

28 November 2008

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

## **Pre-hearing statement / OADR 2008-128**

Dear Ms Hartley:

In accordance with paragraph 8 of the Order, here is our pre-hearing statement.

### **1 Brief summary of the permit in question**

The permit in question – waterways application #W07-2172N – would allow the Boston Redevelopment Authority to enclose and construct an addition to the shade structure at the seaward end of Long Wharf.

The reconfigured structure would then be used for a late-night restaurant and bar (Doc's), which would also have seasonal, late-night outdoor seating. In presentations to the North End Waterfront Residents Association (NEWRA), the proprietor of Doc's explained his intention to seek an all-alcohol license with a 1 am closing 7 days a week (and a 12 am closing for the outdoor seating); this intention was made flesh in the alcohol-license application, and is supported by the BRA. Also at the NEWRA presentation, Doc's stated its intention to apply for an entertainment license including a vocalist and musical instrument(s); and in addition to hold several special functions (up to 16 per year) using a DJ.

### **2 Brief summary of the requested final relief**

We respectfully request that the DEP reverse the decision to approve this project.

### **3 Disputed relevant facts for resolution**

We submit for resolution the following disputed facts, and expect to prove them at the hearing:

1. *whether the seaward end of Long Wharf is unique in the downtown waterfront district for the panoramic views and quiet enjoyment that it offers the public; and whether the project would detrimentally affect those characteristics.* Our position is that Long Wharf is unique in the stated respects and that the project would detrimentally affect those characteristics.

We therefore take the position that the project does not comply with the proper-public-purpose requirement of **310 CMR 9.31(2)(b)(1)**: to 'conserv[e] and utiliz[e] the capacity of the project site to accommodate water-dependent use...'

2. *whether the proposed late-night restaurant and bar would provide a 'more secure and attractive year-round destination' [Written Determination, p. 2].* Our position is that it would be neither more secure nor more attractive.

3. *whether the project would provide ‘welcome addition of accessible restrooms’* [Written Determination, p. 3]. Our position is that the restrooms duplicate those nearby and that their access is encumbered.
4. *whether the enclosure, addition, and outdoor dining areas harm existing public sight lines* [310 CMR 9.51(2)(b)]. Our position is that, although the sight lines from State Street would be unaffected, the sight lines from the public Harborwalk would be harmed. See Disputed legal issue 7.
5. *whether the addition and enclosure fall within the zone forbidden to nonwater-dependent uses that is specified by 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[.]

Our position is that addition and enclosure fall within the forbidden zone.

6. *whether placing a restaurant and bar immediately against a public way – the Harborwalk at the seaward end of Long Wharf – will create a privatized area of effective exclusion that extends into, and therefore detrimentally affects the Harborwalk.* Such an effect would be contrary to the **Secretary of Environmental Affairs’s Decision [22 May 1991]** accepting the Boston Municipal Harbor Plan (MHP). Therein it states [p. 25]:

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 [the broader public’s] interests.

#### 4 Disputed legal issues for resolution

We submit for resolution the following legal issues:

1. *whether the proposed restaurant and bar would ‘promote public use or other water-dependent activity in a clearly superior manner’,* the standard specified by the **Secretary of Environmental Affairs’s decision [22 May 1991, requirement 5(c)]**. Our position is that the project does not meet this standard, and therefore that there is no permission to reconfigure setback distances.

Furthermore, we believe that the ‘clearly superior manner’ standard should be stringently applied in this case where the BRA is acting as public agency (e.g. it does the design review) and private landlord with pecuniary interests. The DEP must therefore be the public’s guardian against this conflict of interest.

2. *whether relief from the forbidden zone (see Disputed fact 5) is offered by the MHP provision of 310 CMR 9.34(2)(b)(1).* Our position is that no relief is offered because the project does not meet the MHP’s ‘clearly superior’ test. See Disputed legal issue 1.
3. *whether ‘more people [being] attracted to the end of Long Wharf over a longer period of time’* [Written Determination, p. 2] *meets the regulatory standard of 310 CMR 9.53(2)(a):*

in the event the project site includes a water-dependent use zone, at least one facility utilizing the shoreline in accordance with the provisions of 310 CMR 9.52(1)(a) **must also promote water-based public activity;** [emphasis added]

Our position is that the claimed benefit does not meet this standard (and that no contrary showing has been made elsewhere in the Written Determination).

4. *whether the project falls within the scope of Article 97 of the Massachusetts Constitution.* Our position is twofold:
  1. that the project falls within the scope of Article 97 – and therefore that the project requires a two-thirds vote of both houses of the legislature; and
  2. that the Chapter 91 program may and should take notice of this point because promoting the qualities protected by Article 97 is an express purpose of the 310 CMR 9.00 regulations [310 CMR 9.01(2)(e)].

Our further position is that the application’s arguments about Article-97 compliance do not qualify as ‘final documentation relative to other state and local approvals which must be obtained by the project’ – the standard for application completion set in 310 CMR 9.11(c)(3).

5. *whether the project meets the ‘proper public purpose’ requirement of 310 CMR 9.31(2), in particular the special standards for nonwater-dependent uses in 310 CMR 9.31(2)(b)(1).* Our position is that the project fails this requirement because it fails the requirements, incorporated by reference, of 310 CMR 9.53(3)(d) [see Disputed legal issue 6] and 310 CMR 9.51(2)(b) [see Disputed legal issue 7].
6. *whether ‘providing a more secure and attractive year-round destination’ qualifies as a ‘reasonably direct’ benefit to the public within the meaning of 310 CMR 9.53(3)(d):*

the 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.

Our position is that the claimed benefit – whose existence we dispute (Disputed fact 2) – does not qualify as a reasonably direct benefit, and therefore cannot be used to justify a license.

7. *whether the project ‘protects the utility and adaptability of the site for water-dependent purposes’ [310 CMR 9.51(2)], with particular reference to ‘views of the water. . . especially along sight lines emanating in any direction from public ways’ [310 CMR 9.51(2)(b)].* Our position is that the project does not protect the utility and adaptability of the site for water-dependent purposes. See also Disputed fact 4.
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)’ (as stated in finding 6 of the Written Determination).* Our position is that it does not provide greater benefit than detriment.
9. *whether, given the foregoing facts and legal issues, the project complies with the general purposes of 310 CMR 9.00 given in 310 CMR 9.01(2).* Our position is that it does not comply. In particular, we take the position that it fails on all five purposes given in the subparagraphs of 310 CMR 9.01(2):
  - a. to ‘promote and protect the public’s interest in tidelands. . . in accordance with the public-trust doctrine’;
  - b. 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’;
  - c. to ‘protect the public health, safety, and general welfare as it may be affected by any project in tidelands, great ponds, and non-tidal rivers and streams’;

- d. to 'support public and private efforts to revitalize unproductive property along urban waterfronts, in a manner that promotes public use and enjoyment of the water';
- e. 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.'

## 5 Witnesses

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Sincerely,



Sanjoy Mahajan