



October 15, 2015

Asst. Secretary for MEPA Deirdre Buckley  
Executive Office of Energy & Environmental Affairs, MEPA Office  
100 Cambridge Street, Suite 900  
Boston, MA 02108

Boston Redevelopment Authority  
Attn: Chris Tracy  
One City Hall Square, 9<sup>th</sup> Floor  
Boston, MA

**RE: MEPA File. No. 15418--ENF for Lewis Wharf Hotel Complex  
Article 80 PNF 2015-09-14—Lewis Wharf Hotel Complex**

Dear Ms. Buckley and Mr. Tracy:

Conservation Law Foundation (CLF) provides the following comments on the environmental notification form under review for the proposed hotel complex on Lewis Wharf off Atlantic Avenue in Boston and on the Article 80 PNF 2015-09-14, which are both out for public comment. CLF has championed the cleanup of the Boston Harbor and public access to and benefits on the Boston Harbor waterfront since 1983. At this time, we are opposed to the proposed Lewis Wharf hotel complex project referenced above and believe that the project has major hurdles to overcome before it can be approved and licensed under municipal and state law.

**1. Legal right to rehabilitate the formerly-licensed pier on the abandoned pile field for the proposed uses and structures**

It is ironic but fitting in some ways that the public is now confronting a proposal that would dramatically foreclose its access to Boston Harbor on the very wharf where the modern era of public trust tidelands law was launched by Justice Querico's decision in Boston Waterfront Dev. Corp. v. Commonwealth in 1979. The irony of this proposal is deepened by the fact that the portions of that wharf where the Supreme Judicial Court identified the public's paramount interest in access to the foreshore—present or former flowed Commonwealth tidelands—have been used in substantial, continuous, and notorious non-compliance with the Public Tidelands Law, Chapter 91, and the public interests that law was intended to protect.

Not only has the site been used for notorious unauthorized activities that have been injurious to the public trust benefits that the property owner was obligated to provide on-site, but the property owner even failed to comply with the requirements of the Administrative Consent Order that was executed between the Department of Environmental Protection (DEP) and Philip

DeNormandie, General Partner of the Lewis Wharf Limited Partnership. Such requirements were intended to protect the public interests in that property and required the on-going maintenance of the piers and structures that the owner has abandoned and that have fallen into ruin.

Now, in return for authorizing a massive, non-water dependent structure and use that largely cuts the general public's access to that waterfront, the public and the Commonwealth are being asked to accept the very public benefits that the property owner has been obligated to provide for decades and has refused to do. However, the public equities associated with this Chapter 91 and BRA approval process have been dramatically compromised from what should be minimally required at this site given the historic "unclean hands" of the property owner. Moreover, there is clearly no development "as of right" as the project proponent continues to insist, as if saying it enough times would make it so.

The eastern portions of this property where the hotel complex would be sited consists of portions of present and formerly flowed tidelands, which may have different considerations that have to be applied to the question of their legal suitability for "redevelopment." Specifically and while CLF's research is on-going, it appears that the legal status and history of the former piers extending out into the harbor beyond the seawalls may be different from the legal status and history of the formerly flowed tidelands to the west of the seawall on the property, the portions of the site that were identified as Area B in the Boston Waterfront decision.<sup>1</sup> The Boston Waterfront Court left open the question of what property interest had been conveyed to Boston Waterfront Development Corp.'s predecessor in those flowed tidelands under the licensed pile-supported piers.

It is now time to finally determine the nature of that interest before discretionary approval under Chapter 91 is given for this project. Given the central importance of this property with respect to the overarching importance of creating and activating public spaces *on the water* in Boston Harbor and the intensive occupation of the waterfront and associated public detriments to the strong public interests in these flowed tidelands, CLF would urge the Commonwealth to hit the pause button on this project. As an early legal article observed, "The State should have the privilege of entering and determining the riparian proprietor's estate."<sup>2</sup> The Supreme Judicial Court has since pointedly observed with respect to that "privilege:" "The State can no more abdicate its trust over property in which the whole people are interested so as to leave them entirely under the use and control of private parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace."<sup>3</sup>

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<sup>1</sup> See Boston Waterfront, 378 Mass. at 656.

<sup>2</sup> The Right of Access and the Right to Wharf Out to Navigable Water, 4 Harv. L. Rev. 14, 24 (1890), cited in Boston Waterfront, 378 Mass. at 650.

<sup>3</sup> Boston Waterfront, 378 Mass. at 647, quoting from the U.S. Supreme Court's landmark public trust decision in Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

CLF believes that by virtue of the actions and failures to act with respect to these areas, a significant and compelling argument can be and should be made that the formerly-licensed north and south piers on Lewis Wharf east of the seawall may now be legally abandoned, and the former license interests associated with those flowed tidelands may be constructively surrendered and void as a result of the actions of the license holder. The private interests in those tidelands may have reverted to the Commonwealth. CLF believes that the Commonwealth has an obligation to the public to make a determination with respect to the remaining interests the Lewis Wharf Limited Partnership possesses in these derelict pile fields prior to any decisions about authorizing and licensing new uses and structures on these flowed tidelands.

Different but equally important questions regarding Lewis Wharf Limited Partnership's current property interests extend to the properties west of the seawall. These properties are clearly subject to the condition subsequent that they be used for the maritime commerce purposes for which they were conveyed by the Commonwealth. While Chapter 91 created a statutory scheme that could be accessed by tideland property owners to change the specified public uses of a parcel of land occupying tidelands, Lewis Wharf Limited Partnership's predecessor in interest did not avail itself of the option to apply for a change of use of the property, and neither the predecessor nor Lewis Wharf Properties have ever received licenses authorizing the changed uses on the property, which are not only unlicensed but also in complete violation of DEP regulations in the case of the extensive parking lots that have been operated on the property over Commonwealth tidelands for decades.

Although the Administrative Consent Order entered into in 2008 by DEP with Lewis Wharf Limited Partnership purports to recognize Lewis Wharf Limited Partnership's "right" to rebuild the piers on the abandoned pile fields, DEP was not delegated the authority under Chapter 91 to exercise such powers and make such determinations on behalf of the Commonwealth. *Cf.*, Moot v. DEP, 448 Mass. 340, 352 (2007). An Administrative Consent Order is not a license and confers none of the protections that a license would confer even while it may protect the Lewis Wharf Limited Partnership from enforcement action by DEP.

Moreover, even if DEP did have authority to exercise such power on behalf of the General Court, Lewis Wharf Limited Partnership did not comply with the terms of the Administrative Consent Order. By its own terms, the Administrative Consent Order—to which Lewis Wharf Limited Partnership agreed—indicated that the partnership would "forfeit the right to develop within the footprint of the existing pile fields." *Id.* at V.11.

Until these threshold legal issues are appropriately resolved, the current project proposal should not go forward.

**2. The proposed public benefits are not greater than the public detriments associated with the project, and the location of this hotel complex does not serve a proper public purpose.**

As this project is predominantly a non-water-dependent proposed use of these present and former tidelands, licensing is discretionary with DEP under the provisions of Section 18 of the Public Tidelands Law, G.L. c. 91, § 18. CLF believes that the public benefits associated with this project do not offset the public detriments as required by Section 18. Essentially, and with the exception of the proposed water-dependent uses, the proponent provides little more than has already been legally required, but not provided, at this property but a new ersatz park set back and essentially disconnected from the waterfront and adjacent to a heavily used vehicle access road to the hotel complex and underground parking garage, the headworks for the underground garage also multi-purposed as the new “sailing center,” and Atlantic Avenue.

CLF recognizes that the proposed hotel complex is defined as a “facility of public accommodation” in DEP regulations and that there are some public benefits associated with that use. But we would argue that the exclusive nature of the proposed hotel makes it out of reach of the general public and therefore must be significantly discounted with respect to the accounting of public benefits associated with this project. There has been virtually no effort to configure a significant public space or activity on the harbor, which is where the public interests are the greatest. The proposal makes little effort to consider other configurations of the structure that would contribute to harbor activation to a greater degree and provide meaningful public benefits that would attract and occupy the general public to this site and its remarkable harbor location. Rather these benefits are largely captured and privatized for the small segment of the population that could afford rooms or functions in this complex. Stated slightly differently, it is clear that the private benefits of this proposal far outweigh the public benefits, and the public detriments of free passage and access to these flowed tidelands are not meaningfully mitigated.

These are not theoretical observations. As anyone who has walked the downtown and North End waterfront knows, there are many examples today of hotel developments on the waterfront that do not embrace or amplify the public realm and its associated burdens that they occupy. There are examples where the public is invited and almost incorporated into the ethos of the development and others where the general public is walled off or excluded in a multitude of subtle but effective ways. This proposed project clearly falls into the latter category. CLF is not aware of a single hotel or development located on open piles in the heart of public waterfront of this scale and dominance that has been approved under Chapter 91. This proposal sets an important, unacceptable precedent for the public benefits that should be associated with any such project in the Commonwealth.

### **3. Significant concerns related to this project's location in the velocity zone**

Substantial issues exist with respect to the implications of massing buildings of this sort in a velocity zone. The hotel complex proponent appears to completely brush these issues aside and seems to think about the issues solely in the context of the potential risks to its own properties in an extreme event, which are now forecast with increased frequency and severity in the decades ahead. It seems likely that this project cannot be permitted without a variance under Article 25-5.8 of the Boston Zoning Code. Critical to any approval, whether of a variance to Article 25-5.8 or MEPA approval, is a full and detailed engineering and hydrological analysis of the potential of this project, as it is currently configured, to aggravate wave damage and flooding effects on neighboring properties and Atlantic Avenue. There should be full disclosure under engineering seal of what the associated risks are with building such a group of structures at this location over the full expected life of this project under various scenarios that are predicted from both current conditions and the various ranges of projections associated with climate change as well as proposed structural and non-structural alternatives to mitigate or avoid those risks. This project site will be underwater and subjected to tidal surge and extreme wave action with predicted 100-year flooding events.

The MWRA, while obviously charged with executing a more critical public health, safety, and welfare responsibility than a coastal developer, has analyzed its system for vulnerabilities to a 100-year flood plus 2.5 feet event, a significant event but still one that is below the realized flood levels associated with Hurricane Sandy in New York. Although Sandy may be a relatively rare 700-year recurrence flooding event, a 500-year event, which is likely to occur at least once every 50 years, would be experienced at this site with statistical likelihood over the stated life of the structures and should be evaluated. Considering potential increases in storm recurrence associated with climate change, some researchers have calculated that today's 500-year storm could occur with a frequency of once every 24-250 years. This project will be significantly at risk to flooding, storm surge, and storm damage and may exacerbate risks at adjoining properties. In this context, CLF believes that the developer's initial response to the City's Article 80 Boston Climate Change Resiliency and Preparedness Checklist Part C flooding/storm checklist is superficial and not responsive to the City's, the neighborhood's, or the public's needs.

While it is one thing for a developer to put its own capital, customers, and employees at risk by constructing in an unsound location, it is completely another thing if there is even a risk that such developments would increase the severity or frequency of storm-related or climate change-related effects on adjacent properties and neighborhoods.

### **4. Other issues**

CLF is aware that a number of significant issues have been raised by members of the public with respect to both the comprehensive scope of the extensive analysis that will be



required under MEPA, Chapter 91 and the City of Boston's various development requirements, including the outdated Harborpark Plan. We will not weigh in on many of those issues at this time beyond reinforcing the importance of a thorough and cautionary approach to this proposed project. The tone of both the materials provided by the developer and the public presentations that CLF has heard is one that seems to be driven by the developer's perspective that this development can move forward as of right and that the details should be of little concern to the public as they are claimed to be consistent with all the required statutory and planning provisions. CLF would argue that this project is not entitled to moving forward as of right and that it is anything but conventional.

This development, given its location, will frame and define the public experience of the Boston Waterfront for the entire segment north of Columbus Park. It does little to advance that experience in its proposed configuration. Given its proposed location in the heart of a storm velocity zone, the project will also define how Boston approaches the coming challenges of sea level rise, tidal surges, and increased storm frequency and severity. The BRA decisions here will frame and define whether the City is in denial about the implications of the new development parameters that such large scale climactic changes compel or whether it will shape new development to mitigate the impacts of climate change and increase the City's resilience to the forces that climate change will unleash.

Sincerely,

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