COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 10-00802-H

SANJOY MAHAJAN, et al.
Plaintiffs
v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION, and BOSTON REDEVELOPMENT AUTHORITY
Defendants

DEFENDANT BOSTON REDEVELOPMENT AUTHORITY'S REPLY TO PLAINTIFFS' OPPOSITION TO RENEWED MOTION TO DISMISS

NOW COMES Defendant Boston Redevelopment Authority (BRA) in reply to Plaintiffs' Opposition to the BRA's Renewed Motion to Dismiss (Opposition). Plaintiffs claim standing in mandamus based on, *inter alia,* evidence of contracts between government entities from almost thirty years ago. Plaintiffs are not parties to either contract nor are they intended beneficiaries of either contract. Therefore, Plaintiffs do not have standing to enforce either contract.

ARGUMENT

I. Plaintiffs Do Not Have Standing as Incidental Beneficiaries of a Government Contract.

"As a general proposition, public citizens are not intended third-party beneficiaries to government contracts despite the fact that such contracts are usually intended to benefit the public in some way." *Speleos v. BAC Home Loans Servicing, L.P.,* 755 F.Supp.2d 304, 307 (D.Mass 2010) (Gorton, J.). "[B]ecause of 'the complications that would ensue from private enforcement of government contracts by members of the general public,' courts require a

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

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

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

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

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

1. Two maps the LWCF Stateside Grant Manager prepared in February 2009 with the LWCF park boundary line marked. Exhibit B (RA 1214), Exhibit C (RA 1215).

2. March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the Senior Planner of the MassDEP Waterways Regulation Program. Exhibit D (RA 1206).

3. March 4, 2009 correspondence from the LWCF Stateside Grant Manager to the BRA Deputy Director for Waterfront Planning. Exhibit E (RA 1274).

[1] These claims are asserted in Plaintiffs' proposed Amended Complaint, which amendment the BRA opposes by separate motion.

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

Boston Redevelopment Authority
By its counsel

May 3, 2013

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