



For a thriving New England

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Via Email and Certified Mail, Return Receipt Requested

Secretary Matthew A. Beaton
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114
Matthew.Beaton@MassMail.State.MA.US

Commissioner Martin Suuberg
Department of Environmental Protection
One Winter Street
Boston, MA 02108
Martin.Suuberg@MassMail.State.MA.US

Re: Notice of Damage to the Environment, G.L. c. 214, § 7A

Dear Secretary Beaton and Commissioner Suuberg:

This letter will serve as notice pursuant to G.L. c. 214, § 7A, that Conservation Law Foundation and its adversely affected members, at least ten of whom are domiciled in the Commonwealth of Massachusetts (collectively, “CLF”), claim that significant damage to and impairment of the environment and protected public resources has occurred and is ongoing by virtue of your approval, Secretary Beaton, of the Downtown Waterfront District Municipal Harbor Plan (“Downtown Waterfront MHP”). The terms of your approval of the Downtown Waterfront MHP are a final agency action that significantly damages and impairs the public benefits and public purposes secured to the public, including CLF’s members, by the Public Waterfront Act, G.L. c. 91 (“Chapter 91”), §§ 14 & 18, and the implementing Waterways Regulations, 310 CMR 9.00. Mr. Secretary, your action significantly reducing these public benefits and public purposes is ultra vires and was taken without required due process.

The public trust interests and rights in former and current intertidal and submerged lands constitute public natural resources of the Commonwealth and are secured for the people as protected public trust resources through Chapter 91 and the Waterways Regulations. The major purpose of Chapter 91 and the Waterways Regulations is to prevent damage to and impairment of these public trust interests and rights in the foreshore by prohibiting the authorization of nonwater-dependent structures and uses on private and Commonwealth tidelands unless proper public purposes are being served, the public benefits outweigh the public detriments at the site,

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and proper due process is followed. On Commonwealth tidelands, which are involved in your action identified herein, private advantages and benefits cannot be advanced unless they are merely incidental to the public purposes being served by the proposed development projects.

Mr. Secretary, your action damages and impairs those protected natural resources by failing to ensure that the nonwater-dependent uses and structures you have authorized and approved in the Downtown Waterfront MHP advance proper public purposes, that the public benefits outweigh the public detriments to those tidelands, that private gain is merely incidental to the public purposes being achieved on the property, and that required regulatory procedures designed to protect the public's interests and prevent such damage to the environment have been followed and observed by the City of Boston.

Further, Mr. Secretary, CLF claims that you are not authorized by Chapter 91 to make the public purpose or public benefit determinations with respect to the tidelands within the Downtown Waterfront MHP that you have made through your approval. The legislature has delegated exclusive authority to the Massachusetts Department of Environmental Protection ("MassDEP") to exercise the legislature's public trustee responsibilities with respect to all jurisdictional tidelands under Chapter 91. Your action directly and immediately binds MassDEP and restricts its ability to exercise its delegated authority to determine proper public purposes and public benefits on Chapter 91 jurisdictional tidelands for new structures and uses in the Downtown Waterfront MHP.

Your action, Mr. Secretary, approving the Downtown Waterfront MHP, is further fundamentally flawed as you have not ensured meaningful public participation in the Downtown Waterfront MHP process as required by law, where eleven members of the Downtown Waterfront MHP Advisory Committee were compelled to complain that their input was being "disregarded, if not ignored." On information and belief, neither you nor your staff nor the City of Boston have consulted with the designated public advisory board at all over the course of the past year, which is when the final decisions that are included in your approval were discussed and determined. Commissioner Suuberg, CLF claims that you have unlawfully ceded your exclusive Chapter 91 authority to the Secretary, failing to carry out MassDEP's non-delegable duties under Chapter 91 to protect the public interests in the foreshore.

Mr. Secretary, your action specifically damages and impairs the public's rights to access and use tidelands and foreshore resources within the planning area, including at the current Hook Wharf and Harbor Garage sites, by approving structures and uses of these tidelands that would otherwise be prohibited by Chapter 91 and the Waterways Regulations. Your action, presumably taken in some capacity as a public trustee, has, in essence, permanently re-zoned the Downtown Waterfront MHP planning area for all future development in terms that violate Chapter 91 and the Waterways Regulations and damage the tidelands resources available for the public. By significantly and arbitrarily reducing and impairing the public benefits and purposes on the tidelands within the Downtown Waterfront MHP planning area, by failing to determine or ensure that private advantages are merely incidental to the public objectives being accomplished, and by failing to ensure that proper procedures have been followed, your action damages and impairs one of the Commonwealth's most precious public natural resources and erodes the public trust.

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This damage, the unlawful loss and impairment of public trust rights of access to and use of tidelands, is immediate and will continue because there is no other mechanism available to prevent this damage, including judicial review of your Downtown Waterfront MHP approval. You have failed, Mr. Secretary, to follow elementary principles of due process and administrative law by promulgating regulations governing structures and uses in the Downtown Waterfront MHP without following the mandatory public notice and judicial review protections of G.L. c. 30A, the Massachusetts Administrative Procedures Act, thus necessitating this action by CLF and its members.

CLF intends to bring suit pursuant to G.L. c. 214, § 7A to prevent the damage to the environment resulting from your actions taken in violation of Chapter 91 and the Waterways Regulations.

Very truly yours,



Peter Shelley
Senior Counsel



Heather Miller
Staff Attorney

cc: Attorney General Maura Healey