

September 10, 2019

The Honorable Martin Suuberg
Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

Re: Non-Compliance with Waterways License # 7740 (Battery Wharf)

Dear Commissioner Suuberg:

On behalf of Conservation Law Foundation (“CLF”), we write in regard to Public Waterfront Act (Chapter 91) Waterways License # 7740 (“the License”), which covers Battery Wharf in Boston’s North End. The License was issued to Raymond Property Company LLC (“the Licensee”) on September 29, 1999 for a term of 80 years.¹ On September 3, 2019, CLF conducted a site visit at Battery Wharf from approximately 3:30 - 4:30 pm. During that visit, CLF staff documented numerous and significant License violations and have also become aware of other egregious violations happening on a regular basis related to the Licensee’s privatization of public areas on the site for its own financial gain. CLF is aware that UNITE HERE Local 26 recently brought many of these concerns to the Department’s attention through a separate letter, and CLF supports their efforts to ensure that the Licensee complies with its binding obligations.

Below is a summary of the license conditions as they relate to these violations and documentation of CLF’s findings with respect to the Licensee’s compliance with these mandatory obligations. The Licensee agreed to provide the public access, amenities, and open space described below as a condition of gaining regulatory approval to construct its private buildings on public tidelands. This License is legally-binding and the public access it requires is non-negotiable. As explained below, the Licensee is regularly restricting access to public areas of the site for private functions and events for its own financial gain, a practice which not only directly violates the conditions of its License and the waterways regulations, 310 CMR 9.00, but is also antithetical to the underlying purposes of the Public Waterfront Act. We request that the Department take immediate enforcement action to bring the Licensee into compliance and levy appropriate fines.

¹ To CLF’s knowledge, the original License has not been modified or amended. If it has, CLF requests that those documents be provided so that the Licensee’s compliance status can be reassessed.

SUMMARY OF RELEVANT LICENSE CONDITIONS

The complete License is attached, but the following summarizes the relevant license conditions as they relate to the violations documented below.

U.S. Coast Guard Museum

Under Special Condition #1, in Building #20 (also referred to as Building 2), the Licensee is required to “exclusively reserve, at a minimum, 1,000 s.f. of ground floor space, adjacent to the United States Coast Guard (USCG) base . . . for a Special Public Destination Facility (SPDF). This facility “shall house an interpretive space utilizing exhibits and displays organized around the maritime history and operations of the USCG and information regarding the self-guided historical site tour.” Under Special Condition #4, “[t]he USCG interior facility shall remain open at a minimum from 8:00 a.m. until 9:00 p.m. on a year round basis, and shall be advertised by [DEP] approved signage located on the ground floor.” This SPDF facility is referred to by the Licensee in its on-site signage and other marketing materials as a museum.

Second Floor Viewing Area

Under Special Condition #1, the Licensee “shall also provide on the second floor of Building #20 a year round, handicapped accessible public viewing area of no less than 1,300 s.f.” which “shall include appropriate seating, interpretive signage, trash receptacles, lighting and telescopes, and shall be exclusively dedicated to public use.” Under Special Condition #4, the second floor viewing area “shall remain open to the public twenty-four (24) hours a day and shall be advertised by Department approved signage located at [the] entrance[] on the ground floor. This viewing area is referred to by the Licensee in its marketing materials as a balcony.

Open Space

Under Special Condition #6, the Licensee is required to provide “approximately 77,430 s.f. of publicly accessible exterior open space Said open space shall consist of all areas of the project site located outside of the footprint of the buildings, and include landscaping, walkways with a minimum width of 12’ clear, seating, a sunken garden, informational kiosks, telescopes, interpretive plaques and signs, a water transportation waiting facility, appropriate lighting fixtures and trash receptacles Said open space facilities shall be made available to the general public, free of charge, twenty-four (24) hours a day.”

Water Taxi Waiting Area

Under Special Condition #10, the Licensee is required to provide a water taxi waiting area, “of which 150 s.f. shall be enclosed to provide adequate four-season shelter.” The waiting area must include “seating; lighting; trash receptacles; a public telephone; and up-to-date passenger information, including schedules, ticketing information and a roster of all water transportation options on the project site.”

Docking Facilities

Under Special Condition #11, the Licensee must provide a water transportation docking facility that reserves no less than 40 linear feet for dockage and is “available for passenger pick-up and drop off by any water transportation provider servicing Boston Harbor and the general boating public.”

Under Special Condition #13, the Licensee must also provide no less than 60 linear feet of transient dockage extending from the water transportation docking facility that is “available to the general public on a first-come, first-served basis during the recreational boating season.” The Licensee must also provide water and utility hook-ups for members of the public using these facilities, dockside trash receptacles, and appropriate lighting to minimize navigational interference. Signage of a reasonable size that is visible to passing boaters must be provided indicating the availability of transient boat dockage and public landing. The signage must also state “the maximum length of stay; the fee to be charged, if any the availability of services that are to be provided, such as public rest rooms; include any reasonable rules governing the slips; and the availability and locations of the nearest boat sewage pump-out facilities for public use.”

Under Special Condition #15, the Licensee must provide approximately 200 linear feet of dock space for use as a public recreational docking facility. Any slips vacated for more than 24 hours must be made available for transient dockage. Water and utility hook-ups, trash receptacles, and appropriate lighting must also be provided.

Signage

Under Special Condition #7, adequately-sized appropriate signage must be clearly visible from the entrances to the site from Commercial Street and the Harborwalk encouraging public patronage of the facilities, stating the hours of public access, and any reasonable rules for their use. At least one sign in a prominent location must state the waterways license number of the project and the location on-site where a copy of the license may be viewed by the public. Under Special Condition #8, a minimum of 4 interpretive signs or plaques must be located along the pier edges.

Restrooms

Under Special Condition #3, the Licensee is required to provide public restrooms on the ground floor of Building #20 adjacent to the USCG museum and on the ground floor of the hotel lobby. The restrooms must be available to the public 24 hours a day, not require the purchase of goods or services, and be advertised by DEP approved signage.

Management Plan

Under Special Condition #5, “[t]he hours, programming, operating procedures and rules associated with each of these interior public spaces shall be further described in a [DEP] approved Public Access Management Plan.” Under Special Condition #17, within 5 months of license issuance, the Licensee was required to provide DEP and the Office of Coastal Zone Management (“CZM”) with a draft management plan that “addresses all aspects of the management of interior and exterior public areas on the site,” and was required to provide DEP and CZM with a final management plan within 8 months of license issuance. The management plan “shall ensure that the quality and quantity of public benefits are effectively sustained throughout the term of the License.”

VIOLATIONS

1. **Across the site, legally-protected public access and public space is routinely eliminated for the Licensee's private financial gain. Areas required under the License to be open and accessible to the public are frequently closed for private events like weddings, receptions, and company functions.**

As described above, open space on the site – which includes all areas outside the footprint of the buildings, including the Harborwalk, water taxi patio, terraces, dining areas, and all other outside space – as well as the USCG interior facility (referred to as the “museum”), the second floor viewing area (referred to as the “balcony”), hotel lobby, and all other common areas shall remain open to the public, free of charge, 24-hours-a-day. In violation of its License, the Licensee regularly holds private events in one more of these public spaces, preventing the public from using the amenities it is legally entitled to and reaping substantial financial benefits in the process.

As documented in public notices for City Licensing Board hearings, from 2018 through the present, Boston Beverages Services, Inc. d/b/a Battery Wharf Hotel Boston Waterfront applied for “a one day extension of the premise” for purposes of extending the area covered by its liquor license in order to hold private events in public areas of the site 21 times. To CLF’s knowledge, the Licensee did not seek or receive approval from the Department for these events.

The following lists occasions on which the Licensee unlawfully extended the site’s “private” areas:

- **“to include the water taxi patio and balcony of building 2 for a wedding ceremony on May 27, 2018 between the hours of 4:00 PM – 10:30 PM;”**
- **“to include the balcony associated with Harborview for a reception on June 7, 2018 between the hours of 6:00 PM – 10:00 PM;”**
- **“to include the terrace for a reception on June 12, 2018 between the hours of 8:00 PM – 10:00 PM;”**
- **“to include the Harbor walk outdoors for a Dinner on June 14, 2018 between the hours of 6:00 PM – 9:00 PM;”**
- **“to include the utilizing outdoor space and museum for a lunch reception on June 15, 2018 between the hours of 12:15 PM – 3:00 PM;”**
- **“to include the Harbor walk outdoor space for a reception on June 23, 2018 between the hours of 7:00 PM – 10:00 PM;”**
- **“to include the Harbor walk outdoor space for a reception on June 29, 2018 between the hours of 4:00 PM – 7:00 PM;”**
- **“to include the Harbor Walk area for a reception on September 11, 2018 between the hours of 5:00 PM – 7:00 PM;”**
- **“to include the Harbor Walk area for a Wedding reception/ dinner on September 14, 2018 between the hours of 6:30 PM – 9:00 PM;”**
- **“to host a reception dinner on the Museum Terrace on May 21, 2019 between the hours of 5:30 pm – 8:30 pm;”**
- **“to utilize the outside space for group event, harborview balcony will be the space utilized;”**

- “to utilize the outside space for group event on May 29, 2019 between the hours of 5:30 pm- 7:30 pm;”
- “to utilize the outside space and Museum Terrace for a ceremony on June 1, 2019 between the hours of 4:30 pm- 10:00 pm;”
- “to utilize the outside space for a general session/meeting on June 3, 2019 between the hours of 12:00 pm- 9:00 pm;”
- “to utilize the outside space (Harbor Walk) for group event on June 3, 2019 between the hours of 4:00pm- 5:00 pm;”
- “to utilize the outside space for group event, company utilizing the museum on June 4, 2019 between the hours of 4:00 pm-5:00 pm;”
- “to utilize the outside space Harborview for a company event on June 6, 2019 between the hours of 12:00 pm- midnight;”
- “to utilize the outside space (Harborview), company dinner on June 10, 2019 between the hours of 5:00 pm-9:00 pm;”
- “to utilize the outside space (Harborview) for the TJX Group on June 13, 2019 between the hours of 8:00 pm – 10:00 pm.”
- “to utilize museum space and Museum Terrace for American Academy of Arts and Science on June 19, 2019 between the hours of 5:00pm- 6:00 pm;” and
- “to utilize the outside space (Harbor Walk) for Harvard Medical School on June 20, 2019 between the hours of 5:30pm- 10:00 pm.”²

Each and every one of these private events constitutes a violation of the conditions of the License. These violations are not inadvertent; the Licensee actually advertises the availability of these public spaces to be rented out for private events. For example, Battery Wharf’s advertised event capacity chart highlights its use of the museum, Harborwalk, and terrace for private functions.

ROOMS	OVERALL DIMENSIONS		CAPACITY							
	L x W	SQUARE FEET	THEATER	CLASSROOM	U-SHAPE	HOLLOW SQ	60" ROUNDS	72" ROUNDS	BOARDROOM	RECEPTION
Constitution Ballroom	40 x 45	1890	170	96	42	64	120	120	40	240
Constitution 1 or 2	40 x 22	945	80	47	32	44	40	48	40	120
Old North	30 x 43	1290	100	86	36	40	90	84	34	N/A
Old North Skylight	30 x 27	819	70	56	24	36	60	60	28	100
Old North Boardroom	30 x 16	480	25	24	21	N/A	30	24	18	N/A
Copp's Hill	22 x 17	385	15	18	N/A	N/A	20	24	12	N/A
Donald McKay	16 x 24	384	25	12	8	N/A	20	10	14	20
Josiah Fox	17 x 26	442	36	19	15	18	20	10	16	20
Joshua Humphreys	17 x 29	493	36	24	18	20	30	20	18	30
Capt William Sturgis	22 x 38	836	60	30	30	32	50	36	26	60
Capt William Sturgis 1	22 x 26	572	36	20	21	20	30	24	18	40
Capt William Sturgis 2	22 x 12	264	22	15	15	16	20	24	14	20
U.S. Maritime Museum	N/A	n/a	30	18	15	18	36	N/A	N/A	50
S.J. Hale Lounge	N/A	850	40	30	20	20	40	36	20	50
Harbor Walk	N/A	264	N/A	N/A	N/A	N/A	110	80	N/A	240
Great Admiral Terrace	N/A	264	N/A	N/A	N/A	N/A	50	60	N/A	60
Harborview Ballroom	22 x 12	2250	152	132	38	50	150	180	40	300

Source: <https://d2h7rc2br5yzgc.cloudfront.net/batterywharfhotelboston.com-2962610814/cms/pressroom/capacitychart.pdf>

² See <https://www.boston.gov/public-notices/43786>; <https://www.boston.gov/public-notices/44006>; <https://www.boston.gov/public-notices/44221>; <https://www.boston.gov/public-notices/48906>; <https://www.boston.gov/public-notices/60671>; <https://www.boston.gov/public-notices/61151>; <https://www.boston.gov/public-notices/61506>; <https://www.boston.gov/public-notices/61721>; <https://www.boston.gov/public-notices/62066> (all emphases added).

Battery Wharf’s wedding brochure also highlights the availability of the Harborwalk for wedding ceremonies (for a \$1500 fee), as well as the availability of the “private balcony” off of the Harborview Ballroom – a.k.a., the second-floor viewing area required to be *exclusively dedicated to public use*.

Ceremonies

Outside on the Harbor Walk



Ceremony rehearsal 1-2 days prior to the wedding, based on availability
Includes elegant chairs, back up space for inclement weather, all permits & fees
Ceremony Fee \$1,500

Say “I Do” with a Harbor View

The Battery Wharf Hotel is a Boston waterfront retreat with stunning Harbor views. Located in the historic North End of Boston, we are a perfect destination for your unforgettable wedding.

Our brand new Harborview ballroom features floor-to-ceiling windows and a private balcony overlooking Boston Harbor. Dance the night away with 150 of your closet family and friends in this waterfront oasis.

Our team of exceedingly skilled planners, hoteliers and culinary specialists will create an experience that will leave a lasting impression to cherish for a lifetime.

Source: https://d2h7rc2br5yzgc.cloudfront.net/batterywharfhoteiboston.com-2962610814/cms/pressroom/batterywharfhoteibweddings_2018.pdf

The museum, which is required to be open to the public *at a minimum* from 8 am to 9 pm on a year round basis, is also routinely used for daytime private events, as advertised on Battery Wharf’s website.



Source: <https://www.batterywharfhoteiboston.com/meetings-events>

When CLF staff visited the site at approximately 3:30 pm on September 3, the museum space was being used for set up or break down of a private event, with the exhibits stored in a far corner and completely useless to the public. The Licensee has even added signage on other occasions instructing the public not to enter the museum during private events.

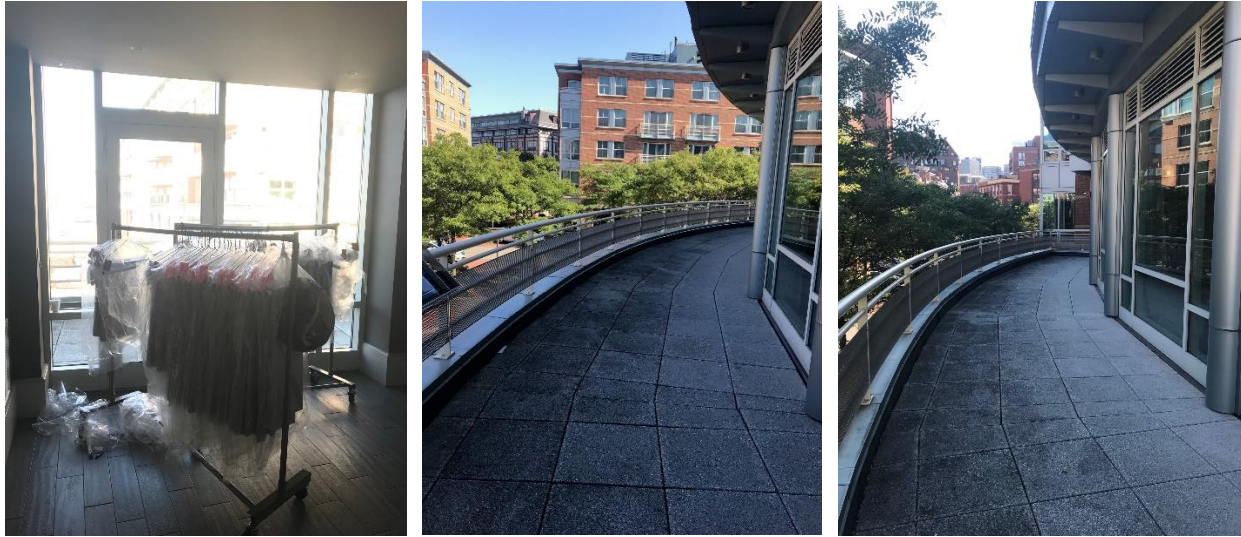


2. Even when private events are not being held in the second-floor public viewing area, it appears to be largely inaccessible to the public, and does not provide the minimum amenities required like seating and telescopes.

In addition to the second-floor viewing area being used as an extension of the Harborview Ballroom event space and advertised as a “private balcony,” it is also unclear whether the public can access the second-floor viewing area when there is an event happening in the museum area below. The elevator leading to the viewing area appears to be accessed via two entrance points. One is located inside the museum, so would not be accessible by the public when there is an event in the museum and the public is instructed not to enter (and as evident from the pictures advertising museum events above, access to the elevator also appears to be physically obstructed by event tables). The second entrance provides direct access from outside, but on the day CLF staff conducted their site visit, that door was locked. This effectively means there is no public access to the second-floor viewing area when events are (unlawfully) taking place in the museum.

During CLF’s site visit, staff were able to access the elevator through the museum, but when they stepped off the elevator on the second floor, the vestibule was being used as a private event staging area. The door leading out to the viewing area was completely blocked by multiple racks of dry cleaning (see photo below).

Finally, even if the public can access the viewing area, it does not have the required “appropriate seating, interpretive signage, trash receptacles, lighting and telescopes” dedicated exclusively to public use. In fact, other than one interpretive sign, the viewing area is completely empty, presumably to facilitate the set-up and break-down of the private events that are held there.



3. **The water taxi waiting area does not meet the minimum requirements in the License.**

The water taxi waiting area, which is supposed to be enclosed to provide adequate four-season shelter, is open at the base and one side. It is clearly not enclosed, and would not provide adequate shelter in cold weather, or in windy conditions (which frequently occur along the waterfront) that might blow rain into the waiting area. The waiting area is also supposed to have a public telephone and up-to-date passenger information, including schedules, ticketing information, and a roster of all water transportation options on the premises. During CLF's site visit, the telephone was out of order and the only information provided was the sign below – there were no schedules, ticketing information, or information about all water transportation options on the premises.

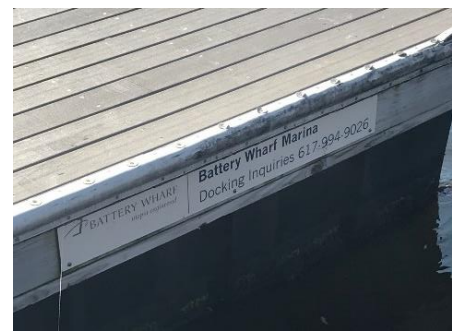


4. **Transient dockage for the general public is non-existent.**

Beyond the water transportation docking facility, the Licensee is required to provide at least 60 feet of transient dockage available to the public on a first-come, first-served basis during the recreational

boating season. CLF staff visited the site on a sunny, warm afternoon in early September and found that not a single area was available for public dockage, transient or otherwise. Beyond the water transportation dock, there was a barge-type structure in the water along the entire length of what staff assumed would otherwise be the public transient docking area, and beyond that, a locked gate prevented anyone from proceeding further down the dock.

The Licensee is also required to provide signage indicating the availability of transient boat dockage and public landing, including the following required information: maximum length of stay; fee to be charged, if any; availability of services such as public restrooms; any reasonable rules governing the slips; and availability and location of nearest boat sewage pump-out facilities for public use. The only signage found contained none of the required information. Additionally, there was no information online at the hotel's website or elsewhere indicating the availability of docking services.



5. A section of the outdoor open space that is supposed to be available to the public free of charge is used as a private dining patio for an on-site restaurant.

During CLF's site visit, it was clear that part of the outdoor open space had been converted to a private dining patio for Battery Wharf Grille, despite the fact that all areas located outside of the footprint of the buildings are required to be available to the general public, free of charge, 24 hours a day. Tables were set for dining, and there was a hostess stand outside.



Advertisements and photos on Battery Wharf Hotel's website confirm that this is a private dining area.



6. The Licensee has not installed required signage informing the public about their rights to access and use the site.

During CLF's site visit, staff were unable to find any signage, much less signage in a prominent location, stating the waterways license number for the site and where on-site the license could be viewed by the public. The purpose of requiring this signage is for the public to be fully informed of their rights to access and use the site. By failing to provide such signage, the Licensee is depriving the public of information necessary to exercise their rights under the law.

The Licensee is also required to install signage encouraging public patronage of the facilities, stating the hours of public access, and any reasonable rules for their use. There are some helpful informational kiosks and maps on the site, but one of the most prominently-featured signs (see photo below) is a sign informing the public of what they *cannot* do, purportedly pursuant to Chapter 91. Per the License, the Licensee *is* allowed to establish reasonable rules for use of the site, but only through a management plan (which it appears the site does not have) and only to the extent that such rules effectively sustain the quality and quantity of public benefits. The sign below does nothing to encourage public use, stating only what is not permitted and incorrectly doing so under the auspices of Chapter 91.

The required signage advertising the museum entrance is hard to read at best. CLF also found no information about the self-guided historical site tour; if it is there, it is not readily apparent to the public.



7. Other Considerations

- Under Special Condition #2, only Facilities of Public Accommodation (FPAs) are allowed on the ground floors of Buildings #30, #40, and #50 (also referred to as Buildings 3, 4, and 5, respectively), with the exception that certain portions may be dedicated to access and egress for residences and other upper floor uses. Special Condition #1 does not contain any similar exception for Building #20; however, we found that a portion of the ground floor space in Building #20 was dedicated to access and egress for residences and other upper floor uses. Unless there was a minor modification or other amendment to the License, this is not a permitted use in Building #20.
- Under Special Condition #17, the Licensee was required to provide, within 5 months of License issuance, a draft management plan that “addresses all aspects of the management of interior and exterior public areas on the site,” and was required to provide DEP and CZM with a final management plan within 8 months of License issuance. To CLF’s knowledge, no such plan was ever prepared or submitted.
- The Licensee has a history of non-compliance. In 2012, Northeastern Law students compiled a report entitled “Public Access to the Tidelands, A Report on Compliance with Chapter 91 Licenses on Boston’s Waterfront.” The report included an account of violations at this site that included many of the violations described herein. The Licensee appears to have made no progress in the past seven years to correct these historical and ongoing violations.
- UNITE HERE Local 26 has raised the important issue of the parameters of First Amendment free speech rights on lands within Public Waterfront Act jurisdiction. As this seems to be a question of first impression, we urge DEP to seek legal guidance on this issue from the Office of the Attorney General and, thereafter, to develop a clear and consistent position with respect to the ability to exercise these Constitutional rights in public spaces protected by the Public Waterfront Act.

Enforcement Action Requested

Immediate enforcement action by the Department to correct these violations is warranted. The Department also has authority to impose civil administrative penalties for the Licensee’s failure to comply with the terms and conditions of its waterways license. *See* 310 CMR 9.08(4). Under the Civil Administrative Penalties Statute, G.L. c. 21A, § 16, DEP “may assess a civil administrative penalty on a person who fails to comply with any provision of any regulation, order, license or approval issued or adopted by the Department, or of any law which the Department has the authority or responsibility to enforce.” If the Licensee continues to ignore the mandatory conditions of its License, DEP should consider exercising its authority under 310 CMR 9.26(1) to “revoke a license or permit for non-compliance with the terms and conditions set forth therein.”

In addition to enforcement action to correct the violations described above, the Licensee should be required to provide compensatory mitigation for depriving the public of their rights under this License, taking into account the economic benefit the Licensee has derived from disregarding its legal obligations. If the Licensee is not required to compensate the public for its years of non-compliance,

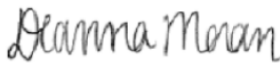
there is no real incentive for it or any other waterways license holder to comply with license conditions that safeguard public rights and interests in tidelands unless and until they are forced to do so by DEP. In fact, license holders may actually have incentive to wait to comply with such conditions until DEP forces them to, knowing that they can gain the economic advantages of doing so without risk of penalty. If enforcement of waterways licenses by DEP becomes increasingly necessary, it will result in further drain on the agency's already limited resources.

If left unchecked, the Licensee's blatant and longstanding disregard for the terms of its waterways license and defiance of the Department will stand as an invitation to other licensees to privatize public spaces, and effectively punish the Licensee's competitors and other business that comply with their license terms and respect the public's rights. We request that you keep us apprised of enforcement actions taken with regard to these violations. Thank you for your attention to this important matter.

Sincerely,



Heather Miller
Staff Attorney



Deanna Moran
Director, Environmental Planning

cc: Nicholas Teeson, General Manager, Battery Wharf Hotel
Brian Lang, President, UNITE HERE Local 26
Richard McGuinness, Deputy Director, Boston Planning and Development Agency
Lydia Edwards, Boston City Councilor, District 1