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& ENGLISH**  
ATTORNEYS AT LAW

October 6, 2011

VIA COURIER/DELIVERY CONFIRMATION REQUESTED

**RECEIVED**

Waterways Regulation Program  
Massachusetts Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

**OCT 06 2011**

**MassDEP**

Attn: Ben Lynch, Program Chief

Leigh A. Gilligan  
Partner  
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Re: Request for Determination of Applicability Submitted  
by Boston Boat Basin, LLC, dated September 16, 2011

Dear Ben:

McCarter & English, LLP  
265 Franklin Street  
Boston, MA 02110-3113  
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F: 617.607.9200  
www.mccarter.com

As you know, McCarter & English, LLP represents Commercial Wharf East Condominium Association ("CWECA") in various matters. We are in receipt of and have reviewed a second Request for Determination of Applicability submitted by Boston Boat Basin, LLC ("Boston Boat") and dated September 16, 2011 ("RDA-2"). Pursuant to 310 C.M.R. 9.06(4), CWECA hereby submits its comments to RDA-2 in order to address issues raised by Boston Boat regarding CWECA's property.

Through RDA-2, Boston Boat seeks to confirm "if the current uses within the Commercial Wharf East building at 84 Atlantic Avenue (hereinafter the "RDA Area"), comply with Chapter 91 regulations." Boston Boat further attaches locus maps and figures to illustrate the RDA Area.<sup>1</sup> See RDA-2, Introduction, §1.0.

**The Department Has Already Reviewed the  
Chapter 91 Status of the RDA Area**

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As the Department is aware, in 2003, in connection with Commercial Wharf East Property LLC's and Wharf Condominium Units, LLC's (entities unaffiliated with CWECA and managed by a private real estate developer, Douglas Freeman) (hereinafter, the "Developer") purchase and redevelopment (including change in use) of approximately fourteen (14) units within the Commercial Wharf building, the Department issued two Unilateral Administrative Orders (UAO-BO-03-6001 and UAO-BO-03-6002), citing alleged violations of Chapter 91. In response, and apparently after consultation with the Department, Fort Point Associates/Jamie

<sup>1</sup> Nothing set forth herein shall indicate CWECA's concurrence or agreement with any of the description, summary or analysis of legislative authorizations, DEP authorizations/licenses or municipal data/authorizations or approvals set forth in Boston Boat's submittals.



Fay,<sup>2</sup> on behalf of the Developer, requested and received approval of a Minor Project Modification on July 14, 2004 (the "Minor Modification"), noting that the Developer's change in use of the subject units from one form of "Facility of Private Tenancy" to another form of private tenancy did constitute a change in use requiring Department authorization. As the Department is also aware, Fort Point Associates' client failed to abide by the requirements of the Minor Modification and CWECA provided details to the Department in prior correspondence (see letter to David Slagle from the Trustees of CWECA dated April 15, 2011 in connection with File No. W11-3232). At the time that the Department's Minor Modification was issued, the Developer had already completed redevelopment of the subject units and was starting to convey them to residential purchasers.

In the Minor Modification, the Department concluded that "the Commercial Wharf building [tantamount to the RDA Area] ... is sited on lawfully filled, private tidelands." The Department noted that the tidelands in question had "been lawfully filled under two legislative authorizations, Chapter 51 of the Acts of 1832, and Chapter 25 of the Acts of 1839," further noting that "no license is required for existing structures located on lawfully filled private tidelands for which there has been no structural alteration or change in use since January 1, 1984." We note that the condominium development occurred in the late 1970s.

Boston Boat's assertion that any alleged changes in use undertaken by individual unit owners on a unit-by-unit basis over the course of thirty years somehow supports an argument to counter the Department's conclusion that the building is, in fact, grandfathered under Chapter 91 is incorrect and entirely inconsistent with Chapter 91, both as written and as implemented. The Department took interest, notice and jurisdiction when Fort Point Associates' client (the Developer) sought to change the use of approximately fourteen units at the same time. Arguably, this change in use was determined by the Department to constitute a "Substantial Change in Use" as defined by the Waterways Regulations inasmuch as 14 of approximately 95 total units were at issue at one time by a single proponent. As you know, "Substantial Change in Use" is defined as "use for a continuous period of at least one year of 10% or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity, whether express or implied."

Any alleged changes in use by individual unit owners one unit at a time over thirty years is not a "substantial change in use" within the meaning of the regulations. Indeed, these alleged prior changes in use would have been known by all at the time of Fort Point Associates earlier application on behalf of the Developer and neither the Department nor Fort Point Associates treated them as anything requiring

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<sup>2</sup> Once again, CWECA finds it alarming that Fort Point Associates is now asserting the various inconsistent positions being posited on behalf of Boston Boat Basin in the multiple filings now in front of the Department.



additional licensure, otherwise the Department would not have issued a Minor Modification. As you know, the use of so-called Minor Modifications is appropriate where the proposed modification to be undertaken is to a "licensed project or a project exempt from licensing pursuant to 310 C.M.R. 9.05(3)(b) through (h) [grandfathering provision noted above is at 310 C.M.R. 9.05(3)(b)]." The Department's issuance of the Minor Modification confirms the Chapter 91 status of the RDA Area. Furthermore, we note the applicable standard for the issuance of the Minor Modification -- "changes of use which maintain or enhance public benefits provided by the project and which represent an insignificant deviation from the original use statement of the license, in terms of function, character, duration, patronage, or other relevant parameters." 310 C.M.R. 9.22(3)(b)

The request by Fort Point Associates is for the Department to reverse its position (and that taken by Fort Point Associates) and look back over the course of three decades to determine if actions undertaken by individual unit owners not within CWECA's control or that of the Department cumulatively and retroactively constitute a substantial change in use although, of course, CWECA remains a predominantly residential building. The suggestion is truly unusual and unprecedented. And, retroactive application where long standing and approved residential use and ownership exist would raise issues of constitutional dimensions. This RDA, together with the earlier one, underscores the very important observation that one must question whether the proponent of this argument simply seeks to use the Department for leverage in Boston Boat Basin's private arguments with CWECA. This is completely inappropriate.

#### **RDA-2 is Another Apparent Pretext for Creating Litigation Leverage in the Land Court Action**

Boston Boat and its owner are presently the subjects of a contempt action in the Land Court Action, and Boston Boat submitted RDA-2 (closely on the heels of a subsequent RDA) after CWECA filed the contempt complaint in the Land Court. Moreover, RDA-2 was prepared by Fort Point Associates, Inc., the same firm that was engaged by the Developer described above. On July 14, 2004, the Department issued the Minor Modification described above to the Developer that required the Developer to construct the South Side Harborwalk (which as of today remains unbuilt).

Although CWECA has been willing to allow a portion of its property to be used to complete the South Side Harborwalk, it has not been completed. Among the primary impediments to construction of the South Side Harborwalk is Boston Boat's refusal to allow a portion of its property necessary for the construction to be used for such purpose. In fact, as recently as August 31, 2011, Fort Point Associates stated in a letter to David Slagle, Program Reviewer of DEP's Division of Wetlands and Waterway Regulations, that construction of the South Side Harborwalk on Boston Boat's property is "simply unacceptable."



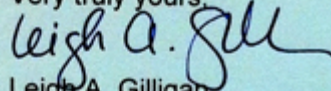
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### Conclusion

There is no factual or legal merit to Boston Boat's assertions in RDA-2 and CWECA strongly questions the use of the RDA process by Boston Boat in this serial manner.

CWECA can be available to meet and answer any questions at the Department's convenience.

Very truly yours,



Leigh A. Gilligan  
LAG/imb

cc: Mr. Joe Collins, CWECA (by mail)  
Ms. Cheryl Delgreco, CWECA (by mail)  
William A. Zucker, Esquire  
Peter Antonelli, Esquire  
Patrick C. Toomey, Esquire  
Fort Point Associates, Attn: Jamie Fay and Richard Jabba (by mail)