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November 9, 2017

Ben Lynch, Waterways Program Chief
Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

Subject: Comments on Chapter 91 License Application No. W17-5079-N (“Lynn Gearworks”)

Dear Mr. Lynch:

Thank you for the opportunity to comment on the Chapter 91 Waterways License Application No. W17-5079-N (“Lynn Gearworks”). Conservation Law Foundation (“CLF”) has worked on tidelands and issues associated with public trust rights for decades. CLF’s focus in this work is to ensure that waterfront activities comply with Chapter 91’s legal requirements and that the longstanding public trust obligations of the Commonwealth’s tidelands laws are fully honored and enforced.

CLF is generally supportive of both brownfield redevelopment and tidelands projects that propose opportunities for public access where there currently are none. Unfortunately, it appears that the Lynn Gearworks redevelopment does not meet even the minimum requirements for public access or benefit. Instead, the project proposes to privatize a significant portion of the Lynn shoreline and develop a private, gated community on public trust lands. Under these circumstances, we cannot conclude that the project serves a proper public purpose in its present configuration and oppose granting a Chapter 91 license to this project in its current form. Instead, and in accordance with 310 CMR 9.31(2), we respectfully request that you direct the applicant to consider alternative designs that would not only meet the minimum requirements for public access and benefit but also maximizes them.

Project Description

The applicant proposes to develop a nonwater-dependent use on private filled tidelands along the Saugus River in Lynn, MA, such uses including residential use, private parking, and other facilities of private tenancy. Specifically, the project involves the construction of a gated,

residential community on 65.6 acres of land on a former General Electric industrial site. There are four buildings (totaling 11,100 SF building footprint) that fall within MassDEP's Chapter 91 jurisdiction that are subject to this application. It is also noteworthy that this site is located within a FEMA-designated 100-year floodplain (Zone AE) and located on a historically industrialized waterfront in an environmental justice community.

Public Access & Benefit

310 CMR 9.31(2) requires all nonwater-dependent uses on tidelands to serve a proper public purpose—providing greater benefit than detriment to public rights in tidelands. In particular, 310 CMR 9.51 requires that nonwater-dependent uses shall not unreasonably diminish the capacity of land to accommodate water-dependent use and shall prevent significant conflict in operation between users of facilities of private tenancy and users of water-dependent facilities and protect the utility and adaptability of the site for water-dependent purposes. CLF does not believe that this project meets these thresholds.

Open space

As an initial matter, we are perplexed that the applicant indicated in the Final Environmental Impact Report (FEIR) that this project would provide 1.8-acres (approximately 78,408 SF) of waterfront public open space which is more than 20 times the amount of public waterfront space now proposed in this application and was central to the Secretary's public benefit determination in that process. We can only assume that this 1.8-acre estimate included the salt marsh along the Saugus River, which the applicant mischaracterized as "public open space." Moreover, it appears that the applicant has ignored the Secretary's request during the MEPA process that it consider alternative open space configurations to prioritize public access.

Turning to the application itself, the applicant reports that the site will include approximately 21,000 SF of open space, but only a meager 3,500 SF of this will be publicly accessible waterfront (see Figure 5 in the license application). The proposed public access is isolated and uninviting as opposed to the remainder of the open spaces which are private, fenced-in areas that include private courtyards and plazas, parking, and recreational facilities.

CLF objects to applicant's privatization of more than 80 percent of the open space on this site. 310 CMR 9.51(3)(d) requires that at least one square foot of the project site be reserved for open space for every square foot of tideland area within the combined footprint of buildings containing nonwater-dependent use. This section goes on to state that the Department shall waive these numerical standards if the project conforms to a municipal harbor plan that preserves the availability of open space for water-dependent activity and public access with greater or comparable effectiveness.¹

¹ 310 CMR 9.51(3)(d) states the Department shall waive the above numerical standard if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, "specifies alternative site

Clearly, this contemplates that the open space required by DEP's regulation is primarily intended to accommodate public water-dependent activity and public access. In stark contrast, the majority of open space on this site is not accessible to the public. As the Department and applicant are well aware, all tidelands, whether private or owned by the Commonwealth, are held in trust by the Commonwealth for the benefit of the public and solely to advance public purposes. Further, public access requirements do not only apply to the shoreline, but to the tidelands themselves. The distinction between commonwealth and private tidelands is irrelevant for determining whether the public purpose and benefit threshold is met.

The public detriment associated with this project (which exceeds public benefits) is the exclusion of the public to its rights to access these tidelands. Providing minimal public access does not offset the project's permanent exclusion of the public from over 80 percent of the tidelands on this site and the token public access that is being provided will not provide access across the majority of the jurisdictional tidelands subject to licensing.

The private nature of this development, including the fences and gates, will likely make the public unaware that public access exists on this site or that they are entitled to access the waterfront open space. Further, even if the applicant attempts to advertise the public availability of the waterfront open space, residents are likely to feel unwelcome given the private, exclusive nature of the site. The Department has extensive experience with failed public spaces and we urge it to exercise its obligation to ensure that there isn't another such space here.

Capacity for Water-dependent Use

The applicant fails to meet several other Chapter 91 thresholds as well. 310 CMR 9.51(2)(a) through (d) requires that structures or spaces be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes. This includes but is not limited to: the layout and configuration of buildings, insofar as they may affect existing and potential public views of the water; and the landscape design of exterior spaces, insofar as it may affect the attainment of effective pedestrian and vehicular circulation within and to areas of water-dependent activity.

The applicant indicates that the configuration of buildings on this site will maximize the view shed to the water mainly via a central "triangular lawn" that provides views of the waterfront. However, this lawn is enclosed within the private, gated section of the site and is preserved for private use and enjoyment by residents of the development rather than general public. The applicant also indicates that the removal of 600 linear feet of eight-foot high chain link fence along the shoreline will enhance water views but has not addressed how the newly erected

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, as appropriate for the harbor in question."

gate around the residential complex will not interfere with these views. Ironically, the applicant comments that “because most of the site is currently fenced and closed to public access, the project will significantly improve views of the shoreline.” But under the applicant’s proposal, much of the site will remain fenced with only the 3,500 SF waterfront open space accessible to the public. While this may allow public access directly along the shoreline, it does not improve access across the majority of these tidelands nor is it likely to improve view sheds from nearby public ways.

The landscape design of the exterior open spaces on this site certainly does not meet the requirements of 310 CMR 9.51(2)(d), which include effective pedestrian and vehicular circulation within and to areas of water-dependent activity. First, the applicant has failed to provide renderings depicting public access points as required by the Secretary during the MEPA process. Second, there appears to only be vehicular access to the waterfront open space via the Lynnway. The applicant states that there will be “direct pedestrian access from the Lynnway to the Saugus River shoreline” but this access is not adequately depicted on any of the maps or renderings. Given that the majority of the site is fenced off from the general public, it remains unclear whether the public will easily be able to access the waterfront open space by foot.

Unfortunately, it is clear that the applicant has given little thought to how pedestrians or the public will access and use even the limited proposed waterfront public space. In particular, CLF is deeply troubled that a transit-oriented development such as this has arranged for private residential use of the MBTA Riverworks Commuter Rail Station and has made no attempt to facilitate pedestrian access from this station to the waterfront open space. Aside from the social equity issues associated with private use of public transportation infrastructure by the residents of a gated community, that arrangement is short-sighted and the loss of a critical opportunity to design this site to accommodate pedestrian flow from the station to the waterfront. Given the proximity of the site to rapid transit and the connection to Boston, this would be an ideal location for meaningful waterfront activity which would be better facilitated by an access corridor between the train station and the water-dependent use zone.

Utilization of Shoreline for Water-dependent Purposes

310 CMR 9.52 requires that nonwater-dependent use projects reasonably conserve the capacity of lands to accommodate water-dependent uses, including public access in the exercise of public rights in such lands, particularly on sites with water-dependent use zones. The applicant has provided no evidence that this site does not have adequate capacity to serve water-dependent uses. The regulations also require sites with a water-dependent use zone to provide facilities that generate water-dependent activity *as well as* a pedestrian access network that allows pedestrians to approach the shoreline from public ways. In particular, the applicant must include at least the following:

1. One or more facilities of water-dependent activity. The Department shall give particular consideration to: facilities that promote use of the shoreline including boat landing

docks, launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water based facilities.

2. A pedestrian access network, which at a minimum consists of: (i) walkways and related facilities along the entire length of the water-dependent use zone and (ii) appropriate connecting walkways that allow pedestrians to approach the shoreline from public ways or other public access facilities to which tidelands on the site are adjacent. Such pedestrian access networks shall be available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of public rights at the project site.

The applicant has failed to demonstrate that these requirements have been met, particularly as discussed above, the requirement that pedestrian access networks allow pedestrians to access the shoreline from adjacent public ways or other public access facilities. We also categorically object to the applicant's assertion that the waterfront open space will facilitate "active and passive" recreation. The applicant has not demonstrated that the limited capacity of this small area would accommodate active recreation. Further, active recreation, by definition, refers to structured recreational activities which require specialized facilities, infrastructure, and management – none of which has the applicant indicated they will provide.

CLF is also concerned that there are no water-dependent facilities proposed for this site that would facilitate water-based recreation. There are currently limited facilities available to the people of Lynn and the adjoining communities to participate in activities like fishing and recreational boating. Residents that wish to exercise their rights in tidelands to participate in these activities have few facilities available to do so and the location of this site along a tidal river is significant. There is immense recreation potential that is being overlooked and it is short-sighted not to provide the community with the amenities they desperately need to meaningfully enjoy this waterfront – fishing piers, launching ramps, landing docks, and more. The applicant states that they "may propose water-dependent uses in the future which could include a pier or marina" but the configuration of this project makes it unlikely that this site will be able to host these amenities in the future. The nature and design of this project significantly diminish the potential capacity for future water-dependent purposes.

Finally, the proponent has proposed two "community amenities" that CLF agrees with in concept but is skeptical about in practice. First, the applicant proposes a "community waterfront amenity building" but little detail is provided about the nature of this structure, its proposed use and management, whether it will host or facilitate water recreational activities, and whether the community is supportive of this amenity. This structure has been called both a building and an open-air pavilion – the lack of clarity around this is concerning. We also wish to confirm that the applicant has not included the footprint of the community waterfront structure in their open space calculation – as this structure is not "open to sky" and therefore cannot be counted as open space for Chapter 91 licensing purposes.

Second, the applicant proposes to provide public parking spaces within the waterfront open space area. While CLF acknowledges the public benefit associated with providing public parking spaces near the waterfront open space, we object to the location of the parking facilities within the water-dependent use zone. 310 CMR 9.51(c)(3) states that parking facilities at or above grade for any use shall not be located within a water-dependent use zone. Given the ample land on this site, we do not believe the applicant is constrained in their ability to offer public parking outside of the water-dependent use zone. This is simply a design issue.

Environmental justice concerns

Lynn has been identified as a community having significant environmental justice populations² where residents do not experience many of the community amenities and protections that others communities in the Commonwealth enjoy. In particular, Lynn has been historically blocked off from its tidal waterfront. Sadly, if this site were in a different community with greater resources than Lynn, CLF expects there would be a very different discussion regarding public access.

We request that the Department seriously consider the ways in which this development will exacerbate these historic problems and situation of poor public access, further alienating and excluding the community-at-large from these tidelands. The applicant has offered far less than the bare minimum to a community that has less access to waterfront open space, water-based recreation, and waterfront public facilities than many of their more affluent neighbors. This deep-rooted disconnection from the water is something the Commonwealth should be looking to address at every opportunity, and particularly where industrial sites that have burdened such communities become available for redevelopment.

If this project is licensed as is, it will be a missed opportunity to reintroduce this community to its waterfront. It would be a disservice to overlook the significant public access and benefit issues associated with this site and ignore community concerns over the implications of this project.

Climate Resilience

CLF notes that the applicant has not sufficiently accounted for the long-term impacts of climate change. Given the site's location within a FEMA-designated floodplain (Zone AE), we are concerned that (1) the applicant is only proposing to elevate structures 2 feet above FEMA BFE and (2) the applicant is not proposing to elevate, or otherwise control flooding for any of the waterfront open space or community amenities, which will likely be the area most often subject to nuisance flooding.

The Office of Coastal Zone Management ("CZM") commented on the applicant's Draft Environmental Impact Report ("DEIR") that the proposed elevation will not ensure that the

² (<http://www.mass.gov/anf/docs/itd/services/massgis/ej-cities-towns.pdf>)

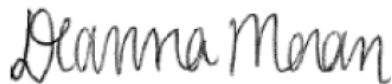
project will be resilient to flooding throughout its design life and will likely require retrofitting later to accommodate sea level rise. The applicant's proclaimed commitment to using temporary flood proofing measures like flood barriers, which are highly subject to human error and could have negative impacts on abutting properties, is insufficient. Further, the applicant has not proposed any additional measures to reduce flood impacts for the publicly accessible portions of the site, which will be at the lowest elevation.

Given the applicant's insufficient climate preparedness measures, if this application is granted, the license should be limited to a 50-year period. The applicant has indicated that they intend to seek an extended term license but have not indicated the length of the requested term. Granting the applicant a 50-year license will ensure that MassDEP has the ability and the authority to revisit climate-related as well as other license issues on this site in the not-too-distant future.

Recommendation

We strongly urge the Department to direct the applicant to reconfigure this project so that it meets the minimum requirements set out in 310 CMR 9.00 by providing more significant and meaningful public access and benefit on this site.

Sincerely,

A handwritten signature in cursive script that reads "Deanna Moran".

Deanna Moran
Director, Environmental Planning