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January 15, 2010

In the Matter of
Boston Redevelopment Authority

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

RECOMMENDED FINAL DECISION

I. INTRODUCTION

The petitioner, Sanjoy Mahajan, ("Mahajan") together with a group of residents of the city of Boston pursuant to G.L. c. 30A, § 10A, challenge the Massachusetts Department of Environmental Protection's ("the Department") September 17, 2008, determination to grant a chapter 91 waterways license to the Boston Redevelopment Authority ("BRA"). The license authorized the BRA to construct a restaurant and other facilities at the seaward end of Long Wharf in Boston, Massachusetts. Claiming errors of law in the final agency decision, the petitioners seek an adjudicatory hearing pursuant to 310 CMR 9.17. For the reasons set forth below, I recommend that the Department's Commissioner issue a Final Decision dismissing the petitioners' claims and affirming the license.

II. FACTS

Long Wharf in Boston is located east of Atlantic Avenue, north of Central Wharf, and south of Commercial Wharf. See Hearing Exhibit 10, Doc's Restaurant at Long Wharf,

Environmental Notification Form, at p. 3, Attachment A. Long Wharf is a designated National Historic Landmark. See Hearing Exhibit 10 at pp. 13-14. It is listed in the State Register of Historic Places, the Inventory of Historic and Archeological Assets of the Commonwealth, and the National Register of Historic Places. Id.

Construction of Long Wharf began in 1711. Testimony Richard McGuinness at ¶ B8.¹ It extended the view corridor of King Street, now State Street from the Town House to the end of the wharf. Id. at ¶ B10. Originally a third of a mile long, it was the longest wharf in North America as well as the oldest continuously operated. Id. at ¶ B7-8; Exhibit 1, Testimony Mark Paul (“Paul”) at ¶ 14. Over time, most of the wharf was subsumed into landfill for Boston’s working waterfront. Id. at ¶ B11. Subsequent infill projects produced Quincy Market as well as the United States Custom House. Id. at ¶ B11, 14. A final surge resulted in the creation of Atlantic Avenue. Id. at ¶ B11, Boston HarborWalk Initiative. The later construction of the elevated Central Artery effectively separated Long Wharf from Boston’s business district. Id.² An integral part of the commonwealth’s shipping and fishing industries, over the past twenty years, Long Wharf has transformed into a recreational and cultural center with hotel, boat landings, restaurants, shops offices and residences. Id. at ¶ B12-19, City of Boston Central Wharf and Long Wharf Water Transportation Improvement Project, Application for State Bond Funds, 2006; Boston HarborWalk Initiative.

Current uses and uses in the area of Long Wharf include waterborne transportation facilities, Massachusetts Bay Transportation Authority Blue Line subway access, office, hotel, retail, parking and restaurant uses. Exhibit 15. The wharf is open to the public and the Boston

¹ Nancy S. Seasholes, Gaining Ground: A History of Landmaking in Boston (MIT Press 2003) at p. 31.

² That connection however, was reclaimed with the depression of the Central Artery. Id. at ¶ B19, Boston HarborWalk Initiative at p. 4-5.

HarborWalk, an active pedestrian passageway, provides public access to the water and the water dependent uses located in the area. Id. At the end of Long Wharf, there is a large plaza that includes the Long Wharf pavilion and a large brass and marble compass set into the ground. Id. Long Wharf is the launch site for ferries to Charlestown, South Boston, the Harbor Islands, Salem, Quincy, and Provincetown. Id. at ¶ B19. There are also sightseeing cruise vessels and whale watch tours, a marina with mooring field and a Massachusetts Bay Transportation Authority, Blue Line stop servicing the wharf. Id.

The BRA proposed project will take place within filled tidelands, which as stated above required a chapter 91 Waterways License Application in accordance with 310 CMR 9.00. Id.; see also Chapter 91 License Application, December 4, 2007; Notice of Application, January 15, 2008; Exhibits 10-11. It involves redevelopment of the existing pavilion for a waterfront restaurant. Id. In its application, BRA requested authorization to enclose and construct a small addition to the shade structure, which it leased for restaurant use. Id. The design of the restaurant will complement the surrounding public open space and the other buildings on Long Wharf. Id. The use is likewise intended to complement the existing public and commercial uses including the hotel, restaurants, and offices, berthing facilities for public water transportation, commercial and recreational vessels. Id. A commensurate area of public seating in the shade will be provided. Id. The project does not include any expansion of the limited area presently available for vehicular parking. Id.

III. PRIOR PROCEEDINGS

A. Proceedings Before The Department Pursuant To The Public Waterfront Act And Waterways Regulations

As required, the BRA published public notice of the application on January 23, 2008, in the Boston Herald. Exhibit 10. The associated public hearing was held at the Department's

Boston Office on January 31 2008, and continued until February 25, 2008. Id. The Department published the same notice in the Environmental Monitor on February 6, 2008. Id.

Twenty-two persons or groups submitted written comments during the public comment period. Id. The commenters stated their support for the project or raised issues while remaining neutral: Boston City Councilor Sal Lamattina; Boston Environment Department; the Boston Harbor Association; New England Aquarium; Michael Vaughn; Board of Managers for the Residences at Rowe's Wharf; ELV Associates; Conservation Law Foundation; and the Boston Waterboat Marina. Id. The following twelve residents and the North End Waterfront Residents' Association raised issues in opposition: Anne Pistorio, Victor Brogna, David Kubiak, Patricia Thiboutot, Bob Skole, Pasqua Scibelli, Shirley Knessel, Stephanie Hogue, Thomas Schiavoni, Mary McGee, Mark and Naomi Paul, Mahajan , and Ted Schwartzberg. Id. All comments were reviewed, responded to by BRA, and addressed in the Department's findings or special conditions. Id.

The Department determined that the use of authorized filled Commonwealth Tidelands for restaurant purposes is a nonwater-dependent use pursuant to 310 CMR 9.12(2)(e)(1). See Written Determination at Findings (1). It also found that the project as conditioned complied with all applicable standards of the waterways regulations, including the special standards for nonwater-dependent use projects. Id. at (5). In addition, the Department concluded that the project complied with all requirements, modifications, limitations, qualifications and conditions set forth in the Decision on the City of Boston Municipal Harbor Plan approved by the Secretary of Environmental Affairs on May 22, 1991. Id. Finally, the Department determined that the project served a proper public purpose that provides greater benefit than detriment to the rights of the public in tidelands in accordance with 310 CMR 9.31(2)(b). Id. Specifically, the outdoor

dining areas were designed to retain the existing sight line emanating from State Street. Id. Moreover, the Department found that there will be no change to the expansive HarborWalk or to the existing water-based activities that line the edge of Long Wharf. Id.

B. Proceedings Before Office Of Appeals And Dispute Resolution

The petitioners filed this appeal on October 9, 2008. Pursuant to the November 10, 2008, Scheduling Order I conducted a Pre-Screening Conference on December 3, 2008. At the Conference, the following eight issues for resolution were established:

1. Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2?
2. Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d)?
3. Whether the project complies with Condition No. 5 of the Executive Office of Energy and Environmental Affairs ("EOEEA") 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?
4. Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)?
5. Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water?
6. Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i)?
7. Whether 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)?

Deadlines for filing Pre-filed Testimony were also established after accommodations were made to incorporate time for the impending holidays and travel by the parties and witnesses.

On January 7, 2009, the petitioners forwarded an electronic message to Office of Appeals and Alternative Dispute Resolution's ("OADR") Case Administrator requesting "[a] brief and

reasonable postponement” until, January 16, 2009, of their Pre-Filed Testimony. I denied the motion in part and allowed it in part. The petitioners were granted leave to file Pre-filed Testimony and a memorandum of law no later than Monday, January 12, 2009.

On February 12, 2009, the petitioners submitted a “Motion For Extension To Submit Rebuttal Pleadings.” The motion sought an extension until February 24, 2009, to file rebuttal testimony that was due on Tuesday, February 17, 2009. See Motion for Extension to Submit Rebuttal Pleadings, at p. 1. The petitioners asserted that the extension was necessary because he “received approximately 1,000 pages of memoranda, affidavits, legal citations, maps, photographs and engineering data from the [a]pplicant.” Id. Additionally, the petitioners asked that the Hearing be rescheduled until March 3, 2009. Id.

The Department and BRA filed their objection on February 13, 2009. The motion to extend time to file Rebuttal Testimony, limited to matters asserted in the Respondents’ Pre-filed Testimony, was allowed. See Revised Ruling and Order On Petitioner’s Motion to Submit Rebuttal Pleadings, February 20, 2009. The petitioner was granted leave to file Rebuttal Testimony no later than Tuesday, February 24, 2009.³ The request to reschedule the hearing was denied.

³ The petitioners filed a Motion for Summary Decision on February 24, 2009. Their argument focused on the application BRA submitted to the Department because, in the petitioners view the project is parkland subject to constitutional and statutory prohibitions against commercial development. For this proposition, they cited Article 97 of the Massachusetts Constitution. See Petitioners’ Motion for Summary Decision at p. 2. On March 6, 2009, the BRA and Department countered that Article 97 is outside the Department’s express statutory authority. In the alternative, they maintain; the project is not subject to Article 97 since it was enacted after the BRA took possession of Long Wharf, and the project is inconsistent with MHP goals. See Joint Opposition of BRA and the Department at pp. 1-4. Due to the fact that I find the BRA’s and Department’s assertions controlling, and because I have held a protracted evidentiary hearing, no useful purpose would be served by an analysis of the petitioners’ reasoning. Accordingly the petitioners’ Motion for Summary Decision is denied.

The hearing took place on February 24, March 2, and March 9, 2009. The parties offered a total of 22 exhibits into evidence.⁴ In addition, on March 23, 2009, I conducted a view of the site pursuant to 310 CMR 1.01(5)(a)14 and 310 CMR 1.01(13)(j).

IV. DISCUSSION

Statutory and Regulatory Schemes

“G.L. c. 91 charges the Department with protecting the Commonwealth’s interest in its harbors, tidelands, and waters and with acting as a steward of the public’s interest in those lands.” Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 754, 755 (2005); G.L. c. 91, § 2; 310 CMR § 9.01(2). It mandates that “[u]pon or prior to applying for a license . . . the applicant shall submit to the planning board of the city or town where the work is to be performed . . . the application containing the proposed use, the location, dimensions and limits and mode of work to be performed. Said planning board may conduct a public hearing within

⁴ EXHIBIT LIST

1. Pre-filed Direct Testimony Mark Paul
2. Pre-filed Direct Testimony Sanjoy Mahajan
3. Rebuttal Testimony Sanjoy Mahajan
4. Pre-filed Direct Testimony Thomas Schiavoni
5. Pre-filed Direct Testimony Anne Pistorio
6. Pre-filed Direct Testimony Selma Rutenburg
7. Pre-filed Direct Testimony Victor Brogna
8. Rebuttal Testimony Victor Brogna
9. Open Space Plan, 2008-2012, Section 1, Executive Summary
10. Environmental Notification Form
11. Certification from Secretary of Energy & Environmental Affairs on Environmental Notification Form
12. Open Space Plan, 2002-2006
13. Pre-filed Direct Testimony Richard McGuinness
14. Letter from Melissa Cryan to Richard McGuinness, February 24, 2009
15. Letter from Melissa Cryan to Richard McGuinness, March 4, 2009
16. Long Wharf, Doc’s Construction Plan
17. Plan Equipment Purchased and Stockpiled for Phase II
18. Open Space Inventory, Section 9
19. Pre-filed Direct Testimony Lawrence Mammoli
- 20A. Photograph View from HarborWalk
- 20B. Photograph View from HarborWalk
21. Pre-filed Direct Testimony Mark Donahue
22. Pre-filed Direct Testimony and Supplement with Corrections Andrea Langhauser

thirty days of receipt of license application. Within fifteen days of conducting said public hearing or within forty-five days of receipt of license application, the planning board shall submit a written recommendation to the department. Said recommendation shall state whether said planning board believes the development would serve a proper public purpose and would not be detrimental of the public's rights in these tidal lands. The department shall take into consideration the recommendation of the local planning board in making its decision whether to grant a license. Every license granted under this chapter shall be signed by the department, shall state the conditions on which it is granted, including but not limited to the specific use to which the licensed structure or fill is restricted.

A public hearing shall be held in the affected city or town on any license application for nonwater dependent uses of tidelands, except for landlocked tidelands. No structures or fill for nonwater dependent uses of tidelands except for landlocked tidelands may be licensed unless a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program.”

See G.L. c. 91, § 18.

ISSUE No. 1 Whether the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2?

Applicable Law Governing Issue No. 1

310 CMR 9.31(2)(b)1-2 provides that “[n]o license or permit shall be issued by the Department for any project subject to 310 CMR 9.03 through 9.05 and 9.09 unless said project:

(b) Nonwater-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2)

is met if the project is a nonwater-dependent use project which: 1. complies 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 complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53; 2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and 3. if consisting entirely of infrastructure facilities.” See 310 CMR 9.31

Findings of Fact Regarding Issue No. 1

The BRA relied on the Pre-filed Testimony of Richard McGuinness (McGuinness”). He is the Deputy Director for Waterfront Planning for the Boston Redevelopment Authority. Testimony McGuinness at ¶ 2. McGuinness has worked for the BRA for eight years and earned a degree in Political Science and Urban Policy from Catholic University. Id. He manages the BRA’s waterfront planning initiatives that include the basic functions of community planning, urban design, zoning, and infrastructure planning. Id. McGuinness was directly involved in a number of important waterfront planning efforts over the past thirteen years. Id. at 4.

In 1970, pursuant to the city of Boston’s 1964, Urban Renewal Plan, the BRA took ownership of Long Wharf and Custom House Block. Id. at ¶ C20-21; Order of Taking, Book 8373, p. 559, June 4, 1970. It owns a shade structure at the seaward end of Long Wharf. Id.; see also Written Determination; Notice of Application #W07-2172-N. The primary purpose of this enclosure is to provide fresh air, ventilation and emergency egress for the Massachusetts Bay Transit Authority (“MBTA”) subway tunnel running below the wharf. Id. The existing structure occupies approximately 3,430 square feet, the proposed additions occupy

approximately 1,225 square feet. Id. Seasonal outdoor dining occupies 2,586 square feet. Id. The remaining 25,915 square feet of the lease area is reserved for open public space. Id. The Urban Renewal Plan included the following goals:

- (a) Eliminate obsolete and substandard building conditions.
- (b) Promote the preservation and enhancement of buildings in the area that have architectural and historical significance.
- (c) Create a mixture of land uses compatible with living, working and recreational opportunities.
- (d) Create an area for the development of marine or marine oriented activities designed to stimulate tourism and symbolize the importance of Boston's historic relationship to the area.
- (e) Provide public ways, parks and plaza, which encourage the pedestrian to enjoy the harbor and its activities.
- (f) Provide maximum opportunity for pedestrian access to the water's edge.
- (g) Establish a relationship between buildings, open spaces, and public ways, which provides maximum protection to the pedestrian during unfavorable weather conditions.
- (h) Create an unobstructed visual channel from the Old State House to Long Wharf and the harbor beyond.

Id. at ¶ C21(a)-(h).

The city of Boston's 1979, Long Wharf Master Plan to revitalize the wharf outlined similar goals. Id. at ¶ C22(a)-(f). The hearing record is replete with evidence that the project is consistent with the Boston HarborWalk Initiative, Municipal Harbor Plan, ("MHP") 1990, Revised Long Wharf Master Plan, 2000, "Open Space Plan 2002-2006, prepared by the city of Boston's Parks and Recreation Department, in that it incorporates growth that activates open spaces and supports year-round day and evening activity. Id. at ¶ C23-33; see also Exhibit 10, at p. 5. Moreover, the project is consistent with "MetroPlan2000, the Regional Development Plan for Metropolitan Boston,"⁵ produced by the Metropolitan Area Planning Council. Id.

⁵ The Plan endorses development that increases uses of public areas, upgrades or expands an existing facility rather than constructing a new facility, and is accessible by public transportation. Id.

On this point , the BRA offered the Pre-filed Testimony of Mark Donahue (“Donahue”). Donahue has been employed by the BRA for eleven years and is its Deputy Director for Asset Management. Testimony Donahue at ¶ 2. He holds a Bachelor of Arts Degree from the University of Massachusetts. Id. at ¶ 3. In his role as Deputy Director, Donahue has oversight and management responsibility for approximately seven million square feet of BRA owned-property. Id. Additionally, the Asset Management Department promotes the use of BRA-owned property for redevelopment. Id. at ¶ 4.

Donahue’s testimony indicated that data for water transit riders passing through Long and Rowes Wharves grew from an estimated 555,000 passengers in 1988 to 1.4 million passengers in 1998. The estimated volume for 2010, is 3.8 million. Id. at ¶ 5. According to Donahue, in developing and designing the project the BRA focused on year-round use of the Long Wharf pavilion. Id. at ¶ 7. To that end, it began a series of meetings with interested parties, abutters, users of the waterfront, public agencies, and elected officials to “explore the idea of reuse of the MBTA vent structure.” Id. In 2003, the BRA submitted an application to enhance water transportation that included a revised site plan from the Long Wharf Master Plan designating the pavilion as “potential adaptive re-use.” Id. at ¶ 8.

In 2005, a series of public meetings took place. Id. at ¶ 9. At those meetings, Mayor Thomas Menino’s Crossroads Initiative⁶ and the redesign of State Street from the Old State House to the tip of Long Wharf were discussed. Id. at ¶ 9. The project’s restaurant concept as a reuse of the MBTA vent structure met the needs articulated by the Urban Redevelopment Plan and the Crossroads Initiative. Id. at ¶ 10. The restaurant would also provide a destination and

⁶ The Crossroad Initiative reunites neighborhoods and revitalizes thirteen streets that connect downtown [Boston] with the Harbor. Id. at ¶ 9.

amenities for pedestrians using the Norman Leventhal Walkway to the sea from the Old State House. Id.

In 2006, the BRA issued a Request for Proposals for the redevelopment and restaurant operation of the pavilion and associated plaza at Long Wharf. Id. at ¶ 11. The BRA sought proposals that would first, contribute to the revitalization of the downtown waterfront neighborhood by providing quality commercial opportunities to the resident of the City across a variety of income ranges and sizes; and second, reinvigorate the pavilion by creating a development that: blends the redevelopment of the project site with nearby structures, preserves the architectural character of the neighborhood, provides street level activity that enhances the public realm and exhibits a high quality of urban design. See Hearing Exhibit 10, at p. 3.

The preferred development option included the rehabilitation of approximately 3,400 square foot Long Wharf pavilion, which was built in 1983, to serve as a MBTA ventilation building and Blue Line tunnel emergency egress. Id. The existing brick structure would be expanded by approximately 1,225 square feet for a waterfront restaurant. Id. In addition to the interior seating, the restaurant will incorporate approximately 530 square feet of outdoor space on a seasonal basis. Id. The outdoor patio will consist of tables, chairs umbrellas, and planters. Id. There is no parking proposed as part of the project, because the location has a high volume of pedestrian traffic and is located near public transportation facilities. Id. BRA chose Eat Drink Laugh Restaurant Group as the designated developer for the site. Id. A community meeting was held on May 10, 2007, with the North End Waterfront Association to discuss the Crossroads Initiative. Id. at ¶ 12. The plans for Doc's restaurant were used. Id.

In 2007, the Department issued License Number 11853 to the BRA for improvements to Long Wharf. Id. at ¶ 13. Pursuant to this license BRA invested \$1,600,000.00 which resulted in

public access to an additional 5,200 square feet on Long Wharf. Id. In September 2008, Boston dedicated the new “Norman B. Leventhal Walk to the Sea.”⁷ Id. at ¶ 14. The walk to the sea features informational panels at eight locations depicting four centuries of Boston history. Id. at ¶ 14. Three panels at Long Wharf are lit at night by low wattage LED lights powered by a small wind turbine, and can be seen from a new seating area. Id. One of the goals of a restaurant at the end of Long Wharf is to winterize the site and provide year-round use. Id. at ¶ 15. The pavilion is currently not fully utilized for approximately eight months of the year. Id.

On the other hand, the petitioners’ evidence refined to its bare essence, and discussed in more detail below essentially restates the harm they believe the project will cause. See generally, Exhibits 1-7, Testimony Paul; Testimony Mahajan; Rebuttal Testimony Mahajan; Testimony Thomas Schiavoni (“Schiavoni”); Testimony Anne Pistorio (“Pistorio”); Testimony Selma Rutenburg (“Rutenburg”); Testimony Victor Brogna (“Brogna”). Nothing contained in it adds incrementally to my assessment of this issue. Therefore, after careful perscrutation of the record I conclude that the project serves a proper public purpose in compliance with 310 CMR 9.31(2)(b)1-2.

ISSUE No. 2 Whether the project provides reasonably direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d)?

Applicable Law Governing Issue No. 2

310 CMR 9.53(3)(d) states in relevant part, “[a] nonwater-dependent use project that includes fill or structures on Commonwealth tidelands, except in Designated Port Areas, must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of

⁷ This is a way finding path from the top of Beacon Hill, the highest point on the Shawmut peninsula, to Boston’s furthest projection into the harbor Long Wharf. Id. at ¶ 14.

use are not primary but merely incidental to the achievement of public purposes. In applying this standard, the Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, especially those which are nonwater-dependent; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with 310 CMR 9.53(1)through (4).”

“The project shall promote other development policies of the Commonwealth, through the provision of nonwater-related benefits in accordance with applicable governmental plans and programs and in a manner that does not detract from the provision of water-related public benefits. In making this determination, the Department shall act in accordance with 310 CMR 9.53(3)(a) through (d): (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. 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.” See 310 CMR 9.53(3)(d).

Findings of Fact Regarding Issue No. 2

As stated above, the project includes a non-water dependent facility of public accommodation on filled tidelands. See Hearing Exhibits 10-11. Therefore, in accordance with 310 CMR 9.53(3)(d), the majority of the site will remain as open space and the proposed development will reinvigorate the HarborWalk for utilization of water-dependent purposes. Id.

The proposed building will occupy 4,890 square feet of the site and the remaining 28,440 square feet of filled tidelands will be reserved as open space. Id. The project was designed to conserve the capacity of the site for water-dependent uses and enhance the utilization of the shoreline. Id. The proposed restaurant will serve people using the HarborWalk, a water dependent use. CITE Significantly, no total reduction of the Water-Dependent Use Zone (“WDUZ”), as required in the Waterways Regulations and substitute provisions of the MHP, will occur. Id. In fact, an additional 3,135 square feet of WDUZ setback area is proposed. Id.

The Department fortified its position with the testimony of Andrea Langhauser (“Langhauser”). See Hearing Exhibit 22 with supplement. Langhauser earned a Bachelor of Science degree in Environmental Biology from the State University of New York in Syracuse in 1981. Testimony Langhauser at ¶ 2. She has been employed by the Department since 1988, save a period between June 1998 and April 2004, when she was a Regional Planner with the Executive Office of Environmental Affairs. Id. at ¶ 1. She returned to the Department as Regional Planner in May 2004. Id. In that capacity, Langhauser administers and enforces the Waterways Act and the accompanying regulations. As such, she reviews non-water dependent license applications, performs site inspection, and drafts licensing decisions and enforcement actions. Id. at ¶ 3. Langhauser was the primary author of the Written Determination issued in this matter. Id.

The Department determined that the project complied with all applicable standards if the waterways regulation, including the special standards for nonwater-dependent use projects described in 310 CMR 9.53 to activate commonwealth tidelands for public use. Id. at ¶ 11. The Department’s rationale fits readily within an unforced reading of 310 CMR 9.52(1) (a). To elaborate, the project includes publicly accessible landscaped areas and the HarborWalk along

the full perimeter of the wharf, which are facilities that promote the active use of the project shoreline. Id. at ¶ 10.

Aside from that, Long Wharf is a center for existing water-based activity including water transportation to points in the harbor, to the harbor islands, and to Provincetown among other water-based operations. Id. On that basis, piles were installed to allow visiting vessels to berth; there are docks for a marina along one side and tocks for thee harbor cruise vessels located along the other side at the project site. Id. Langhauser opined that under existing conditions the site was fully utilizing the water sheet along the project shoreline. Id. Additionally, the proposed restaurant use will draw greater numbers of people to the site in more seasons of the year, which can promote a greater use of the publicly accessible landscaped areas, a water dependent use for longer periods of time. Id.

Langhauser, also contended that 310 CMR 9.53(3) addresses other development policies of the Commonwealth, and the regulatory provision is not applicable to this project because the application did not include any guidance from government agencies as described in 9.53(3)(a) or other written agreement from any state Executive Office as described in 9.53(3)(b). Id. at ¶ 12. Indeed, the city of Boston's MHP is the only document presented in the BRA's license application that resembles those contemplated in 310 CMR 9.53(3). Id. at ¶ 13.

Langhauser posited that the proposed project provides reasonably direct public non water-related benefits. Id. In her words, a restaurant, in this case DOC's, "provides services 'made directly available to the transient public on a regular basis, at which advantages if use are otherwise open on essentially equal terms to the public at large.'" Id. at ¶ 14; 310 CMR 9.02. She asserted too that the restaurant is designed to not interfere with the functions the structure has been performing for the MBTA subway system that runs underground, and the ability to vent

the tunnel and provide emergency egress will not be impaired by the project. Id. at ¶ 15, Exhibit C.

The petitioners mount several efforts to subvert the Department's decision. See Exhibits 3, 8, Rebuttal Mahajan and Brogna. However, nothing in their rebuttal evidence undermines the reasonableness of Langhauser's professed and documented belief that the project benefits the public. To sum up, I find that based on the foregoing, the project provides direct public non-water related benefits in compliance with 310 CMR 9.53(3)(d).

ISSUE No. 3 Whether the project complies with Condition No. 5 of the EOEEA 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?

Applicable Law Governing Issue No. 3

310 CMR 9.52 provides in material part, that "a nonwater-dependent use project that includes fill or structures on any tidelands shall devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands. In applying this standard, the Department shall take into account any relevant information concerning the capacity of the project site to serve such water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall give particular consideration to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2.. Except as necessary to protect public health, safety, or the environment, the Department shall act in accordance with the following provisions. (1) In the event the project site includes a water-dependent use zone, the project shall include at least the following: (a) 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; in making this determination, the Department shall 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; and (b) a pedestrian access network of a kind and to a degree that is appropriate for the project site and the facility(ies) provided in 310 CMR 9.52(1)(a); at a minimum, such network shall consist of: 1. walkways and related facilities along the entire length of the water-dependent use zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width; and 2. appropriate connecting walkways that allow pedestrians to approach the shoreline walkways from public ways or other public access facilities to which any tidelands on the project site are adjacent. Such pedestrian access network shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site. (2) In the event the project site does not include a water-dependent use zone, the project shall provide connecting public walkways or other public pedestrian facilities as necessary to ensure that sites containing water-dependent use zones will not be isolated from, or poorly linked with, public ways or other public access facilities to which any tidelands on the project site are adjacent. (3) The requirements of 310 CMR 9.52(1) and (2), shall also apply in the event a nonwater-dependent use project is located on a Great Pond.”

See 310 CMR 9.52.

Findings of Fact Regarding Issue No. 3

The BRA began the HarborWalk planning process for the waterfront in the early 1980s

with the goal of creating a continuous 47-mile waterfront walkway along Boston Harbor.

Testimony McGuinness at ¶ 23. The HarborWalk connects the city's neighborhoods to the Harbor. Id. at ¶ 23(d).

The Department determined that the project will promote public use on the seaward end of Long Wharf in a clearly superior manner. This is true for a number of reasons. As an initial matter, approximately 25,915 square feet of the area at the seaward end of Long Wharf will be preserved as open space and continue to be used as a public plaza. Testimony McGuinness at ¶ D34(d); Testimony Mammoli at ¶ 5, 19. Next, none of the proposed additions are closer to the water than the existing structure. Id. at ¶ 21. Indeed, all of the proposed additions are at least twenty-eight feet from the water. Id. Further, seasonal outdoor dining will occupy approximately 2,586 square feet. Id. at ¶ 22. At the southeastern portion of the wharf, there will be eighteen seasonal shaded tables for public use, independent of patronage of the restaurant. Testimony McGuinness at ¶ D34(d). The proposed design of the restaurant will complement the surrounding open space and the other buildings on Long Wharf and the existing public and commercial uses. Id. at ¶ D34. Last but not least, the proposed design includes flood mitigation measures of rabbited aluminum barrier door stop. Testimony Mammoli at ¶ 26. The Department and BRA offered evidence that by establishing a restaurant more people will be attracted to the end of Long Wharf over a longer period of the day and into the colder months of the year, thereby providing a year-round destination without interfering with the important function performed by the underground subway system. Id. at ¶ 19. The project will serve the pedestrian public and other persons utilizing the existing water-dependent operations on and along the edge of the wharf, such as the HarborWalk, public plaza, marina, water transportation to the

Charlestown Navy Yard, Boston, Harbor Islands, and Provincetown, and charter vessels and boats utilizing the adjacent mooring field. Id. at ¶ 20.

Significantly, Special Conditions Nos. 3 and 4 require the BRA to “maintain the seaward end of Long Wharf, as open space with no obstacles for safe, free, and universally accessible public passage twenty-four hours a day with no gates or other barriers installed to impede pedestrian circulation.” See Written Determination at p. 7. BRA must also “provide restrooms for use by the general public, regardless of patronage, during . . . regular business hours.”⁸ Id.

Additionally, in order to maintain the existing use of the pavilion, there will be seating with views of the harbor continue to be available to the general public, free of charge on benches and as informal seating. Id. at ¶ 21. The same condition limits the area of outdoor seating and provides at a minimum 18 shaded tables with accompanying chairs to be arranged so the general public can enjoy the harbor vista in a manner that does not obstruct the view corridor from State Street. Id. The restaurant operator is also required to perform routine maintenance of pedestrian amenities including keeping the public binoculars in good working order, picking up trash on a daily basis, limiting the hours of deliveries to avoid conflict with the pedestrian public and clearing snow and ice in accordance with the Department snow disposal guidance. Id.

Another meaningful metric is the Department’s determination that the reconfiguration of the setback distances for the project will promote public use and other water dependent activity on the seaward end of Long Wharf in a clearly superior manner because it provides a larger setback distance than required by 310 CMR 9.51(3)(c) and it allows modest additions to be constructed on an existing structure to expand the public use and activation of the seaward end of

⁸ At least two clearly visible signs must be posted identifying the free public use of restrooms. Written Determination at p. 7.

Long Wharf. Id. at ¶ 24. The total amount of the substitute setback area is approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c). Id.

Based on the well-pleaded factual averments, the testimony that illuminated and supplemented those facts, I find that the project complies with Condition No. 5 of the EOEEA 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. This finding while unfortunate for the petitioners is neither unreasonable nor implausible. It is also not inconsistent with the regulatory scheme or the broader context of the regulations as a whole which seek to make the best possible use of public lands.

ISSUE No. 4 Whether the project meets the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)?

Applicable Law Governing Issue No. 4

310 CMR 9.34(2)(b)(1) states “[i]f the project conforms to the municipal harbor plan the Department shall: apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 CMR 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at 301 CMR 23.00 and associated guidelines of CZM.

A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. In applying this standard, the Department shall take into account any relevant information concerning the utility or adaptability of the site for present or future water-dependent purposes, especially in the vicinity of a water-dependent use zone; and shall adhere to the greatest

reasonable extent to applicable guidance specified in a municipal harbor plan, as provided in 310 CMR 9.34(2)(b)2. At a minimum, the Department shall act in accordance with the following provisions. The Department shall find that the standard is not met if the project does not comply with the following minimum conditions which, in the absence of a municipal harbor plan which promotes the policy objectives stated herein with comparable or greater effectiveness, are necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use: (c) new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone; except as provided below, the width of said zone shall be determined as follows:

1. along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but no less than 25 feet; and
 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; and
 3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet.
- As provided in 310 CMR 9.34(2)(b)1., the Department shall waive the above numerical standards if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative setback distances and other requirements which ensure that new buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent activity and public access associated therewith, as appropriate for the harbor in question.”

Findings of Fact Regarding Issue No. 4

Regarding the total amount of open space located within the reconfigured Water Dependent Use Zone, the current proposal included approximately 3,135 square feet more area than required by 310 CMR 9.51(3)(c) and the additions are no closer to the water than the existing structure. *Id.* at 3. The project complies with applicable city and state plans as well as written memoranda of understanding and decisions by the Secretary of Environmental Affairs. Testimony Mammoli at ¶ 14(c). In fact, the MHP allows for a “reconfiguration of setback distances along the ends and sides of wharves” if the reconfiguration “promotes public use or other water dependent activity in a clearly superior manner” and if no overall reduction of total setback area occurs. Testimony Mammoli at ¶ 15. There was also testimony that rejuvenating Long Wharf through redevelopment of the shade pavilion with seats and tables, refreshment, and restroom facilities will promote and enhance the used of the existing water transportation by making the area a destination. Testimony McGuinness at ¶ C 34(c).

The Department and BRA have the better of this argument. This is true because the petitioners offered can not skirt the regulatory channel markers by lumping together a mélange of claims and eschew a direct challenge to the opposing parties’ submissions.⁹ See generally, Exhibits 1-7, Testimony Paul; Testimony Mahajan; Rebuttal Testimony Mahajan; Testimony Schiavoni; Testimony Pistorio; Testimony Rutenburg; Testimony Brogna; Rebuttal Testimony Brogna. Against this backdrop, I find that the evidence showed that pursuant to 310 CMR 9.51(3)(c) the Department correctly waived the numeric standards for water-dependent use zones. Accordingly, the project complies with the requirements of 310 CMR 9.34(2)(b).1. and

⁹ Findings of fact as to technical matters beyond the scope of ordinary experience are not warranted in the absence of expert testimony supporting such findings. Department of Revenue v. Sorrentino, 408 Mass. 340 (1990); In the Matter of Hargrove, Company, Docket No. 98-134, Determination of Applicability Ruling On Motion For Reconsideration (November 22, 1999)(no basis to alter decision to credit testimony of one witness over that of another).

310 CMR 9.51(3)(c) by substituting the alternate setback distances and other requirements of the MHP.

ISSUE No. 5 Whether the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water?

Applicable Law Governing Issue No. 5

310 CMR 9.51(2)(b) indicates 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. Aspects of built form that may give rise to design incompatibility include, but are not limited to: (b) 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.”

Findings of Fact Regarding Issue No. 5

There was evidence that the project complies with 310 CMR 9.51(2)(b). Specifically, the outdoor dining areas have been designed to retrain the existing sight line emanating from State Street. As an initial matter, the height, scale and massing of the building will not change. Testimony McGuinness at ¶ C38(d). The view corridor down State Street is important because unobstructed sight lines down public ways help to draw the public down to the waterfront. *Id.* Next, there was testimony that the project does not interfere with the HarborWalk in any way, which runs the full perimeter of Long Wharf. *Id.* Similarly, the proposed design does not adversely impact the view corridor from State Street or sight lines to the water from the

HarborWalk. Id.; Mammoli Testimony at ¶ 17, Exhibit 9, Aerial Photograph of Downtown Waterfront. Indeed, there are very limited changes in the view from the pavilion to the restaurant because the existing columned structure will be reused and existing open views through the pavilion will be maintained through the use of windowed walls. Testimony McGuinness at ¶ C 34(c). For the reasons elucidated above, I find that the project meets the requirements of 310 CMR 9.51(2)(b) regarding public views of the water.

ISSUE No. 6 Whether the project complies with the historic resource requirements of 310 CMR 9.33(1)(i)?

Applicable Law Governing Issue No. 6

310 CMR 9.33(1)(i) states that “(1) All projects must comply with applicable environmental regulatory programs of the Commonwealth, including but not limited to: (i) Massachusetts Historical Commission Act, M.G.L. c. 9, §§ 26 through 27C, as amended by St. 1982, c. 152 and St. 1988, c. 254, and 950 CMR 71.00. For projects for which a Project Notification Form must be submitted pursuant to 950 CMR 71.07 the applicant shall file said form with the Massachusetts Historical Commission.”

Findings of Fact Regarding Issue No. 6

The project’s exterior architectural elements include a new wood frame folding storefront and reclaimed deck planks and signage that wrap around the upper level of the building. See Exhibit 10 at p. 14. BRA offered testimony that it sought to design and construct projects on Long Wharf that maximize public access to the water and waterfront view corridors. For example, innovative configuration of fully accessible ramps and floats at the marine facility respect the site’s historic context while minimizing visual obstructions. Testimony Mammoli at ¶ 12. Moreover, the evidence showed that the project proposes to rehabilitate the Long Wharf pavilion, which was constructed in 1983 after the site’s designation as a historic district in 1966.

See Exhibit 10 at p. 14. The project was designed to blend with nearby structures and to preserve the architectural character of the neighborhood. Testimony McGuinness at ¶ C34(b); see also Hearing Exhibit 10 at p. 14. Additionally, licensing funds from the project will be used to install interpretive signage that explains the history of Long Wharf. Id. In conclusion, I note that the petitioners, who assert that they will be irreparably harmed by the project have not satisfactorily explained how or why this is so. So, while I am sensitive to the concerns raised by the petitioners, I find their claims lacking in this instance. I reject them out of hand and for the reasons elucidated above rule that the project complies with the historic resource requirements of 310 CMR 9.33(1)(i).

ISSUE No. 7 Whether the petitioners have standing to appeal either: (as) abutters to the proposed project pursuant to 310 CMR 10.04, and/or as aggrieved parties pursuant to 310 CMR 10.04?

Applicable Law Governing Issue No. 7

G.L. c. 91 provides that a “person aggrieved by a decision of the department to grant a license . . . shall have the right to an adjudicatory hearing in accordance with chapter thirty A.” See G.L. c. 91, § 18.¹⁰ The persons who have the right to an adjudicatory hearing are listed in 310 CMR 9.17(1), and include “any person, aggrieved by the decision of the department to grant a license or permit who has submitted written comments within the public comment period.”¹¹ It is the burden of the person claiming aggrieved party status to present, in writing, sufficient facts to allow the Department to determine whether or not he or she is in fact aggrieved. Id.; In the Matter of Town of Hull, Docket No. 88-22 DEQE Wetlands File No. 35-383 Decision on Motion

¹⁰ “Aggrieved person means any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public which is within the scope of the public interests protected by G.L. c. 91.” See 310 CMR 9.02.

¹¹ The petitioners here fulfilled all applicable procedural requirements. See Section IIA above.

fro Reconsideration of Dismissal, (July 19, 1988); In the Matter of Boston Harbor Marina Company, Docket No. 85-68 DEQE Wetlands File No. 59-160, Denial of Motion for Reconsideration (May 7, 1986). Conversely, “an allegation of abstract, conjectural or hypothetical injury is insufficient to show aggrievement.” In the Matter of Doe, Doe Family Trust, Docket No. 97-097 Final Decision, 5 DEPR 61, 64 (April 15, 1998).

To determine whether standing exists, the Supreme Judicial Court “look[ed] to the considerations set forth in Enos v. Secretary of Environmental Affairs, 432 Mass. 132, 135-36 (2000); see also Hertz & others v. Secretary of the Executive Office of Energy and Environmental Affairs & others, 73 Mass. App. Ct. 770, 771 (2009)(quoting Enos v. Secretary of Environmental Affairs, 432 Mass. at 135-36); the language of the statute [or regulations]; its or their intent and purpose; ‘the nature of the administrative scheme; decisions on standing; any adverse effects that might occur, if standing is recognized; and the availability of other, more definite, remedies to the plaintiffs. In making [the] inquiry . . . special attention [is to be given] to the requirement that standing is usually is not present unless the governmental official or agency can be found to owe a duty directly to the plaintiffs.” Id.

The cases instruct that the burden is not a particularly difficult one to meet. In the Matter of Hull, at 9. It is “analogous to a rule of pleading rather than to an evidentiary rule.” Id. at 11. While as indicated above, conjectural injury is insufficient to show aggrievement, a person claiming to be aggrieved need only present facts showing a possibility of injury related to the interests protected by the Act and is not required to prove that the injury would actually occur or that he or she is entitled to the relief sought on appeal in order to show aggrieved person standing. Id. at 11-12. By this standard, the petitioners have not met this low-threshold burden.

None of the evidence offered recites any injury that they would suffer as a result of the project. They accordingly lack standing to appeal the license as aggrieved persons. Id.

Findings of Fact Regarding Issue No. 7

The petitioners rely on the following claims of harm to confer standing: (1) as abutters they will suffer injuries that are different in kind or magnitude from that suffered by the general public within the scope of public interest protected by chapter 91; (2) the project will block the view of the harbor that they enjoy, and will also impede their view as they travel to work and around the waterfront, an area they travel more frequently than the general public; and (3) the project will exacerbate an already severe noise, and trash problem. I reject these claims as conferring standing. Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 754, 756-57 (2005)(court rejected plaintiffs' claims that wharf development would block light air visual benefits of their property create traffic problems noise and pollution).

The petitioners all reside in Boston. See Exhibits 1, 2, 4, 5, 6, 7. Their addresses are as follows: Paul 61 Prince Street in the North End; Mahajan 5 Jackson Avenue in the North End; Schiavoni 46 Snow Hill Street in the North End; Pistorio 72 North Margin Street in the North End; Rutenburg lives at Harbor Towers, East India Row in Boston; and Brogna's address is 120 Commercial Street. Id. I conclude that under the regulations, abutters do not receive special status for purposes of standing. Id. "Rather, for persons in the circumstances of the petitioners, standing depends on whether they are persons aggrieved as defined in 310 CMR §§ 9.02 and 9.17(b), quoted above." Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57 (quoting In the Matter of Lipkin, 21 DEPR 249, 250 (1995)).

The petitioners fare no better on the claims concerning interference with their views of the harbor. More exactly, they assert that "overwhelms the site, obstructs sight lines and scenic

views, and usurps the immediate open space and parkland for a private enterprise.” See Hearing Exhibit 4, Schiavoni, at ¶ 4. Other petitioners suggested that Long Wharf is “unique” and offers “uncluttered” “panoramic” “sweeping” “unobstructed” views. Exhibit 1, Paul ¶¶ 2-3; Exhibit 2, Mahajan at p. 1; Exhibit 5, Pistorio at ¶ 4G. In like vein, petitioners assert that their injury includes “damage to the environment” “excessive noise” disturbance of the tranquility of the mooring basin” and “loss of quiet enjoyment by those who live on their boats”. See e.g., Exhibit 7, Brogna at ¶¶ 2(a)-3. For example, the evidence indicated that the petitioners commuted to work by way of the HarborWalk. Exhibit 1, Paul Pre-filed at ¶ 1. They also take walks along Long Wharf. Exhibit 2, Mahajan; Exhibit 4, Schiavoni at ¶ 1; Exhibit 5, Pistorio at ¶ 2. Brogna moors his boat near the project site.¹² See Hearing Exhibit 7, Brogna at ¶ 2(b).

While the impact on their views from may differ in kind or magnitude from that of the general public, this is not an interest that the statute protects. Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57. The statute protects for water-dependent purposes the public’s interest in views from public places, such as parks and esplanades. Id. Furthermore, the petitioners’ claim that their more frequent travel in the waterfront area differs in kind or magnitude from the general public is as a matter of law, not a difference in kind or magnitude of injury within the meaning of 310 CMR 9.02. With respect to the petitioners’ third claim of injury, noise and trash problems, I rule that they likewise do not state a protected interest.¹³ Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. at 756-57; Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 774.

¹² Brogna also testified that he does not live on his boat, but sleeps on it during the summer once every 10 days.

¹³ There was also testimony that the project will not appreciably increase noise levels at the end of Long Wharf. Testimony Mammoli at ¶ 18.

Further, I conclude that that petitioners' other claims such as diminished use of and access to the waterfront and their being subject to increased noise and pollution are not within the area of concern of the harbor plan regulations, or stated differently, the regulations do not create "a right in the particular plaintiff[s] to redress those injuries." Enos v. Secretary of Environmental Affairs, 432 Mass. at 139 n.6. Moreover, the Massachusetts Constitution does not confer standing on the petitioners in this appeal to protect the aesthetic qualities of their environment. Id. at 142 and n.7.

Beyond that, the Appeals Court believed that granting plaintiffs standing in such cases would also have adverse effects contrary to the purposes of the administrative regulatory scheme see Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 776, "would allow suit with the attending delay in almost every project . . . 'based on generalize claims by plaintiffs of injury such as loss of use and enjoyment of [their private] property.'" Id.; Enos v. Secretary of Environmental Affairs, 432 Mass. at 138. "Similarly here, granting standing to the [petitioners] to assert claims of harm to their private property, compare Higgins v. Department of Environmental Protection, 64 Mass. App. Ct. 758 n. 11 (claim based on goal of protecting clean air and aesthetic interests) would subject almost all municipal harbor projects to litigation and confer rights beyond those of comment and public hearing envisioned by the harbor plan regulations." Hertz & Others v. Secretary of the Executive Office of Energy and Environmental Affairs & Others, 73 Mass. App. Ct. at 776.

The petitioners' claims contradict the considered views of prior decisions, which make plain that aggrieved parties must show that they suffered harm that was different in kind and magnitude from the public at large. See e.g., In the Matter of Mark Whouley/Three Oak Development, Docket No. 99-087, Final Decision, 2000 (May 16, 2000). Thus, there are two

main reasons underpinning my finding that the petitioners lack standing: (i) that under the regulations, abutters do not receive special status for purposes of standing and (ii) that the regulations do not create a right in the particular petitioners to redress the injuries they alleged. Applying the above tenets to this matter, I conclude that the petitioners' claims of standing fail.

ISSUE No. 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)?

Applicable Law Governing Issue No. 8

In relevant part, 310 CMR 9.31(2)(b) provides that “no license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands. In applying 310 CMR 9.31(2), the Department shall act in accordance with the following provisions. (a) Water-Dependent Use Projects - The Department shall presume 310 CMR 9.31(2) is met if the project is a water-dependent use project. (b) Nonwater-Dependent Use Projects. The Department shall presume 310 CMR 9.31(2) is met if the project is a nonwater-dependent use project which: 1. complies 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 complies with the additional standard for activating Commonwealth tidelands for public use, according to the applicable provisions of 310 CMR 9.53; 2. if located in the coastal zone, complies with the standard governing consistency with the policies of the Massachusetts Coastal Zone Management Program, according to 310 CMR 9.54; and 3. if consisting entirely of infrastructure facilities, to which 310 CMR 9.31(2)(b)1. does not apply, complies with the special mitigation and public access standards governing such facilities, according to 310 CMR 9.55.

The presumptions of 310 CMR 9.31(2) are rebutted only if:(a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or (b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting; in the case of a project for which a final EIR has been prepared, the presumption may be overcome only if such detriment has been identified during the M.G.L. c. 30, §§ 61-62H review process.”

Findings of Fact Regarding Issue No. 8

The proposed project is a portion of a process that articulates the goals of the MHP as well as the intent of chapter 91. Moreover, the project as conditioned serves a proper public purpose that provides greater benefit than detriment to the right of the public in tidelands in accordance with 310 CMR 9.31(2)(b). See Written Determination at p. 3. The outdoor dining areas have been designed to retain the existing sight line emanating from State Street. There will be no change to the expansive HarborWalk or to the existing water-based activated that line the edge of Long Wharf two water transportation facilities with destinations in the inner and outer harbor, berthing for a variety of excursion vessels, a marina and a mooring field. Id.

The BRA also provided the Pre-filed Testimony of Lawrence Mammoli (“Mammoli”) the Director of Engineering and Facilities Management at BRA. See Exhibit 19. Mammoli is the Director of Engineering and Facilities Management for the BRA. He holds a degree in Civil Engineering from Northeastern University, and has worked for the BRA for twenty nine years. His experience includes management of all BRA properties, including its many waterfront properties such as Marine Industrial Park, Charlestown Navy Yard, Sargent Wharf, and Long

Wharf. He is also responsible for all capital improvements performed by the BRA, including a number of waterfront construction projects.

He testified that the BRA applied for state funding to finance in part a comprehensive, multi-year program known as the Central Wharf and Long Wharf Water Transportation Improvement Project. According to Mammoli the purpose of the project is to expand the capacity and improve the quality of water transportation infrastructure at Long Wharf. See Exhibit 13, Boston Inner Harbor Passenger Water Transportation Plan 2000; November 20, 2000 letter from the Executive Office of Transportation and Construction awarding BRA \$1,800,000.00 grant. In 2000, the BRA and Executive Office of Transportation and Construction (“EOTC”) identified the Long Wharf/Central Wharf area as the highest priority site in Boston’s Inner Harbor for infrastructure investment because of the high volume of vessel operations which accommodate multiple uses. See Exhibit 13, Central Wharf and Long Wharf Water Transportation Improvement Project: Long Wharf North Terminal Extension, Application for State Bond Funds Fiscal Year 2006 (2006 Application), Section 4.

Mammoli indicated that the primary goals of the project are defined as follows:

- a. Maximize public access to and along the entire waterfront area while preserving much of the original form and character of the area.
- b. Promote active water dependent uses such as public landings, commuter ferries, commercial boating activities, and water taxi facilities.
- c. Anticipate growth of these boating activities and provide an orderly program for their expansion, considering both waterside and landside space and functional needs.
- d. Provide additional terminal sites and berthing capacity to sustain anticipated ferry growth.
- e. Improve linkages among different ferry services to facilitate passenger transfers.
- f. Ensure that newly constructed buildings and terminals (including waiting areas, kiosks, and associated amenities) continue to reflect and blend w/ the existing historic waterfront architecture.
- g. Preserve and enhance environmental and navigational conditions of the harbor

See Testimony Mammoli at ¶ 5, Exhibit 25, 2006 Application.

The proposed project extends from Christopher Columbus Park to East India Row along the downtown Boston waterfront. See Testimony Mammoli at ¶ 6. Since 1996, the BRA sought funding in each fiscal year for a number of discrete projects included in the Central Wharf and Long Wharf Water Transportation Improvement Project pursuant to legislative authorization for the expenditure of funds for “public piers and improvements to the public HarborWalk for the purpose of enhanced water transportation capacity and intermodal access to the waterfront. . . .”¹⁴

¹⁴ The BRA matched state funding for total project improvements of over nine million dollars that was invested in the Long Wharf area. From fiscal years 1998 through 2008, the BRA completed a number of improvement projects in the Central Wharf and Long Wharf project area. Funding for this work came from the BRA, EOTC, and the Commonwealth of Massachusetts Department of Environmental Management (“DEM”). Projects include but are not limited to:

Design and Construction of a Pedestrian Walkway on the north Side of Long Wharf:

This walkway begins at Christopher Columbus Park and extends to the head of Long Wharf, and includes all new decking, lighting, seating and other amenities. The total design and construction cost was \$363,125.

Design and Removal of Dilapidated Timber Piles and Long and Central Wharves:

This work included the removal of dilapidated and rotted wood timbers and the removal of large granite blocks from the Central and Long Wharves watersheet to remove a hazard to navigation. The total design and construction cost was \$78,702.

Walkway Improvements to East India Row/HarborWalk:

This work involved the preparation of contract documents that are suitable for public bidding and can be used to obtain all of the necessary permits to dredge an area on the north side of Long Wharf where Harbor Express is located along with required site improvements. The cost of this design was \$113,500.

Dredging and Dock Reconfiguration North Side of Long Wharf:

This work involved the dredging and reconfiguration of the Harbor Express facility on the north side of Long Wharf. This work provided for an increase in watersheet on the north side of Long Wharf, minimizing the impact of the commuter docking facility on the use of the watersheet by additional water transportation vessels as well as recreational and commercial vessels in the area. This work represented the first phase of the long-term plan to build-out along the north side of Long Wharf. The cost of this project was approximately \$716,000.

Preparation of Design and Construction Documents for Water Transportation Facility Improvements at Long and Central Wharves

The BRA hired consultants to prepare design and construction documents for the construction of water transportation facility improvements around the perimeter of Long Wharf, between Long and Central Wharves, and along the north face of Central Wharf. The Engineering and Design services have provided for safe and convenient facilities for use by the general public. The consultants determined the structural repairs necessary to satisfy typical loading requirements for a variety of maritime users who will be using the wharves for loading and unloading boats. Design and engineering elements included the reconstruction or rehabilitation of the seawall, rehabilitation of utility infrastructure, improvements to selected existing waterfront structures and development of new facilities and amenities, such as waiting area, signage and information area. The work was completed at a cost of \$440,000.

Old Atlantic Avenue Project

The work included (1) the construction of a new pier facility adjacent to the existing seawall parallel to the old Atlantic Avenue together with a new floating dock to replace the existing 80-foot MBTA floating dock; (2) the installation of fixed and articulated ramps to provide fully accessible access from the new pier to the floating dock

The project complies with the MHP mandates. Testimony Mammoli at ¶ 14. First, according to the MHP, the pavilion is an underutilized site that currently does not serve the proper public purpose. Id. at ¶ 14(a). Second, the project aims to meet MHP mandates and create a superior use by revitalizing an underutilized structure with the use of private funds. Id. at ¶ 14(a). Third, the project will create job opportunities, an affordable dining establishment for residents and visitors, public amenities that currently do not exist i.e., public shaded seating and restrooms, and a destination location to attract residents and visitors to the waterfront year-round. Id. at ¶ 14(a). Fourth, through the creation of a partnership with the tenants, the BRA will

surface; and (3) the construction of 150 feet of new linear berthing space along the north side of Central Wharf. Approximate cost \$2.4 million.

Central Wharf, South Pier Improvements

The BRA and the New England Aquarium (NEAQ) partnered on a project to create a water transportation dock and public access on the south side of Central Wharf. NEAQ completed the HarborWalk around its IMAX theater in 2004. The South Pier is now open to the public. The Discovery was recently moved to accommodate the new dock. This dock will serve smaller vessels primarily, freeing up space on the north side of Central Wharf for larger vessels. Approximate cost \$2 million.

Emergency Repair of Collapsed Seawall on the South Side of Long Wharf-Phase I

The BRA performed demolition, stabilization, and remediation of a collapsed length of historic Long Wharf. The cost of construction was \$740,724.

Emergency Repair of Failed Seawall South Side of Long Wharf-Phase II

The BRA performed stabilization and remediation of an additional failed section of historic Long Wharf. The cost of construction was \$644,524.

Long Wharf-South-Pier Restoration Project

The BRA completed construction of a new 300 foot long boardwalk to complete HarborWalk/Walk to the Sea improvements atop the recently completed seawall stabilization. Total project cost valued at approximately \$1,300,300.

Long Wharf-North-Pier Restoration Project

BRA completed construction of a new boardwalk to complete HarborWalk/Walk to the Sea improvements and 180-foot long floating dock system. Total project cost valued at approximately \$1,600,000.

Additional Improvements:

Additional improvements to the area included new light pole fixtures for the HarborWalk area on the south side of Long Wharf, repairs to the flagpole, and other site improvements. The cost of these improvements was approximately \$120,000.

New waiting area/shelters for MBTA water shuttles have been installed with telephone kiosks at a cost of \$160,000. A public bathroom was added in 2004 at a cost of \$340,000. Another public bathroom is under construction at a cost of \$350,000. The BRA and its design consultants received a design award for the phase one project. Mammoli Testimony at X. Among other aspects, the Adaptive Environment Group commended the BRA for its stewardship and “people friendly” design of Long Wharf. The Adaptive Environments’ award for Excellence in Universal Design 2003 notes that the Long and Central Wharves Marine Berthing Facility: “solves a range of complex design, structural issues and queuing space problems in a very prominent downtown location that serves thousands of commuter and visitors. Instead of looking at the obligation of accessibility as a discrete task, the team sought an integrated solution that would address the disparate set of goals. The new pier, accessible ramps, and floating berthing facility resulted in a major new urban marine intersection that created a highly visible system with a bold industrial look that is a primary point of access for everyone to the Harbor.” Id.

revitalize an underutilized structure and generate capital investment that will allow for improvements to adjacent open space. Id. at ¶ 14(b). Specifically, the BRA believes that the project will encourage year-round pedestrian use along the waterfront. Id. at ¶ 14(b). The project aims to attract pedestrians to the waterfront through reuse of an existing structure; creating a place for those to meet and be sheltered during the colder months as well as to sit and enjoy the outdoors space in the warmer months. Id. at ¶ 14(b).

The petitioners also complained that the BRA failed to correctly complete the Environmental Notification portion of its waterways application in accordance with applicable law. See Exhibit 8, Brogna Rebuttal at ¶¶ 19-23. To be sure, this claim bears a connection to the EOEEA Secretary's decision. The statutory channel markers indicate that the project is land that was designed and reconstructed with federal Land and Water Conservation Fund ("LWCF") assistance. See Exhibit 14. Therefore, a portion of the project site is legally protected park land open to recreational use by the general public. Id. Conscious of its role as a program administrator, the Division of Conservation Services ("DCS") took issue with the outdoor seating and whether it encroached on LWCF public parkland. Id.; see also Langhauser Affidavit, with Melissa Cryan ("Cryan") Attachment, March 6, 2009. Although the petitioners' factual premise is unarguably correct, the BRA resolved the issue and satisfied the agency's concerns.¹⁵ Id.; Exhibits 13, 15. As the Cryan communications make manifest, if the conditions in the final license include the items set out at n.15 below, "the project causes no detriment to the public interest protected by the DCS as described in 310 CMR 9.31(3)(b)." Id. Accordingly, I

¹⁵ Melissa Cryan, LWCF Stateside Coordinator, in a letter dated March 4, 2009, indicated that "[t]he 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." See Langhauser Affidavit, with Cryan Attachment, March 6, 2009.

conclude that the BRA redressed the issues raised by DCS and on that basis, I reject the petitioners' argument that the project contravenes 310 CMR 9.31(2)(b).

V. CONCLUSION

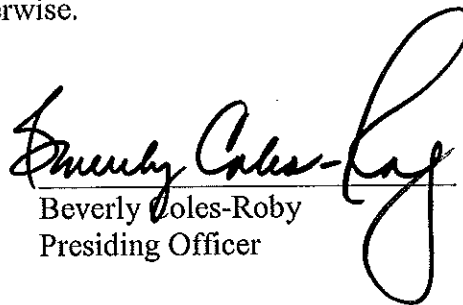
Based on the foregoing, I recommend that the Department's Commissioner issue a Final decision dismissing the petitioners' appeal and affirming the license issued to the BRA.

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

January 15, 2010


Beverly Coles-Roby
Presiding Officer