

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, s.s.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 17-0504-E

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, DOUGLAS I. FOY, ANDREW JOHN
FALENDER and AJAY SAINI,
residents of the COMMONWEALTH OF MASSACHUSETTS

Plaintiffs,

v.

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.

AMENDED
COMPLAINT

INTRODUCTORY STATEMENT

1. This is a civil action in the nature of a declaratory judgment pursuant to G. L. c. 231A, § 1, a declaratory and equitable action pursuant to G.L. c. 214, § 7A, 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 damage to the environment and irreparable harm to plaintiffs in connection with the challenged and connected agency actions.

2. Plaintiff Conservation Law Foundation (“CLF”), in its own right and on behalf of its adversely affected members and nine identified Massachusetts citizens and taxpayers (the “Massachusetts Citizens”), asserts 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, in violation of the Commonwealth’s solemn public trust responsibilities, and improperly impair tidelands, which are protected natural resources of the Commonwealth.

3. Plaintiffs request that this court declare that (i) the municipal harbor planning 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*; (ii) the *ultra vires* delegation of regulatory licensing authority under G.L. c. 91 to the Secretary by the Commissioner constitutes damage to the environment; (iii)

the Secretary's failure to uphold Chapter 91 by approving the Waterfront MHP Renewal and Amendment is contrary to law and a violation of the EOEEA's obligation to ensure that public purposes are achieved in the development of Commonwealth tidelands; and (iv) 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 as part of a Chapter 91 licensing process 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 that is based in whole or in part on the municipal harbor planning process or its results; and (iii) take such other legal and equitable 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 & 2; G.L. c. 214, § 1; and G.L. c. 214, 7A. CLF directed a notice of the environmental damage alleged herein on behalf of its ten domiciled Massachusetts members to the Commissioner and Secretary pursuant to G.L. c. 214, 7A, by certified mail on February 17, 2017, 21 days prior to filing this amended complaint. CLF has not received a response to that notice.

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, including more than ten members of CLF domiciled in Massachusetts.

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. Douglas I. Foy, Boston, Massachusetts
- viii. Andrew John Falender, Lincoln, Massachusetts
- ix. Ajay Saini, Boston Massachusetts

8. CLF, its adversely affected members, 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 specific 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 taxpayer status to enforce by writ of mandamus the Commissioner's public duties to them as citizens as well as the Massachusetts public in general under Chapter 91.

20. Defendants have a fiduciary duty to CLF and its adversely affected members and to 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 and irreparably harms CLF, CLF's adversely affected members, CLF's ten Massachusetts-domiciled members, and 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. The Property is wholly located on former Commonwealth tidelands.

26. On information and belief, the two restaurants, in whole or in part, are located on two formerly separate waterfront properties. Atlantic Beer Garden is located on a property identified as 146-148 Seaport Boulevard, formerly 146-148 Northern Avenue, and on information and belief was formerly owned by CK Realty Trust or Haynes Realty Trust ("Atlantic Beer Garden site"). Whiskey Priest is currently located on a property formerly known as 150 Seaport Boulevard, formerly 150 Northern Avenue. On information and belief, the Whiskey Priest site was formerly owned by Paul's Lobster Company ("Whiskey Priest site").

27. On information and belief, the two restaurants were built around 1997-1998 and were changes in use for the Property from the pre-existing water-dependent uses and

structures—seafood processing and related facilities—to nonwater-dependent uses and structures, the restaurants.

28. Two tidelands licenses, one for each site, were required for the changed uses and new structures under the Tidelands Regulations.

29. Cronin Holdings' predecessors-in-interest applied for and received a G.L. c. 91 tidelands license for the conversion of the Whiskey Priest site to nonwater-dependent uses: Waterways Lic. No. 6970, a true and correct copy of which is attached hereto as **Exhibit A** ("Lic. # 6970").

30. On information and belief, other of Cronin Holdings' predecessors-in-interest applied for and received a written determination from the DEP approving the second required Chapter 91 tidelands license for the Atlantic Beer Garden site but the final Chapter 91 license was not and has never been issued and recorded for that site. A true and correct copy of the 1997 written determination is attached hereto as **Exhibit B** ("Written Determination").

31. On information and belief, the Atlantic Beer Garden site Chapter 91 license proceedings subsequent to receiving the DEP Written Determination were suspended by Cronin Holdings' predecessor-in interest during the pendency of wetland permit appeal filed by an abutter. The petitioner of that wetland permit appeal voluntarily withdrew that appeal in December 2015.

32. On information and belief, there is not now and there has never been a Chapter 91 license issued for the Atlantic Beer Garden site as required by DEP regulations and Chapter 91 and its predecessors.

33. While the private benefits of the use conversion started accruing almost immediately through the opening and operation of the new restaurants, Cronin Holdings' predecessors-in-interest and Cronin Holdings have not provided the associated public benefits required by Lic. # 6970 or by approved in the Written Determination.

34. Specifically, Cronin Holdings and its predecessors-in-interest have never complied with the license and the written determination conditions that mandated the construction and maintenance of a harbor walk on the water side of the restaurants with a minimum free-and-clear 12-foot distance between the buildings and the water's edge. *See Lic. # 6970, Special Condition 2; Written Determination, Special Condition 1.*

35. Cronin Holdings and its predecessors-in-interest have never landscaped and maintained the public open spaces between Northern Avenue and the Whiskey Priest or the Atlantic Beer Gardens sites, as required. *See Lic. # 6970, Special Condition 3; Written Determination, Special Condition 2.*

36. Cronin Holdings and its predecessors-in-interest have never constructed or operated the required year-round boat docking facilities, i.e. the ramps, the 12-foot floating docks, and the transitory and excursion boat tie-up facilities which were required in connection with the harbor walk on the water side of both restaurants. *See Lic. # 6970, Special Condition 6; Written Determination, Special Condition 5.*

37. On information and belief, Cronin Holdings and its predecessors-in-interest have never applied to DEP for relief from any of these substantial public benefits on the grounds of infeasibility or secure approval of alternative public benefits on site, an option made available

under the license and the Written Determination. See Lic. # 6970, Special Condition 8; Written Determination, Special Condition 7.

38. The structures and uses on the Atlantic Beer Garden site are illegal in that they are not authorized by a valid Chapter 91 license as required by Chapter 91 and DEP's implementing regulations.

39. The structures and uses on the Whiskey Priest site are illegal because they are in substantial and fundamental non-compliance with Lic. #6970.

The Project

40. 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 C** is a true and correct copy of said Letter of Intent.

41. The Project will occupy roughly 75% of the Commonwealth tidelands on site 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. On information and belief, this new deck is in addition to the 3,600 square feet of watersheet to the east of the Project that will be covered up by the so-called "Massport Wharf" to be constructed between the Project and Commonwealth Pier.

42. 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.

43. 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 EOOEA Secretary Robert Durand on December 6, 2000. A true and correct copy of the Notice to Proceed is attached as **Exhibit D**.

44. 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 D.

45. 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.

46. 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 E** is a true and correct copy of said filed comments.

47. 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.

48. 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 F** is a true and correct copy of said supplemental comments.

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

50. 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 H** is a true and correct copy of said petition.

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

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

Chapter 91 and Regulations

53. 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....

54. 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....

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

56. 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.

57. 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.

58. 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 Chapter 91.

59. 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.

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

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

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

63. With an exception addressed below at paragraphs 68-71, 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).

64. The Project does not conform to any of these minimum regulatory standards.

65. 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).

66. 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.*

67. The Project at issue here was approved with 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 and the Written Determination issued for these sites have required such facilities and areas to have been built and maintained since approximately 2000.

68. The Project does not conform to these supplementary regulations that impose mandatory minimum conditions on any nonwater-dependent uses and structures on tidelands.

Limited Exemptions from Public Waterfront Act & Tidelands Regulations

69. As referenced in paragraph 63 above, 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.

70. 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).

71. DEP has no jurisdictional authority over a municipal harbor plan and no discretion to reject or modify a project during DEP's Chapter 91 licensing process that conforms to the substitute municipal harbor plan criteria.

72. 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).

73. 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.

74. 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

75. 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.

76. 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).

77. 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 (WDUZ) 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 increases the on-site public detriments by authorizing a new 5,000 square foot deck to be built out 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.

78. 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."

79. 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.

80. 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 even though a minimum 12-foot walkway was already a 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 were already mandatory Chapter 91 license requirements at this site since 1997.

81. 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 private outdoor seating.

82. 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.

83. 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.

84. 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 and significantly impairs its primary public trust purposes as a resource of the Commonwealth.

85. 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.

86. 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.

87. 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.

88. 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.

89. 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.

90. 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 & 2)

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

92. 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.

93. 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.

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

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

96. 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.

97. A declaratory judgement is necessary to protect the public interest and the rights and interests of Plaintiffs.

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

98. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 97 above.

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

100. 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.

101. 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.

102. 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.

103. 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.

104. 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.

105. 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.

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

107. 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.

108. 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)

109. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 108 above.

110. 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.

111. 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.

112. 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.

113. 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.

114. 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.

115. 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.

116. 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.

117. 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)

118. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 117 above.

119. 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.

120. 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.

121. 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.

122. 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.

123. 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.

124. 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.

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

COUNT V (ENVIRONMENTAL DAMAGE, G.L. c. 214, § 7A)

126. Plaintiffs reallege and incorporate by reference each of the allegations contained in paragraphs 1 – 125 above.

127. Article 97 of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts guarantees, *inter alia*, the people of Massachusetts their right to the conservation, development and utilization of water and other natural resources, including public tidelands.

128. Chapter 91 was enacted in order to ensure that any development of public tidelands achieves a proper public purpose and additionally, with respect to nonwater-dependent projects on Commonwealth tidelands, to ensure that the public benefits outweigh the public detriments of the project and that the private benefits associated with the development are only incidental to the project's public purposes.

129. The major purpose of Chapter 91 is preventing unreasonable damage to or impairment of current and former public tidelands.

130. G.L. c. 214, § 7A, provides that ten people domiciled in Massachusetts have the right to bring an action in court seeking declaratory and injunctive relief to prevent damage to the environment. "Damage to the environment" includes destruction, damage or impairment of "seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites." G.L. c. 214, § 7A.

131. Plaintiffs comprise more than ten persons domiciled in Massachusetts.

132. CLF on behalf of ten of its Massachusetts-domiciled members directed a written notice of the violations and imminent violations complained of herein by certified mail to

Secretary Beaton and Commissioner Beaton on February 17, 2017. CLF has not received a response to such notice as of the date of filing this Amended Complaint.

133. Current and former tidelands, particularly Commonwealth tidelands, are natural resources of the Commonwealth.

134. Protection of public tidelands from destruction, damage or impairment lies within the scope of G.L. c. 214, § 7A.

135. Chapter 91 provides the licensing mechanism by which public tidelands are protected and through which Plaintiffs' rights of access and use of such tidelands are ensured.

136. Chapter 91 requires that development on public tidelands be dedicated only to supporting proper public purposes. To achieve such proper public purposes, the public benefits of the proposed uses must outweigh the public detriments and private benefits can only be incidental to the purpose of the development.

137. The Commissioner's and the Secretary's failure to ensure that the development proposed for 150 Seaport Boulevard fully protects those public interests and primarily promotes public purposes of the Commonwealth tidelands on that site will destroy, damage, and impair those public natural resources of the Commonwealth.

138. The Project will damage and impair those public tidelands in the ways heretofore alleged including, *inter alia*, by occupying more than 75% of Commonwealth tidelands with an oversized private building, by looming 250 feet in height immediately adjacent to the Project shoreline, and by newly covering 5,000 square feet of open waters on Boston Harbor with a pile-supported platform.

139. Such damage and impairments of the public tidelands constitute violations of sections 14 and 18 of G.L. c. 91, which provide that all nonwater-dependent development of public tidelands is prohibited unless it is demonstrated in a judicially-reviewable action by DEP that the private development primarily serves proper public purposes and that the public benefits outweigh the public detriments.

140. DEP cannot exercise its duties to Plaintiffs under Chapter 91 in this case as major aspects of the Project related to DEP's statutory public benefits determination have been foreclosed to DEP review and approval under the Waterfront MHP Renewal and Amendment approved by the Secretary.

141. The alternative and substitute measures approved in the Waterfront MHP Renewal and Amendment do not achieve the objectives of the Tidelands Regulations with comparable or greater effectiveness.

142. The damage and impairment of natural resources of the Commonwealth as a result of the Secretary's approval and the DEP's failures to exercise its duties has not been offset by any compensating or meaningful public tidelands protections to ensure that proper public purposes are being served.

143. The Project and the Waterfront MHP Renewal and Amendment violate the Tidelands Regulations and Chapter 91. The approval of a nonwater-dependent use of and structures on Commonwealth tidelands that fails to achieve proper public purposes is the harm intended to be prevented by Chapter 91.

144. Plaintiffs believe that the Chapter 91 licensing process that will authorize such damage to the public's protected interests is imminent and that Plaintiffs have no opportunity

to seek appropriate relief from the measures approved in the municipal harbor plan in any appeal of that license.

145. Without this Court's intervention pursuant to G.L. c. 214, §7A, Plaintiffs will be irreparably harmed. The harm to CLF and its ten Massachusetts-domiciled members outweighs the harm to EOEEA, DEP and Cronin Holdings.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

- 1) Enter a judgement that Secretary Beaton and Commissioner Suuberg lack authority to vary the requirements of the Chapter 91 or bind DEP's licensing actions under section 18 of Chapter 91 through alternative regulatory provisions established in a municipal harbor planning process controlled by the Secretary;
- 2) Enter a judgement that Secretary Beaton and Commissioner 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 Secretary 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 or the Tidelands Regulations otherwise applicable within the municipal harbor planning area, or

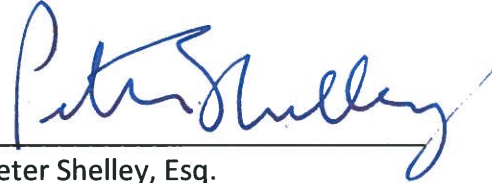
that circumvents DEP's exercise of its fiduciary duties under Chapter 91 in licensing projects on jurisdictional tidelands within the municipal harbor planning area;

- 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 Secretary Beaton, including specifically 310 C.M.R. § 9.34(2)(b) but not limited thereto, null and void;
- 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 Commissioner Suuberg from undertaking any Chapter 91 licensing with respect to the Project or any other development within the Waterfront MHP Renewal and Amendment, or any other municipal harbor plan that applies the substitute and alternative regulatory provisions modifying the Tidelands Regulations in order to prevent irreparable harm to CLF, its adversely affected members, or Massachusetts Citizens;
- 7) Issue a writ of mandamus directing Commissioner Suuberg to immediately commence regulatory proceedings to vacate and remove 310 C.M.R. § 9.34(2)(b) and any other related municipal harbor planning provisions from the Tidelands Regulations;
- 8) Grant Plaintiffs their costs and fees, and
- 9) Grant such other relief as may be just and equitable.

Respectfully submitted,

**Conservation Law Foundation
Massachusetts Citizens**

By their attorney,



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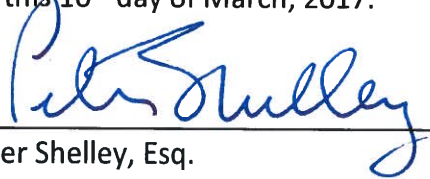
Email: pshelley@clf.org

March 10, 2017

CERTIFICATE OF SERVICE

I, Peter Shelley, hereby certify that I have on this day served this Amended Complaint upon the defendants by mailing true and correct copies of the Amended Complaint by first-class certified mail with return receipt to all defendants and the Massachusetts Office of the Attorney General at their ordinary places of business.

Signed under the pains and penalties of perjury this 10th day of March, 2017.



Peter Shelley, Esq.