Commonwealth of Massachusetts

Suffolk, S.S. Superior Court Civil No. SUCV2010-0802-H

Sanjoy Mahajan, Victor Brogna, Stephanie Hogue, David Kubiak, Mary McGee, Anne M. Pistorio, Thomas Schiavoni, Pasqua Scibelli, Robert Skole, and Patricia Thiboutot,
Plaintiffs

v.

Massachusetts Department of Environmental Protection
and
Boston Redevelopment Authority,
Defendants

Plaintiffs' memorandum of law in support of motion for judgment on the pleadings pursuant to Rule 12(c)

1. Introduction

At the seaward (eastern) end of Long Wharf, Boston Harbor, the Applicant, the Boston Redevelopment Authority (BRA), has proposed an enclosed waterfront restaurant and bar with outdoor restaurant service and takeout service *(Record, p. 38)*. Under the Massachusetts Public Waterfront Act (c. 91), the BRA applied for and received a favorable written determination dated September 17, 2008 from the Massachusetts Department of Environmental Protection (the DEP) *(Record, p. 49)*. The written determination was appealed by the Petitioners, all residents of the City of Boston. The issues raised by the Petitioners include creation of excessive and unnecessary noise, damage to public open space and parkland, and damage to scenic quality *(Record, p. 1)*.

2. Facts

The park at issue is located at the seaward (eastern) end of Long Wharf in Boston Harbor (*"public waterfront parkland," Record, p. 918, Secretary's Certificate on the Environmental Notification*

Form). The park is utilized extensively by residents and visitors to enjoy marine sights and sounds and for other passive-recreation purposes *(Record, p. 268, 298, 633, 641)*. It is unique among the wharves and parks in the downtown/waterfront area in the combination it provides of expansive harbor views—surrounded on three sides by water—and a spacious, quiet public space in which to enjoy them *(Record, p. 602, 620)*.

The park at Long Wharf is designated 'Protected Open Space' in the City of Boston Parks Department *Open Space Plan 2002–-2006* and in its draft *Open Space Plan 2008–-2012*. On both plans, Long Wharf is marked as subject to Article 97 of the Amendments to the Massachusetts Constitution (hereafter Article 97), the Land and Water Conservation Fund (LWCF), Chapter 91, and the Wetlands Protection Act. *(Record, p. 831, 847, 1358)*

The BRA sought a Chapter 91 license allowing it to enclose and expand the current shade structure in the park, in order to construct a late-night restaurant and bar with takeout service and outdoor table service *(Record, p. 38)*. However, the Executive Office of Environmental Affairs (EOEA, now EOEEA) Article 97 Land Disposition Policy *(Record, p. 685)* mandates that, except in exceptional circumstances and then only after an extensive review procedure, the EOEEA and its agencies shall not change the control or use of any right or interest in Article 97 land. The proposed change in the control (by lease) and in the use of the park was, among other substantive procedural deficiencies, not approved by the Legislature.

On or about September 17, 2008, DEP made a Chapter 91 Written Determination *(Record, p. 49)* for the BRA to construct a 4,655 square-foot restaurant and bar in this park. The BRA had also been granted 14 zoning variances by the Boston Zoning Board of Appeals to allow for, among other permissions, live entertainment, take-out service, and food and alcohol service until 1:00 a.m. at the proposed restaurant *(Record, p. 129, 291)*.

On or about October 9, 2008, pursuant to GL c. 30A s. 10A, the plaintiffs, as ten residents of the Commonwealth and of the City of Boston alleging damage to the environment, appealed the DEP's decision to award the BRA the Chapter 91 license *(Record, p. 1)*.

The DEP held a hearing on the appeal on February 24, March 2, and March 9, 2009. On or about January 29, 2010, the DEP issued a final decision *(Record, p. 600)* affirming the grant of the Chapter 91 license for construction of a restaurant and bar. The plaintiffs, who were all parties to the DEP proceeding, are aggrieved by the Department's final decision and, for the reasons set forth below, ask this Court to reverse the decision.

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3. Errors of law

The Final Decision of the Commissioner of the Executive Office of Energy and Environmental Affairs *(Record, p. 600)*, which adopted almost entirely the Recommended Final Decision of the Presiding Officer *(Record, p. 563)*, were based on the following errors of law:

1. The Presiding Officer failed to rule that the BRA-owned shade pavilion on Long Wharf occupies parkland protected by Article 97 of the Amendments to the Massachusetts Constitution and therefore that neither the proposed change of use from parkland to restaurant, nor the proposed change of control by lease from the BRA to a commercial restaurant operator, can take place without first obtaining the affirmative two-thirds vote of each branch of the Massachusetts legislature. (The characterization of the seaward end of Long Wharf as parkland is made on p. 3 of the Secretary's Certificate on the Environmental Notification Form, Record, p. 918, where the DEP is quoted as supporting the project on "public waterfront parkland." Note, however, Article 97 protections are not limited to parkland, and the Plaintiffs' argument on this issue does not depend on a finding that Long Wharf is parkland.) The Presiding Officer did note that a portion of Long Wharf is designated as federally protected under the Land and Water Conservation Fund (LWCF) *(Record, p. 598)*. This statement suggests that the LWCF protection is the sole protection for Long Wharf. This implication is manifestly incorrect, since it ignores once again the protections of Article 97 for the entire site.
2. The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from areas of concentrated public activity and therefore that the project violates the Waterways (Chapter 91) regulations.
3. The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, fails to comply with the Municipal Harbor Plan, and therefore that it violates the Waterways regulations.
4. The Presiding Officer failed to rule that the proposed project encroaches upon the water-dependent use zone and therefore that it violates the Waterways regulations.
5. The Presiding Officer failed to rule that the proposed project does not serve a proper public purpose and therefore that it violates the Waterways regulations.

Each error of law is discussed in the following subsections.

A. Article 97

The Presiding Officer, in her Recommended Final Decision *(Record, p. 563)*, failed to recognize the fundamental role played by Article 97 in the facts and law of this case. She treated the issue summarily in a brief footnote *(Record, p. 568)*, without discussing the facts underlying the Plaintiffs' contention or the Opinion of the Attorney General (the Quinn Opinion) upon which the Plaintiffs' Article 97 argument is based. *Rep.A.G.,Pub.Doc.No.12 (1973), Op.Atty.Gen., June 6, 1973, p. 139; see also Rep.A.G.,Pub.Doc.No.12 (1981), Op.Atty.Gen., March 26, 1981, p. 143, 146*. The Presiding Officer simply adopted, without discussion, the claims of the BRA (a) that the applicability of Article 97 was not within the Presiding Officer's jurisdiction to review, and (b) that Article 97 does not apply to Long Wharf because the BRA took possession of Long Wharf prior to the enactment of Article 97 *(Record, p. 568)*. Both claims fail as a matter of law.

Jurisdiction lay with the Presiding Officer

The BRA's argument as to lack of jurisdiction fails due to three undisputed facts that the footnote ignores:

1. The Massachusetts Executive Office of Energy and Environmental Affairs (EOEEA) assumed jurisdiction of the Article 97 issue when it asked in its Environmental Notification Form whether any part of the project involves conversion of land held for natural resources purposes in accordance with Article 97 of the Amendments to the Constitution of the Commonwealth, to any purpose not in accordance with Article 97 *(Record, p. 683, 823, 825)*. The phrase "land held for natural resources purposes" tracks the language of Article 97 and of the Quinn Opinion (at p. 139–140), which established the standards for interpretation and application of the requirements of Article 97 to proposed changes of use or control of land held for natural resources purposes—such as the proposed Long Wharf project. The Office of the Attorney General continues to view of the Quinn Opinion as a controlling precedent, and applies the Quinn interpretation of Article 97 to the issues raised by the Plaintiffs in this case.

2. Secondly, the EOEEA explicitly assumed jurisdiction of Article 97 issues as to projects within its Chapter 91 jurisdiction as early as February 19, 1998, when it adopted its written Article 97 Land Disposition Policy. The policy opens with the following words:

   > "It is the policy of the EOEA [now the EOEEA] *and its agencies* to protect, preserve and enhance all open space areas covered by Article 97 of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts." *(Record, p. 685; emphasis supplied)*

The Defendant Massachusetts Department of Environmental Protection (the DEP) is an agency within the EOEEA. Therefore, by the adoption of the Policy, the EOEEA has assumed jurisdiction of Article 97 issues for itself and the DEP. Consequently, the Presiding Officer and the Commissioner committed errors of law by not applying the two-thirds Legislative vote requirement of Article 97, along with the stringent procedures of the Policy, as a condition precedent to the issuance of a Chapter 91 License by the DEP for the proposed Long Wharf project.

3. Thirdly, jurisdiction of Article 97 issues is placed directly in the hands of the DEP under the Waterways Regulations, 310 CMR 9.00. There are four "general purposes" of the Waterways Regulations specified in 310 CMR 9.01, one of which refers specifically to Article 97:

   > "[to] foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution." *(310 CMR 9.01(2)(e))*

   The purposes of Article 97 therefore become the purposes of the Waterways Regulations, which the DEP is mandated to apply.

Finally, even if this Court should rule that the Presiding Officer and the Commissioner did not commit an error of law by failing to apply the requirements of Article 97 in their administrative proceeding, the BRA and the DEP have agreed that they may be applied in a judicial proceeding: The BRA and the DEP both argued to the Presiding Officer that "jurisdiction to interpret and apply Article 97 lies with the courts of the Commonwealth" *(Record, p. 458)*. The requirements of Article 97 should be applied in the proceedings now before this Court.

Article 97 applies retroactively

The BRA's second argument adopted by the Presiding Officer in her footnote, that Article 97 does not apply because the BRA took Long Wharf by eminent domain prior to the enactment of Article 97, fails as well.

The question whether Article 97 applies retroactively was directly addressed and answered in the Quinn Opinion of 1973. The House of Representatives had addressed four questions to Attorney General Quinn regarding the provision in the Article requiring that acts concerning the disposition of, or certain changes in, the use of certain public lands be approved by a two-thirds roll-call vote of each branch of the General Court. Question 1 asked specifically whether the provisions,

> "apply to all land and easements held for such a purpose regardless of the date of acquisition, or in the alternative, do they apply only to land and easements acquired for such purposes after the effective date of said Article of Amendment?" *(Quinn Opinion, p. 139)*

The Attorney General's answer was in the affirmative:

> "Indeed all land whenever taken or acquired is now subject to the new voting requirement." (Quinn Opinion, p. 141, see also p. 147)

The Presiding Officer and the Commissioner therefore both committed errors of law in adopting the BRA's second argument denying the applicability of Article 97 to Long Wharf.

Crucial guidance from other agencies not considered

310 CMR 9.53(3)(a) provides that

> "the Department shall take into account *any guidance forthcoming from a state, federal, regional, or municipal agency* as to the extent to which the project will contribute to or detract from the implementation of any specific policy, plan or program relating to, among other things: education; employment; energy; environmental protection; historic or archaeological preservation; housing; industry; land use; natural resources; public health and safety; public recreation; and transportation." (emphasis supplied)

Such guidance includes the EOEA Article 97 Land Disposition Policy *(Record, p. 685–687)*. However, because the BRA on the Environmental Notification Form incorrectly described the project as *not* involving an Article 97 land conversion *(Record, p. 824, 825)*, the stringent standards in the Policy were not applied. The extensive review process mandated in the Policy, which was thereby bypassed, still needs to happen.

Summary of Article 97 argument and request

This is not a case where the Plaintiffs seek a private right of action under Article 97. Cf. *Chase* v. *Trust for Public Land*, 2008 WL 642635 (Mass Land Court March 11, 2008) Rather, the Plaintiffs ask the Court to enforce the EOEEA's own policy regarding Article 97, which the Presiding Officer and the Commissioner, through error, failed to do. The policy contains stringent requirements *(Record, p. 685–687)*, which were not applied by either EOEEA or the DEP. We therefore ask that the Court reverse the Final Decision or, alternatively, order the DEP by way of mandamus under GL c. 249 s. 5 to enforce the Article 97 policy. See Plaintiffs' Complaint, para. 6.

Standing of the Plaintiffs in mandamus is confirmed by the words of Ronan, J., in *Pilgrim Real Estate, Inc.* v. *Superintendent of Police of Boston*, 330 Mass. 250, 251 (1953):

> "The apparent object of the petition is to secure on the part of the [DEP] the performance of a public duty which, if it exists, was owed by [the DEP] to all the citizens. In such a proceeding, the petitioner is a nominal party, for the real party in interest is all the people."

and further at p. 251:

> "It has been frequently decided that where the object of a petition is to procure the enforcement of the law, a petitioner 'without special interest in the subject matter independent of the rights of the public has a standing by reason of his citizenship to maintain a petition for a writ of mandamus to enforce a public duty of interest to citizens generally.'" (Citations omitted.)

B. Damage to water views

The Presiding Officer failed to rule that the proposed project would significantly degrade views of the water from "areas of concentrated public activity" (the phrase used in 310 CMR 9.51(2)(b)).

From almost any location in the park on the end of Long Wharf, visitors now enjoy an approximately 270-degree panorama of Boston Harbor and nearby historic locations. Enclosing and filling the shade structure greatly reduces the zone where the public would enjoy 270-degree panoramas. And in the summer, the additional blockage from the outdoor seating and sun umbrellas shrink that zone to a few meager regions near the water. *(Record, p. 610–615 and also the photographs at 605–609 and 636–637)*

The Defendants try to overcome this problem by stating that the project will enclose the shade structure using windowed walls, a claim adopted by the Presiding Officer in the Recommended Final Decision *(Record, p. 586)*. However, windowed walls surrounding an active restaurant significantly degrade the wide, expansive, see-through views currently available. (The windowed walls are shown on the plan at Record, p. 1297; on the obstructive effect of the windowed walls, as shown in the proponent's own renderings, see Mahajan rebuttal testimony at paras. 58–63, Record, p. 622–623.)

The Waterways regulations require that

> "[i]f the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and

spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site." *(310 CMR 9.51(2))*

The project, however, would create significant incompatibility in design. The paragraph from the regulations continues by explaining what "aspects of built form" constitute such an incompatibility:

"the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity[.]" *(310 CMR 9.51(2)(b))*

On this issue, the Recommended Final Decision *(Record, p. 586)* contains several materially incorrect statement leading to the incorrect conclusion of regulatory compliance. The first incorrect statement is that the "height, scale, and massing" of the building will not change. In fact, the building will be enlarged, thereby changing its scale; and the building will be enclosed, thereby changing its massing *(Record, p. 38)*. The second incorrect statement is that the project does not interfere with the HarborWalk "in any way." In fact, as discussed above, the views from the HarborWalk to the water through the structure will be significantly diminished.

Because the project's proposed nonwater-dependent structure would detrimentally affect views of the water from areas of concentrated public activity, including by greatly diminishing the panoramic vistas offered to the Long Wharf park visitor, on the Harborwalk and elsewhere, the project fails to meet the regulatory requirement of 310 CMR 9.51(2)(b). The contrary finding by the Presiding Officer was an error of law.

C. Failure to comply with Municipal Harbor Plan

The Presiding Officer failed to rule that the proposed project, by requiring zoning variances that are not de minimus, fails to comply with the Municipal Harbor Plan, and therefore that the project violates the Waterways regulations.

Because the proposed project is located in an area covered by the City of Boston Municipal Harbor Plan, the Waterways regulations require that the project comply with the Municipal Harbor Plan *(310 CMR 9.34(2)(a))*. The regulations provide stringent standards before the Department can find compliance with the Municipal Harbor Plan, including that

> "the Department shall not find the requirement [of compliance with the Municipal Harbor Plan] has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of GL c. 91 or 310 CMR 9.00." 310 CMR 9.34(2)(a)(2)

The Municipal Harbor Plan adopts the provisions of Boston Zoning Code (excluding only conditional uses and de-minimus variances). *Secretary's Decision on the Municipal Harbor Plan, Section VI(b), p. 37 [this document is referred to by the Presiding Officer in the Recommended Final Decision (Record, p. 582)].* This project required 14 variances *(Record, p. 659)*, many substantial, from the Boston Zoning Code and therefore from the Municipal Harbor Plan. The variances required include the following:

> "Change the legal occupancy to a restaurant. . . A takeout, allowing outdoor seating and patio use until midnight. Also, allow live entertainment." *(Record, p. 659, City of Boston ZBA hearing notice)*

Here is a further partial subset of the section titles: 'Chapter 91 requirements' (42A-5), 'Open space requirements' (42A-6), 'Waterfront yard area requirements' (42A-7), and 'Environmental protection and safety standards' (42A-9). The Zoning Board of Appeal written decision further describes that it granted variances "from the dimensional, open space, environmental and design requirements cited for the project." *(Record, p. 129, 139)*

Because the project needed substantive variances, the DEP is mandated by the regulations *(310 CMR 9.34(2)(a))* to find that it does not comply with the Municipal Harbor Plan and therefore that it cannot go forward.

D. Encroachment on water-dependent use zone

The project fails because it does not meet the dimensional requirements of the regulations. Specifically, the regulations specify a water-dependent use zone in which "new or expanded buildings for nonwater-dependent use" shall not be located *(310 CMR 9.51(3)(c))*. This zone, shaded in gray on the map provided by the proposed lessee *(Record, p. 36)*, includes a portion of the pavilion proposed for enclosure and expansion. Because the project is a nonwater-dependent use *(Record, p. 49, Written Determination)*, it may not use the water-dependent use zone for new or expanded buildings.

The project, according to the Recommended Final Decision, circumvents this restriction via the Municipal Harbor Plan. The Municipal Harbor Plan indeed provides alternative setback

distances, with which the project is argued to comply. However, as discussed in the Recommended Final Decision *(Record, p. 585)*, the Municipal Harbor Plan distances are applicable only if the project "promotes public use or other water-dependent activity in a clearly superior manner." The Presiding Officer incorrectly found that the project does so *(Record, p. 582, 583, 585)*. A project that changes the use or control of Article 97 land—i.e., of constitutionally protected land—without the constitutionally mandated legislative authorization, cannot reasonably be said to promote public use in a clearly superior manner.

The presumed expertise of the DEP personnel and the Commissioner should not be permitted to override errors in conclusions of fact and of law in this case. See *Cummings* v. *Secretary of Environmental Affairs*, 402 Mass 611, 629 (1988), Abrams, J., dissenting opinion:

> "[P]recluding judicial review on the basis of the Secretary's 'expertise' means that 'administrative expertise will. . . be on its way to becoming 'a monster which rules with no practical limits on its discretion.'" (Citations omitted.)

We should heed Justice Abrams' warning in the *Cummings* case and not take "an unacceptable step toward agency nonaccountability and carte blanche." *Id.*

Failing the clearly superior manner test, the project cannot use the Municipal Harbor Plan's setback distances. Instead, it must meet the dimensional requirements of 310 CMR 9.51(3)(c)—which it does not. Therefore, the project fails to meet the requirements of 310 CMR 9.34(2)(b)(1) and 310 CMR 9.51(3)(c)(2). The contrary finding by the Presiding Officer is an error of law.

E. Failure to serve a proper public purpose

The regulatory requirement is that the project must serve "a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands." *(310 CMR 9.31(2)(b))* After a lengthy discussion of the Transportation Improvement Project, the history and funding of the HarborWalk, and much else, the Presiding Officer found that the project does indeed serve a proper public purpose *(Record, p. 594–598)*. These basic findings of the Presiding Officer are irrelevant to, and do not support, the ultimate finding of proper public purpose. First, the HarborWalk and Transportation Improvement Project already exist, are not part of this project, and therefore cannot be counted among its public benefits. Nominal improvements, such as adding binoculars to the existing amenities on the HarborWalk, do not change this basic fact.

Second, the Recommended Final Decision ignores, once again, the protections of Long Wharf under Article 97 (discussed above). These protections, including their regulatory implementa-

tion through *(310 CMR 9.01(2)(e))* and the Article 97 land-disposition policy, can be altered only through an express act of the Legislature. Changing the control and use of Article 97 land by administrative fiat, without the constitutionally mandated legislative authorization, cannot provide greater benefit than detriment to the rights of the public.

In evaluating the proper-public-purpose requirement, the Waterways regulations explicitly envision taking account of protections such as Article 97. In 310 CMR 9.31(3)(b), the presumptions (based on 310 CMR 9.31(2)) that the project serve a proper public purpose may be overcome if

> "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[.]"

The DEP is responsible for protecting the environment, which is the subject of Article 97. The Article 97 land disposition policy, promulgated by the state's EOEEA (the DEP's parent agency) specifies stringent requirements before the EOEEA or its agencies can support the change of control (by lease) of Article 97 land. Because Long Wharf is protected by Article 97 and because the EOEEA's stringent requirements have not been met, the proposed change would do significant damage to the rights of the public. It therefore cannot serve a proper public purpose. The Presiding Officer's contrary finding is an error of law.

4. Unlawful procedure

The Final Decision *(Record, p. 600)* and the Recommended Final Decision *(Record, p. 563)* were a result of unlawful procedure and therefore should be reversed.

After the close of evidence in the case, Attorney Kenneth P. Fields, who represented the proposed restaurant operator in the proceedings, sent an ex-parte communication *(Record, p. 561)* to the Presiding Officer. This communication was a flagrant and unlawful attempt to influence the Presiding Officer and the outcome of the proceedings, which is expressly prohibited by 310 CMR 1.03(7). The method of contact, coupled with its inaccurate factual content, was highly inappropriate and prejudicial. Attorney Fields's ex-parte communication, by virtue of its content, was an attempt to undermine the neutrality and independence of the Presiding Officer. The ex-parte communication also assumed an outcome favorable to the BRA and restaurant operator.

Of equal concern to the Plaintiffs was the content of the OADR Case Administrator's response *(Record, p. 561)*. Rather than informing Attorney Fields that his communication was inappropriate and would not be responded to, it instead gave him a corrected email address for the

Chief Presiding Officer (Salvatore Giorlandino) and acceded to Mr. Fields's demands by establishing an immediate deadline for the issuance of a decision in a case involving several days of trial, multiple pleadings and memoranda, and a record exceeding over one thousand pages of documentary evidence (submitted at the insistence of the Defendant BRA over the objections of the Plaintiffs). The response from the DEP's Office of Alternative Dispute Resolution gave the impression that Attorney Fields's assumption of a favorable outcome was warranted.

5. Conclusion

The Final Decision, by adopting the Recommended Final Decision almost entirely, must fail because of substantive errors of law: on Article 97, views of the water, compliance with the Municipal Harbor Plan, the water-dependent use zone, and the proper-public-purpose requirement. Permeating the whole case is the failure to recognize and apply the Article 97 requirements. When the public has rights in land, those rights cannot be abrogated except by an express act of the legislature. See *Arno v Commonwealth, 457 Mass 434 (2010)*. The Commissioner's final decision must therefore be reversed and the Permit revoked.

Respectfully submitted,
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by their attorney,

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Dated: August 27, 2010