

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, s.s.

SUPERIOR COURT
DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

)
CONSERVATION LAW FOUNDATION, on behalf of itself)
and its adversely affected members, and)
BRADLEY M. CAMPBELL, KATHERINE HACKL, CAROL)
RENEE GREGORY, GORDON HALL, BARBARA MAHONEY,))
DEANNA MORAN, and AJAY SAINI, residents of the)
COMMONWEALTH OF)
MASSACHUSETTS)

Plaintiffs,)

v.)

COMPLAINT

)
)
MATTHEW A. BEATON, in his official capacity as)
SECRETARY OF THE EXECUTIVE OFFICE OF ENERGY)
AND ENVIRONMENTAL AFFAIRS, and)
MARTIN SUUBERG, in his official capacity as)
COMMISSIONER OF THE DEPARTMENT OF)
ENVIRONMENTAL RESOURCES, and)
CRONIN HOLDINGS, LLC.)

Defendants.)

)
INTRODUCTORY STATEMENT

1. This is a civil action in the nature of a declaratory judgment pursuant to G. L. c. 231A, § 1, a petition in the nature of a writ of mandamus pursuant to G.L. 249, § 5, and a request to grant *certiorari* pursuant to G.L. c. 249, § 4, to challenge, mandate, and make other legal determinations regarding certain actions of Matthew A. Beaton, in his official capacity as Secretary (the “Secretary”) of the Executive Office of Energy and Environmental Affairs (“EOEEA”) and Martin Suuberg, in his official capacity as Commissioner (the “Commissioner”)

of the Department of Environmental Protection (“DEP”), concerning the approval of the South Boston Waterfront District Municipal Harbor Plan Renewal and Amendment (“Waterfront MHP Renewal and Amendment”) on December 21, 2016. The Complaint seeks injunctive relief as necessary to prevent irreparable harm to plaintiffs in connection with the challenged and connected agency actions.

2. Plaintiffs, Conservation Law Foundation (“CLF”) in its own right and on behalf of its adversely affected members and seven identified Massachusetts citizens (the “Massachusetts Citizens”), assert that the Secretary’s approval of the Waterfront MHP Renewal and Amendment was a *de facto* and illegal delegation of the Commissioner’s exclusive authority pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91, §§ 14 & 18 (“Chapter 91”) to execute the Commonwealth’s fiduciary duties with respect to public tidelands development. The Secretary’s and the Commissioner’s failure to exercise their independent trust responsibilities pursuant to Chapter 91 are contrary to law and in violation of the Commonwealth’s solemn public trust responsibilities.

3. Plaintiffs request that this Court declare that (i) the Secretary’s failure to uphold Chapter 91 by approving the Waterfront MHP Renewal and Amendment are contrary to law and a violation of the EOEEA’s obligation to ensure that public purposes are achieved in the development of Commonwealth tidelands; (ii) the regulations purporting to give the Secretary authority to determine the public purposes associated with the non-water dependent development and licensing of Commonwealth tidelands are *ultra vires*, and (iii) the Secretary’s approval of the Waterfront MHP Renewal and Amendment is arbitrary, capricious and an error of law.

4. Plaintiffs further request that the Court direct the Commissioner to (i) exercise his non-delegable trust duties to make an independent determination that the Waterfront MHP

Renewal and Amendment achieves proper public purposes as required by Chapter 91; (ii) enjoin the Commissioner from granting a Chapter 91 license or taking any other action with regard to the 150 Seaport Boulevard project described below; and (iii) take such other action as the Court deems proper in order to ensure that the Commonwealth's public trust interests in the Commonwealth tidelands covered by the Waterfront MHP Renewal and Amendment are fully protected.

JURISDICTION

5. This Court has jurisdiction over this matter pursuant to G.L. c. 249, § 4, G.L. 231A, § 1, and G.L. c. 214, § 1.

PARTIES

6. Plaintiff Conservation Law Foundation ("CLF") is a Massachusetts not-for-profit corporation with principal offices located at 62 Summer Street, Boston, MA 02110. CLF brings this action in its own right and on behalf of its adversely affected members.

7. CLF also brings this action on behalf of the following named Massachusetts citizens (the "Massachusetts Citizens"):

- i. Bradley M. Campbell, Boston Massachusetts
- ii. Katherine Hackl, Boston, Massachusetts
- iii. Carol Renee Gregory, Jamaica Plain, Massachusetts
- iv. Barbara Mahoney, Milton, Massachusetts
- v. Gordon Hall, Marblehead, Massachusetts
- vi. Deanna Moran, Boston, Massachusetts
- vii. Ajay Saini, Boston Massachusetts

8. CLF and the Massachusetts Citizens are collectively referred to as "Plaintiffs."

9. Defendant Matthew A. Beaton is the Secretary of the Executive Office of Energy and Environmental Affairs of the Commonwealth of Massachusetts. He is sued in his official capacity.

10. Defendant Martin Suuberg is the Commissioner of the Department of Environmental Protection of the Commonwealth of Massachusetts. He is sued in his official capacity.

11. The Commissioner and the Secretary are collectively referred to as “Defendants.”

12. On information and belief, Cronin Holdings LLC (“Cronin Holdings”) is the owner and developer of the 150 Seaport Boulevard project and is joined as a defendant pursuant to section 8 of G.L. 231A.

FACTS

CLF and Massachusetts Citizens

13. CLF was incorporated and has been dedicated to and actively engaged as an organization and on behalf of its members in matters relating to the public trust doctrine in Massachusetts, Article 97 of the Massachusetts Constitution, and Chapter 91 for most of its 50-year history. Since the 1980s, CLF has worked extensively on public tidelands issues in Massachusetts through direct participation in rulemaking proceedings, commenting on numerous municipal harbor plans and Chapter 91 licenses in Boston Harbor and throughout Massachusetts, attending and participating in public hearings and comment periods on municipal harbor plans, participating in court proceedings concerning Article 97 and Chapter 91 with Massachusetts courts, and challenging tidelands licensing decisions that CLF considered to be contrary to law or regulation.

14. CLF was extensively engaged in its own right and on behalf of its adversely affected members in various procedures that took place in the late 1990s and early 2000s concerning development of the South Boston waterfront, which is the locus of this matter.

15. CLF has also had an extensive historical commitment to cleaning up Boston Harbor and improving use and enjoyment of Boston Harbor for its members and others. For example, CLF was the lead plaintiff in the federal court matter of *CLF v. Metropolitan District Comm'n et al.*, Civil Action No. 83-16145-RGS (later consolidated with *U.S. v. Metropolitan District Comm'n et al.*, Civil Action No. 85-0489-RGS.), a sustained effort over thirty years to clean-up Boston Harbor pollution on behalf of its members, Massachusetts citizens, and tourists.

16. Here, CLF participated on behalf of itself and its adversely affected members in commenting on the Waterfront MHP Renewal and Amendment and filed a petition for reconsideration, which was summarily rejected by the Secretary.

17. CLF files this action in its own right and on behalf of its adversely affected members, who join and support CLF to advance their personal and business interests in ensuring the protection of the public's trust rights in tidelands in Boston Harbor as required by law. These members join and support CLF and support this action to protect their current and future interests in the use of the waterfront public activation and other public benefits protected by Chapter 91.

18. CLF and its adversely affected members have standing to bring this action.

19. Massachusetts Citizens have standing by virtue of their Massachusetts citizenship and their particular interests in tidelands protected by Chapter 91 to challenge actions by the Secretary and the Commissioner and seek to enforce a public duty.

20. Defendants have a fiduciary duty to CLF and the Massachusetts Citizens to carry out their public trust obligations secured by Article 97 of the Massachusetts Constitution, the prior public use doctrine, and Chapter 91.

21. Defendants' failure to exercise, or alternatively, to not properly exercise those fiduciary duties, directly harms CLF, CLF's adversely affected members and the Massachusetts Citizens.

22. The interests of CLF, its adversely affected members and the Massachusetts Citizens are within the zone of interest of Chapter 91 and other relevant statutes applicable here.

The Property History

23. The Waterfront MHP Renewal and Amendment came about as a result of a project proposed by Cronin Holdings to build a 22-story, 250-foot luxury residential condominium building (the "Project") at 150 Seaport Boulevard (the "Property").

24. The Property is currently the site of two restaurants: Atlantic Beer Garden and Whiskey Priest.

25. When the restaurants were built, they were a change in use for the Property from a water-dependent use and structures—a seafood processing facility—to a nonwater-dependent use and structures, the restaurants. This change in use was authorized by the DEP to Cronin Holdings predecessor-in-interest in 1997 subject to Cronin Holdings' predecessor's obligation to secure new Chapter 91 licenses for the changed uses and structures.

26. On information and belief, two licenses were required by DEP for the change in uses and structures on the Commonwealth tidelands. Cronin Holdings' predecessor-in-interest received one such license: No. 6970 which is attached hereto as **Exhibit A** ("Lic. # 6970"). On

information and belief, Cronin Holdings' predecessor-in-interest or Cronin Holdings itself applied for, but never received, the second required Chapter 91 tidelands license.

27. While the private benefits of the use conversion were achieved almost immediately through the opening and operation of the new restaurants, Cronin Holdings' predecessor and Cronin Holdings have never provided the associated public benefits required by Lic. # 6970.

28. Specifically, Cronin Holdings and its predecessor have never built the public harbor walkways condition that mandated a minimum free-and-clear 12-foot distance between the buildings and the water's edge. *See* Lic. # 6970, Special Condition 2.

29. On information and belief, Cronin Holdings and its predecessor have never landscaped and maintained a publicly accessible open space between the restaurants and the relocated Old Northern Avenue. *See* Lic. # 6970, Special Condition 3.

30. Cronin Holdings and its predecessor never made the walkways and public landscaped areas available to the public 24 hours a day. *See* Lic. # 6970, Special Condition 4.

31. Cronin Holdings and its predecessor never constructed the required boat docking facility, consisting of a ramp and floating dock, which was supposed to be in operation within three years of license issuance. Lic. # 6970, Special Condition 6.

32. On information and belief, Cronin Holdings and its predecessor never applied to DEP for relief from Special Conditions 2 or 6 on the grounds of infeasibility or secure approval of alternative public benefits on site. *See* Lic. # 6970, Special Condition 8.

33. On information and belief, Cronin Holdings has never received the second Chapter 91 license apparently required for the restaurant use conversions at the Property and, therefore, may be operating the restaurants without a valid Chapter 91 license.

The Project

34. On December 21, 2015, Cronin Holdings initiated the Boston regulatory process for zoning and related approvals for the Project, which subsequently became the primary focus of the Waterfront MHP Renewal and Amendment. Cronin Holdings' Letter of Intent proposed a 22-story, 250-foot building made up of luxury residential condominiums and restaurant space. Attached as **Exhibit B** is a true and correct copy of said Letter of Intent.

35. The Project will occupy roughly 75% of the Commonwealth tidelands and will only be set back ten feet from the shoreline. The Project also proposes a public walkway from the Property to Commonwealth Pier to the east. Later in the process set forth below, the developer added a new pile-supported deck on the water side of the building that would cover roughly 5,000 square feet of currently open water.

36. On January 4, 2016, only fourteen days after receipt of that Letter of Intent, which also included two major holidays, the Boston Planning and Development Agency ("BPDA") (formerly the Boston Redevelopment Authority) submitted a request to renew and amend the South Boston Waterfront District Municipal Harbor Plan ("Waterfront MHP") to the Office of Coastal Zone Management ("CZM") of the EEOA.

37. In the Notice to Proceed with the municipal harbor plan amendment process to the BPDA issued by CZM on February 4, 2016, CZM Director Bruce Carlisle specifically noted that development of the Project was not proposed in or covered by the underlying Waterfront MHP and was not covered by any of the substitute or offset provisions contained therein, which had been previously approved by former EOEEA Secretary Robert Durand on December 6, 2000. A true and correct copy of the Notice to Proceed is attached as **Exhibit C**.

38. For the next approximately four months, various meetings and public hearings were convened by the BDPA in conjunction with the Project. While the municipal harbor plan renewal aspects of the submitted plan covered broader topics that affirmed and expanded on information in underlying Waterfront MHP, the Project was the sole focus of the Waterfront MHP Renewal and Amendment. *See Exhibit C.*

39. On June 15, 2016, the BDPA submitted the Waterfront MHP Renewal and Amendment to the Secretary and CZM pursuant to 301 C.M.R. § 23.04. BDPA sought approval of the Project and for renewal of the underlying Waterfront MHP.

40. A public comment period on the Waterfront MHP Renewal and Amendment was held between June 22 and July 22, 2016. CLF submitted comments on behalf of itself and its members during the public comment period and provided oral testimony at a public hearing on the proposed renewal and amendment on July 19, 2016. Attached hereto as **Exhibit D** is a true and correct copy of said filed comments.

41. At the close of the public comment period and on information and belief, CZM and the state ran an internal consultation process on the Waterfront MHP Renewal and Amendment. Three extensions to the deadline for the state consultation process were requested by the BDPA, running ultimately until December 9, 2016.

42. On November 23, 2016, the BDPA submitted supplemental information to CZM. A public comment period on the supplemental information was held between November 23 and December 9, 2016. CLF submitted comments on its own behalf and that of its members during this supplemental comment period. Attached hereto as **Exhibit E** is a true and correct copy of said supplemental comments.

43. Secretary Beaton published his decision approving the Waterfront MHP Renewal and Amendment on December 21, 2016. Attached as **Exhibit F** is a true and correct copy of the Secretary's approval decision.

44. CLF filed a timely petition for reconsideration on behalf of itself and its members of the decision with the Secretary pursuant to the municipal harbor planning regulations, 301 C.M.R. § 23.04(5), on January 11, 2017. Attached as **Exhibit G** is a true and correct copy of said petition.

45. The Secretary denied CLF's petition for reconsideration on February 1, 2017. Attached as **Exhibit H** is a true and correct copy of the Secretary's denial.

46. On February 17, 2017, CLF initiated this timely action requesting various forms of relief from the Secretary's decision.

Chapter 91 and Regulations

47. Pursuant to its authority under Chapter 91, section 18, DEP developed tidelands licensing regulations, which are found at 310 C.M.R. § 9.01-.55 ("Tidelands Regulations"). These regulations implement the public trust purposes of Chapter 91.

48. Section 14 of Chapter 91 provides in pertinent part as follows:

- i. Except as provided in section eighteen [of Chapter 91], no structures or fill may be licensed on private tidelands or commonwealth tidelands unless such structures or fill are necessary to accommodate a water dependent use....

49. Section 18 of Chapter 91 provides in pertinent part as follows:

- ii. No structures or fill for nonwater dependent uses of tidelands ... may be licensed unless a written determination by [DEP] is made after 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....

50. Chapter 91 gives DEP the sole statutory power to promulgate regulations implementing the Public Waterfront Act. G.L. c. 91, § 18.

51. DEP's Tidelands Regulations provide explicit and extensive regulatory standards for the licensing of any fill or structures on tidelands. DEP identified the requirements, numerical and other standards as the *minimum* requirements applicable to such development on tidelands. *E.g.*, 310 C.M.R. § 9.51 & 9.52.

52. The statutory objective served by the Tidelands Regulations is ensuring that the proposed fill or structures serve proper public purposes and that the public benefits outweigh the public detriments as required by sections 14 & 18 of the Massachusetts Public Waterfront Act.

53. Fundamental to and repeatedly embedded in the text of the Tidelands Regulations is the principle that “[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.” 310 C.M.R. § 9.51.

54. The public has a maximum trust interest in Commonwealth tidelands, which are lands that are currently or formerly below the mean low water line.

55. Commonwealth tidelands must be used for proper public purposes unless the General Court has properly extinguished the public interests in those tidelands.

56. The General Court has not extinguished the public interests in the Commonwealth tidelands located at the Project site.

57. With an exception addressed below at paragraphs 62-67 , there is a conclusive presumption in the Tidelands Regulations that the minimum standards for preserving capacity for water-dependent uses on sites cannot be met if, *inter alia*:

- i. a new nonwater-dependent building is located within the 25-foot water-dependent use zone (“WDUZ”) for a project that is not on a pier or wharf, 310 C.M.R. 9.51(3)(c)(1);
- ii. a new nonwater-dependent building occupies more than 50% of the tidelands within the project site landward of the project shoreline, 310 C.M.R. 9.51(3)(d); or
- iii. a new nonwater-dependent building exceeds 55 feet in height within 100 feet of the high water mark, 310 C.M.R. § 9.51(e).

58. The Project, described in paragraphs 34 & 35 above, is significantly non-conforming with respect to all these minimum regulatory standards.

59. The Tidelands Regulations further provide significant additional limitations and mandatory requirements for nonwater-dependent developments like the Project that are located on Commonwealth tidelands. Those projects must “...*ensure* that private advantages of use are not primary but are incidental to the achievement of public purposes.” 310 C.M.R. § 9.53 (emphasis added).

60. To accomplish this objective, such nonwater-dependent projects “shall attract and maintain substantial public activity *on the site* on a year-round basis....” 310 C.M.R. § 9.53(2)(emphasis added). Minimum regulatory requirements to meet this standard include providing at least one facility promoting water-based activity such as “ferries, cruise ships, water shuttles, public landings and swimming /fishing areas, excursion charter/rental docks, and community sailing centers[;]” 310 C.M.R. § 9.53(2)(a), and providing an “exterior public open space for active or passive public recreation such as parks, plazas, and observation areas....[;]”

such areas shall include related pedestrian amenities such as lighting and seating facilities, ... and children's play areas." *Id.*

61. The Project at issue here has no public facilities promoting water-based activities and no active or passive public recreation areas with related amenities, even though the prior Chapter 91 license issued for this site has required such facilities and areas since approximately 2000.

Limited Exemptions from Public Waterfront Act & Tidelands Regulations

62. DEP's Tidelands Regulations provide that a municipal harbor planning process can be used to provide limited alternative regulatory criteria to the regulatory criteria in the Tidelands Regulations.

63. Pursuant to this process, if the Secretary of EOEEA approves a harbor plan submitted by a municipality that modifies those Tidelands Regulations criteria, DEP "shall apply" the alternative use limitations and numerical standards in the municipal harbor plan as a substitute for the respective limitations set forth in the Tidelands Regulations. 310 C.M.R. § 9.34(2)(b).

64. DEP has no jurisdictional authority over a municipal harbor plan and no discretion to reject a project that conforms to the alternative municipal harbor plan criteria.

65. The Secretary can only approve a municipal harbor plan with alternative use limitations and numerical standards if the Secretary determines that the plan:

- i. "specifies alternative setback distances and other requirements which ensure that new buildings of 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...[;]” 310 C.M.R. § 9.51(3)(c)(emphasis added),

- ii. “specifies alternative site coverage ratios and other requirements which ensure that, in general, buildings for nonwater- dependent use will be relatively condensed in footprint, in order that an amount of open space commensurate with that occupied by such buildings will be available to accommodate water-dependent activity and public access associated therewith...[;] 310 C.M. R. § 9.51(3)(d),
- iii. “specifies alternative height limits and other requirements which ensure that, in general, such buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of ground level environment will be conducive to water-dependent activity and public access associated therewith...[;]” 310 C.M.R. § 9.513(e), and
- iv. “specifies alternative requirements for public outdoor recreational facilities that will establish *the project site* as a year-round locus of public activity in a comparable and highly effective manner....” 310 C.M.R. § 9.53(2)(b)2(emphasis added).

66. Chapter 91 does not authorize or empower any entity apart from the DEP to make determinations delated to achieving the purposes of sections 14 and 18 of Chapter 91.

67. The Secretary’s approval of the Waterfront MHP Renewal and Amendment, however, amounts to a *de facto* amendment to the Tidelands Regulations,

yet DEP has no authority under those regulations to act inconsistently with the Waterfront MHP Renewal and Amendment requirements in any subsequent Chapter 91 licensing process.

The Secretary's Approval of the Waterfront MHP Renewal and Amendment

68. All parts of the Project identified in the Waterfront MHP Renewal and Amendment lie on current or former Commonwealth tidelands. The 22-story, 250-foot building approved as part of the Project comprises restaurant, and residential uses and is a nonwater-dependent use of and structure on Commonwealth tidelands.

69. Accordingly, in approving the Waterfront MHP Renewal and Amendment, the Secretary was obligated to determine and demonstrate that the substitute regulatory provisions applicable to the Project in the plan met the Chapter 91 regulatory requirements that would otherwise prohibit 150 Seaport Boulevard with “comparable or greater effectiveness.” *E.g.*, 310 C.M.R. § 9.51(3).

70. Contrary to his obligations, the Secretary approved a number of alternative regulatory criteria applicable to future licensing of 150 Seaport Boulevard that are not comparably effective to the standards in the Tidelands Regulations, including:

i. authorizing a water-dependent use zone (WUZ) at the Property that is a maximum of ten feet, instead of the regulatory minimum of 25 feet for a property that is not on a pier or a wharf;

ii. authorizing a building that occupies roughly 75% of the site instead of the regulatory maximum of 50% of the site, a 50% expansion of the private footprint of the building;

iii. authorizing a building height of 250 feet instead of the regulatory maximum building height of 55 feet;

iv. authorizing a building height that will put public open water and public benefits being developed on the adjacent Pier 4 development in shadow for significant portions of time;

v. authorizing a nonwater-dependent use on these Commonwealth tidelands that specifically exempts the developer from providing any facilities that promote water-based public activities even those previously required by DEP and that actually increased the public detriments by authorizing a new 5,000 square foot deck to be built over open water;

vi. authorizing a nonwater-dependent use on these Commonwealth tidelands that specifically exempts the developer from providing the open spaces dedicated to active or passive public recreation that include the providing and maintenance of on-site pedestrian amenities such as those listed in the Tidelands Regulations; and

vii. authorizing a nonwater-dependent use on these Commonwealth tidelands that specifically exempts the developer from providing public facilities and activities on the site that will attract and maintain substantial public activity on a year-round basis as required by the Tidelands Regulations.

71. The Secretary's approval of the Waterfront MHP Renewal and Amendment provides no reasoned analysis that could withstand even minimal scrutiny with respect to the critical regulatory test of "equivalent or greater effectiveness."

72. Among the improper factors the Secretary relied on in reaching his decision were: (i) the current conditions of the Property and including the lack of public access without noting the substantial non-compliance with the Property's current tidelands license noted above, (ii) the

proposed building architecture, (iii) the proposed public way which was already required by License No. 6970, and (iv) the 600 square-foot building reduction (roughly 4% at ground level but not above ground level which cantilevers outward) to allow the small 10-foot setback from the project shoreline. *See Exhibit F at 16.*

73. The sole public benefits required by the Secretary in return for the extraordinary private benefits the Project will receive by virtue of the approval are:

- i. \$1.5 million to be paid toward construction of Martin's Park near the Children's Museum, which in and of itself does not create any new compensatory public open space as it is largely already funded by private and municipal contributions and which is not in any way proximate to the Property;
- ii. an interior "public waiting area and reception space ... within the general lobby areas" of the 150 Seaport Boulevard building that has public amenities like seating, tables, free Wi-Fi, information on water transportation, and local artwork. No minimum dimensions for this "public space" in the lobby to the residences is specified (*See Exhibit F at 18 and 22*);
- iii. a ten-foot walkway around the building instead of a minimum 12-foot walkway that is an already mandatory Chapter 91 license requirement at this site since 1997; and
- iv. a new 5,000 square foot deck "amplification" covering currently running ocean water that is not designed or intended for water-based activities, even though public boating facilities have already been a mandatory Chapter 91 license requirement at this site since 1997.

74. The new approved 5,000 square foot deck over Boston Harbor has no public facilities or amenities, nor a prohibition against the restaurants at the Project using the deck for outdoor seating.

75. Contrary to Chapter 91 and the Tidelands Regulations, the Secretary provided no demonstration that private benefits are not the primary purpose of these substitute regulatory provisions or that the value of the public benefits being approved is in any way proportional to the significant economic value of the private benefits being conferred by the substitute provisions.

76. On information and belief, the private profits being granted to Cronin Holdings through the Secretary's approved new regulations applicable for development at this site exceed the monetary value of the public benefits being required by potentially more than two orders of magnitude.

77. The Secretary's action approving the Project--a nonwater dependent use and structure--unreasonably diminishes the capacity of the Property to accommodate water-dependent uses.

78. The Waterfront MHP Renewal and Amendment modifying the Chapter 91 license terms applicable to the Project amounts to a *de facto* amendment of the Tidelands Regulations, without comparable procedural protections ensuring adequate public notice, public participation, or public appeal rights that otherwise would be applicable to the provisions of any Chapter 91 license as set forth in 310 C.M.R. § 9.13.

79. The Secretary, in making *de facto* amendments to the Tidelands Regulations, did not provide for public notice or comment for his proposed changes to the Tidelands Regulations included in the Waterfront MHP Renewal and Amendment.

80. The Secretary, in making *de facto* amendments to the Tidelands Regulations, did not provide a small business report with his proposed changes to the Tidelands Regulations included in the Waterfront MHP Renewal and Amendment as required by law.

81. On information and belief, the Secretary did not publish the proposed changes to the Tidelands Regulations included in the Waterfront MHP Renewal and Amendment in the Massachusetts Register as required by law.

82. On information and belief, the Secretary, in making *de facto* amendments to the Tidelands Regulations, did not provide a fiscal statement to the Secretary of State on his proposed changes to the Tidelands Regulations included in the Waterfront MHP Renewal and Amendment as required by law.

83. The Secretary, in making *de facto* amendments to the Tidelands Regulations, did not provide notice or an opportunity for an aggrieved person to challenge his proposed changes to the Tidelands Regulations included in the Waterfront MHP Renewal and Amendment as required by law.

COUNT I (DECLARATORY JUDGEMENT, G.L. C. 231, § 1)

84. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 83 above.

85. There is an actual controversy between the parties as to their respective rights and duties and in particular as to the legality of DEP's regulatory delegation of its statutory obligation to determine whether proper public purposes and other Chapter 91 requirements to the Secretary.

86. Delegation of DEP's statutory responsibility to develop regulations implementing the public trust and public benefits requirements of Chapter 91 for development of a nonwater-

dependent project on Commonwealth tidelands to the Secretary of EOEEA without retaining approval oversight is *ultra vires* and exceeds DEP's statutory authority.

87. No other permit, approval or condition can correct the Secretary's unlawful variance of the requirements and numerical standards contained in the Tidelands Regulations.

88. CLF, its adversely affected members, and the Massachusetts Citizens have exhausted their administrative remedies and joined all necessary parties to this action.

89. The errors of law committed by EOEEA and the DEP in making this delegation are harmful to the rights and interests of the public, including Plaintiffs' rights and interests in their use and enjoyment of public tidelands.

90. A declaratory judgment is necessary to protect the public interest and the rights and interests of Plaintiffs.

COUNT II (CERTIORARI, G.L. C. 249, § 4)

91. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 90 above.

92. The Project is a nonwater-dependent use located wholly on Commonwealth tidelands within the meaning of Chapter 91 and the Tidelands Regulations.

93. If the Court concludes that the DEP had the statutory power to delegate its fiduciary responsibilities to the Secretary to ensure that development in Commonwealth tidelands serves a proper public purpose and the public benefits outweigh the public detriments, the Secretary erred in determining that the Waterfront MHP Renewal and Amendment was consistent with the Tidelands Regulations and policies.

94. The Secretary's action approving a municipal harbor plan that creates alternative Chapter 91 regulatory requirements is a proceeding to which certiorari is available under G.L. c.

249, § 4. There is no other forum or avenue for appeal of the broad variance of dimensional and other Tidelands Regulations public benefits requirements approved by the Secretary.

95. The Secretary's determination that the public benefits provided by the Project exceed the public detriments created by the Project is fundamentally and arbitrarily inconsistent with other municipal harbor plan approvals.

96. The Secretary erred in determining that the minimum water-dependent use zone from the shoreline under the Tidelands Regulations is only 10 feet as the Property is not on the sides of a pier or a wharf.

97. The Secretary erred by relying on legally irrelevant factors by comparing the Project to the current non-conforming restaurant/bar uses of and structures on the Property.

98. The Secretary erred by allowing the BDPA to abuse the municipal harbor planning amendment process by approving the Waterfront MHP Renewal and Amendment, which is the equivalent of "spot zoning," i.e., it establishes development rules and requirements that solely benefit Cronin Holdings and the Project and which are inconsistent with the public trust approaches taken elsewhere in the underlying Waterfront MHP or, on information and belief, in any other municipal harbor plans previously approved.

99. The Secretary erred in denying Plaintiffs' Petition for Reconsideration, which was well-found and identified fundamental errors in the decision.

100. The Secretary's approval of the Waterfront MHP Renewal and Amendment and refusal to act on CLF's Petition for Reconsideration was arbitrary, capricious, and constitutes an error of law.

101. Plaintiffs will suffer irreparable harm if the Secretary's approval is permitted to stand and the Project is licensed on Commonwealth tidelands pursuant to the terms of the Waterfront MHP Renewal and Amendment.

COUNT III (MANDAMUS G.L. C. 249, § 5)

102. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 101 above.

103. The Secretary and the Commissioner owe a mandatory statutory fiduciary duty to CLF, CLF's members, and the Massachusetts Citizens to ensure that proper public purposes are achieved in any approval of a nonwater-dependent project on Commonwealth tidelands.

104. The Secretary and the Commissioner have not carried out this duty in a statutorily lawful way by delegating significant elements of the proper public purpose determination and the public benefits/public detriments balancing to the Secretary through the municipal harbor planning regulations.

105. The Commissioner is bound by the actions of the Secretary approving exemptions from the dimensional and other Tidelands Regulations criteria and requirements in any subsequent Chapter 91 licensing procedure and can only take licensing action consistent with those alternative regulatory requirements.

106. Such delegation prevents the Commissioner from carrying out his mandatory, statutory duties to CLF and its members and Massachusetts Citizens with respect to the Project's compliance with section 18 of Chapter 91.

107. In the context of the Project, such failure by the Secretary and the Commissioner to carry out their mandatory duties has resulted in a public trust property being largely and illegally converted to private use and control.

108. There is no other available remedy to protect Plaintiffs' rights or to compel appropriate action by the Secretary or the Commissioner to conform the municipal harbor planning procedures in the Tidelands Regulations to Chapter 91's legal requirements.

109. Without issuance of a writ of mandamus to the Secretary and the Commissioner to execute their responsibilities under the Chapter 91, CLF and its adversely affected members and Massachusetts Citizens will be irreparably harmed.

110. Without issuance of a writ of mandamus to the Secretary and the Commissioner, there will be a failure of justice and a loss of the use and enjoyment of public Commonwealth tidelands to which Plaintiffs have a constitutionally recognized right under Article 97 of the Massachusetts Constitution.

COUNT IV (DECLARATORY JUDGEMENT re ILLEGAL RULEMAKING G.L.

C. 30A, §§ 3, 5-6, 7)

111. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 110 above.

112. The Secretary's approval of the Waterfront MHP Renewal and Amendment has general and future effect, *inter alia*, for all Chapter 91 licensing proceedings and decisions pursuant to sections 14 and 18 of Chapter 91 involving the water- and nonwater-dependent development activities in the area covered by the municipal harbor plan.

113. The Secretary's approval of the Waterfront MHP Renewal and Amendment constitutes the adoption of a new policy with respect to public tidelands development that substantially alters the rights and interests of regulated parties as well as the general public.

114. The Secretary's approval of the Waterfront MHP Renewal and Amendment is binding on DEP in exercising its fiduciary duties ensuring that all licensed development on

jurisdiction public tidelands serves proper public purposes and that the public benefits produced by the proposed development outweigh the public detriments.

115. The Secretary's approval of the Waterfront MHP Renewal and Amendment under the auspices of 301 C.M.R. 23.00 was a regulation applicable to and binding for Chapter 91 licensing within the area of the municipal harbor plan.

116. The Secretary's approval of the Waterfront MHP Renewal and Amendment was not promulgated in a manner consistent with the Massachusetts Administrative Procedures Act, G.L. c. 30A ("APA"), with respect to notice and comment on the proposed action, preparation of a small business report, publishing in the Massachusetts Register, providing a fiscal statement, and providing notice and opportunity to appeal.

117. Any rulemaking actions undertaken by any agency in Massachusetts that are not promulgated in compliance with the provisions of the Massachusetts APA are null and void.

118. The Secretary's approval of the Waterfront MHP Renewal and Amendment is null and void and must be vacated as an improper rulemaking.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

- 1) Enter a judgement that Defendants Beaton and Suuberg lack authority to vary the requirements of the Chapter 91 or bind DEP's licensing actions under section 18 of Chapter 91 through a municipal harbor planning process controlled by the Secretary;
- 2) Enter a judgement that Defendants Beaton and Suuberg lack authority and have acted *ultra vires* by taking actions that result in DEP's relinquishing, delegating, or otherwise assigning DEP's fiduciary duties to determine whether projects on

Massachusetts tidelands meet the requirements of sections 14 & 18 of the Public Waterfronts Act to the Secretary;

- 3) Enter a judgement that Defendant Beaton's approval of the Waterfront MHP Renewal and Amendment is null and void and vacated to the extent that it alters in any respect the requirements of Chapter 91, the Tidelands Regulations otherwise applicable within the municipal harbor planning area, or DEP's fiduciary duties under Chapter 91 in licensing projects on jurisdictional tidelands within the municipal harbor planning area;
- 4) Enter a judgement declaring all regulations within the Tidelands Regulations that purport to delegate actions or fiduciary responsibilities DEP has under Chapter 91 to Defendant Beaton null and void and vacating Secretary Beaton's approval of the Waterfront MHP Renewal and Amendment;
- 5) Enter a judgment invalidating the Secretary's approval of the Waterfront MHP Renewal and Amendment as null and void for failure to provide and follow appropriate G.L. § 30A procedures;
- 6) Issue injunctive relief prohibiting Defendant Suuberg from undertaking any Chapter 91 licensing with respect to the Project or any other development within the Waterfront MHP Renewal and Amendment that applies the substitute and alternative regulatory provisions modifying the Tidelands Regulations and as otherwise necessary to prevent irreparable harm to CLF, its adversely affected members, or Massachusetts Citizens;
- 7) Issue a writ of mandamus directing Defendant Suuberg to immediately commence regulatory proceedings to vacate and remove 310 C.M.R. § 9.34(b)

and any other related municipal harbor planning provisions from the Tidelands Regulations; and

- 8) Grant such other relief as may be just and equitable.

Respectfully submitted,

Conservation Law Foundation

Massachusetts Citizens

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