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102780-04

Delivered By Hand

Mr. Tom Skinner, Director
Massachusetts Office of Coastal Zone Management
251 Causeway Street, Suite 800
Boston, MA 02114

Attn: Deerin Babb-Brott

Re: Lapse of Municipal Harbor Plan For Boston; Development Proposal Advanced
By LDA Acquisition, L.L.C. For Pier 5 In The Charlestown Navy Yard (EOEA
13279)

Dear Mr. Skinner:

It is my understanding that your office is preparing comments on the development proposal advanced by LDA Acquisition, L.L.C. for Pier 5 in the Charlestown Navy Yard for which an ENF was filed on May 18, 2004 (EOEA #13279). In particular, we are writing to address the status of the Boston Municipal Harbor Plan ("MHP"), originally approved by the Secretary on May 22, 1991 with an expiration date of May 22, 1996. It is our belief that the MHP has lapsed due to the Boston Redevelopment Authority's ("BRA") failure to renew the MHP in a timely manner in accordance with the Municipal Harbor Plan Approval Regulations, 301 C.M.R. § 23.00.¹ Therefore, the development of Pier 5 is governed by the Chapter 91

¹ We have reviewed the following documents and correspondence: The Secretary's Decision on City of Boston Request for Approval of the Boston Harborpark Plan pursuant to 301 C.M.R. 23.00 dated May 22, 1991; Letter from the BRA to the Secretary dated April 4, 1996; Letter from the BRA to the Secretary dated April 18, 1996; Letter from the Secretary to the BRA dated June 14, 1996; Letter from the BRA to the Secretary dated May 20, 1997; Letter from the Secretary to the BRA dated June 30, 1997; Letter from the BRA to the Secretary dated October 6, 1997; Letter from the Secretary to the BRA dated February 18, 1998. The Secretary's Decision on the City of Boston's North Station Amendment to The Boston MHP pursuant to 301 C.M.R. 23.00, dated July 29, 1999; The Secretary's Decision on the City of Boston's Charlestown Navy Yard Building 114 Minor Geographic Amendment to The Boston MHP pursuant to 301 C.M.R. 23.00, dated October 21, 1999; The Secretary's issuance of the Notice to Proceed for the Fort Point Downtown Waterfront District Municipal Harbor Plan, dated November 26, 2001; Expanded Environmental Notification Form/Project Notification Form for The Residences at Pier 5 (EOEA No. 13279) submitted by LDA Acquisition, L.L.C. on May 17, 2004.



regulations, which do not permit LDA Acquisition, L.L.C. to construct facilities of private tenancy over flowed tidelands. 310 C.M.R. §§ 9.51(3)(b).

Section 23.06 of the Municipal Harbor Plan Regulations (the "Regulations") specifies that approval of a plan expires on the date stipulated in the Secretary's approval decision, unless a written request from the planning representative of the municipality is received by the Secretary to renew the approval or extend the expiration date. 301 C.M.R. § 23.06(2)(a). The Secretary may extend the original expiration date of the approval for a period not to exceed one year. 301 C.M.R. § 23.06(2)(a). The renewal request must include supporting information regarding the plan's effectiveness in promoting state tidelands policy objectives and other water-related public interests. After a renewal request is received by the Secretary, provisions of the plan must be reviewed in accordance with Section 23.04 in order for the plan to be officially renewed. These review procedures require a public notice and comment period and a public hearing, in which the affected neighborhoods can provide input on the issues of current concern with respect to land use and planning objectives. 301 C.M.R. 23.04(2) and (3). The Secretary is permitted to deny renewal of an approved plan, or portions thereof, if changed circumstances mean that a continued implementation of certain provisions will result in significant detriment to any public interest in tidelands protected by this Chapter. 301 C.M.R. § 23.04(4)(b) and (c).

On April 4, 1996, the BRA requested a one-year extension to submit its renewal of and amendment to the MHP, and clarified this request as a request for a renewal of the MHP in a letter dated April 18, 1996. While the BRA correspondence made no effort to satisfy the submittal requirements set forth in the Regulations, the Secretary subsequently agreed to initiate the renewal process in a letter dated June 14, 1996, and extended the expiration date of the MHP until May 22, 1997. On May 20, 1997, the BRA restated its intent to initiate the renewal process and requested a delay in the renewal process until it had completed its planning objectives to address certain amendments to the MHP. Notwithstanding that the Regulations only authorize the Secretary to extend the expiration date for one year, the Secretary indicated on June 30, 1997 that the renewal process could be initiated by the BRA in October of 1997, after the expiration of the extended expiration date of May 22, 1997. At the same time, the Secretary indicated she would not allow the outdated provisions of the existing MHP, including but not limited to the Yard's End district within the Charlestown Navy Yard, to remain in full force and effect beyond October of 1997. Notable is the fact that the Secretary based this determination on the fact that the underlying premises of the original MHP for the Navy Yard were no longer valid; that is, that the land use components that would have ensured that critical Special Public Destination Facilities, including a new aquarium, were no longer programmed. Without these critical public facilities, the public benefits which would compensate for the loss of public use of Commonwealth Tidelands would not be provided, and the projects in at least the Yard's End district must be evaluated in the context of 310 C.M.R. 9.00.



On October 6, 1997, the BRA submitted a letter indicating that the MHP was still in the process of being redrafted and requesting that the MHP remain in full force and effect in the interim. The BRA also requested that the redrafted MHP be effective for 15 years. In response, in a letter dated February 18, 1998, the Secretary affirmed that the provisions in the MHP, including those relating to the Yard's End portion of the Charlestown Navy Yard, were invalid due to BRA's failure to submit the requested information for renewal and amendment.

Since 1997, the BRA has taken no action whatsoever to fulfill the requirements set forth in the MHP regulations to renew the relevant provisions of the MHP, as they would apply to the Navy Yard. Certainly, there can be no reasonable interpretation of the Regulations that would permit an MHP to remain valid after the one year permissive extension without a substantial documented effort to comply with the renewal requirements of the Regulations. Although we note that the Secretary approved two "amendments" to the MHP in July and October of 1999 for a North Station parcel and the Building 114 Parcel in the Navy Yard, the approvals contain no indications that the Secretary intended the MHP in its entirety, or even that portion applicable to the Navy Yard, to be renewed. These amendments very clearly were intended to apply to discrete geographic areas, which do not include Pier 5. Thus, to the extent that these amendments are valid, their validity would only extend to the two geographic areas encompassed by the amendments. The North Station amendment approved on July 29, 1999 pursuant to 301 C.M.R. § 23.04 and 23.05 simply extends Boston's previously established harbor planning area by 12.3 acres in the North Station area. The Charlestown Navy Yard Building 114 amendment, approved on October 21, 1999 pursuant to 301 C.M.R. § 23.04 and 23.05, incorporates only Building 114 into the planning area. Moreover, on page 1 of the approval of the Charlestown Navy Yard Building 114 amendment, the Secretary refers to the *future* renewal of Boston's MHP. Because the Municipal Harbor Plan Regulations provide that portions of an MHP may be approved at different times, the Secretary's approval of these two amendments does not impact the expired MHP as it relates to Pier 5. 301 C.M.R. 23.05. Since the BRA did not meet the standards for renewal pursuant to 301 C.M.R. 23.04(4)(c), the MHP which covered the Navy Yard expired on May 22, 1997.

It is important to note that in a recent Delaware bankruptcy matter, the applicant, LDA Acquisition, L.L.C. successfully argued that it did not have to make certain cure payments to the BRA under a Land Disposition Agreement for the development of certain property within the Navy Yard because the MHP had expired, pointing out to the Court that it was not ever renewed by the BRA. *In re Competrol Acquisition Partnership, L.P.*, 274 B.R. 362, 379-80 (Bankr. D. Del. 2000). Thus, any assertion by LDA Acquisition, L.L.C. that the 1991 MHP is still in effect is contrary to their position in the bankruptcy case. A copy of this decision is enclosed for your reference.

As you are aware, the MEPA and Article 80 process is time and resource-consuming, and the public interest is best served by suspending the process now if the project is not

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permissible under current regulations. To the extent that a new MHP is proposed for the Navy Yard, the process prescribed by 301 C.M.R. 23.00 must be initiated, and the proposal to allow private condominiums to be built over flowed Commonwealth tidelands evaluated very carefully. It is in this public process that the issue of further privatization of the filled and flowed tidelands in the Navy Yard should be considered by the stakeholders. The integrity of the Regulations can only be maintained by your enforcement of the regulatory process, and your requirement that the City engage in the Harbor Planning process to justify any decision to permit Commonwealth tidelands to be further privatized.

Very truly yours,

Michael A. Leon

cc: Ms. Ellen Roy Herzfelder, Secretary
Commissioner Robert W. Gollidge, Jr., DEP
Ben Lynch, DEP

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