of the Public Waterfront Act (c. 91), 'The Commonwealth's primary tool for protection and promotion of public use of its tidelands and other waterways' (DEP web site). As Long Wharf is on filled tidelands, any project proposed on it is subject to c. 91 licensing under the public trust doctrine.
5. The proposed restaurant and bar are non-water dependent uses and thus must meet the standards of 'proper public purpose' and, as Long Wharf site has been granted certain exceptions to DEP requirements through the 1991 Municipal Harbor Plan, any non-water dependent use must meet the additional standards of a 'clearly superior manner'.
6. The project does not serve a proper public purpose under 310 CMR 9.31(2)(b)(1) because it does not 'conserv[e] and utiliz[e] the capacity of the project site to accommodate water-dependent use'. Its current water-dependent use is as protected open

space used by the public for passive recreation. Conversion of a significant portion of this space to a commercial use does not meet the 310 CMR 9.31(2)(b)(1) standard.

7. There can be no presumptions under 310 CMR 9.31(2) because: (1) the basic requirements specified in 310 CMR 310 CMR 9.31(1) have not been met; and (2) the relevant agencies in 310 CMR CMR 9.31(3)(b) were not correctly informed of the project's character due to the defective ENF.
8. The deference given by the Department to the BRA's interpretation of the term 'clearly superior manner' ignores the conflict of interest between the BRA being the city-planning agency while being a landowner seeking to 'maximize the value of its property'.
9. The project does not promote public use or other water-dependent activity in a 'clearly superior manner', which is Condition 5 of the Secretary's decision on the Municipal Harbor Plan (MHP). Given that a majority of public comment opposed the project, it cannot be called 'clearly' superior by any reasonable definition of clearly. DEP said that because it lacked a definition of clearly superior, it relied on public comment and on the BRA's planning objectives. Since more public comments were against than in favor of the project, DEP must have relied most strongly on the BRA's planning objectives. However, DEP had the responsibility to apply its administrative expertise, which it failed to do and instead passed the decision to the BRA. ('No man shall be a judge in his own case.', Federalist #10).
10. The 'clearly superior' test requires a finding of superior in quality of use, not just in quantity of users, yet the written determination fails to consider the issue of quality of use and is thereby legally deficient.
11. The MHP adopts the provisions of the Boston Zoning Code, excluding only conditional uses and de-minimus variances. *[Secretary's decision on the Municipal Harbor Plan, Section VI(b), p.37 (BRA's Exhibit 16)]*
12. The project does not comply with the MHP because of the substantive zoning variances that it required (and received). The regulations provide [310 CMR 9.34(2)(a)(2)]:

the Department shall not find the requirement [to comply with the MHP] 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.

DEP did not find any of the project's variances to be de minimus; furthermore, for many of the variances, DEP could not justifiably make such a finding because of their substantive character.

13. The project fails to meet the regulatory requirement that it contain 'one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site.' [310 CMR 9.52(1)(a)] No studies were offered to support the allegations that water-dependent activity would be enhanced. For this project, the Harborwalk cannot count as such a facility because it is already there.
14. By significantly degrading views 'of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront' from an area of concentrated public activity – the plaza – the project fails to meet the view shed requirement of 310 CMR 9.51(2)(b). The project fails this requirement a second time by significantly degrading views from the Harborwalk.
15. The nonwater-related benefits alleged for the project are, in the words of 310 CMR 9.53(3)(d), 'remote, diffuse, or theoretical'. The alleged security benefits are illusory, since the area is already an adequately secure destination. The argument is not valid that restaurant use, by offering 'direct' service to the public automatically qualifies as a direct public benefit. With so many restaurants of varying types in the area, the proposed restaurant cannot provide a reasonably direct public benefit.
16. The project does not comply with the dimensional regulations of 310 CMR 9.51(3)(c), because the water-dependent use zone extends roughly 100 feet landward from the seaward end of Long Wharf, and the project proposes to place a non-water-dependent use within that zone. No relief is offered by the setback exemptions in the MHP because the project does not comply with the MHP (due to the numerous, non-de-minimus variances and due to failing the 'clearly superior manner' test).
17. Because the ENF failed to fully describe the project, the MEPA process could not provide an appropriate or adequate review of the proposal.
18. Because the DEP was not informed or aware of the protected status of the project site, the DEP process could not provide an appropriate or adequate review of the proposal.
19. Article 97 applies to land taken before and after the passage of Article 97. The BRA's arguments to the contrary came with no supporting legal citations and are contrary to settled interpretations of Massachusetts law. [*Opinion of the Attorney General, a.k.a. 'Quinn Opinion', Rep A. G. Pub Doc No. 12 at 140–141 (1973)*]

20. 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 archeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation. (emphasis supplied)

Such guidance includes the EOEPA Article 97 Land Disposition Policy (Finding 12). However, because the BRA on the ENF incorrectly described the project as not involving an Article 97 land conversion, the stringent standards in the Article 97 Policy were not applied; and the extensive review process mandated in the Policy was bypassed, and still needs to happen.

21. The project requires a further review under the LWCF Act to ensure that the revised project, revised only after petitioners' notification to state regulatory authorities, complies with the stringent LWCF conditions that the State has agreed to.

Conclusion

In view of the foregoing findings of fact and rulings of law, a finding for the Petitioners is required, and the written determination that the BRA is entitled to a license must be annulled.

For the petitioners,



Dated: 30 March 2009

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