Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CASE NO. 1884CV02132-BLS1

NOTICE SENT
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(KAT)

KATHARINE ARMSTRONG[1] & others,[2]

Plaintiffs,

vs.

MATTHEW A. BEATON[3] & others,[4]

Defendants,

(and a companion case).[5]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

These actions involve a dispute over proposed development in Boston's downtown waterfront. In *Armstrong* v. *Beaton*, Case No. 1884CV02132-BLS1 (the "*Armstrong Case*"), the plaintiffs are members of the Harbor Towers condominium community situated on Boston

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[1] As Trustee of the Harbor Towers II Condominium Trust.

[2] Michael Burkin, Neal Hartman, Matthew Rubins, and Pran Tiku, as Trustees of the Harbor Towers II Condominium Trust; Robert Gowdy, Lee Kozol, Frank Mairono, Norman Meisner, and Gary Robinson, as Trustees of the Harbor Towers I Condominium Trust; and Julie Mairono and Marcelle Willock, as Members of the Garage Committee of the Harbor Towers I Condominium Trust and Harbor Towers II Condominium Trust.

[3] In his Official Capacity as Secretary of the Executive Office of Energy and Environmental Affairs.

[4] Martin Suuberg, in his Official Capacity as Commissioner of the Department of Environmental Protection and RHDC 70 East India, LLC.

[5] Conservation Law Foundation, on behalf of itself and its adversely affected members; and Bradley M. Campbell, Carol Renee Gregory, Gordon Hall, Priscilla M. Brooks, David Lurie, Karl See, Erica A. Fuller, Kirstie L. Pecci, Lara G. DeRose, Edward T. Goodwin, Carol A. Goodwin, Jamie Goodwin, and Pareesa Charmchi, residents of the Commonwealth of Massachusetts vs. 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 Massachusetts Department of Environmental Protection, Suffolk Superior Court, Case No. 1884CV02144-BLS1.

Harbor (the "Harbor Towers Plaintiffs"). They contend that defendant RHDC 70 East India, LLC's ("RHDC") planned construction of a 600-foot-tall tower on the current site of the Harbor Garage -- in which Harbor Towers residents currently park their vehicles -- will unlawfully interfere with their parking rights in the garage and harm the environment. The Harbor Towers Plaintiffs further contend the decisions of defendant Matthew A. Beaton, as Secretary of the Executive Office of Energy and Environmental Affairs (the "Secretary"), and defendant Martin Suuberg, as Commissioner of the Department of Environmental Protection (the "Commissioner") (the "State Defendants" or, collectively with RHDC, simply the "Defendants"), to approve the City of Boston's "Downtown Waterfront District Municipal Harbor Plan" (the "Downtown MHP"), which opens the door to the construction of RHDC's planned 600-foot-tall tower on the Boston waterfront, are *ultra vires*.

In *Conservation Law Foundation* v. *Beaton*, Case No. 1884CV02144-BLS1 (the "*CLF Case*"), plaintiff Conservation Law Foundation ("CLF"), in its own right, on behalf of its purportedly adversely affected members, and on behalf of thirteen Massachusetts citizens (the "CLF Plaintiffs" or, collectively with the Harbor Towers Plaintiffs, simply the "Plaintiffs"), also challenges the approval of the Downtown MHP, and further challenges the validity of the municipal harbor plan regulatory framework under the Commonwealth's "Waterways" regulations, which appear at 310 Code Mass. Regs. §§ 9.00, *et seq.* (the "Waterways Regulations"), and Commonwealth's "Review and Approval of Municipal Harbor Plans" regulations, which appear at 301 Code Mass. Regs. §§ 23.00, *et seq.* (the "MHP Regulations").

The cases came before the Court most recently on three related motions to dismiss. They are: (1) in the *Armstrong Case*, RHDC's Motion to Dismiss (Docket Entry No. 20); (2) in the *Armstrong Case*, the State Defendants' Motion to Dismiss First Amended Complaint Pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for Lack of Subject Matter Jurisdiction and for Failure to State a Claim (Docket Entry No. 23); and (3) in the *CLF Case*, the State Defendants' Motion to Dismiss Pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for Lack of Subject Matter Jurisdiction and for Failure to State a Claim (Docket Entry No. 15). Plaintiffs in the *Armstrong Case* and in the *CLF Case* oppose the motions to dismiss filed in their respective cases.

The Court conducted an extended hearing on the three pending motions to dismiss on May 2, 2019. The parties thereafter were given the opportunity to submit additional memoranda to the Court addressing some of the issues discussed at the motion hearing. Having now considered all of the parties' written submissions and oral arguments, RHDC's motion in the *Armstrong Case* is **ALLOWED IN PART**, the State Defendants' motion in the *Armstrong Case* is **ALLOWED**, and the State Defendants' motion in the *CLF Case* is **ALLOWED IN PART** for the reasons discussed below.

Legal and Factual Background

The Court begins with a brief overview of the relevant law. The facts relative to the specific claims asserted in each case are set forth separately thereafter.

I. Massachusetts Law Regarding the Protection of Tidelands.

"Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply

to inland property." *Boston Waterfront Dev. Corp.* v. *Commonwealth*, 378 Mass. 629, 631 (1979). In Massachusetts, "[u]nder the public trust doctrine, the Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation."[6] *Moot* v. *Department of Envtl. Prot.*, 448 Mass. 340, 342 (2007). It is well-established that "only the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights." *Fafard* v. *Conservation Comm'n of Barnstable*, 432 Mass. 194, 199 (2000).

The Waterways Act, G.L. c. 91, is an "encapsulation of the Commonwealth's public trust authority and obligations." *Id.* at. 200 n.11. In enacting the Waterways Act, the Legislature delegated "[t]he obligation to preserve the public trust and to protect the public's interest" to the Massachusetts Department of Environmental Projection (the "Department"). *Moot*, 448 Mass. at 342. See G.L. c. 91, § 2. The Department is obligated to "act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose."[7] G.L. c. 91, § 2. Under Section 18 of the Waterways Act, the Department may license a non-water-dependent use of tidelands (except for landlocked tidelands) only if the

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[6] "Tidelands" are "present and former submerged lands and tidal flats lying below the mean high water mark." G.L. c. 91, § 1.

[7] "Water-dependent uses" are,

> those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: marinas, recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site.

G.L. c. 91, § 1.

Department first has made a written determination, after a public hearing, that the "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 and that the determination is consistent with the policies of the Massachusetts coastal zone management program." G.L. c. 91, § 18. See also *Moot*, 448 Mass. at 343-344.

The Department promulgated the Waterways Regulations under the Waterways Act in order to "carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands...." 310 Code Mass. Regs. § 9.01(2). Under the Waterways Regulations, the Department may issue a license for a project on tidelands only if the "project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands." 310 Code Mass. Regs. § 9.31(2). A non-water-dependent use project located on tidelands is presumed to meet this standard if, among other requirements, the project "complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use, according to the applicable provisions of 310 [Code Mass. Regs. §] 9.51 through 9.52...." 310 Code Mass. Regs. § 9.31(2)(b)(1). Section 9.51 of the Waterways Regulations, in turn, provides that a non-water-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 Code Mass. Regs. § 9.51. To meet this standard, the project generally must comply with certain "minimum conditions" set forth in § 9.51(3), including specified height limits for new or expanded buildings. 310 Code Mass. Regs. § 9.51(3). In assessing whether these "minimum conditions" have been met by a project that is located in an area that also is covered by a municipal harbor plan ("MHP"),

> the Department shall ... apply the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained in 310 [Code Mass. Regs. §§] 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c), in accordance with the criteria specified in 310 [Code Mass. Regs. §§] 9.32(1)(b)3., 9.51(3), 9.52(1)(b)1., and 9.53(2)(b) and (c) and in associated plan approval at [the MHP Regulations] and associated guidelines of CZM.

310 Code Mass. Regs. § 9.34(2)(b)(1).

An MHP is a "document (in words, maps, illustrations, and other media of communication)" that, among other things, sets forth,

> a community's general goals and objectives for a Harbor Planning Area, and a corresponding expression of the applied policies that have been established to guide development and other human activity in various sub-areas, in terms of its desired sequence, patterns, limits, and other characteristics....

301 Code Mass. Regs. § 23.02. The creation and content of an approved MHP is controlled by the MHP Regulations, which "establish[] a voluntary procedure by which municipalities may obtain approval of Municipal Harbor Plans (MHPs) from the Secretary, in order that such plans may serve to inform and guide state agency actions affecting the implementation of waterway management programs at the local level." 301 Code Mass. Regs. § 23.01(2). One of the purposes of the MHP Regulations is to promote local, approved MHPs that "will be of direct assistance to the Department ... in making regulatory decisions pursuant to M.G.L. c. 91 that are responsive to municipal objectives and priorities, harbor-specific conditions, and other local and regional circumstances." *Id.*

Under the MHP Regulations, the Secretary -- whom the Legislature has designated as "the administrator of tidelands," G.L. c. 91, § 18B(a) -- may approve an MHP upon finding

that the standards set forth in 301 Code Mass. Regs. § 23.05 have been met. In cases where an MHP contains "provisions that are intended to substitute for the minimum use limitations or numerical standards" of the Waterways Regulations as referenced above, the Secretary also "must determine," in addition to other requirements, that, the MHP,

> specif[ies] alternative height limits and other requirements that ensure that, in general, new or expanded buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question.

301 Code Mass. Regs. § 23.05(2)(c)(5). According to the Plaintiffs, Section 9.34(2) of the Waterways Regulations requires the Department "to grant a [G.L. c. 91] license for any proposed waterfront development project that meets the standards of an approved MHP, even if the proposed project violates [the Department]'s regulations such that it would otherwise deny the license." First Amended Complaint of the Harbor Towers Plaintiffs ("Harbor Towers Complaint"), ¶ 227.

II. Alleged Facts of the *Armstrong Case.*

The following facts are taken from the allegations of the Harbor Towers Complaint and, for purposes of the motions to dismiss, are presumed to be true.

The Harbor Towers are two forty-story residential towers on India Wharf at Boston Harbor that were developed as part of an urban renewal project planned by the Boston Redevelopment Authority (the "BRA") in the 1960s. The Towers started as apartments, but were converted into private condominiums in the early 1980s. The residents of Harbor Towers currently park their vehicles in the Harbor Garage, a seven-story parking garage on the corner

of Atlantic Avenue and East India Row (the "Garage Property") that was constructed in connection with the urban renewal project. Like much of the surrounding area, the Garage Property is located on former tidelands.

The genesis of the Harbor Towers dates back to the late 1950s. At that point in time, the Boston waterfront in and around where the Harbor Towers and Garage Property currently stand was in serious disrepair. On July 2, 1964, the Legislature enacted legislation known as Chapter 663 of the Acts of 1964, "An Act Authorizing the Department of Public Works and the Boston Redevelopment Authority to Exercise Certain Powers in Regard to Certain Tidelands Along the Atlantic Avenue and Commercial Street Waterfront in the City of Boston" (the "1964 Act"). The 1964 Act expressly provides that the BRA "may include in the area covered by an urban renewal plan" certain tidelands within the city of Boston, including the Garage Property. Harbor Towers Complaint, ¶ 46. The 1964 Act further provides that all of the Commonwealth's right, title, and interest in the tidelands shall vest in the BRA.

The Harbor Towers Plaintiffs allege that the Legislature enacted the 1964 Act in order to effectuate the "Downtown Waterfront-Faneuil Hall Urban Renewal Plan" (the "Urban Renewal Plan" or the "Plan"), which was adopted by the BRA on April 24, 1964, and approved by Boston City Council on June 8, 1964. The Urban Renewal Plan provides that its "basic goal" is to "stimulate and to facilitate development efforts in the [Boston] area, by eliminating those severe conditions of blight, deterioration, obsolescence, traffic congestion and incompatible land uses which hinder private investment in new development without the aid of governmental action...." *Id.*, ¶ 32. The Plan, by its terms, expires on April 30, 2022.

The Urban Renewal Plan's project area encompasses, among other properties, the parcels that now contain the Harbor Towers (the "Harbor Towers Property," identified in the Plan as "Parcel A-2"), and the Garage Property (identified in the Plan as "Parcel A-3"). The Harbor Towers project, which is described in the Plan as a residential community between Atlantic Avenue and the waterfront with an attached marina, is, in fact, an integral part of the Plan. At the same time, the Plan establishes certain land use and building requirements for different parts of the project area. According to the Plan, Parcel A-2 was designated for residential use, and Parcel A-3 was designated for general office and general business use. The Plan further requires that Parcel A-3 have a maximum floor-area ratio of 8, a maximum building height of 125 feet, and at least 600 parking spaces with no open parking. The Harbor Towers Plaintiffs interpret these provisions of the Plan as "mandat[ing]," in perpetuity, "that the Garage Property contain a parking garage to serve the residential buildings next door." *Id.*, ¶ 38.

Actual development of the Harbor Towers project did not commence until roughly three years after the Urban Renewal Plan was adopted. On August 1, 1967, the BRA and Boston Waterfront Associates I ("BWA I"), a redeveloper, entered into a Land Disposition Agreement (the "LDA") under which the BRA agreed to convey to BWA I the Harbor Towers Property (identified in the LDA as Parcel A-2) and the Garage Property (identified in the LDA as Parcel A-3S). Section 302(a) of the LDA provides, consistent with the Plan, that the Harbor Towers Property would be used for the construction of two residential apartment buildings, and the Garage Property would be used for the construction of a parking garage. Section 302(a) further provides that "[e]ach apartment building shall have rights in the garage, running

with the land on which such apartment building is built, to the use of a number of parking spaces in the garage equal to three fourths of the number of dwelling units in such apartment building." *Id.*, ¶ 61.

By an Order of Taking dated January 9, 1969, the BRA acquired title to the Harbor Towers Property and the Garage Property in anticipation of further conveying the properties to BWA I as called for in the LDA. The BRA divided the land that was taken into four parcels: (1) the Garage Property; (2) the land currently used for Tower I of Harbor Towers, along with the marina (the "Tower I Parcel"); (3) the land currently used for Tower II of Harbor Towers (the "Tower II Parcel"); and (4) additional land that currently remains undeveloped (the "Undeveloped Parcel") (collectively, the "Harbor Towers Community").

On January 9, 1969, the BRA conveyed the Garage Property and the Tower I Parcel to Harbor Towers Trust I, a trust created by the principals of BWA I, in accordance with its obligations under the LDA. On the same date, the BRA conveyed the Tower II Parcel and the Undeveloped Parcel to Harbor Towers Trust II, the sole beneficiary of which was Boston Waterfront Associates II ("BWA II"), which was owned by the principals of BWA I. The deeds for both transactions provide that the conveyances were "subject to and with the benefit of all the terms and conditions set forth in [the LDA]." *Id.*, ¶ 74.

On January 8, 1969, the day before the BRA's conveyances, Harbor Towers Trust I and Harbor Towers Trust II entered into an Indenture of Lease for parking spaces in the yet-to-be-built parking garage for the tenants of the residential building that would be built on the Tower II Parcel (the "1969 Lease"). 1969 Lease, Exhibit E of RHDC's Appendix. The 1969

Lease has an explicit fifty (50) year term, which (as later modified) currently expires on February 28, 2022. *Id.*, Article II, Section 2.

Construction of the parking garage on the Garage Property (the "Garage") and the two Harbor Towers was completed by 1972. On August 12, 1974, Harbor Towers Trust I conveyed the Garage Property and the Tower I Parcel to BWA I. On the same date, Harbor Towers Trust II conveyed the Tower II Parcel and the Undeveloped Parcel to BWA II.

BWA I and BWA II subsequently sold the Harbor Towers Community to a condominium developer. The sale closed on April 2, 1981. Title to the Garage Property and the Tower I Parcel was transferred to First City Developments Corp. of Boston--Harbor Towers I ("HT I"), and title to the Tower II Parcel and the Undeveloped Parcel was transferred to First City Developments Corp. of Boston--Harbor Towers II ("HT II"). At the time of the sale, HT I and HT II (collectively, the "Condominium Developer") were commonly owned.

The Condominium Developer subsequently converted the Tower I Parcel and the Tower II Parcel to residential condominiums, while retaining ownership of the Garage Property. The question of ongoing parking rights for owners of the newly-converted condominium units in the Garage was specifically addressed in the condominium documents. The Master Deed for the Harbor Towers II Condominium, recorded in the summer of 1981, expressly states that the 1969 Lease (which gives residents living in the building constructed on the Tower II Parcel certain parking rights in the Garage until February 28, 2022) was being submitted to the provisions of G.L. c. 183A as an appurtenance to the Tower II Parcel and that "[n]o unit has as an appurtenant right to it any specific right to the use of a parking space in

the Garage." See Exhibit H to Appendix of Exhibits to RHDC's Memorandum in Support of its Motion to Dismiss ("RHDC Appendix") (Master Deed of the Harbor Towers II Condominium, § 6).

Not long thereafter, HT I and the Trustees of the Harbor Towers I Condominium Trust entered into a separate lease that gives residents living in the building constructed on the Tower I Parcel certain parking rights in the Garage (the "1982 Lease"). 1982 Lease, Exhibit I of RHDC's Appendix. The 1982 Lease, like the 1969 Lease, is explicitly set to expire on February 28, 2022. *Id.*, Article II, Section 1. The Master Deed for the Harbor Towers I Condominium, recorded in April, 1982, refers to a lease expiring February 28, 2022, for resident parking in the parking garage, and, like the Master Deed for the Harbor Towers II Condominium, expressly states that "[n]o Unit has as an appurtenant right to it any specific right to the use of a parking space in the Garage." Exhibit K to RHDC Appendix (Master Deed of the Harbor Towers I Condominium, § 6).[8]

Before the condominium conversions, the Condominium Developer granted easements appurtenant to the Garage Property to moor boats and operate a marina on parts of the Tower I Parcel and the Tower II Parcel. The trustees of the Harbor Towers condominiums have since granted to the Commonwealth a pedestrian access easement for public access over their properties along the water in the vicinity of the Boston Harborwalk.

On December 11, 2007, after a series of mesne conveyances following the condominium conversions, RHDC acquired title to the Garage Property. RHDC intends to

[8] The Court can consider the Master Deeds of the Harbor Towers I Condominium and the Harbor Towers II Condominium for purposes of Defendants' motions to dismiss because they are public records and they are relied upon in the Harbor Towers Complaint. See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

demolish the Garage and construct a 900,000-square-foot, 600-foot-high skyscraper on the Garage Property (the "RHDC Project"). In conjunction with its development efforts, RHDC has notified the Harbor Towers Plaintiffs that "it has the right to discontinue parking" after the 1969 Lease and the 1982 Lease expire in February, 2022. Harbor Towers Complaint, ¶ 87. At present, many residents of the Harbor Towers continue to use the Garage on a daily basis for their residential parking needs. They do not have ready access to substitute parking facilities in the area and, depending upon the outcome of this litigation, they plan to construct a new underground parking facility to replace the Garage, if necessary. It is anticipated that construction of a new parking facility will take at least three years to complete.

On October 3, 2013, the Office of Coastal Zone Management submitted to the BRA a Notice to Proceed with an MHP for Boston's downtown waterfront. The Boston Planning and Development Agency (the "BPDA," formerly known as the BRA) voted to adopt the Downtown MHP and, on March 15, 2017, submitted it to the Secretary for review and approval. By decision dated April 30, 2018, the Secretary formally approved the Downtown MHP pursuant to the MHP Regulations.

Under 310 Code Mass. Regs. § 9.51(3)(e) of the Waterways Regulations, the maximum height allowed for buildings constructed on the Garage Property ranges from 55 to 155 feet. The Downtown MHP approved by the Secretary, however, establishes a considerably greater 600-foot height limitation for the Garage Property, which, coincidently or otherwise, happens to correspond to the height of the proposed RHDC Project. The Harbor Towers Plaintiffs claim that the Secretary's approval of the Downtown MHP was unlawful for at least four reasons.

First, they allege that the substitute standards contained in the Downtown MHP exceed those permitted under the Plan and, therefore, the Downtown MHP is contrary to the Legislature's grant of the tidelands under the 1964 Act.

Second, they allege that the regulatory MHP process is an unlawful delegation to the Secretary of the Department's authority over the development of tidelands under the Waterways Act.

Third, they allege that the Downtown MHP violates various MHP regulations, including the requirement under 301 Code Mass. Regs. § 23.04 that a proposed MHP be submitted to the Secretary within two years of the issuance of the Notice to Proceed, and the requirement that alternative height limits ensure that "buildings for nonwater-dependent use will be relatively modest in size...." 301 Code Mass. Regs. § 23.05(2)(c)(5).

Lastly, they allege that the approval of the Downtown MHP constitutes rulemaking that was not conducted in compliance with the Massachusetts Administrative Procedures Act ("APA"), G.L. c. 30A.

As previously noted, the core of the RHDC Project is a proposed 600-foot-high skyscraper to be built on the Garage Property. In a news article dated June 21, 2018, an RHDC representative stated that RHDC intended to submit development plans for the Garage Property to the BPDA that summer.

The Harbor Towers Plaintiffs allege that the RHDC Project would harm the environment and "substantially increase traffic on the adjacent roadways, pedestrian activity, and overall congestion in an area that is already heavily congested and over-utilized." Harbor Towers Complaint, ¶ 156. They further allege that the RHDC Project would result in vehicles

"taking up garage spaces that would otherwise be available for water-dependent users," *id.*, ¶ 161, and cause "wind impacts" that "violate Chapter 91 and its regulations." *Id.*, ¶ 165. These environmental impacts, they allege, necessarily "would flow from the construction of any development project with a height of 600 feet on the Garage Property -- the building envelope approved by Secretary Beaton in the [Downtown MHP]." *Id.*, ¶ 166.

The Harbor Towers Plaintiffs also claim that the Secretary's approval of the Downtown MHP affects their Chapter 91 interests. The marina attached to the Tower I Parcel is used by various residents to dock their boats. The Harbor Towers Plaintiffs claim that the RHDC Project's traffic impacts will make gaining access to the marina and other water-dependent uses -- such as the Boston Harborwalk, which runs through the Harbor Towers Property -- more difficult. They further claim that it will obstruct water views and "inalterably change the panorama of Boston's historic waterfront." *Id.*, ¶ 180.

The Harbor Towers Plaintiffs filed the instant action against RHDC and the State Defendants on July 11, 2018. Their Complaint includes three claims against RHDC: Count I, which is styled as a "Claim to Restrain Damage to the Environment, G.L. c. 214, § 7A"; Count II, which seeks a "Declaratory Judgment Regarding Prior Public Use, G.L. c. 231A, § 1"; and Count IV, which seeks a "Declaratory Judgment Regarding Land Disposition Agreement and Deed Restrictions, G.L. c. 231A, § 1." The Harbor Towers Complaint also includes two claims against both the Secretary and the Commissioner: Count V, which seeks a "Declaratory Judgment Regarding Improper Delegation, G.L. c. 231A, § 1"; and Count VI, which is styled as a "Complaint for Mandamus Regarding Improper Delegation, G.L. c. 249, § 5." The three remaining counts of the Harbor Towers Complaint assert claims against the

Secretary only. They are: Count III, which seeks a "Declaratory Judgment Regarding Inconsistency of Downtown Waterfront Municipal Harbor Plan with Chapter 663 of the Acts of 1964, G.L. c. 231A, § 1"; Count VII, which seeks a "Declaratory Judgment Regarding Approval of Downtown Waterfront Municipal Harbor Plan, G.L. c. 231A, § 1"; and Count VIII, which seeks a "Declaratory Judgment Regarding Violation of G.L. c. 30A, §§ 3, 5-7, G.L. c. 231A, § 1."

III. Alleged Facts of the *CLF Case.*

The following facts are taken from the allegations of the Amended Complaint of the CLF Plaintiffs (the "CLF Complaint") and, for purposes of the motion to dismiss, again are presumed to be true.

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, or the Public Waterfront Act...." CLF Complaint, ¶ 10. CLF is invested "in cleaning up Boston Harbor and improving the access to and use and enjoyment of a restored Boston Harbor for its members and others," and "[p]rotecting the public's tidelands rights is a core component of CLF's corporate purposes." *Id.*, ¶¶ 10, 11. Many members of CLF "intensively use and enjoy the public tidelands in and around Boston Harbor for recreation, sightseeing, fishing, and other uses." *Id.*, ¶ 16.

The CLF Plaintiffs challenge the validity of the Secretary's approval of the Downtown MHP, which concerns approximately 42 acres of tidelands on the waterfront along Atlantic Avenue and the Rose Kennedy Greenway. Pursuant to the MHP Regulations, the City of Boston, on July 31, 2013, submitted to the Commonwealth a Request for a Notice to Proceed

with a municipal harbor plan for the city's downtown waterfront area. The Office of Coastal Zone Management issued a Notice to Proceed on October 3, 2013. The City of Boston subsequently submitted the Downtown MHP, in draft form, to the Executive Office of Energy and Environmental Affairs on March 15, 2017. After a public comment period and a series of private meetings between BPDA and others, possibly including the Secretary's office, BPDA submitted a supplemental filing that made significant changes to the plan on February 16, 2018. An additional public comment period followed. CLF utilized both comment periods to submit comments on the plan on behalf of itself and its members.

On April 30, 2018, the Department submitted to the Secretary a Recommendation for Approval of the Downtown MHP. The Recommendation for Approval states: "[t]he Department will adopt as binding guidance in all License application review any Substitute Provisions contained in the Secretary's final Decision on the Plan." *Id.*, ¶ 68. The Secretary thereafter approved the Downtown MHP in a decision dated April 30, 2018. *Id.*, ¶ 69.

The Downtown MHP contains alternative use limitations and numerical standards for the Hook Wharf and Harbor Garage sites in the planning area, as well as alternative maximum height standards for other buildings in the planning area, that exceed the standards set forth in the Waterways Regulations. Under the Waterways Regulations, the maximum allowable structure height on the Hook Wharf site is 55 feet, and the maximum allowable structure height on the Harbor Garage site ranges from 55 feet to 155 feet. The Downtown MHP, however, establishes a 305-foot maximum height requirement for the Hook Wharf site and a 600-foot maximum height requirement for the Harbor Garage site. *Id.*, ¶ 52.

The CLF Plaintiffs claim that the Secretary's approval of the alternative use limitations and height standards set out in the Downtown MHP "constitutes a formal rulemaking applicable to and binding for all Public Waterfront Act licensing within the area of the [Downtown MHP]," and that such alternative limitations and standards were not properly promulgated in accordance with the APA. *Id.*, ¶¶ 99, 100. The CLF Plaintiffs further claim that the Secretary's approval of the Downtown MHP was unlawful because he did not abide by the MHP filing deadline under the MHP Regulations, or make certain demonstrations that are required under Chapter 91, the Waterways Regulations, and the MHP Regulations. *Id.*, ¶¶ 105, 106.

The CLF Plaintiffs allege that the Secretary's unlawful approval of the Downtown MHP harms both the general public and its members. According to the CLF Plaintiffs, "[t]he Secretary's action approving nonwater-dependent uses and structures in the [Downtown MHP] unreasonably diminishes the capacity of the [Downtown MHP] area to accommodate the public water-dependent uses which CLF's members rely on and actively take advantage of and significantly impairs the primary public trust purposes of those public tidelands as a natural resource of the Commonwealth." *Id.*, ¶ 87. CLF further alleges that the Secretary's approval of the Downtown MHP has and will continue to adversely affect CLF's corporate purposes and its members' use and access rights in the public tidelands.[9] CLF's members, they assert, "specifically use and enjoy the public tidelands in the area covered by [the Downtown MHP]," and the injuries caused to CLF's members by the Secretary's approval "are different in kind and degree than the injuries suffered by the general public." *Id.*, ¶ 16.

[9] In support of their opposition to the motions to dismiss, the CLF Plaintiffs have submitted several affidavits from CLF members which describe, with specificity, their alleged harms.

The CLF Plaintiffs also allege that the entire MHP regulatory framework under the MHP Regulations and the Waterways Regulations is legally flawed. They claim that the Legislature expressly gave the Department exclusive authority over the licensing process for developments on tidelands under Chapter 91, and that the Department has unlawfully delegated that authority to the Secretary by virtue of 310 Code Mass. Regs. § 9.34(2)(b).

On July 11, 2018, the CLF Plaintiffs filed this action solely against the State Defendants. The CLF Complaint contains six claims: Count I, which seeks a "Declaratory Judgment, [per] G.L. c. 231, §§ 1 & 2," concerning "the legality of the [Department's] delegation of its statutory obligation to determine proper public purposes and other [Chapter 91] requirements to the Secretary and his municipal harbor planning process"; Count II, which seeks a "Declaratory Judgment Re: Illegal Rulemaking, [per] G.L. c. 30A"; Count III, which seeks a "Declaratory Judgment re Illegal MHP Approval Process"; Count IV, which is styled "Environmental Damage, G.L. c. 214, § 7A"; Count V, which seeks an order of "Mandamus, [per] G.L. c. 249, § 5," directing the Commissioner "to execute his responsibilities and duties under [Chapter 91]"; and Count VI, which seeks an order of "Mandamus, [per] G.L. c. 249, § 5," directing the Secretary "to comply with the Massachusetts APA when engaging in rulemaking as part of his MHP approval process."

Discussion

I. The Legal Standard.

RHDC has moved to dismiss all of the Harbor Towers Plaintiffs' claims against it, and the State Defendants separately have moved to dismiss all of the Harbor Towers Plaintiffs'

claims against them, as well as all of the CLF Plaintiffs' claims, pursuant to Mass. R. Civ. P. 12(b)(6) and Mass. R. Civ. P. 12(b)(1).

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief...." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). "The allegations must be more than 'mere labels and conclusions,' and must 'raise a right to relief above the speculative level.'" *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 17 (2018), quoting *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 165 (2014). The court's review is limited to the factual allegations in the complaint and facts contained within any attached exhibits, see *Eigerman* v. *Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007), as well as any matters of public record and documents relied upon in the complaint. See *Marram*, 442 Mass. at 45 n.4; *Schaer*, 432 Mass. at 477. The court must "accept as true the factual allegations in the complaint and the attached exhibits, [and] draw all reasonable inferences in the plaintiff's favor...." *Buffalo-Water 1, LLC*, 481 Mass. at 17.

When ruling on a motion to dismiss under Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, the court must "accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true." *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322 (1998). The court also may consider "affidavits and other matters outside the face of the complaint that are used to support the movant's claim that the court lacks subject matter jurisdiction." *Id.* at 322 n.6.

II. Plaintiffs' Claims under G.L. c. 214, § 7A.

RHDC has moved to dismiss the Harbor Towers Plaintiffs' claim under G.L. c. 214, § 7A ("Section 7A"), and the State Defendants have moved to dismiss the CLF Plaintiffs' claim under Section 7A, based on the contention that the requirements for bringing a claim under this statute are not satisfied in the present case.

Section 7A is a broadly-worded statute that is intended to prevent damage to the environment. The specific language of Section 7A provides, in relevant part, that,

> [t]he superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs ... determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

G.L. c. 214, § 7A. "Damage to the environment" under Section 7A means "any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally." *Id.* A claim under Section 7A (formerly G.L. c. 214, § 10A), "will lie to enforce the procedural as well as the prohibitory provisions" of environmental laws. *City of Boston* v. *Massachusetts Port Auth.*, 364 Mass. 639, 647 (1974). See also *Enos* v. *Secretary of Envtl. Affairs*, 432 Mass. 132, 142 (2000); *Cummings* v. *Secretary of Exec. Office of Envtl. Affairs*, 402 Mass. 611, 615 (1988) ("*Cummings*").

Against this expansive statutory backdrop, RHDC and the State Defendants argue that no "damage to the environment is occurring or is about to occur," as a matter of law, because the Downtown MHP does not approve any specific project, various additional agency reviews and approvals still will be required before the RHDC Project (or any other project within the Downtown MHP project area) can proceed, and RHDC has not, as yet, received any approvals or pending applications for a project on the Garage Property.

The Court is persuaded that the Defendants read Section 7A too narrowly, and that the Harbor Towers Plaintiffs and the CLF Plaintiffs plausibly have alleged that approval of the Downtown MHP violates various provisions of environmental laws. It is plausible, for example, that the Downtown MHP is invalid because it was not filed within the timeframe required under 301 Code Mass. Regs. § 23.04, and that the Secretary's subsequent approval of the plan, notwithstanding its untimeliness, was improper. See *Entergy Nuclear Generation Co.* v. *Department of Envtl. Prot.*, 459 Mass. 319, 325 (2011) ("[A]n actual controversy exists when a plaintiff asserts that an agency has exceeded its statutory authority in a manner that has caused, or will cause, injury to the plaintiff."). It also is plausible that the 600-foot height limitation imposed on the Garage Property by the Downtown MHP violates the Secretary's legal obligation under the MHP Regulations to ensure that the MHP "specif[ies] alternative height limits and other requirements that ensure that, in general, new or expanded buildings for nonwater-dependent use *will be relatively modest in size....*" 301 Code Mass. Regs. § 23.05(2)(c)(5) (emphasis added). And it is plausible that the Downtown MHP, as approved by the Secretary, violates the requirements of Chapter 91 regarding public benefit determinations. See G.L. c. 91, § 18. Such violations can constitute "damage to the

environment" for purposes of Section 7A, and, therefore, trigger an immediate right to relief under the statute. Cf. *Enos*, 432 Mass. at 142 (action under Section 7A "may lie" to revoke Secretary's certification of allegedly deficient final supplemental environmental impact report).

The Court is, at the same time, unpersuaded by the Defendants' arguments that RHDC's need for additional project approvals precludes Plaintiffs' Section 7A claims.[10] With the approval of the Downtown MHP secured, RHDC allegedly is moving forward with the RHDC Project, and it is plausible that other projects in the vicinity soon will move forward as well. This is sufficient to constitute "actual or probable" damage to the environment that "is occurring or is about to occur" for purposes of the Defendants' motions to dismiss. G.L. c. 214, § 7A. Cf. *General Acc. Ins. Co. of Am.* v. *Bank of New England-W., N.A.*, 403 Mass. 473, 475-476 (1988) (in deciding whether to grant preliminary injunction, risk of irreparable harm is within discretion of judge).

Lastly, the Court rejects RHDC and the State Defendants' assertions that they are not appropriate defendants for the Section 7A claims. An action may be brought under Section 7A against any "person causing or about to cause" damage to the environment. G.L. c. 214, § 7A. RHDC and the State Defendants contend that they do not satisfy this standard because, in their view, they are not proponents of the RHDC Project or the Downtown MHP. The Supreme Judicial Court ("SJC") has stated that, in the MEPA context, the person causing, or about to cause environmental damage is "the agency or authority or private person proposing a

[10] The case cited in support of the proposition that the issuance of a permit marks when environmental harm is about to occur, *Town of Canton* v. *Commissioner of Massachusetts Highway Dep't*, 455 Mass. 783 (2010), concerned the specific context of a challenge to the Secretary's certification of an environmental impact report ("EIR") under the Massachusetts Environmental Policy Act ("MEPA"), G.L. c. 30, § 61, *et seq.*, and therefore is not controlling in these cases. Furthermore, to the extent that the issuance of a permit is required to trigger a claim under Section 7A, the Secretary's approval of the Downtown MHP is, in the Court's view, the functional equivalent of a permit.

project, and not the public official who administers the statutory scheme...." *Cummings*, 402 Mass. at 616. This does not bar the Plaintiffs' Section 7A claims in these cases, however, because MEPA is not at issue and both RHDC and the State Defendants plausibly can be described as project "proponents." In this regard, RHDC allegedly is moving forward with its development plans for the Garage Property in accordance with the standards set forth in the approved Downtown MHP and, in light of the supportive regulatory changes made by the Downtown MHP, the State Defendants reasonably can be characterized as fellow proponents of RHDC's plans. The Court thus is satisfied that, for purposes of the pending motions to dismiss, RHDC and the State Defendants are "person[s] causing or about to cause" damage to the environment. G.L. c. 214, § 7A.

For the foregoing reasons, the Court concludes that the Harbor Tower Plaintiffs and the CLF Plaintiffs have stated viable claims against RHDC and the State Defendants under Section 7A, and that the claims are not appropriate for dismissal at the present time.

III. The Harbor Towers Plaintiffs' Declaratory Judgment Claims against RHDC.

RHDC also has moved to dismiss both of the Harbor Towers Plaintiffs' claims seeking declaratory relief with respect to RHDC's alleged violations of the prior public use doctrine and the terms of the LDA. The Court addresses these two claims separately.

A. The Applicability of the Prior Public Use Doctrine.

In Count II of the Harbor Towers Complaint, the Harbor Towers Plaintiffs request a judicial declaration that a project of the intensity of the proposed RHDC Project cannot be constructed on the Garage Property, and that their current use of the Garage Property for parking purposes, cannot be discontinued without legislative authorization. They claim that the Legislature, in enacting the 1964 Act, authorized the conveyance of the tidelands that underlie

the Garage Property for the purposes set forth in the Plan, and that the Plan, in turn, restricts the height of buildings on the Garage Property to 125 feet and requires the Garage Property to serve as a parking garage for the residential community contemplated by the Plan (*i.e.*, the present-day Harbor Towers). Thus, the Harbor Towers Plaintiffs contend that, under the prior public use doctrine, legislation is necessary to change the designated use of the Garage Property. RHDC maintains that the prior public use doctrine does not apply here.

"The prior public use doctrine holds that 'public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion.'" *Mahajan* v. *Department of Envtl. Prot.*, 464 Mass. 604, 616–617 (2013), quoting *Robbins* v. *Department of Pub. Works,* 355 Mass. 328, 330 (1969). To the extent that the Legislature ever devoted the Garage Property -- admittedly former tidelands -- to any particular use, however, it has relinquished its control over the future use of the Garage Property by delegating its authority to protect the public trust to the Department. See G.L. c. 91, § 2. As explicitly recognized by the SJC in *Moot*, "[t]he obligation to preserve the public trust and to protect the public's interest ... has been delegated by the Legislature to the [D]epartment, which, as charged in G.L. c. 91, § 2, 'shall act to preserve and protect the rights in tidelands of the inhabitants of the commonwealth by ensuring that the tidelands are utilized only for water-dependent uses *or otherwise serve a proper public purpose.*'" 448 Mass. at 342–343 (emphasis in original). The question of whether the RHDC Project serves a "proper public purpose" is, therefore, one for the Department to decide and additional legislation is not necessary in order to change the use of the Garage Property.[11]

[11] The Harbor Towers Plaintiffs cite *Broude* v. *Massachusetts Bay Lines, Inc.*, 2005 WL 1501885 (Land Ct. June 2005) (Trombly, J.), as support for their contention that a change in use of the Garage Property would require

For the foregoing reasons, Count II of the Harbors Towers Complaint does not assert a plausible claim and must be dismissed.[12]

B. The Enforceability of the Harbor Towers Plaintiffs' Alleged Permanent Parking Rights Under the LDA.

Count IV of the Harbor Towers Complaint seeks a judicial declaration that RHDC has an obligation under the LDA to provide permanent parking to the residents of Harbor Towers. RHDC maintains that it has no such obligation.

The interpretation of a written contract, such as the LDA, presents a question of law for the Court to decide. See *Balles* v. *Babcock Power, Inc.*, 476 Mass. 565, 571 (2017). In doing so, the Court is obliged to "construe [the] contract as a whole, so as 'to give reasonable effect to each of its provisions.'" *James B. Nutter & Co.* v. *Estate of Murphy*, 478 Mass. 664, 669 (2018), quoting *J.A. Sullivan Corp.* v. *Commonwealth*, 397 Mass. 789, 795 (1986). The Court also must construe all unambiguous contract language in accordance with its plain meaning. See *Balles*, 476 Mass. at 571. "The language of a contract is unambiguous unless 'the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" *A.L. Prime Energy Consultant, Inc.* v. *Massachusetts Bay Transportation Auth.*, 479 Mass. 419, 431 (2018), quoting *Bank* v. *Thermo Elemental, Inc.*, 451 Mass. 638, 648 (2008). "[W]hen the language of a contract is clear, it alone determines the contract's meaning." *Balles*, 476 Mass. at 571.

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further legislation. The Court regards the statement in *Broude* that "a proposed transfer of submerged lands from one public use to another can only occur by subsequent legislative act that is explicit as to the change in use" (*id.* at *9) as dicta that was issued prior to, and does not survive, the SJC's subsequent decision in *Moot*.

[12] As the Court concludes that Count II of the Harbor Towers Complaint fails on its merits, it does not reach RHDC's further argument that the Harbor Towers Plaintiffs lack standing to bring that claim.

In this case, the Harbor Towers Plaintiffs' claim to permanent parking rights in the Garage is based, almost exclusively, on Section 302(a) of the LDA, which provides that "[e]ach apartment building shall have rights in the garage, *running with the land on which such apartment building is built*, to the use of a number of parking spaces in the garage equal to three fourths of the number of dwelling units in such apartment building." LDA, Section 302(a), Exhibit B of RHDC's Appendix (emphasis added). The Harbor Towers Plaintiffs read the language "running with the land" in Section 302(a), and view the lack of an explicit expiration date in that section, as indicating an intention to make their parking rights under the LDA permanent. See Plaintiffs' Opposition to Motion to Dismiss of Defendant RHDC 70 East India, LLC at 15-17.

The Harbor Towers Plaintiffs' interpretation of the LDA is wrong as a matter of law. The LDA, construed as a whole, unambiguously recognizes and confirms that the Harbor Towers Plaintiffs possess the right to park in the Garage for a fixed period of years, not in perpetuity. More specifically, Section 502 of the LDA states that, after construction of all the improvements required by the Plan and the LDA has been completed, "the Redeveloper shall not, *until the expiration of the Term of the Plan*, reconstruct, demolish, or subtract therefrom or make any additions thereto or extensions thereof, without the prior written approval of the Authority...." LDA, Section 502, Exhibit B of RHDC's Appendix (emphasis added). Section 101 of the LDA, in turn, defines "Term of the Plan" as "the period of forty years commencing upon the aforesaid approval of the Plan by the Boston City Council." *Id.*, Section 101(e). Thus, the LDA, on its face, grants the "Redeveloper" or its successors the express right to outright "demolish" the Garage on or after June 8, 2004 (*i.e.*, forty years after

the Boston City Council approved the Plan). See Harbor Towers Complaint, ¶ 43. To interpret the Harbor Towers Plaintiffs' parking rights in the Garage as extending beyond the very existence of the Garage itself simply would not be reasonable. See *James B. Nutter & Co.*, 478 Mass. at 669 (court must construe contract "so as to give reasonable effect to each of its provisions") (internal quotation marks and citation omitted).

The literal interpretation of the LDA adopted by the Court also is directly supported by other documents concerning the Harbor Towers Plaintiffs' parking rights, not the least of which are the 1969 Lease and the 1982 Lease. These two lease agreements constitute the operative documents whereby the Harbor Towers Plaintiffs obtained their parking rights in the Garage, and in full knowledge of which they agreed to purchase their condominium units. Each document unambiguously states that all parking rights in the Garage held by the Harbor Towers Plaintiffs would end on a date certain, which currently is February 28, 2022. See 1969 Lease, Article II, Section 2; 1982 Lease, Article II, Section 1.

Lastly, the interpretation of the LDA adopted by the Court is entirely consistent with the language of Section 302(a) because Massachusetts law recognizes that a real property lease is an obligation that can "run with the land." See, e.g., G.L. c. 183, § 4 ("A conveyance of ... a lease for more than seven years from the making thereof ... shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless ... a notice of lease ... is recorded in the registry of deeds for the county or district in which the land to which it relates lies."). See also *Bright Horizons Children's Centers, Inc.* v. *Sturtevant, Inc.*, 82 Mass. App. Ct. 482, 486 (2012) ("The ancient rule, which has not lost any vitality in the Commonwealth, is in essence that a successor lessor, who

takes by deed real property subject to a pre-existing valid lease, stands in the shoes of and has the same rights and duties under the lease as had been held by its predecessor."). This means that the Harbor Towers Plaintiffs' leased parking rights in the Garage remain enforceable and will continue to "run with the land" until February 28, 2022, but not thereafter. By agreement, all of the Harbor Towers Plaintiffs' parking rights in the Garage will end on that date. No other reasonable construction of the LDA, viewed in its entirety, is possible.

For the foregoing reasons, Count IV of the Harbor Towers Plaintiffs' Complaint does not assert a plausible claim and must be dismissed.[13]

IV. The Declaratory Judgment Claims against the State Defendants.

The State Defendants have moved to dismiss all of the Plaintiffs' declaratory judgment claims against them on various grounds. As before, the Court addresses each claim separately.

A. The CLF Plaintiffs' Claim Alleging Improper Delegation of Authority by the Department.

Count I of the CLF Complaint requests a declaratory judgment that 310 Code Mass. Regs. § 9.34(2)(b) and other related sections of the Waterways Regulations pertaining to the MHP process are *ultra vires* because the regulatory framework constitutes an unlawful delegation of the Department's "exclusive statutory responsibility to exercise all public trust duties associated with the terms and conditions of licensing under the Public Waterfront Act for development of a nonwater-dependent project on tidelands to the Secretary without retaining approval oversight and control over the outcome...." CLF Complaint, ¶ 91. In this regard, Count I is not tied in any direct way to the RHDC Project, or to the Secretary's approval of the Downtown MHP. The State Defendants contend that Count I must be

[13] Again, because the Court concludes that Count IV of the Harbor Towers Complaint fails on its merits, it does not reach RHDC's further argument that the Harbor Towers Plaintiffs lack standing to bring that claim.

dismissed because the CLF Plaintiffs lack standing to challenge the MHP process and have not stated a plausible claim.

"Substantive challenges to the validity of a statute or regulation governing an administrative agency must be brought by means of declaratory judgment action pursuant to G.L. c. 231A, § 2, and G.L. c. 30A, § 7." *Baker* v. *Director of Div. of Unemployment Assistance*, 83 Mass. App. Ct. 1105 (2013), 2012 WL 6778429, *1 (Rule 1:28), citing, *inter alia*, *Salisbury Nursing & Rehabilitation Center, Inc.* v. *Division of Administrative Law Appeals*, 448 Mass. 365, 371(2007), and *Doe* v. *Sex Offender Registry Bd.*, 459 Mass. 603, 629-631 (2011). A party seeking declaratory relief, however, must demonstrate "'the requisite legal standing to secure its resolution'" and "the existence of an actual controversy." *Doe* v. *Secretary of Educ.*, 479 Mass. 375, 384 (2018), quoting *Entergy Nuclear Generation Co.*, 459 Mass. at 326. To have standing, the complaining party must allege "an injury within the area of concern of the statute, regulatory scheme, or constitutional guarantee under which the injurious action has occurred." *Doe*, 479 Mass. at 386. See also *Enos,* 432 Mass. at 134-136. "[I]t is not enough that the plaintiff be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the plaintiff." *Penal Institutions Comm'r for Suffolk County* v. *Commissioner of Correction*, 382 Mass. 527, 532 (1981) (citation omitted).

In this case, Count I of the CLF Complaint alleges that the Department has effectively and unlawfully abrogated its duties and responsibilities under Chapter 91 to protect public tidelands by delegating responsibility for reviewing all draft MHPs to the Secretary. The CLF Plaintiffs' allegations of resulting harm are admittedly broad, but still reasonably detailed. See

CLF Complaint, ¶ 94 ("The errors of law committed by the [Department] in making this unlawful delegation harm the rights and interests of the public, including [the CLF] Plaintiffs' rights and interests in their use and enjoyment of public tidelands."). These injuries, as pled, fall squarely within the area of concern of Chapter 91 and the Waterways Regulations and flow from the Commissioner's alleged violation of his duties to the CLF Plaintiffs, as members of the public, under Chapter 91. Furthermore, the CLF Plaintiffs' alleged injuries are not, as the State Defendants contend, too speculative or generalized to confer standing. The Court is confident that the CLF Plaintiffs' allegations that the less-restrictive standards incorporated in the approved Downtown MHP (a) diminish the capacity of the downtown waterfront area to accommodate water-dependent uses, and (b) adversely affect CLF's corporate purpose and its members' use of the waterfront, are sufficient to plead "an injury within the area of concern" of Chapter 91 so as to give the CLF Plaintiffs standing to pursue Count I.[14] See *Doe*, 479 Mass. at 386.

The State Defendants contend that Count I of the CLF Complaint also fails to raise an "actual controversy" because the Secretary's approval of the Downtown MHP did not approve any particular waterfront project. "[A]n actual controversy exists," however, "when a plaintiff asserts that an agency has exceeded its statutory authority in a manner that has caused, or will cause, injury to the plaintiff." *Entergy Nuclear Generation Co.*, 459 Mass. at 325. The CLF Plaintiffs have done exactly that in this case. See CLF Complaint, ¶ 94 ("The errors

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[14] Although not decisive as to the CLF Plaintiffs' standing, the Court agrees with the SJC's dicta in similar circumstances in *Town of Brookline* v. *Governor*, 407 Mass. 377 (1990), that,

> [i]f the plaintiff[s] ... lack standing to challenge the lawfulness of [the statute at issue], no one else is likely to have any greater standing to do so. We would be reluctant to tolerate a situation in which allegedly unconstitutional conduct would be free from judicial scrutiny even on the request of an entity most directly affected by the alleged unlawful conduct.

Id. at 384.

of law committed by the Commissioner in making this unlawful delegation [to the Secretary] harm the rights and interests of the public, including [the CLF] Plaintiffs' rights and interests in their use and enjoyment of public tidelands."). These allegations of harm, read, as they must be, in the light most favorable to the CLF Plaintiffs, are sufficient to demonstrate an actual controversy. See *Entergy Nuclear Generation Co.*, 459 Mass. at 325.

The State Defendants further maintain that Count I lacks merit because the regulations at issue were duly promulgated and the Secretary, in approving an MHP, does not exercise any authority that is exclusive to the Department. However, it is a plausible reading of 310 Code Mass. Regs. § 9.34(2)(b) that the Department is bound in licensing proceedings by the substitute standards set by the Secretary in an approved MHP. See 310 Code Mass. Regs. § 9.34(2)(b) ("If the project conforms to the [approved] municipal harbor plan the Department *shall ... apply* the use limitations or numerical standards specified in the municipal harbor plan as a substitute for the respective limitations or standards contained" in the Department's standard regulations) (emphasis added). It also is at least plausible that, by virtue of 310 Code Mass. Regs. § 9.34(2)(b), the Department has unlawfully relinquished its obligations under Chapter 91 to the Secretary. Cf. *Moot*, 448 Mass. at 352 ("[B]y exempting [certain] tidelands from the licensing requirements of G.L. c. 91, § 18, entirely, the department has relinquished its obligation to ensure that all nonwater-dependent uses of filled tidelands serve a 'proper public purpose,' as the Legislature has mandated. The exemption exceeds the department's authority and is invalid.").

For the foregoing reasons, the Court concludes that Count I of the CLF Complaint states a viable claim against the State Defendants and is not appropriate for dismissal at this time.

B. The Plaintiffs' Claims Challenging the Legality of the Downtown MHP.

All of the CLF Plaintiffs' claims for declaratory judgment against the State Defendants (with the exception of Count I of the CLF Complaint, discussed above) and all of the Harbor Towers Plaintiffs' claims for declaratory judgment against the State Defendants (collectively, the "Downtown MHP Declaratory Judgment Claims") seek a judicial declaration that the Downtown MHP is unlawful for various reasons. The State Defendants contend that the Plaintiffs, as a group, lack standing to assert these claims and have stated no plausible claim for declaratory relief.

The Downtown MHP Declaratory Judgment Claims differ from Count I of the CLF Complaint in that each one explicitly challenges, in one way or another, the Secretary's decision to approve the Downtown MHP in particular. The distinction is an important one because it causes the Court to conclude that all of the Downtown MHP Declaratory Judgment Claims fail for lack of standing under *Hertz* v. *Secretary of Exec. Office of Energy & Envtl. Affairs*, 73 Mass. App. Ct. 770 (2009).

In *Hertz*, the residents of a condominium abutting Lovejoy Wharf in Boston challenged the Secretary's approval of a specific amendment to an MHP that permitted the development of the wharf and authorized two buildings of a height that the residents claimed was injurious to them. See *Hertz*, 73 Mass. App. Ct. at 771. More particularly, the residents claimed that the buildings would "directly block the light, air, and visual benefits of their property;" "reduce

their access to the waterfront;" and "create traffic problems, noise, and pollution on their property." *Id.* The Appeals Court concluded that the residents' claims of "diminished use of and access to the waterfront and their being subject to increased noise and pollution are not within the area of concern of the [MHP Regulations]" and, therefore, the residents had no right to redress those injuries under the MHP Regulations. *Id.* at 774. The Appeals Court stated that the MHP Regulations gave the residents the opportunity to "play a role in the process" by participating in public hearings and submitting comments, and that "nothing in the [MHP Regulations'] language, purpose, or administrative scheme ... suggest[ed] a legislative intent that persons such as the [residents] should be able to seek judicial review of the Secretary's determination of what constitutes a proper [approval]." *Id.* at 775, quoting *Enos*, 432 Mass. at 137-138. On these grounds, the Appeals Court held that the residents had no standing to challenge the amendment to the MHP. See *Hertz*, 73 Mass. App. Ct. at 776.

Hertz forecloses the Harbor Towers Plaintiffs' and the CLF Plaintiffs' attempts, by means of the Downtown MHP Declaratory Judgment Claims, to seek judicial review of the Secretary's approval of the Downtown MHP. There simply is no rational basis to distinguish the Plaintiffs' Downtown MHP Declaratory Judgment Claims from the similar claims that the Appeals Court rejected in *Hertz*. As in *Hertz*, however, the fact that the Plaintiffs "may not challenge the Secretary's approval [through a declaratory judgment action] does not mean that they may not have other avenues to challenge that approval." *Id.* at 775. Both the Harbor Towers Plaintiffs and the CLF Plaintiffs may contest the Secretary's approval of the Downtown MHP through their Section 7A claims. Cf. *Enos*, 432 Mass. at 142 (rejecting argument that Secretary's certification of final supplemental EIR would be "virtually immune

from judicial review" if court denied plaintiffs' standing to bring G.L. c. 231A claim challenging certification because plaintiffs could bring claim under G.L. c. 214, § 7A). The CLF Plaintiffs also may challenge the entire MHP approval framework through Count I of the CLF Complaint. Lastly, the Harbor Towers Plaintiffs and the CLF Plaintiffs potentially may appeal any future Chapter 91 license that is granted for a purportedly non-conforming project within the Downtown MHP project area. See G.L. c. 91, § 18; 310 Code Mass. Regs. § 9.17.

For the foregoing reasons, the Plaintiffs' Downtown MHP Declaratory Judgment Claims do not assert a plausible claim and must be dismissed.

V. Plaintiffs' Mandamus Claims.

The Harbor Towers Plaintiffs and the CLF Plaintiffs both seek relief in the nature of a writ of mandamus against the State Defendants. In particular, the Harbor Towers Plaintiffs request a writ (1) directing the Commissioner to conduct any Chapter 91 licensing proceeding concerning the Garage Property without regard to any MHP, and (2) directing the Secretary to withdraw his approval of the Downtown MHP. The CLF Plaintiffs, in turn, request a writ (1) directing the Commissioner vacate and remove 310 Code Mass. Regs. § 9.34(2)(b) and other related MHP provisions from the Waterways Regulations, and (2) directing the Secretary to revoke his approval of the Downtown MHP and comply with the APA in any rulemaking concerning public tidelands development. The State Defendants contend that the Plaintiffs are not entitled to any mandamus relief.

"A complaint in the nature of mandamus is a call to a government official to perform a clear cut duty, and the remedy is limited to requiring action on the part of the government official." *Boston Med. Ctr. Corp.* v. *Secretary of Exec. Office of Health & Human Servs.*, 463

Mass. 447, 469-470 (2012), quoting *Simmons* v. *Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't,* 448 Mass. 57, 59–60 (2006) (internal quotations omitted). Mandamus action "is extraordinary" and is available "only to prevent a failure of justice in instances where there is no alternative remedy." *Callahan* v. *Superior Court*, 410 Mass. 1001, 1004 (1991). Furthermore, relief in the nature of mandamus is not available "to obtain a review of the decision of public officers who have acted and to command them to act in a new and different manner," *Boston Med. Ctr. Corp*, 463 Mass. at 470, quoting *Harding* v. *Commissioner of Ins.*, 352 Mass. 478, 480 (1967), or "to compel the performance of discretionary acts." *Town of Boxford* v. *Massachusetts Highway Dep't*, 458 Mass. 596, 606 (2010).

Here, neither the Harbor Towers Plaintiffs, nor the CLF Plaintiffs are entitled to relief in the nature of mandamus because the orders they seek would require the Court to command the State Defendants to undo what already has been done (*e.g.*, invalidate or ignore the Downtown MHP), and/or to do it over again "in a new and different manner" (*e.g.*, comply with the APA in any rulemaking concerning public tidelands development). As previously noted, mandamus simply is not available for such purposes. See *Boston Med. Ctr. Corp*, 463 Mass. at 470. All of Plaintiffs' mandamus claims necessarily fail as a result.

Order

For the foregoing reasons, **IT IS HEREBY ORDERED THAT**:

(1) With respect to the *Armstrong Case*, Case No. 1884CV02132-BLS1, RHDC's motion to dismiss is **ALLOWED IN PART** in that Count II and Count IV of

the Harbor Towers Complaint are **DISMISSED**. The motion otherwise is **DENIED**;

(2) Also with respect to the *Armstrong Case*, Case No. 1884CV02132-BLS1, the State Defendants' motion to dismiss is **ALLOWED** in its entirety; and

(3) With respect to the *CLF Case*, Case No. 1884CV02144-BLS1, the State Defendants' motion to dismiss is **ALLOWED IN PART** in that Count II, Count III, Count V, and Count VI are **DISMISSED**. The motion otherwise is **DENIED**.

Brian A. Davis
Associate Justice of the Superior Court

Date: October 17, 2019