



showing that the parties clearly intended that third parties be permitted to enforce the contract.” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 834 (Minn.2012), quoting *Edwards v. Aurora Loan Servs., LLC*, 791 F.Supp.2d 144, 151 (D.D.C.2011). “Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.” *Teixeira v. Federal National Mortgage Ass'n*, 2011 WL 3101811, \*2 (D.Mass.2011). “Under Massachusetts law, only intended beneficiaries, not incidental beneficiaries, can enforce a contract.” See *Harvard Law School Coalition for Civil Rights v. President and Fellows of Harvard College*, 413 Mass. 66, 71. (1992).

In a recently decided case, a plaintiff sought to enforce a contract between the United States Treasury and a private bank. *Laguer v. OneWest Bank, FSB*, 2013 WL 831055 (Mass. Super. Feb. 27, 2013). The contract was entered into under a federal directive, known as HAMP, whereby certain financial incentives are given to private banks voluntarily entering into contracts with Fannie Mae, acting as the financial agent of the United States, to perform loan modification services. *Id.* at n. 6. The Court found that the plaintiff did not have a private right to enforce *any* contractual promise by OneWest to the Treasury Department or its agent because the plaintiff was merely an incidental beneficiary of the contract between OneWest and the Treasury Department. “A contract with a federal agency or its representative that merely incorporates legal obligations imposed by a federal statute or program is not enforceable by a contract beneficiary who has no private right of action to enforce the underlying statute or program.” *Id.* at \*11; see also *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1347–1349 (2011).

Plaintiffs in the instant case claim standing in mandamus based on agreements between the BRA and federal and state entities.<sup>1</sup> The agreements are between the BRA and the Land and Water Conservation Fund in 1981 (Exhibit A), and between the BRA and the now-defunct Department of Environmental Management in 1985 (Plaintiffs' Exhibit G). Plaintiffs are not specifically named in these agreements, nor do these agreements afford them any benefit not generally recognized by other members of the general public. Moreover, there is no indication that either agreement creates a private right of action for Plaintiffs.

## **II. The Appellate Record Demonstrates that the BRA Complied with the Land and Water Conservation Fund Act.**

Even if Plaintiffs somehow had standing to enforce contracts between governmental entities, their claims would fail. In this case, the Supreme Judicial Court, as well as the Superior Court and the Department of Environmental Protection, reviewed the question of the boundaries of the land on Long Wharf covered by Section 6(f)(3) of the Land and Water Conservation Fund (LWCF) Act. The Administrative Record and Appellate Record contain the following documents, attached here for the Court's convenience:

1. Two maps the LWCF Stateside Grant Manager prepared in February 2009 with the LWCF park boundary line marked. Exhibit B (RA 1214), Exhibit C (RA 1215).
2. March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the Senior Planner of the MassDEP Waterways Regulation Program. Exhibit D (RA 1206).
3. March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the BRA Deputy Director for Waterfront Planning. Exhibit E (RA 1274).

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<sup>1</sup> These claims are asserted in Plaintiffs' proposed Amended Complaint, which amendment the BRA opposes by separate motion.

The map attached as Exhibit B shows the “Line of Land and Water Conservation Restricted Area” superimposed on the BRA site plan for the proposed redevelopment. The map attached as Exhibit C shows the “Work Limit Line” of the project the LWCF funded in 1985. Both maps attached as Exhibits B and C show that the LWCF park boundary is approximately twenty-five feet south of the BRA’s proposed redevelopment.

The BRA has been in partnership with LWCF for over thirty years. The 1981 project agreement between LWCF and the state for Long Wharf envisioned significant reconstruction of the entire pier, perimeter walkways, and a passive park. Exhibit A. This initial broad project scope is reflected on the 1980 “6f map” Plaintiffs attach to their Opposition. When the BRA received less funding from BRA than initially anticipated, the scope of the project covered by LWCF changed, as reflected by the 1985 contract documents (Exhibit A) and the documents of record in this case detailing the LWCF boundaries at Long Wharf as of 2009. (Exhibits B – E).

The issue of a conflict between the BRA’s proposed redevelopment and the area protected by LWCF funds first arose in this case during the administrative proceedings. In February 2009 the LWCF Stateside Grant Manager questioned whether the BRA’s proposed redevelopment would be a conversion of LWCF protected land. The BRA agreed to move all seating for the restaurant north of the park boundary and to place planters on the boundary line. Exhibit D. The LWCF Stateside Grant Manager stated in response that “[t]his visible barrier and change in location of the seating to non-parkland will satisfy our concerns of a potential conversion.” Exhibit D; see also Exhibit C (“changes discussed below will ensure that the final Chapter 91 license satisfies the LWCF project agreement”).

The handwritten notation on the 1980 map upon which Plaintiffs rely is unenforceable because it was superseded by the 1985 contract documents between the BRA and LWCF

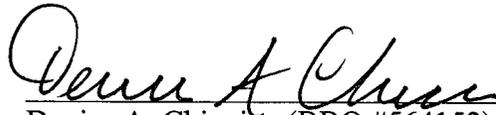
(Exhibit A), as confirmed by the 2009 correspondence (Exhibits B - E).<sup>2</sup> In view of the clear delineation of the LWCF boundaries on Long Wharf and the project's design and benefits, there is no question that the proposed redevelopment is not located within, and will have no adverse impact on, the LWCF protected area of Long Wharf.

### CONCLUSION

For all the foregoing reasons and those set forth in the BRA's Renewed Motion to Dismiss, the BRA respectfully requests that this Court dismiss the Plaintiff's Complaint for lack of subject matter jurisdiction based on lack of standing pursuant to Mass.R.Civ.P. Rule 12(b)(1).

Respectfully submitted,

Boston Redevelopment Authority  
By its counsel



Denise A. Chicoine (BBO #564152)  
Edward S. Englander (BBO #154540)  
Shannon F. Slaughter (BBO #684684)  
ENGLANDER, LEGGETT & CHICOINE  
44 School Street, Suite 800  
Boston, MA 02108  
Tel. (617) 723-7440

May 3, 2013

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<sup>2</sup> Similarly, the 1984 agreement between the BRA and Department of Environmental Management (DEM) is unenforceable as written. The original agreement set forth obligations that would arise only if DEM paid BRA all the funds under the terms of the agreement. However, the parties amended the DEM Agreement five times, and DEM ultimately failed to transfer all the funds to the BRA.

# Exhibits

- A Land and Water Conservation Fund Project Agreement 1981, as amended 1985
- B BRA Project Site Plan with LWCF park boundary line marked by LWCF Stateside Grant Manager (RA 1214)
- C 1985 LWCF Contract Document Survey with LWCF park boundary line marked by LWCF Stateside Grant Manager (RA 1215)
- D March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the Senior Planner of the MassDEP Waterways Regulation Program (RA 1206)
- E March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the BRA Deputy Director for Waterfront Planning (RA 1274)



THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
LAND AND WATER CONSERVATION FUND

Project Agreement

Project Agreement# 25-00295

Project Period 5/15/81 to 12/31/84

Between City of Boston

Hereinafter referred to as the PARTICIPANT and the Commonwealth of Massachusetts acting by and through the State Liaison Officer, Secretary, Executive Office of Environmental Affairs hereinafter referred to as the COMMONWEALTH.

WHEREAS, the PARTICIPANT has made application to the COMMONWEALTH for assistance under the Federal Land and Water Conservation Fund Act of 1965, Stat. 897 (1964) as it may be amended, for a project briefly described as follows:

This project will consist of a planning and design study (master plan), design and reconstruction of a portion of Long Wharf to include support facilities, seawall reconstruction, wood pilings, perimeter wood decking walkways and a passive park by the Boston Redevelopment Authority, County of Suffolk.

WHEREAS, the COMMONWEALTH has reviewed said application and found the project to be in conformance with the Comprehensive Outdoor Recreation Plan, and

WHEREAS, the COMMONWEALTH has forwarded said application to the United States Heritage Conservation and Recreation Service, Department of the Interior (hereinafter referred to as the Heritage Conservation and Recreation Service), and

WHEREAS, the Heritage Conservation and Recreation Service has approved said application, has obligated certain federal funds in the amount of Eight hundred twenty five thousand dollars( \$825,000.00 ), and has agreed to tender the COMMONWEALTH that portion of the obligation which is required to pay the United States' share of the costs of the above project stage,

WHEREAS, the COMMONWEALTH has undertaken to cause the project to be carried out in accordance with the Federal Project Agreement.

WITNESSETH: the COMMONWEALTH and the PARTICIPANT mutually agree to perform this agreement in accordance with the Land and Water Conservation Fund Act of 1965, 78 Stat. 897 (1964) and

The COMMONWEALTH agrees to transfer to the PARTICIPANT the amount received from the Heritage Conservation and Recreation Service on account of said project.

THE PARTICIPANT agrees to execute the project described above in accordance with the terms of and the obligations contained in the Federal Project Agreement, Number 25-00295, with the terms, promises, conditions, plans, specifications, estimates, procedures, project proposals, maps and assurances made a part thereof, with the Heritage Conservation and Recreation Service Grants-In-Aid Manual, and with any special terms and conditions attached hereto, all of which are hereby incorporated by reference. All significant deviations from the project as described therein shall be submitted to the COMMONWEALTH for prior approval.

Failure by the PARTICIPANT to comply with this project agreement may, at the option of the COMMONWEALTH, suspend or terminate all obligations of the COMMONWEALTH hereunder.

In accordance with paragraph E(4) of the General Provisions of the Federal Project Agreement, the PARTICIPANT agrees that payment by the PARTICIPANT to the COMMONWEALTH of money would be an inadequate remedy for a breach by the PARTICIPANT of this agreement, and agrees therefore that, as an alternative or as an additional remedy, specific performance of this agreement may be enforced by the COMMONWEALTH.

IN WITNESS WHEREOF, the parties hereto have hereinunder set their hands and seals, the day and year first above written.

COMMONWEALTH OF MASSACHUSETTS

PARTICIPANT

BY   
Secretary  
Executive Office of Environmental  
Affairs

Boston Redevelopment Authority, for  
City of Boston  
BY   
Chief Executive Officer\*  
Robert J. Ryan, Director,  
Boston Redevelopment Authority

\*Duly authorized or a majority of the members of a duly authorized board or commission.

Attach hereto evidence of authority to execute this contract on behalf of the PARTICIPANT: In the case of a municipality, a certified copy of the vote or votes of the governing body authorizing the project, appropriating the municipality's funds, therefor, authorizing execution of this agreement by the officer, board, or commission whose signature(s) appears above.

(Rev. August, 1975)

25-00295

UNITED STATES DEPARTMENT OF THE INTERIOR  
Heritage Conservation and Recreation Service  
Land and Water Conservation Fund Project Agreement

State <b>Massachusetts</b>	Project Number <b>25-00295</b>
Project Title <b>Long Wharf</b>	
Project Period <b>12/31/84</b>	Date of Approval <b>12/31/84</b>
Project Stage Covered by this Agreement <b>Entire Stage</b>	

Project Scope (Description of Project)

This project will consist of a planning and design study (master plan), design and reconstruction of a portion of Long Wharf to include support facilities, sea wall reconstruction, wood pilings, perimeter wood decking walkways and a passive park by the Boston Redevelopment Authority, County of Suffolk.

Project Cost	
Total Cost,	\$ <u>1,751,000</u>
Fund Support not to exceed 50% Fund Amount	\$ <u>825,000</u>
Cost of this Stage	\$ <u>1,751,000</u>
Assistance this Stage	\$ <u>825,000</u>

The following are hereby incorporated into this agreement:

1. General Provisions (HCRS Manual)
2. Project Application and Attachments.

3.	POSTED
4.	Date <u>5/29/81</u>
	By <u>LSB</u>

25-10295

The United States of America, represented by the Director, Heritage Conservation and Recreation Service, United States Department of the Interior, and the State named above (hereinafter referred to as the State), mutually agree to perform this agreement in accordance with the Land and Water Conservation Fund Act of 1965, 78 Stat. 897 (1964), the provisions and conditions of the Heritage Conservation and Recreation Service Manual (Grants-in-Aid Series), and with the terms, promises, conditions, plans, specifications, estimates, procedures, project proposals, maps, and assurances attached hereto or retained by the State and hereby made a part hereof.

The United States hereby promises; in consideration of the promises made by the State herein, to obligate to the State the amount of money referred to above, and to tender to the State that portion of the obligation which is required to pay the United States' share of the costs of the above project stage, based upon the above percentage of assistance. The State hereby promises, in consideration of the promises made by the United States herein, to execute the project described above in accordance with the terms of this agreement.

The following special project terms and conditions were added to this agreement before it was signed by the parties hereto:

In witness whereof, the parties hereto have executed this agreement as of the date entered below:

THE UNITED STATES OF AMERICA  
By [Signature]  
(Signature)

STATE  
Massachusetts  
By [Signature]  
(Signature)

Heritage Conservation and  
Recreation Service  
United States Department  
of the Interior

[Signature] John A. Bewick  
(Name)  
State Liaison Officer  
(Title)

Date MAY 15 1981

AMENDMENT TO PROJECT AGREEMENT  
(OMB No. 1024-0033, 09/30/84)

25-00295

THIS AMENDMENT To Project Agreement No. \_\_\_\_\_ is hereby made and agreed upon by the United States of America, acting through the Director of the National Park Service and by the State of Massachusetts pursuant to the Land and Water Conservation Fund Act of 1965, 78 Stat. 897 (1964).

The State and the United States, in mutual consideration of the promises made herein and in the agreement of which this is an amendment, do promise as follows:

That the above mentioned agreement is amended by adding the following:

Delete: Construction of perimeter wood decking and walkways from the project scope.

In all other respects the agreement of which this is an amendment, and the plans and specifications relevant thereto, shall remain in full force and effect. In witness whereof the parties hereto have executed this amendment as of the date entered below.

THE UNITED STATES OF AMERICA

By *Maury Laura*  
(Signature)  
**OUTDOOR RECREATION PLANNER**  
(Title)

National Park Service  
United States Department of  
the Interior

Date 24 NOV 1986

STATE

Massachusetts  
(State)

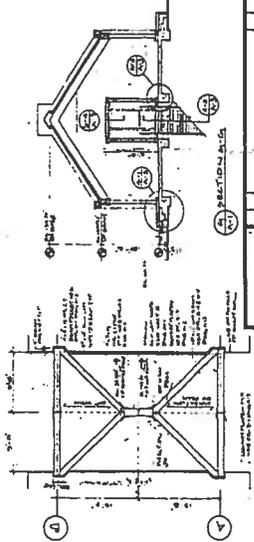
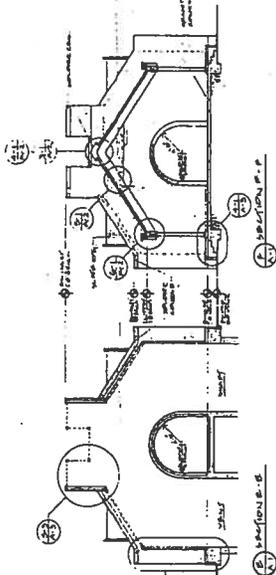
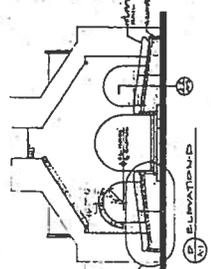
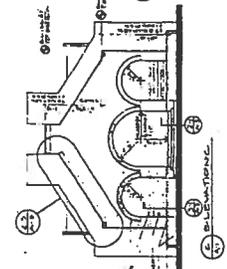
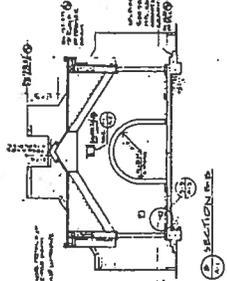
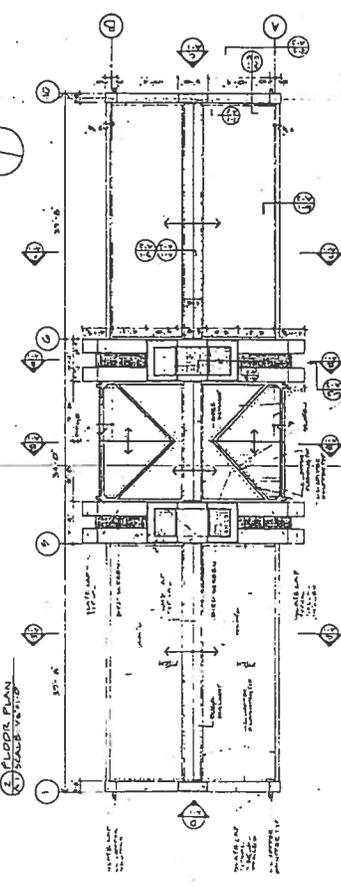
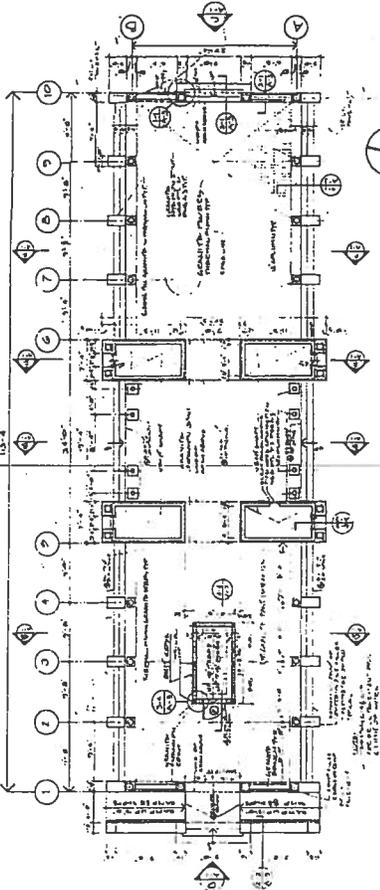
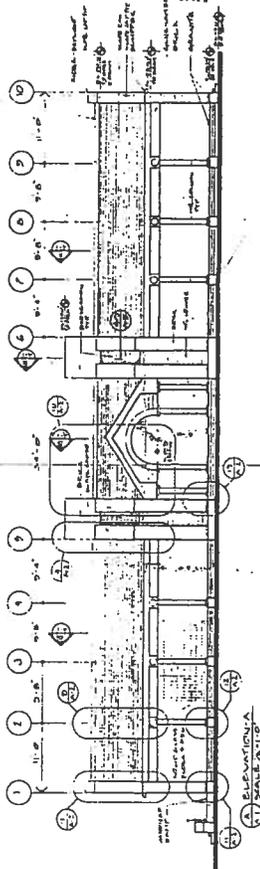
By X *James Hoyte*  
(Signature)

James S. Hoyte  
(Name)

State Liaison Officer  
(Title)

NPS 10-902a  
(7-81)

POSTED  
Date 12-3-86  
By *JSL*



NOTES:  
 1. ALL DIMENSIONS, UNLESS OTHERWISE SPECIFIED, SHALL BE IN FEET AND INCHES.  
 2. ALL DIMENSIONS SHALL BE TO THE CENTERLINE UNLESS OTHERWISE SPECIFIED.  
 3. ALL DIMENSIONS SHALL BE TO THE CENTERLINE UNLESS OTHERWISE SPECIFIED.  
 4. ALL DIMENSIONS SHALL BE TO THE CENTERLINE UNLESS OTHERWISE SPECIFIED.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY  
 SUBWAY VENTILATION IMPROVEMENTS  
 CONTRACT NO. 103-103  
 LONG WHARF B-6  
 SURFACE PLAN ELEVATION AND SECTION

DESIGNED BY: [Signature]  
 CHECKED BY: [Signature]  
 DATE: APRIL 1983

SCALE: 1/8" = 1'-0"  
 SHEET: B0437  
 OF: B0437  
 PART: A-1

85-00295

# LONG WHARF - Phase 1A

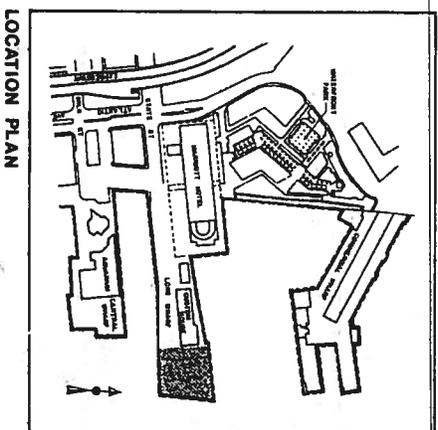
## City of Boston, Massachusetts

IN COOPERATION WITH:  
THE COMMONWEALTH OF MASSACHUSETTS -  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT -

HONORABLE MICHAEL S. DUKAKIS, GOVERNOR  
JAMES S. HOYLE, SECRETARY  
JAMES GUTENSOHN, COMMISSIONER

Prepared For :

# BOSTON REDEVELOPMENT AUTHORITY



HONORABLE RAYMOND L. FLYNN - MAYOR

### BOSTON REDEVELOPMENT AUTHORITY

ROBERT L. FARRELL	CHAIRMAN
JOSEPH J. WALSH	VICE CHAIRMAN
JAMES K. FLAHERTY	TREASURER
WILLIAM A. McDERMOTT JR.	MEMBER
CLARENCE J. JONES	ASSISTANT TREASURER
KANE SIMONIAN	SECRETARY
STEPHEN COYLE	DIRECTOR
WALLACE B. ORPIN P.E.	DIRECTOR OF ENGINEERING

## Contract Documents

### May 1985



U.S. Department of the Interior  
The Land and Water Conservation Fund  
Project No. 25-00295

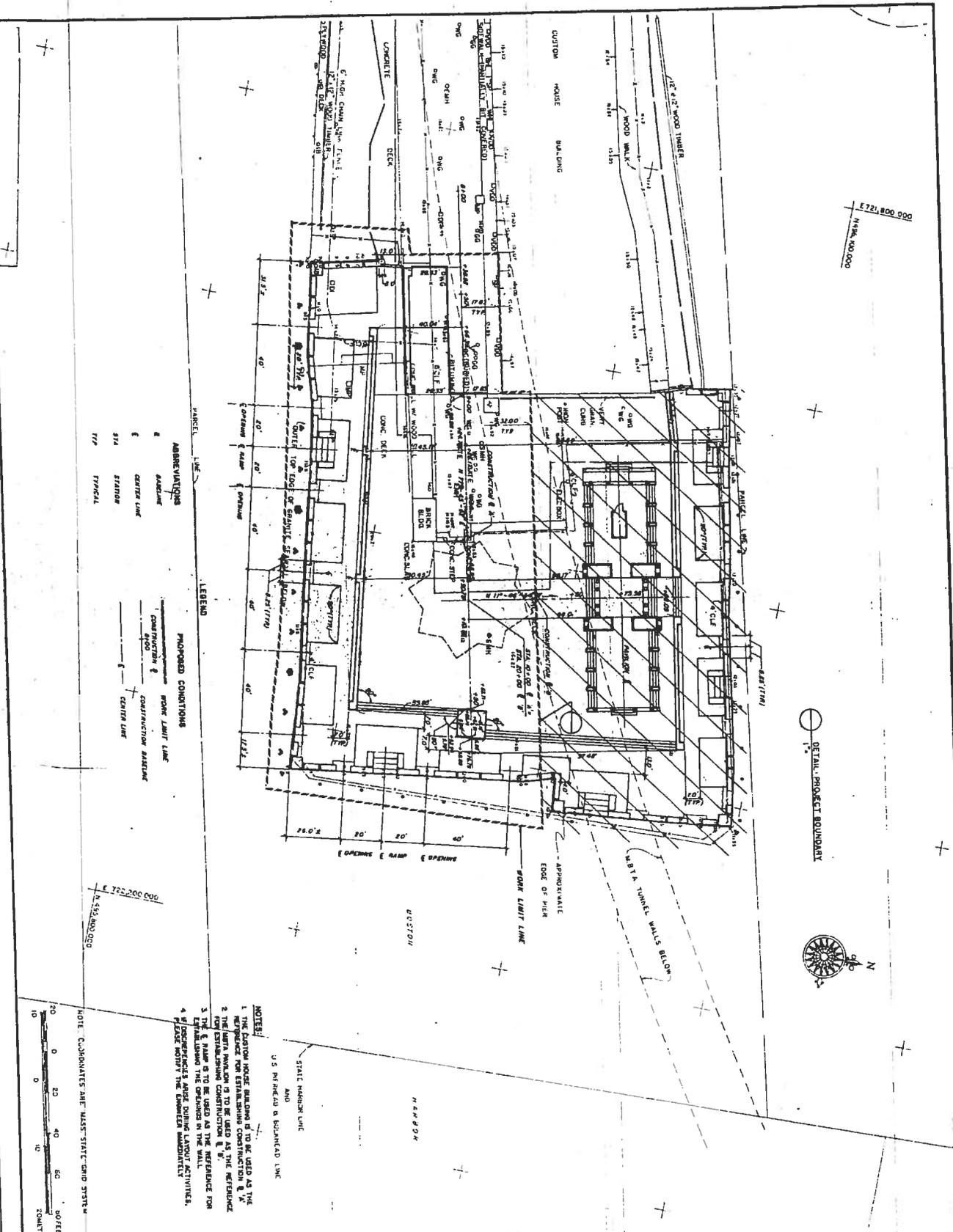


**Sasaki Associates, Inc.**  
64 Pleasant Street, Watertown, MA 02172  
Planning / Architecture / Landscape Architecture / Urban Design  
Civil Engineering / Environmental Services

For Boston Redevelopment Authority

Wallace B. Orpin, P.E. Director of Engineering





**LEGEND**

**ABBREVIATIONS**

— PROPOSED CONSTRUCTION

— EXISTING CONSTRUCTION

— CENTER LINE

— CENTER LINE

— CENTER LINE

— CENTER LINE

**NOTES:**

1. THE CUSTOM HOUSE BUILDING IS TO BE USED AS THE REFERENCE FOR ESTABLISHING CONSTRUCTION & THE LIMITATION IN TO BE USED AS THE REFERENCE FOR ESTABLISHING CONSTRUCTION & REFERENCE FOR
2. THE STATE MACHINE LINE IS TO BE USED AS THE REFERENCE FOR ESTABLISHING CONSTRUCTION & REFERENCE FOR
3. THE STATE MACHINE LINE IS TO BE USED AS THE REFERENCE FOR ESTABLISHING CONSTRUCTION & REFERENCE FOR
4. THE STATE MACHINE LINE IS TO BE USED AS THE REFERENCE FOR ESTABLISHING CONSTRUCTION & REFERENCE FOR

NOTE: COORDINATES ARE U.S. STATE GRID SYSTEM

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0 20 40 60 80 100  
FOOT / METERS

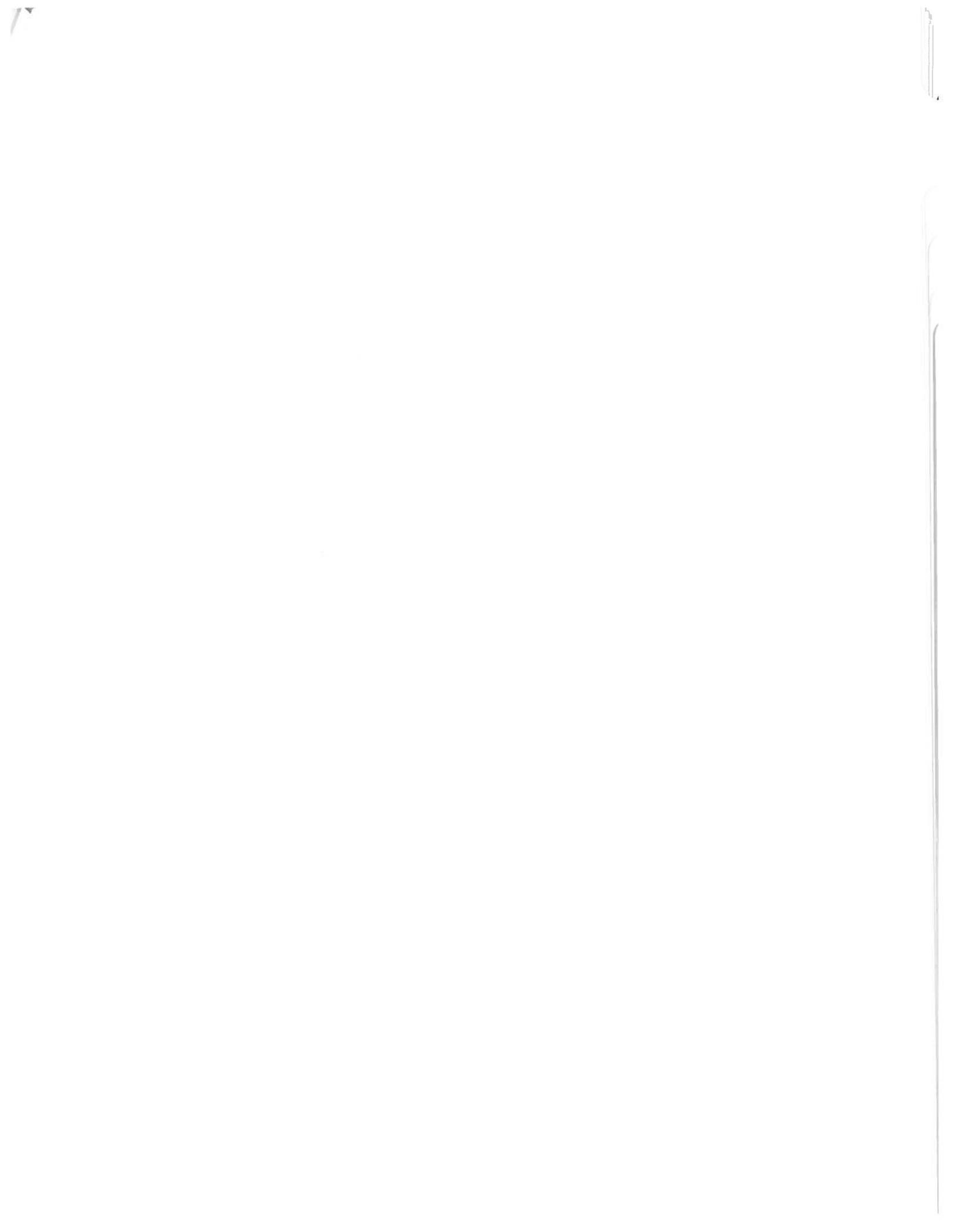
**FOR REVIEW ONLY**

**PHASE 1A**

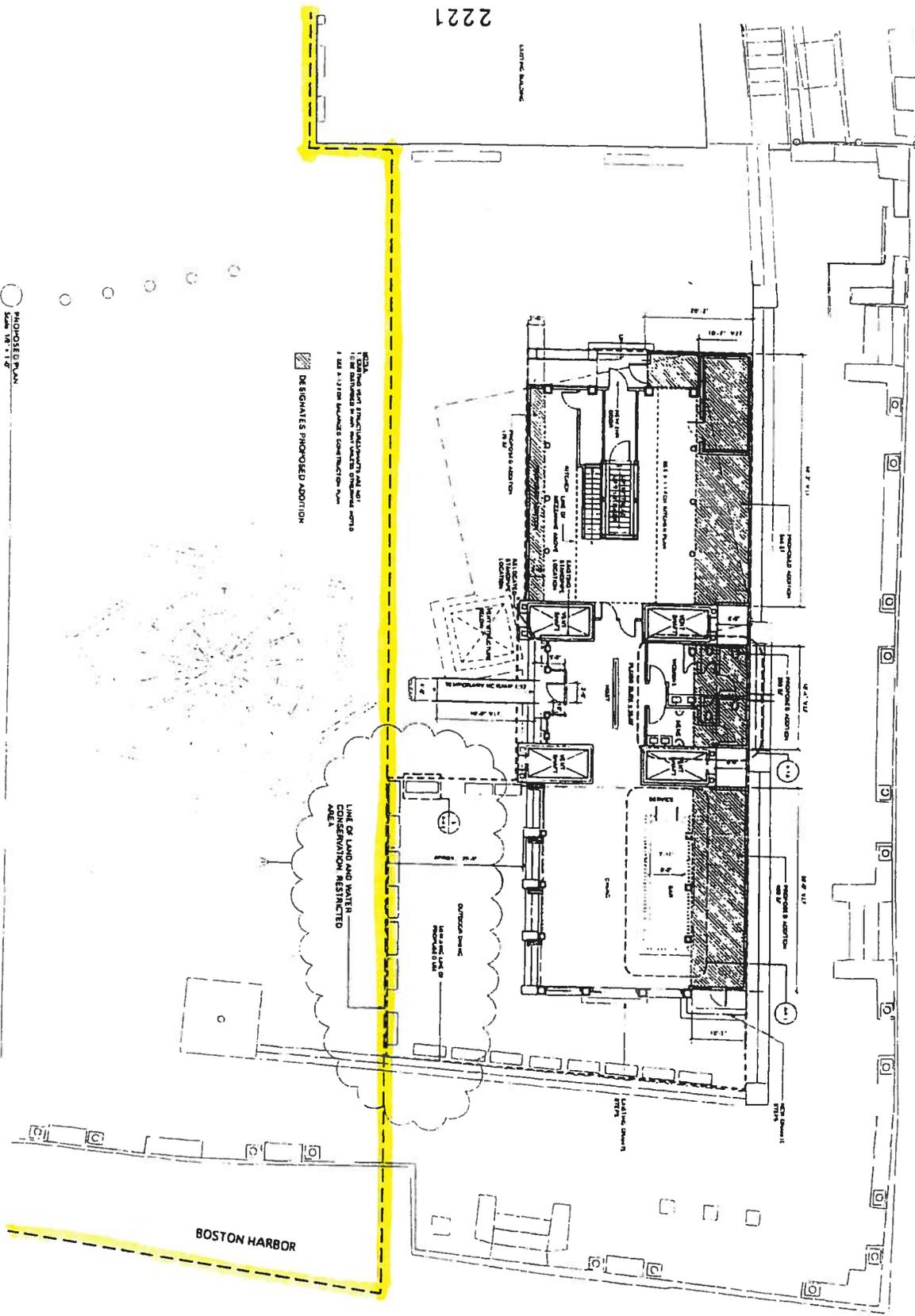
**LAYOUT PLAN**

DATE	DATE	DATE	DATE	DATE

SHEET 4 OF 20



BOSTON HARBOR



2221

■ DESIGNATES PROPOSED ADDITION  
 ■ DESIGNATES EXISTING STRUCTURE  
 ■ DESIGNATES EXISTING STRUCTURE TO BE DEMOLISHED  
 ■ DESIGNATES EXISTING STRUCTURE TO BE RECONSTRUCTED  
 ■ DESIGNATES EXISTING STRUCTURE TO BE RECONSTRUCTED WITH VARIOUS STRUCTURAL MODIFICATIONS  
 ■ DESIGNATES EXISTING STRUCTURE TO BE RECONSTRUCTED WITH VARIOUS STRUCTURAL MODIFICATIONS AND ADDITIONAL CONSTRUCTION WORK

PROPOSED PLAN  
 Scale: 1/8" = 1'-0"

This drawing is a part of a set of drawings prepared by the architect for the owner. It is not to be used for construction without the approval of the architect. The architect is not responsible for the accuracy of the information shown on this drawing. The architect is not responsible for the accuracy of the information shown on this drawing.

Docs  
 Long Street  
 Boston, MA

The architect is not responsible for the accuracy of the information shown on this drawing. The architect is not responsible for the accuracy of the information shown on this drawing.

SOUSA design

CONSTRUCTION PLAN  
 Elevation 10  
 A-1.1

RA1214

A

C

E

E



A

B

D

E



The Commonwealth of Massachusetts  
 Executive Office of Energy and Environmental Affairs  
 100 Cambridge Street, Suite 900  
 Boston, MA 02114

Deval Patrick  
 GOVERNOR

Timothy Murray  
 LIEUTENANT GOVERNOR

Ian Bowles  
 SECRETARY

Tel: (617) 626-1000  
 Fax: (617) 626-1181

March 4, 2009

Andrea D. Langhauser, Senior Planner  
 MassDEP Waterways Regulation Program  
 One Winter Street, Fifth Floor  
 Boston, MA 02108

RE: W-07-2172-N, Doc's Restaurant

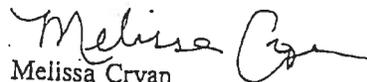
Dear Ms. Langhauser,

I am writing in regards to the above referenced Chapter 91 license. The restaurant use directly abuts Land and Water Conservation Fund (LWCF) Project #25-00295, Long Wharf. As the state program that administers the LWCF for the National Park Service, the Division of Conservation Services is responsible for addressing potential conversions of project sites. DCS does take issue with the restaurant use's current configuration and advises that changes discussed below will ensure that the final Chapter 91 license satisfies the LWCF project agreement.

The restaurant plan currently has seating in the LWCF protected park boundaries<sup>1</sup>. I have attached Boston Redevelopment Authority's site plan with the LWCF park boundary line included. The BRA has agreed to move the seating off of the LWCF protected parkland. DCS is most concerned that the outdoor seating, even when moved, will encroach on the LWCF public parkland. The BRA has said that they will be willing to put planters on the boundary line so that there is a clearly visible delineation of where the restaurant ends and where the parkland begins. This visible barrier and change in location of the seating will satisfy our concerns of a potential conversion. If the conditions in the final license include those two items, the project causes no detriment to the public interest protected by DCS as described in 310 CMR 9.31(3)(b).

If I can be of any further assistance, please let me know.

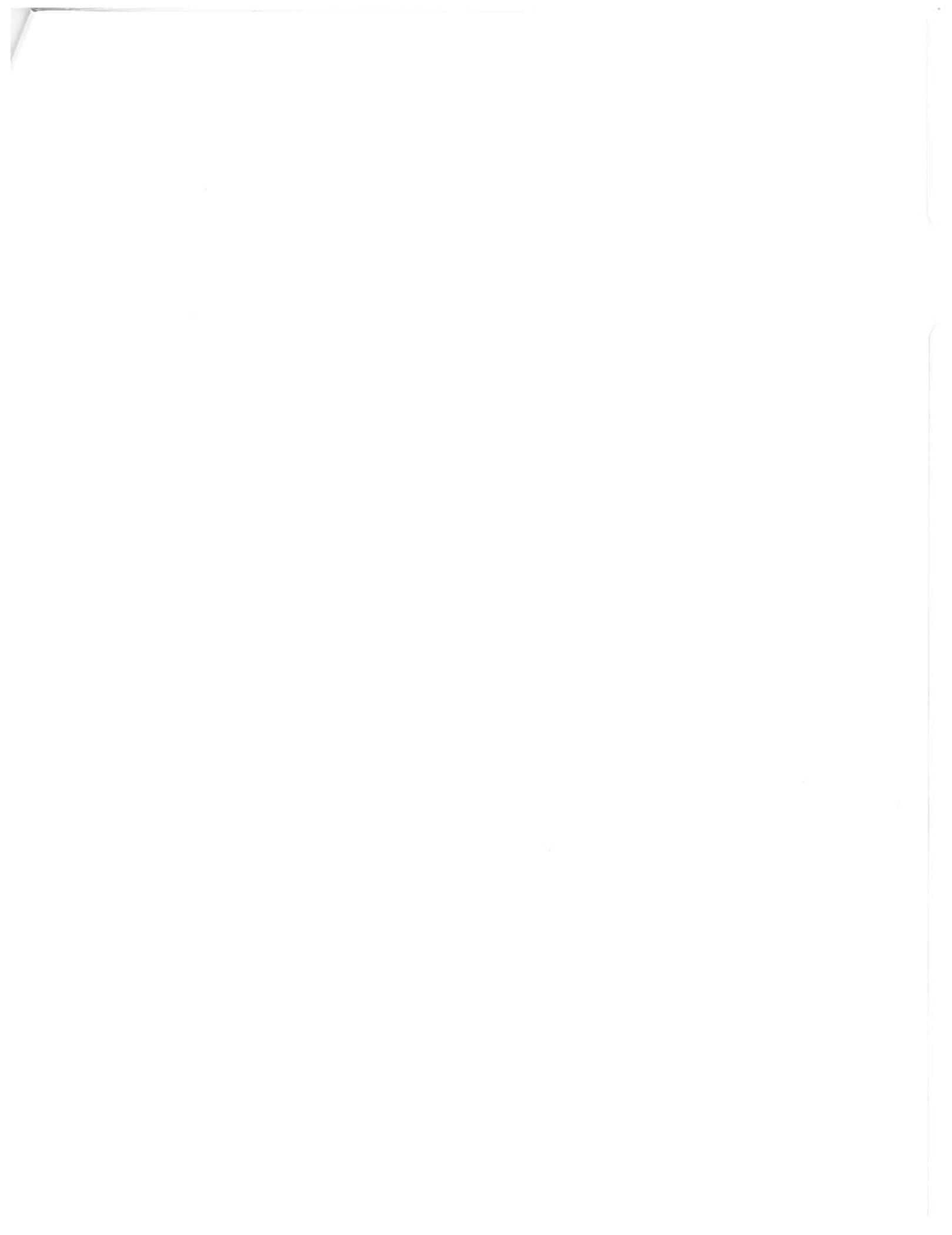
Sincerely,

  
 Melissa Cryan  
 LWCF Stateside Coordinator

cc: Jack Howard, NPS  
 ✓ Richard McGuinness, BRA

Enc.

<sup>1</sup> See <http://www.nps.gov/nrcr/programs/lwcf/manual/lwcf.pdf> for more on Section 5(f)(3) protected park boundaries





The Commonwealth of Massachusetts  
Executive Office of Energy and Environmental Affairs  
100 Cambridge Street, Suite 900  
Boston, MA 02114



Deval Patrick  
GOVERNOR

Timothy Murray  
LIEUTENANT GOVERNOR

Ian Bowles  
SECRETARY

Tel: (617) 626-1000  
Fax: (617) 626-1181

March 4, 2009

Richard McGuinness, Deputy Director for Waterfront Planning  
Boston Redevelopment Authority  
One City Hall Square  
Boston, MA 02201

RE: LWCF #25-00295, Long Wharf

Dear Mr. McGuinness,

Thank you for your quick response regarding the potential conversion of Land and Water Conservation Fund (LWCF) Project #25-00295, Long Wharf. I think that our discussion has reached a mutually beneficial resolution.

The project plan currently has seating in the LWCF protected park boundaries. I have attached Boston Redevelopment Authority's site plan with the park boundary line included. You have committed the BRA to moving the seating to non-protected parkland. DCS is most concerned that the outdoor seating, even when moved, will encroach on the public parkland. Per our conversation last week, you suggested that the BRA would be willing to have planters placed on the boundary line so that there is a clearly visible delineation of where the restaurant ends and where the LWCF protected parkland begins. This visible barrier and change in location of the seating to non-parkland will satisfy our concerns of a potential conversion. If these conditions are met, the DCS review will be complete. Also, please note that one of the grant requirements is to have a permanent LWCF sign on site that demonstrates the financial commitment made by the National Park Service. I did not see one posted during my site visit. If you have any questions regarding the sign requirements, feel free to get in touch with me.

If I can be of any further assistance, please let me know.

Sincerely,

Melissa Cryan  
LWCF Stateside Coordinator

cc: Jack Howard, NPS  
Jane Mead, North End Residents' Association

Enc.