

Decision on

The City of Boston's

South Boston Waterfront District

Municipal Harbor Plan

December 6, 2000

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Table of Contents

| | | |
|-------------|---|-----------|
| I. | Introduction | 4 |
| | Our Evolving Understanding of the Public Trust Doctrine | 4 |
| | 1. Citybuilding and Transportation | 6 |
| | 2. Ensuring Public Access to the Waterfront | 7 |
| | 3. The Importance of Urban Parks and Open Spaces | 8 |
| | 4. Activation of the Water’s Edge | 8 |
| | 5. Timeliness and Predictability in Environmental Decisionmaking | 9 |
| | 6. Heights, Setbacks, and Open Spaces: Offsetting the Impacts of Development | 10 |
| | Summary of Key Modifications and Conditions | 11 |
| II. | Overview | 13 |
| | A. Review Process | 13 |
| | B. Geographic Area | 13 |
| | C. How This Decision is Organized | 14 |
| III. | Review of Basic Plan Elements | 15 |
| | A. Goals and Applied Policies | 15 |
| | B. Implementation Program | 16 |
| | C. Planning Analysis | 17 |
| | D. Public Participation | 17 |
| IV. | Standards for MHP Approval | 19 |
| V. | Application of Approval Standards: CZM Harbor Planning Guidelines and Policies | 20 |
| | A. Consistency with CZM Harbor Planning Guidelines | 20 |
| | B. Consistency with CZM Policies | 21 |
| VI. | Application of Approval Standards: Compatibility With State Agency Plans or Planned Activities | 26 |
| | A. Commonwealth Flats Development Area | 26 |
| | B. MBTA Silver Line Project | 26 |
| | C. Logan Airport | 27 |

| | | |
|--------------|--|-----------|
| VII. | Application of Approval Standards: Consistency With State Tidelands Policy Objectives | 29 |
| | A. Evaluation of Plan-wide Amplifications and More Restrictive Provisions | 31 |
| | 1. Pedestrian Access Network | 31 |
| | 2. Open Space/Lot Coverage Requirements | 31 |
| | 3. Upper Floor Accessory Uses on the Ground Floor | 32 |
| | B. General Approach to Determinations on Substitute Provisions | 33 |
| | C. Determination on Proposed Substitute Provisions | 33 |
| VIII. | Evaluation of Requested Substitute Provisions: Inner Harbor District | 38 |
| | A. General Description of District and Current Projects | 38 |
| | B. Proposed Height Substitute Provisions: Fan Pier and Pier 4 | 38 |
| | C. Proposed Setback Substitute Provisions: Fan Pier and Pier 4 | 47 |
| | D. Proposed Open Space and Height Substitute Provisions: McCourt/Broderick Parcels A, B, C, and D | 49 |
| | E. Barking Crab Parcel | 52 |
| IX. | Evaluation of Requested Substitute Provisions: Fort Point Historic North District | 57 |
| X. | Fort Point Historic South and Fort Point Industrial Districts | 60 |
| | A. Fort Point Historic South District | 60 |
| | B. Fort Point Industrial District | 62 |
| XI. | Enforceable Implementation Commitments | 64 |
| XII. | Effective Date and Term of Approval | 66 |
| XIII. | Statement of Approval | 66 |

South Boston Waterfront MHP Decision

I. INTRODUCTION

Today, I am approving, subject to certain conditions, the South Boston Waterfront District Municipal Harbor Plan (MHP or the plan) submitted in July 2000 by the City of Boston.

Over three years ago the City of Boston, under the leadership of Mayor Thomas M. Menino, began the planning process for approximately 1,000 acres of land located in South Boston, across Fort Point Channel from the Downtown Financial District. My approval of the South Boston Waterfront MHP, governing 128 acres of land within the larger planning area, represents the achievement of one milestone necessary to realize the City's vision. With its associated conditions, I believe my decision will guide the redevelopment of this important urban waterfront in a way that protects the use and enjoyment of this valuable resource by future generations. Although the tidelands that comprise the harbor planning area have been filled for many years, I am confident that the public's rights to use, enjoy, and pass freely over them to reach the water will remain strong and vibrant.

Our Evolving Understanding of the Public Trust Doctrine

With responsibilities rooted in ancient principles of English and Roman law known as the Public Trust Doctrine, the Commonwealth has been charged with protecting the public interest in all tidelands since the earliest days of the Massachusetts Bay Colony. As Secretary of Environmental Affairs, I must ensure that harbor planning decisions in Massachusetts are grounded in core principles of the Public Trust Doctrine, reflecting:

- The public's fundamental rights and interests in natural resource areas such as the sea and its shores; and
- The state's responsibility to preserve and enhance these areas, and the public's right to use them.

The Public Trust Doctrine is a broad principle that has been called the "conceptual and spiritual compass" of environmental law. Under Massachusetts law the Public Trust Doctrine affects a wide range of resources, from rivers to coastal waters to filled tidelands along the shore. Over the past 350 years the nature of public trust rights has evolved significantly in response to changing societal needs and desires. In previous eras, public trust rights in tidelands were implemented to promote maritime commerce, while preserving free access for water-dependent individual activities such as hunting, fishing, and boating. Today, the nature of these rights continues to evolve in response to our changing understanding of the environment. The public's trust rights in tidelands protect a broad range of waterfront activities – all of them dependent on the public's ability to use and enjoy the benefits of this unique resource.

In 1641, the Massachusetts Bay Colony exercised its sovereignty over the sea and adjacent tidelands by enacting the Colonial Ordinance, the first codification of the Public Trust Doctrine in America. In 1647, recognizing a need to stimulate commerce and a struggling maritime economy, the colonial government amended this ordinance and redefined the limits of

Commonwealth tidelands, thereby encouraging the building of wharves and docks by private interests. At the same time, the Colonial Ordinances of 1641 - 1647 reaffirmed the public's trust rights to fishing, fowling and navigation in tidelands. These Ordinances still provide the foundation for current Massachusetts tidelands law and policy.

Between the 17th and early 20th centuries, under the authority of state enabling acts and licenses, a large portion of the tidelands in Boston Harbor were filled to create new docks and piers, railyards, and warehouses. In the 1960s and 1970s, as the economy changed, much of this industrial waterfront became available for new residential and commercial uses. During the same time, the environmental movement revitalized the use of the public trust doctrine. In 1979, the SJC's decision in the *Boston Waterfront* case, 378 Mass. 629, reaffirmed the power of the public trust doctrine to shape the redevelopment of urban waterfronts. The case involved a North End wharf that had been filled for commercial purposes under a 19th century grant from the legislature. The court held that future uses that did not comply with the original public purpose could give rise to new intervention by the state on behalf of the public. The court reminded us all that a site within Commonwealth tidelands is not "subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development." *Id.* at 649.

Following this decision, the legislature significantly amended Chapter 91 in 1983, 1986, and 1990, and the Department of Environmental Protection (DEP) adopted the Waterways Regulations (310 CMR 9.00) in 1990. The statutory amendments and the Waterways Regulations clarify the relationship between public and private rights in tidelands while protecting, promoting, and preserving the public's interest. Chapter 91 and the Waterways Regulations authorize DEP to license the development of nonwater-dependent projects, including offices, retail, hotels, and residences, within filled tidelands, subject to strict requirements for open space, setback, height, and active ground-level uses.

During the same period, EOEAs Office of Coastal Zone Management (CZM) adopted Regulations for Review and Approval of Municipal Harbor Plans (the Municipal Harbor Planning Regulations), 301 CMR 23.00. These regulations allow communities to submit plans that promote future waterfront development, carefully tailoring specific provisions of the Waterways Regulations to reflect the local vision and needs of the harbor area. Among other things, approval of a harbor plan by EOEAs can allow for the use of substitute dimensional provisions to be used in DEP's Chapter 91 licensing of individual nonwater-dependent projects.

In January 1991 Boston submitted its initial Municipal Harbor Plan (MHP). Secretary of Environmental Affairs Susan Tierney approved portions of the MHP governing the downtown, North End, and Charlestown areas of the waterfront. This MHP for the South Boston waterfront is a significant expansion of the Boston MHP. In upcoming months I expect additional submittals for the downtown side of the Fort Point Channel and for East Boston, and for the renewal of the Downtown/North End/Charlestown MHP.

In reviewing and approving a harbor plan, my role is neither overly intrusive nor overly deferential. I am reviewing a plan put forward by the City of Boston, which will govern a significant portion of that city's waterfront. My role is to act as a trustee of the rights of all the people of the Commonwealth, and to judge the City's plan by the standards set forth in the Municipal Harbor Planning Regulations. While respecting local goals, I must be mindful of my responsibilities to balance competing public and private interests in a way that will ensure that such plans protect and promote the full range of public trust rights in tidelands. Because this harbor plan is the first to involve such significant departures from baseline Chapter 91 requirements for height, open space, and setbacks, I am particularly mindful of the precedent it will set for other plan decisions in Boston and throughout the state.

This harbor plan for the South Boston Waterfront District is the product of significant effort on the part of the City and many members of the public who participated in the public process. In particular I would like to commend the efforts of the Boston Redevelopment Authority (BRA) staff, who have worked closely with members of EOEI over the past three years. I also would like to acknowledge the members of the Municipal Harbor Planning Advisory Committee, who volunteered their time and talents in weekly meetings over the past year, and who participated in an intensive series of meetings during the consultation process, when many important issues were resolved. The lively and well-attended public participation process was critical in informing me about the goals and objectives of this MHP and the desires of the public. The public participation process was particularly helpful in identifying those benefits that would best protect the public interests in these filled tidelands.

In exercising my judgment, I have considered carefully each section of the plan and related documentation, and I have considered the public comments submitted in writing and made orally at the three public hearings, each of which I chaired personally, and at the consultation meetings. I note that a large number of comments urged me to reject the plan outright, and that a smaller number of comments urged me to approve the plan precisely as submitted. There were also many detailed and thoughtful comments that suggested ways in which particular sections of the plan could be improved. I am very appreciative of the time and effort that went into all these comments, and I have incorporated many of the suggestions into the conditions of my approval. Six broad themes voiced in the public comment and the consultation process have informed my Decision.

1. Citybuilding and Transportation

The South Boston waterfront is potentially the most significant new city-building opportunity to be undertaken in Boston since the creation of the Back Bay in the late 19th century. Presently, much of the South Boston Waterfront consists of parking lots and warehouses, inaccessible to the public and underutilized economically. But the possibilities for this area are superb, due to its proximity to the downtown financial district, the airport, the deepwater port, and the historic Fort Point Channel. As envisioned in the City's *Public Realm Plan*, one thousand acres of former industrial land, much of it now vacant or underused, will be transformed into a new mixed-use urban district, which could accommodate as much as 17 to 24 million square feet (SF) of new development. The development of the South Boston waterfront is generally consistent with the goals of Executive Order 385 (Planning for Growth), which favors the

redevelopment of previously developed areas served by public infrastructure. I particularly want to note that the increased percentage of residential use in new waterfront developments will further the efforts of Governor Paul Cellucci and Mayor Menino in expanding housing opportunities for urban residents.

Within the larger *Public Realm Plan* area, the MHP focuses on 128 acres of waterfront land in South Boston that are subject to Chapter 91 jurisdiction. The MHP provides a framework through which public and private interests can work together to achieve a common benefit. I believe that the revitalization of this waterfront must take advantage of its potential for commercial development. To be successful, public access and open space must be integral components of the plan.

Providing good transportation access will also be a key to unlocking the development potential of the South Boston waterfront. The state and federal government have invested billions of dollars in new public investments to serve the area: the Central Artery / Tunnel project, the MBTA's Silver Line, and new surface streets. The MHP expressly references the *South Boston Transportation Study*, issued by the Boston Transportation Department (BTD) in association with the BRA and Massport. At the recent South Boston Transportation Summit, I articulated the following principles to guide the upcoming MEPA review of projects in South Boston, both within and without the harbor planning area:

- Development of a unified transportation strategy that implements the goals of the *BTD Study*, in a manner that makes efficient use of transportation investments and that favors clean, non-polluting forms of transportation – public and quasi-public transit, water transportation, bicycling, walking – over private automobile use.
- Ensuring that transportation demand is in balance with capacity, both in the short term and the long term. If demand exceeds capacity, project proponents may choose to reduce demand by reducing density, delaying development, or changing the mix of land uses, or to take steps that will increase the capacity of public and quasi-public transit services.

2. Ensuring Public Access to the Waterfront

Public access to our coast is often limited severely, or even prevented. Believing firmly that we have a common heritage in the waterfront, I have pursued ways in which public coastal access can actively be expanded throughout the Commonwealth. Limited access has been a particularly critical issue along the intensely developed shorelines of Boston Harbor. Through the City's implementation of Harborwalk and the state's Waterways Regulations, public pedestrian access to this valuable resource has been expanding steadily since the late 1980's. The \$4 billion cleanup of Boston Harbor by the Massachusetts Water Resources Authority has made the use of this public resource far more inviting and desirable.

Through the course of three public hearings and written public comments, it became apparent that coastal access in an urban area means different things to different people. For some, it can mean trees, green lawns, and picnic areas. For others it can mean paved urban plazas enlivened by sidewalk cafes and band concerts. For still others, it can mean access to boats,

marinas, and ferries. I believe that implementation of the MHP must embrace the full range of these public goals and desires. Only in this way can we create a new urban waterfront that is truly accessible and inviting to all Massachusetts residents and visitors.

In light of the public comment, and my priorities and responsibilities as Secretary, I note the extensive new opportunities for public access that will be provided through this MHP. Approximately 4,700 linear feet of new Harborwalk will be created along the Fort Point Channel and the Inner Harbor, along with an extensive system of walkways connecting the shoreline with interior public ways. View corridors, pedestrian ways, and streets will establish direct links to the water's edge, providing both physical and visual access. New, publicly accessible space will be created in the form of parks, plazas, and other open spaces, ground floor public space within buildings, boardwalks, docks, and a publicly accessible breakwater protecting the seaward entrance to the Fan Pier cove.

I am also pleased to note that the area will be served extensively by water transportation, creating a "blue highway" that connects residents and visitors with other areas of the Harbor. The availability of water transportation will contribute to making this waterfront area truly accessible to all. Water transportation will also be a key element in the sustainable transportation strategy that I called for in the recent South Boston Transportation Summit, and that I expect to see implemented through the upcoming MEPA and Chapter 91 reviews of individual development projects.

3. The Importance of Urban Parks and Open Spaces

Throughout my tenure in public office, I have worked aggressively to continue Massachusetts' reputation as a leader in the conservation and protection of public open space. I was both pleased and proud to see some of these efforts come to fruition with Governor Paul Cellucci's recent signing of the Community Preservation Act. Urban parks and open spaces are a crucial component of the broader statewide open space system.

Urban open spaces function as gathering places where diverse groups of people can meet and interact, fulfilling the democratic vision of Frederick Law Olmsted, founder of the Boston parks system. They provide both active and passive recreational opportunities within the confines of daily city life. Proximity to Boston Harbor offers a unique opportunity for a wide range of uses, from watching the bustle of a modern port against the backdrop of an historic cityscape to active boating, fishing, jogging, and walking along the harbor's edge. And within the broader region, walkways, parks, and plazas along the South Boston Waterfront will become part of a larger open space system that includes Olmsted's Emerald Necklace, the Charles River Basin, the new Central Artery open spaces, and the Boston Harbor Islands.

4. Activation of the Water's Edge

For an area to be truly accessible it must contain a significant amount of quality open space with uses and programming that will attract the public on a year-round basis. The MHP must provide sufficient benefits and guide future Chapter 91 licensing decisions to ensure activation of the water's edge for public use and enjoyment. I am satisfied that this MHP, as

conditioned, will ensure that the public's interest will not be compromised in the face of private development.

In reviewing the plan, I am pleased to see that development projects will provide first-floor restaurants, shops, and retail stores, all integrated with the water's edge. Significant portions of the harbor planning area will be dedicated to public open space, providing the public with both physical and visual access to the waterfront in all seasons. The harbor planning area will also provide a variety of water-dependent uses and activities such as recreational boating and fishing.

I am particularly interested in the possibilities for new civic and cultural uses. The MHP provides for approximately 127,000 sf of new civic uses along the South Boston waterfront. These will include the new facility for the Institute of Contemporary Arts (ICA), a family multi-cultural center, a potential new maritime museum, and an interpretive Gateway facility for the Boston Harbor Islands National Park Area. The Gateway may include a multimedia theater and other interpretive facilities that educate the public about the extraordinary riches of the harbor islands. Space will be permanently dedicated to these civic and cultural uses within the Fan Pier and Pier 4 projects, with appropriate legal enforcement mechanisms. These are the kind of special public destinations that will help transform the South Boston waterfront into a vibrant and popular year-round public destination.

5. Timeliness and Predictability in Environmental Decisionmaking

Under the Municipal Harbor Planning Regulations that were in effect when this MHP was submitted, there was no deadline for EOE action to approve or disapprove a harbor plan. Upon the recommendation of the Harbor Planning Task Force that I convened in May 1999, the regulations have since been revised to require an approval decision within four to five months of the plan submission. The environmental agencies and I have worked very hard to comply with the timelines set out in the new regulations. I am happy to say that this decision, the most complex decision to be issued under the Municipal Harbor Planning Regulations within the last decade, has complied with those timelines.

I also believe that as public agencies, we owe it to private property owners, members of the public, and our fellow agencies to render decisions that provide a clear, predictable path to guide future actions and approvals. Development projects within the planning area for this MHP will be required to obtain a variety of subsequent state environmental approvals, notably Chapter 91 licenses from DEP. Once a harbor plan has been approved, I do not believe that it is appropriate to defer major substantive project decisions to the stage of Chapter 91 licensing, leaving open the possibility that significant changes or additional mitigation might be required at that stage. Therefore, I have gone to considerable lengths in this decision to clarify applicable conditions, both with respect to amplified or substitute provisions, and even with respect to baseline DEP licensing conditions that may be expected. In this way, the model of timely review and decisionmaking to which I have adhered in this approval process should carry over into subsequent decisions.

6. Heights, Setbacks, and Open Spaces: Offsetting the Impacts of New Development

To implement the planning vision described in the Public Realm Plan and the MHP, the City has proposed significant departures from the baseline requirements of the Waterways Regulations. These departures, or “substitute provisions,” would allow greater building heights, altered setbacks from the waterfront, and the relocation of required open space. My decision must weigh whether the additional public benefits that the plan would achieve are proportional to the adverse impacts of these changes. Like the MHP, my Decision takes into account the specific character of each of the subdistricts within the harbor planning area.

The Fort Point Historic South and Fort Point Industrial Subdistricts are marked by the 1.5 million sf manufacturing facility of the Gillette Company, Boston’s largest industrial employer. The reliance of this facility upon the waters of the Fort Point Channel for industrial processing entitles it to special protections under the Waterways and Municipal Harbor Planning Regulations as a water-dependent industrial use. The proposed new height limits for the 11 acres of vacant land in the Fort Point Historic South Subdistrict would result in somewhat more modest levels of development than that achievable under the Waterways Regulations. However, there is a need for further measures to protect industrial truck routes, and the definition of buffer zones to prevent conflicts among land uses. Therefore, I am conditioning my approval of this section of the Decision upon the completion of a further and more detailed masterplanning effort for this area, to be undertaken by the City in coordination with landowners and other stakeholders.

The Fort Point Historic North Subdistrict contains the superb architectural ensemble of the Boston Wharf Company warehouses, as well as the expansive open space along the Fort Point Channel in front of the Children’s Museum. I agree with the City’s urban design objective of maintaining the historic physical character of the neighborhood. To do so, the MHP proposes waiving the open space requirement for several small infill development parcels, in return for contributions into an open space fund. But to satisfy the requirements of the regulations, the new public open space created through this fund must be near to the private development projects in a phased approach. In this Decision I have identified parcels along the Fort Point Channel as the location of the required new public open space. These parcels can significantly expand the new park already planned by the MBTA on the site of the former Victoria Station.

The Inner Harbor Subdistrict is described in the *Public Realm Plan* and the MHP as the primary focus for intensive development in the South Boston waterfront. Although much of the area is currently vacant land, the Central Artery / Tunnel project, the MBTA’s Silver Line, and new surface streets will enormously expand the capacity and ease of transportation access. Three major development projects have been proposed and are currently undergoing MEPA review: the Fan Pier project, the McCourt Gateway project, and the Massport Commonwealth Flats masterplan. The Pier 4 site, though not currently undergoing public review, is another site with strong development potential. About one-third of the Inner Harbor Subdistrict lies within Chapter 91 jurisdiction and the harbor planning area: the entirety of the Fan Pier and Pier 4 project sites, and portions of the McCourt property.

The City’s urban design objectives for this area aim to extend the existing urban fabric of the city through a system of small blocks, 75 to 85 foot high base building elements that frame

pedestrian-friendly streets, and tower elements that are set back from the street. The density of development proposed in the MHP would require a series of significant changes from the baseline Chapter 91 height limits: up to 250 feet within the Pier 4 and McCourt sites, and up to 300 feet within the Fan Pier site. The MHP identifies several specific public benefits on the Fan Pier site, including the new ICA site and a public green at the south side of the Fan Pier Cove. A formula in the MHP quantifies adverse impacts as the area of net new shadow created by larger buildings.

The substitute height provisions and offsetting public benefits proposed in the MHP for the Fan Pier and Pier 4 sites have been the focus of much of the public comment that I have received. I support the urban design objectives of the MHP. I also support the use of a formula approach to quantifying impacts and offsets in this MHP; it offers clear and predictable rules to guide future Chapter 91 licensing decisions, while providing flexibility as project designs evolve over time. My analysis has shown, however, that the development originally contemplated under the MHP would significantly increase wind, shadow, and other adverse impacts on public use of the waterfront. I find further that the originally proposed offsets are not proportional to the level of impacts, and that they are not identified with adequate specificity. Therefore, I have disqualified several proposed categories of offsets and limited the allowable range of public benefits to additional exterior open space and other measures of equal value to public trust rights.

In response to the public comments and the draft decision, the City has proposed a number of significant modifications to the MHP that have enhanced public waterfront access. In particular, the amount of public open space on the Fan Pier site has been enlarged, the size and height of one prominent building reduced, and the amount of interior space devoted to civic uses nearly doubled. This Decision contains further conditions on the Fan Pier, Pier 4, and McCourt properties, including significant further reductions in building heights and square footages, the maintenance or enlargement of Chapter 91 setback distances, and over an acre of additional public open space, as mandatory offsets. These changes will provide public benefits commensurate in quantity and quality to the complete elimination of Building H that was described in the draft decision. With the modifications proposed by the City and the additional conditions defined in this Decision, the obligations of the Public Trust Doctrine are now fully satisfied.

Summary of Key Modifications and Conditions

To satisfy the standards of the Municipal Harbor Planning Regulations and the Commonwealth's obligations as trustee under the Public Trust Doctrine, the MHP as originally submitted is subject to the following modifications and conditions, among others:

- To avoid interference with the flight path from Runway 27 at Logan Airport, maximum heights along Old Northern Avenue may be reduced to between 240 and 270 feet.
- To ensure that total building massing allowable under the MHP is comparable to that allowable under Chapter 91, the total aggregate development allowable on the Fan Pier and Pier 4 sites combined will not exceed 3.87 million sf (exclusive of civic and cultural space).
- To enlarge public use and enjoyment of the waterfront, reduce shadow impacts on the Fan Pier Cove, and improve physical and visual links between the MBTA's Courthouse Square

station and the waterfront, the size of the Public Green on the Fan Pier site shall be increased to approximately two acres, and its width increased to approximately 270 feet..

- The setbacks of buildings from the waterfront shall be increased by reducing building footprints all along the shoreline of the Fan Pier and Pier 4 sites, and streets shall be eliminated from the setback zone in key locations, to enhance the pedestrian-usable quality of the open space.
- At least 56% of each of the Fan Pier and Pier 4 sites will be devoted to open space. At least 40% of each site will be devoted to parks, plazas, and other pedestrian-usable public open spaces, exclusive of streets.
- To fully activate the waterfront along Fan Pier and Pier 4 as a public destination, the MHP now requires approximately 127,000 square feet of permanently dedicated civic and cultural space in buildings along the water's edge.
- Consistent with previous DEP decisions, water transportation facilities and subsidies should be considered as baseline Chapter 91 licensing conditions, and will only be eligible for limited credit as offsets, once the baseline has been determined.
- In providing offsetting public benefits for open space and height substitute measures on the McCourt properties, priority shall be given to enlarging the open space between the Public Green on the Fan Pier Cove and a potential new MBTA headhouse for the Silver Line.
- For new buildings within the MHP area that do not provide the amount of open space required under Chapter 91, a system of aggregated offsets will be used to provide viable, usable open space along and adjacent to Fort Point Channel, the McCourt properties, and other areas along the water's edge.
- To fully comply with the Scope and to respond to concerns raised by the Gillette Company regarding its continued operation as a water-dependent industrial user, a more detailed master planning effort should be completed for the Fort Point Industrial and Fort Point Historic South Subdistricts.
- For the MHP to take effect, the City shall implement new permanent zoning that incorporates the effective provisions of the MHP and this Decision, relative to Chapter 91 licensing.

I believe that this MHP, including its substitute provisions and the conditions of my Decision, will result in future Chapter 91 licensing decisions that reflect the local vision for this waterfront. Further, I believe that my Decision balances competing public and private interests in this land appropriately, providing greater predictability and consistency at all levels of regulatory review for the development community while ensuring that such development benefits the public-at-large. In this manner the MHP will achieve the overarching goal set forth in Chapter 91: it will promote the public use and enjoyment of Commonwealth Tidelands in a manner fully commensurate with the public's trust rights, and it will ensure that private advantages of use are not primary, but merely incidental to the achievement of those public purposes.

In the sections that follow, I discuss in detail the standards for plan approval, my evaluation of the plan, and my analysis of the proposed substitute provisions. Further, I will specify those conditions (beyond those required by the City and Chapter 91) that are necessary to ensure that public benefits are a primary focus of this MHP, creating an exciting, diverse and sustainable South Boston Waterfront that will be treasured by this and future generations.

II. OVERVIEW

A. Review Process

The South Boston municipal harbor planning process began formally with the appointment of members to the Municipal Harbor Planning Advisory Committee (MHPAC) and the Boston Redevelopment Authority (BRA)'s submission of a Request for Scope (RFS) in July of 1999. Following a detailed review of the RFS, a Scope for the South Boston Waterfront District Municipal Harbor Plan was issued on October 20, 1999. With this document as a guide, the MHPAC met weekly to discuss the development of the MHP. On March 3, 2000, the BRA issued a Draft MHP for initial public review and comment.

Following the review procedures contained in 301 CMR 23.00, the South Boston Waterfront Municipal Harbor Plan (the Plan) was submitted to the Executive Office of Environmental Affairs (EOEA) on July 14, 2000 and noticed in the *Environmental Monitor* on July 25, 2000. In response to requests from the City of Boston and the public, the thirty-day public comment period was extended to October 18, 2000. During this extended comment period, I personally chaired the three public hearings, held on August 8, 2000 at the Condon School in South Boston, August 9, 2000 at the New England Aquarium, and September 26 in the Gardner Auditorium at the State House. Written comment letters were accepted throughout the 86-day public comment period.

Numerous comment letters, including several petitions, were received prior to the close of the comment period. These included comments from elected officials, federal, state, and local agencies, and numerous interested members of the public. In addition, the review process, led by the Massachusetts Office of Coastal Zone Management (CZM), included consultation with staff of DEP, the BRA, and the MHPAC. A series of seven consultation meetings were held with the MHPAC over the course of three weeks. All public and agency comments were considered fully.

I note that the Municipal Harbor Planning Regulations were revised recently based on the recommendations of the Chapter 91-Municipal Harbor Planning Work Group that I convened in May 1999. These regulations became effective on June 23, 2000. My Scope, however, was issued pursuant to the regulations in effect as of December 15, 1994. Therefore, my review of the South Boston Waterfront District Municipal Harbor Plan must be conducted in accordance with the approval standards set forth in the 1994 regulations. All citations to the Municipal Harbor Planning Regulations at 301 CMR 23.00 refer, therefore, to the 1994 regulations.

B. Geographic Area

The MHP, as submitted, has been developed in conjunction with the City's comprehensive master planning process for the South Boston Waterfront. This two-year process resulted in the City's issuance of its *Public Realm Plan* (PRP) for the South Boston Waterfront in February

1999. As set forth in the PRP, the South Boston Waterfront District encompasses approximately 1,025 acres of land and adjacent water sheet extending generally from the east side of the Fort Point Channel to the Reserved Channel.

As depicted in Figure 1, the boundary of the harbor planning area for this MHP has been defined to include only those lands subject to Chapter 91 jurisdiction (approximately 128 acres) within the *Public Realm Plan's* South Boston Waterfront District. All lands subject to Chapter 91 jurisdiction in the South Boston Waterfront District consist of Commonwealth Tidelands. The South Boston Waterfront District includes areas within such jurisdiction in the following subdistricts: the Fort Point Historic Subdistrict (North and South); the Fort Point Industrial Subdistrict; and the Inner Harbor Subdistrict. The City's primary focus for this MHP is to seek substitute provisions to the requirements of the state Waterways Regulations (310 CMR 9.00) that will facilitate implementation of its waterfront vision.

The MHP Planning Area does not include the following areas, which are also subject to Chapter 91 jurisdiction:

1. The South Boston Designated Port Area (DPA), which was the subject of a joint BRA/Massport planning process that resulted in the *Port of Boston Economic Development Plan of 1996*.
2. The Boston Marine Industrial Park (BMIP), for which a final master plan was submitted to both MEPA and DEP in December 1999, and for which a Master Chapter 91 license is under review.
3. The Fort Point Channel, for which planning is ongoing. Although considered in detail by MHPAC and a focused sub-group, the vision for this prominent watersheet has not advanced sufficiently for inclusion in this MHP. I understand that an active harbor planning sub-committee is looking into this valuable resource, and I will look forward to seeing the results of this work, either separately or as part of the Downtown MHP.
4. Adjacent land of the Massachusetts Port Authority (Massport), development of which will be addressed through a Memorandum of Understanding (MOU) between DEP and Massport, which was recently published in draft form in the *Environmental Monitor*.

C. How This Decision is Organized

The major part of this decision demonstrates how the conditional approval of the MHP meets the standards for review set forth in the Municipal Harbor Planning Regulations. Section 23.04(1) of the Regulations defines certain minimum submission requirements. These requirements are addressed in Section III of the Decision. Section 23.05 of the Regulations defines the standards for review and approval. These standards are summarized in Section IV of the Decision. Sections V through IX then discuss in detail how the MHP as conditioned satisfies each of these standards.

III. REVIEW OF BASIC PLAN ELEMENTS

The Approved Plan was developed through consultations with CZM and DEP and was reviewed under procedures set forth at 301 CMR 23.04. Pursuant to 301 CMR 23.04(1), the content of the MHP must contain text that addresses the basic elements of a *Municipal Harbor Plan* as defined in the Municipal Harbor Planning Regulations (301 CMR 23.02) and as further required by the Scope. These elements include:

- A description of the community's general goals, objectives, and applied policies that will guide development in the harbor planing area;
- A description of the proposed implementation program, in accordance with the applied policies;
- A discussion of the planning analysis that resulted in the proposed plan; and
- A review of the public participation process that contributed to plan development.

Based on the discussion below, I find that the Plan's content incorporates the basic plan elements in a manner that complies sufficiently with the MHP requirements at 301 CMR 23.04(1).

A. Goals and Applied Policies

Chapters 2 and 4 of the MHP identify the City's broad goals for the South Boston Waterfront District. These goals are presented in the context of a general long-range vision for the larger South Boston area expressed in the City's *Public Realm Plan*. The *Public Realm Plan* encompasses an area approximately ten times the size of that addressed in the MHP. This MHP, therefore, is but one subset of much larger effort to implement a vision that will take South Boston through the next century. My authority as Secretary is constrained to the approximately 128 acres defined by the harbor planning area, and it does not extend to a review of this larger City planning effort. I am, however, pleased to note that the broad planning goals and objectives expressed in the *Public Realm Plan* seek to further the principles that underlie both the Waterways and Municipal Harbor Planning Regulations.

The *Public Realm Plan* envisions the transformation of the South Boston Waterfront, based upon the following goals:

- Enhance the South Boston residential neighborhood.
- Preserve and enhance the industrial port. This includes the South Boston Designated Port Area, comprising the Boston Marine Industrial Park (BMIP) and the Conley Terminal, as well as the manufacturing facilities for Gillette, the largest industrial employer in the city.
- Plan the Waterfront as a vital mixed-use neighborhood. The City has set goals that at least one-third of the total new development district-wide should be residential, and no more than one-third should be commercial.
- Develop the Waterfront as an integral part of Boston's economy.
- Promote access to Boston Harbor by land and by water, building upon the just completed \$4 billion cleanup of the Harbor.

Implementation of the *Public Realm Plan* is consistent with Executive Order 385 (Planning for Growth), which seeks to guide development towards previously developed areas where it can be supported most efficiently while protecting environmentally sensitive areas from the impacts of new development and construction. The Commonwealth's investment in the Boston Convention and Exhibition Center, which will provide the economic underpinning for the waterfront redevelopment area, also furthers the goals of E.O. 385.

EOTC has undertaken major public transportation investments to support this redevelopment, including the Central Artery / Tunnel (CA/T) project and the Transitway, the initial phase of the MBTA's Silver Line project, which will extend transit service from South Station to the Convention Center. The Transitway, which is scheduled for completion in 2003/04, will serve as the backbone of the waterfront's public transit system. The full Silver Line, currently scheduled for completion in 2010 if federal funding is obtained, will include a second phase tunnel connecting South Station to the Green Line at Boylston Station and the Washington Street corridor at Chinatown.

The City seeks to accomplish its vision for the South Boston Waterfront through the use of provisions intended to substitute for certain numerical standards and use limitations that apply to nonwater-dependent use projects under the Waterways Regulations. The substitute provisions proposed by the City establish maximum development envelopes that will provide predictability to both project proponents and the public in future project review processes. Consequently, a major focus of this plan concerns the planning rationale for the use of substitute provisions, and a discussion of the policies that will guide the review of individual projects as detailed designs evolve.

Chapters 7 and 8 contain more detailed discussions of the City's comprehensive policies related to the built environment, including design standards for Harborwalk, standards and guidelines for activating the watersheet, and design guidelines that address features such as building scale and character, sustainability, and universal accessibility. These policies, although not critical to my evaluation of this plan, contribute further to the City's articulation of its vision for the South Boston Waterfront.

B. Implementation Program

Chapter 14 provides a general discussion of the actions necessary to adopt appropriate zoning measures that will implement plan policies and guide and regulate private development. As presented in the plan, once the MHP has been approved, amendments to the Boston Zoning Code will be drafted to codify those use and dimensional requirements approved as substitute provisions, and any offsets required with respect to such substitute provisions. Such amendments may take the form of Planned Development Areas (PDAs). It is my understanding that PDAs are only allowed for large project sites in excess of one acre, and not for individual building sites. The BRA must authorize any proposed zoning amendment before recommending it to the Zoning Commission for adoption. After conducting a public hearing, the Zoning Commission must present an amendment to the Mayor for final approval.

The development and implementation of a regulatory framework in the form of appropriate zoning provisions is fundamental to ensuring that public access and rights to the waterfront are promoted in accordance with the policies of this MHP approval. (Such local implementation is parallel to DEP's enforcement of applicable requirements within the Chapter 91 licensing process.) As discussed in detail later in this Decision, Section 23.04(6) of the Municipal Harbor Planning Regulations requires the City to certify that applicable PDA provisions or other relevant permanent zoning measures have been adopted, prior to the substitute provisions in this plan taking effect with respect to projects seeking Chapter 91 licenses.

C. Planning Analysis

Recognizing the potential for significant ground-level environmental impacts associated with the proposed substitute provisions, my Scope focused carefully and clearly on the type and degree of analysis required in the MHP. Specifically, this Scope required the City to evaluate and assess the pedestrian-level impacts of substitute provisions on water-dependent activities and public access. Where adverse impacts were identified, the analysis should evaluate the effects upon the character of the anticipated ground-level uses. Finally, the MHP was required to identify appropriate offsets and other mitigation measures.

I find that the planning analysis included in the MHP, supplemented by additional shadow studies depicting alternative height scenarios provided by the BRA as requested during my review of the plan, complies adequately with the requirements set forth in the Scope. This analysis relates directly to my evaluation of the proposed substitute provisions. Due to its technical and detailed nature, it is discussed more appropriately in Section V.A.

D. Public Participation

Chapter 2 discusses the lengthy public participation program that contributed to the development of the South Boston MHP. In July of 1999, Mayor Menino appointed members to the Municipal Harbor Plan Advisory Committee (MHPAC) to begin the process of developing planning goals for several of the City's waterfront areas. Consisting of representatives from the City's waterfront neighborhoods, advocacy groups, elected officials, educational institutes, and commercial interests, the MHPAC held its first meeting on July 21, 1999. It continued to meet almost every week until the middle of July 2000. Open to the public, these well-attended sessions provided a forum at which a variety of visions for the South Boston waterfront were put forth.

Of particular note was the formation of three working groups charged with researching specific planning issues identified through the public process and making recommendations to the broader Committee and the BRA. The Fort Point Channel sub-group was tasked with investigating measures to activate the Fort Point Channel. Meeting bi-weekly, it developed a series of planning goals for the Channel. I understand that a consultant will soon be hired, to assist with the development of a watershed activation plan for the Channel and its edges. I look forward to the results of this study, either separately or as part of the Downtown MHP.

A second sub-group was formed to study and make recommendations related to baseline open space maintenance requirements that should be required as part of the terms of approval for any project in the harbor planning area. Finally, a third sub-group was formed to explore the use of planned civic events as a means of activating the waterfront. The recommendations of the latter two groups are included in appendices to the MHP.

In March and April of 2000, in response to the issuance of the preliminary Draft MHP, the BRA received significant oral and written public comments to be addressed in the final MHP submission. Further, in response to the Scope, three evening public meetings were held in the South Boston community to ensure opportunity for neighborhood input.

The final MHP was submitted to me on July 14, 2000. Although the Municipal Harbor Planning Regulations require only one hearing, recognizing the degree of interest, I elected to chair two hearings to facilitate public comment. Based on the testimony received, the public comment period was subsequently extended to eighty-six (86) days and a third public hearing was held at the State House. Taken in its entirety, I am convinced that the public participation program has been an inclusive process, one that has informed this Decision and identified those areas critical to the implementation of a harbor plan that will be mutually beneficial to public and private interests alike.

IV. STANDARDS FOR MHP APPROVAL

The plan must contain supporting documentation that establishes how it complies with the standards of approval set forth at 301 CMR 23.05. These approval standards can be summarized as follows:

- The plan must be consistent with *CZM Harbor Planning Guidelines*, as applicable. This standard is deemed to be met if the plan adequately and properly complies with the Scope [301 CMR 23.05(1)];
- The plan must be consistent with all applicable policies of CZM [301 CMR 23.05 (2)];
- The plan must include all feasible measures to achieve compatibility with the plans and planned activities of all state agencies owning real property or otherwise responsible for the implementation or development of plans or projects within the harbor planning area [301 CMR 23.05 (4)];
- The plan must be consistent with state tidelands policy objectives and associated regulatory principles as set forth in the Waterways Regulations of DEP [301 CMR 23.05(3)]; and
- The plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in the Waterways Regulations [301 CMR 23.05 (5)].

I have re-ordered the sequence of these standards as they appear in the MHP Regulations (301 CMR 23.00) to facilitate and inform my detailed evaluation of proposed substitute provision requests. The following sections present my findings and determinations on how the Plan, as conditioned, satisfies each of these standards for approval.

V. APPLICATION OF APPROVAL STANDARDS: CZM HARBOR PLANNING GUIDELINES AND POLICIES

A. Consistency with CZM Harbor Planning Guidelines

CZM's Harbor Planning Guidelines, last revised in 1988, are no longer in effect and, under the recent regulatory revision, will no longer be called upon in the review of municipal harbor plans. Pursuant to 301 CMR 23.05(1) of the 1994 regulations, which govern this Decision, this approval standard is deemed met if the plan adequately and properly complies with the Scope and any written statement of the Secretary to the municipality relative to how such guidelines are to be applied.

The Scope identified the geographic area to be defined as the harbor planning area, as well as the broader harbor-wide context for the South Boston plan. It established the content and level of detail that I expected in the plan, including the nature and extent of the planning effort and the information and analysis required for evaluation of compliance with the standards for approval. It also discussed the nature of the public participation to be carried out in the course of developing the plan, requiring that the City hold at least three evening meetings in the South Boston community to facilitate local input.

Because the entire harbor planning area is comprised of Commonwealth Tidelands, in addition to specific District and parcel guidance, my Scope was framed around two principles that I expected to guide the development of the South Boston Waterfront MHP:

- Proposed development shall be carried out in a manner that protects the public rights in filled and flowed tidelands of the Commonwealth; and
- Water-related public benefits and uses, including open spaces, pedestrian walkways, and view corridors, shall be actively enhanced by all future development in the harbor planning area.

Chapters 4, 5, and 6 provide an overview of this harbor plan in the context of extensive planning efforts - past, present and future - within South Boston and the broader City. These efforts include the Public Realm Plan, the Boston Marine Industrial Park Master Plan, the Fort Point Downtown Waterfront MHP, the Boston Inner Harbor Passenger Water Transportation Plan, the Port of Boston Economic Development Plan, and the East Boston Master Plan and MHP. I am pleased to note the degree to which this MHP builds upon the efforts and findings of these previous planning efforts.

Recognizing that the primary focus of this MHP would be the use of substitute provisions to the Waterways Regulations, the Scope focused carefully, and in detail, on the level and type of analysis that would be necessary to meet the standards for approval found at 301 CMR 23.05(3)(c) and (d). Specifically, the Scope focused on the quality of the pedestrian experience and upon means of analyzing pedestrian-level impacts that could result from a proposed substitute provision. Because of the advanced design stage of some projects within the harbor planning area (*e.g.*, the Fan Pier Project), the Scope specifically looked to MEPA review for further quantification of this empirical information. I am satisfied with the level and type of analysis

provided in the Plan (along with additional shadow information requested from and provided by the BRA). Because of its direct relationship to my evaluation of the proposed substitute provisions, I will discuss compliance with these provisions of the Scope in detail in Sections VII through X.

The record before me indicates that the planning analysis, public participation program, and development of the MHP were carried out in a manner that complies adequately and properly with the Scope. Accordingly, I have determined that the Plan meets the requirements of 301 CMR 23.05(1).

B. Consistency with CZM Policies

In 1978, EOEA adopted an overall program to manage the Massachusetts coastal zone, based on 27 broad statements of policy. In March 1997, CZM revised these statements, as set forth at 301 CMR 21.98, and they now form the basis for the Commonwealth's environmental policy for the coastal zone. The CZM Program Plan now includes a series of policy principles that provide guidance for the management of activities in the coastal zone.

In general, detailed planning for individual projects in the South Boston Waterfront harbor planning area is preliminary in nature. For this reason, determinations of consistency with some policies, such as those related to water quality, stormwater management, coastal hazards, and dredging, will be more appropriately considered within the context of individual project reviews. Several CZM Policy Principles, however, are particularly relevant to the current level of planning provided with this MHP. These include:

Ports Management Principle #1:

Encourage, through technical and financial assistance, expansion of water-dependent uses in designated ports and developed harbors, re-development of urban waterfronts, and expansion of visual access.

Public Access Management Principle #1:

Improve public access to coastal recreational facilities and alleviate auto traffic to coastal recreation facilities through improvements in public transportation. Link existing coastal recreation sites to each other or to nearby coastal inland facilities via trails for bicyclists, hikers, and equestrians, and via rivers for boaters.

Public Access Management Principle #3:

Provide technical assistance to developers of private recreational facilities and sites that increase public access to the shoreline.

Public Access Management Principle #4:

Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities. Give highest priority to expansions or new acquisitions in regions of high need or limited site availability. Assure that both transportation access and the recreational facilities are compatible with social and environmental characteristics of surrounding communities.

Growth Management Principle #1:

Encourage, through technical assistance and the review of publicly funded development, proposed developments that are compatible with local community character and scenic resources.

Growth Management Principle #3:

Encourage the revitalization and enhancement of existing development centers in the coastal zone through technical assistance and federal and state financial support for residential, commercial and industrial development.

Generally, these policies establish Program priorities that seek to promote, maintain, and improve efforts to help the public get to and enjoy the coast; to encourage the expansion of water-dependent uses and activities in developed ports and harbors; and to encourage the re-development of urban waterfronts.

Public access to the waterfront has been and will continue to be a focus of the CZM Program. Well-designed urban waterfronts, with increased opportunities for open space enjoyment, possess a unique combination of visual, cultural, and historic qualities that attract significant numbers of people to the waterfront on a year-round basis. Opportunities for public waterfront access are particularly important in the metropolitan Boston area, where the demand for coastal recreation areas continues to outpace the supply. CZM encourages redevelopment strategies for urban waterfronts that will offer a clear destination value to the public. Typically, such active waterfronts combine water-dependent activities with commercial, residential, and civic uses, including shops and restaurants, cultural institutions, open space, and parks.

The MHP addresses consistency with each of the applicable CZM Policies in some detail in Sections 10.9, 11.7, and 15.2. More generally, the City's vision for the South Boston Waterfront is captured succinctly in the discussion of MHP goals and priorities contained in chapters 1 – 3, which may be summarized as follows:

- To continue efforts to bring about a primary goal of the 1991 Municipal Harbor Plan's vision of the waterfront – A vibrant, mixed-use area with a variety of special destinations that, emphasizing the public's right of access to the waterfront, relies on a well-developed set of urban design guidelines to ensure that new development is compatible with the existing waterfront character and attracts people from all walks of life on a year round basis.
- To promote access to Boston Harbor as a shared natural resource, connecting people, land , and water, and the public's rights in tidelands.
- To revitalize and publicly activate a presently underutilized area of Boston's shoreline.
- To balance the growth of mixed use, water-dependent, and recreational activities along Boston Harbor against the needs of maritime commerce and private development.
- To plan a district comprised of mixed-use neighborhoods that expands the City's residential communities while providing a lively mix of open space, civic and cultural, and commercial uses and economic opportunities that are mutually supportive and bring activity to the waterfront.

- To continue to implement Harborwalk, a 43-mile continuous waterfront walkway system that, when completed, will provide 24-hour, ADA-compliant access to the shoreline, including lateral connections to adjacent interior areas; with amenities such as public restrooms, seating, lighting, fishing piers, observation decks, and public boating facilities.
- To supplement the City's public open space system through the creation of waterfront parks, plazas, and other green spaces enhanced by cultural facilities such as historic facilities, outdoor theatres, kiosks, landscaping and waterfront boulevards.
- To provide interior public space comprising the entire ground floors of all buildings (and portions of upper floors), such as cultural facilities, museums, restaurants, cafes, shops, and hotels, that will attract the public to the water.
- To develop appropriate requirements that will guide private development in a way that reflects the unique pedestrian-oriented scale typical of Boston and its waterfront.
- To reestablish water transportation as a viable means of commuting to Boston and around the Harbor area.

I applaud the City for its aggressive strategy to rejuvenate what are today large expanses of parking lots and warehouses with redevelopment at a “density, scale, and activity level consistent with other areas of the City and supportive of the broadest public use of the waterfront... The plan requires... a minimum of 50% open space on all major development sites; Harborwalk along the entirety of the waterfront; major water transportation facilities; ... civic and cultural uses; application of urban design and universal access guidelines; ... and offsets for any impacts [to ground-level pedestrian uses] from development on tidelands.” (MHP, p. iii)

A large number of comments referred to the transportation impacts of the new development proposals within or abutting the harbor planning area. In the context of the ongoing MEPA reviews of the Fan Pier, McCourt Gateway, and Commonwealth Flats projects, I was sufficiently concerned about the cumulative traffic impacts of these projects that I recently convened a South Boston Transportation Summit. I believe it is important, therefore, to discuss the extent to which the treatment of transportation issues in the MHP is consistent with CZM Policies, particularly Public Access Management Principles #1 and #4.

Water transportation access is squarely within DEP's jurisdiction in issuing c. 91 licenses, and within my jurisdiction in rendering an MHP decision. Section 5.2 of the MHP describes the City's recently issued Water Transportation Plan. The Plan identifies a potential network of existing and future water transportation facilities harborwide – many of them within the South Boston harbor planning area. These facilities would serve regional commuter boats, local scheduled and water-taxi services, and excursion boats. As I discuss later in this Decision, I expect that specific and enforceable commitments to provide docks, land-side support facilities, and operating subsidies for water transportation will be a baseline condition (and not an offset) of the Chapter 91 licenses issued for all major projects within the harbor planning area. Such

commitments should be executed in a coordinated fashion to implement the goals of the City's water transportation plan.

Pedestrian and bicycle access is also critical to use and enjoyment of the waterfront open spaces to be created within the harbor planning area. The MHP describes the City's pedestrian and bicycle access networks within the harbor planning area, and how they will connect with the larger PRP area. The Fan Pier DEIR demonstrates how a project proponent has worked with the City to develop an exemplary series of pedestrian-friendly streetscape designs, with wide sidewalks and corner neckdowns. I am confident that pedestrian and bicycle access issues can be fully and effectively addressed in project-specific MEPA, Chapter 91, and Article 80 review processes to implement the goals of the MHP.

The traffic impacts of new development fall within my authority under MEPA review, where the necessary subject matter jurisdiction exists. For the following reasons, I believe that global issues of transportation impacts affecting the *Public Realm Plan* area in South Boston are best addressed through MEPA review (including MEPA review of the Fan Pier project), rather than through this Decision. First, two of the three major development projects currently under review that may have major traffic impacts -- McCourt Gateway and Commonwealth Flats -- lie largely outside the boundaries of the harbor planning area. Second, the total volume of traffic generated by a project is a factor of the overall density, the mix of land uses, and the availability of transit. As discussed later in this Decision, the overall density of projects within the MHP is comparable to or (in the case of Fort Point Historic South) less than the density potentially buildable under Chapter 91. The mix of land uses is generally under the control of the City through local zoning, and is not subject to Chapter 91 jurisdiction (with limited exceptions, such as requirements for ground-floor Facilities of Public Accommodation, and limitations on Facilities of Private Tenancy on pile-supported structures over the water and activities within DPAs). The availability of transit access is discussed in Section 5.2 of the MHP.

This emphasis on project-specific MEPA and Article 80 review is consistent with the treatment of transportation issues in the MHP. The MHP expressly references the *South Boston Transportation Study*, issued by the Boston Transportation Department (BTD) in association with the BRA and Massport. The *BTD Study*, available in draft form when the MHP was filed and subsequently issued in final form in August 2000, examines the cumulative transportation impacts of a variety of land development scenarios, including the full buildout envisioned in the *Public Realm Plan*. The *BTD Study* defines the following transportation goals for South Boston:

- Protect the residential neighborhood.
- Preserve the working port and industrial land uses.
- Support appropriate development: "new development in the South Boston Waterfront should generate travel demand that is appropriate to the transportation system's capacity available to accommodate this demand."

The MHP describes a range of measures arising out of the *BTD Study* that can be implemented through MEPA and Article 80 review, and that will mitigate the impacts of automobile traffic. These include transportation demand management (TDM) measures, compliance with the South Boston parking freeze, construction mitigation measures, and urban

design guidelines that will require all new parking to be underground, preserving the pedestrian quality of the streetscapes. (MHP, p. 101.)

At the recent South Boston Transportation Summit, I articulated a number of principles to guide the upcoming MEPA review of projects in South Boston, both within and without the harbor planning area. These principles include:

- Development of a unified transportation strategy that implements the goals of the *BTD Study*, in a manner that makes efficient use of transportation investments and that favors clean, non-polluting forms of transportation – public and quasi-public transit, water transportation, bicycling, walking – over private automobile use.
- Ensuring that transportation demand is in balance with capacity, both in the short term and the long term. If demand exceeds capacity, project proponents may choose to reduce demand by reducing density, delaying development, or changing the mix of land uses, or to take steps that will increase the capacity of public and quasi-public transit services.

In summary, I find that the MHP addresses issues of water transportation, pedestrian and bicycle access, and automobile traffic in sufficient detail to demonstrate its consistency with CZM Public Access Management Principles #1 and #4, and with all other applicable approval standards. I have discussed separately in Section VI below the compatibility of the MHP with state agency transportation planning: specifically, the MBTA's Silver Line project and Massport's aviation planning for Logan Airport.

The elements of the City's MHP, enhanced by my Conditions for Approval discussed later in this Decision, are consistent with the broader goals established by CZM for the redevelopment of the Commonwealth's urban waterfronts. Upon review of the documentation provided by the City, I conclude that it meets the intent of each relevant policy statement and, as required by 301 CMR 23.05(2), I find the Plan consistent with CZM policies.

VI. APPLICATION OF APPROVAL STANDARDS: COMPATIBILITY WITH STATE AGENCY PLANS OR PLANNED ACTIVITIES

Pursuant to 301 CMR 23.05(4), the plan must include all feasible measures to achieve compatibility with the plans or planned activities of all state agencies owning real property or otherwise responsible for the implementation or development of plans or projects within the harbor planning area. In making this determination I am guided by the regulations to ensure that the City and all relevant state agencies have consulted and made every reasonable effort to maximize the compatibility of their planning efforts. In this regard, I am pleased to note that Massport, owners of adjacent property, and the Executive Office of Transportation and Construction (EOTC), overseeing State plans on adjacent property, participated actively on the MHPAC.

For the purposes of this harbor plan decision, I read this provision broadly to cover also the activities of state agencies on adjacent properties, where activities within the harbor planning area would have direct beneficial or adverse effects upon the state agency properties or plans. In this case, I have specifically focused on the MHP's compatibility with Massport's Commonwealth Flats Development Area masterplan and the MBTA's Silver Line project, both of which are addressed in the MHP (see MHP Sections 10.8 and 5.1, respectively), and Massport's aviation planning for Logan Airport, which is not.

A. Commonwealth Flats Development Area

Approximately 70 acres of the Inner Harbor District defined in the Public Realm Plan is owned by Massport. Of that total, approximately 40 acres of land has already received Chapter 91 licensing (Commonwealth Pier and the World Trade Center project), or is a part of the Designated Port Area (the Fish Pier). The remaining 30 acres lie within Massport's Commonwealth Flats Development Area. Approximately 3 acres of this land is subject to Chapter 91 jurisdiction.

As described in Section 10.8 of the MHP, Massport is currently undertaking a parallel masterplanning effort for the Commonwealth Flats area. The MEPA Office has reviewed a Draft Area-wide EIR (EOEA #11882), describing a long-term mixed-use development of approximately 3.4 million sf, and a subsequent Notice of Project Change describing in greater detail Massport's open space planning for the area. An initial phase of the Commonwealth Flats project, an office and residential project known as Parcel F, is also undergoing joint MEPA/Article 80 review. The state agencies have consulted closely with the BRA in these MEPA reviews. A draft MOU between Massport and DEP was recently published in the *Environmental Monitor*, pursuant to Section 9.03(3) of the Waterways Regulations. This MOU sets forth proposed procedures for the future licensing of Massport projects that are partially comprised of nonwater-dependent uses.

I am satisfied that the MHP has demonstrated its compatibility with Massport's planning for the Commonwealth Flats area, as required under 301 CMR 23.05(4).

B. MBTA Silver Line Project

As discussed above, excellent public transit access will be critical to the successful redevelopment of the South Boston Waterfront. Many of the public comments that I heard at the recent South Boston Transportation Summit focused on the importance of the MBTA's new Silver Line project, and on the need for intermodal connections between transit stops and water transportation. The best opportunity for such an intermodal connection within the harbor planning area is the potential link between an additional headhouse for the Courthouse Square MBTA station on the McCourt property and a new water transportation facility proposed by the Fan Pier project at the Cove. Both the *Public Realm Plan* and the MHP identify the need for an additional headhouse at this location. A major factor in my decision to require a linked pair of expanded open spaces on the Fan Pier and McCourt project sites as offsets for substitute height provisions (described in more detail in Section VIII below) was the importance of ensuring compatibility with public transit and water transportation planning.

The MHP, as so conditioned, has demonstrated its compatibility with the MBTA's planning for the Silver Line project, as required under 301 CMR 23.05(4).

C. Logan Airport

The flightpath for Runway 27 at Logan Airport passes near the Fan Pier and Pier 4 project sites, which lie less than one mile from the end of the runway. The Federal Aviation Administration (FAA) has defined a set of maximum building heights within the flightpath under the Terminal Instrument Procedures (TERPS) regulations, in order to minimize safety and operational interference with aircraft takeoffs and landings. As noted in the comment letters from Massport and the FAA, the maximum building heights proposed in the MHP could allow buildings that would violate the contours defined by TERPS standards. (See the attached map.) I understand that neither Massport nor the FAA have permitting authority over building heights within the flightpaths. I also understand that whenever such a potential interference exists, airplane pilots may, at their discretion under certain circumstances, refuse to use that runway in favor of another.

In addition to the safety and operational concerns raised by Massport and FAA, I am concerned about the potential environmental impacts. Last spring I reviewed the DEIR for the Logan Airside Improvements Planning Project (EOEA #10458). The 1,400 written comments that I received spoke strongly about the existing noise and air pollution impacts of airplane travel over urban neighborhoods in Boston and other local communities. If the use of Runway 27 is constrained, scheduled flights would be reallocated to other runways, potentially increasing the traffic over areas in East Boston, Chelsea, and Winthrop that are already heavily burdened by the airport. This would directly interfere with Massport's attempts to allocate airplane travel over different neighborhoods in an equitable and predictable manner through use of the PRAS goals.

For this reason, I am conditioning my approval as follows. For any structure that would project into the TERPS limits, DEP must receive a written affirmation from both the FAA and the

BRA, prior to Chapter 91 licensing, that they do not foresee any adverse effects on the operations of current Runway 27 in a manner that would increase flights over other neighborhoods. The FAA should consult with Massport prior to any such affirmation. This could have the specific effect of reducing the maximum substitute height provisions on those portions of the Fan Pier, Pier 4, and McCourt projects that abut Old Northern Avenue to between 240 and 270 feet (these heights are measured to the top of a building structure, and thus include any rooftop mechanical penthouses). The MHP, as so conditioned, has demonstrated its compatibility with Massport's planning for Logan Airport, as required under 301 CMR 23.05(4).

VII. APPLICATION OF APPROVAL STANDARDS: CONSISTENCY WITH STATE TIDELANDS POLICY OBJECTIVES

The MHP must be consistent with the primary state tidelands policy objectives and associated regulatory principles as articulated in the Waterways Regulations (310 CMR 9.00). The foundation for this determination is set forth in the MHP Regulations and is applied generally in two parts.

First, I have broadly reviewed the effect of all plan provisions that relate to the tidelands policy objectives reflected in the Waterways regulations. In particular, Chapter 7 of the MHP highlights features of the City's Plan and current regulatory program that support the primary state tidelands policy objectives, as set forth in 301 CMR 23.05(3)(a). My examination of the Plan confirms that a sufficiently high degree of consistency exists between the plan and those state policy objectives.

301 CMR 23.05(3)(a) identifies ten primary state tidelands policy objectives and regulatory principles with which the Plan must be consistent. Several objectives, including those related to other environmental regulatory programs and the licensing of coastal engineering structures, will be more appropriately considered within the context of the MEPA review and Chapter 91 licensing processes when designs for projects within the harbor planning area have matured.

My general review focused on the consistency of the harbor plan with the following five state tidelands policies. These policies protect the public's rights in tidelands by ensuring that:

- Those rights held by the Commonwealth in trust for the public to use tidelands for lawful purposes, including rights of access associated with such use, as provided in 310 CMR 9.35, are preserved. (301 CMR 23.05(3)(a)2.)
- The availability and suitability of tidelands that are in use for water-dependent purposes, or which are reserved primarily as locations for maritime industry or other specific types of water-dependent use, as provided in 310 CMR 9.32(1)(b) and 9.36, are preserved. (310 CMR 23.05(3)(a)3.)
- Nonwater-dependent uses do not unreasonably diminish the capacity of tidelands to accommodate water-dependent-uses, as provided in 310 CMR 9.51. (301 CMR 23.05(3)(a)8.)
- Nonwater-dependent use projects on any tidelands devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in said lands, as provided in 310 CMR 9.52. (301 CMR 23.05(3)(a)9.)
- Nonwater-dependent use projects on Commonwealth Tidelands, except in Designated Port Areas (DPAs), promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes, as provided in 310 CMR 9.53. (301 CMR 23.05(3)(a)10).

In response to public comment and the draft decision, the City has modified the MHP to increase significantly the amount of space devoted to civic and cultural uses. The City has committed to a planning process for civic/cultural uses and programming in the Inner Harbor subdistrict and along the Fort Point Channel. The planning must begin expeditiously with the help of an advisory group that represents broad civic and cultural interests in the waterfront area and citywide.

On the Fan Pier site, in addition to the previously proposed site for a 60,000 sf new building for the Institute of Contemporary Art (ICA), the City will now require a 17,000 sf facility for the Harbor Islands Gateway in the first two floors of Parcel D, and a 30,000 sf new family multi-cultural center in the first two floors of Parcel H, as described in a memo from the BRA dated November 17, 2000. The City will also require an approximately 20,000 sf civic or cultural facility, such as a maritime museum, on Pier 4. These spaces shall be permanently dedicated only to civic and/or cultural uses, through deed restrictions or other legally enforceable mechanisms that include reversion to the City. Any change from the programmatic uses, precise square footage, or building location (provided a total of 127,000 sf of civic/cultural space is provided in buildings along the waterfront) described above shall require the City to certify to DEP, prior to Chapter 91 licensing, that such use is consistent with public principles arising out of the civic/cultural uses masterplanning process. I also look forward to additional contributions from project proponents toward improved public access facilities in the Boston Harbor Islands National Park Area.

This commitment to civic and cultural uses, together with the increased open space commitments and constraints on overall massing in the Inner Harbor subdistrict, as described in Section VIII below, allow me to find that the MHP promotes public use and enjoyment of Commonwealth Tidelands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and that the MHP ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes,

I have also conducted a focused review of all plan requirements that are intended to expand on any of the discretionary requirements of the Waterways Regulations (“amplifications”), and of those requirements intended to substitute for the specific use limitations and numerical standards of the Waterways regulations for nonwater-dependent use projects (“substitute provisions”). My detailed evaluations of these plan elements are discussed generally in this Section, and in greater detail, District-by-District, in Sections VIII through X below.

Subject to the conditions and requirements that I have stated in these sections, I find the Plan to be broadly consistent with the state tidelands policy objectives and regulatory principles set forth in the Waterways Regulations, pursuant to 310 CMR 23.05(3)(a).

A. Evaluation of Plan-wide Amplifications and More Restrictive Provisions

The MHP regulations (301 CMR 23.05(3)(b)) require me to find that any provision that amplifies a discretionary requirement of the Waterways regulations will complement the effect of the regulatory principle(s) underlying that requirement. Upon such a finding, DEP is committed to “adhere to the greatest reasonable extent” to the applicable guidance specified in such provisions, pursuant to 310 CMR 9.34(2)(b)(2). The MHP, and Chapter 7 specifically, contains many provisions that will have operative significance in the Chapter 91 licensing process, pursuant to 301 CMR 23.05(3)(b)&(c).

The City requested in the MHP that an amplification be approved requiring property owners in the harbor planning area to develop programming strategies for their sites that would “provide the public with an assortment of program options, from passive recreation to special events, and take into account the infrastructure needs of the entire range of options.” This high level of site programming is, however, typically required by the Waterways Regulations for nonwater-dependent use projects located on Commonwealth Tidelands (in proportion to project size) and, therefore, cannot be considered as an amplification. (See 310 CMR 9.53(2)(b).)

Below I discuss the three specific state Waterways regulations and corresponding MHP provisions that I have approved as amplifications or as more restrictive provisions, applicable throughout the harbor planning area. Where my approval is qualified, I identify the specific conditions of my approval and the basis for them. Additional amplifications or more restrictive provisions applicable to limited areas are noted elsewhere in this Decision.

1. Pedestrian Access Network

- State Waterways Regulation --
310 CMR 9.52(1)(b)1. (Utilization of Shoreline for Water-Dependent Purpose): At a minimum, the pedestrian access network shall be no less than ten feet in width.
- City Provision --
Pursuant to the City’s Harborwalk standards, at a minimum, property owners must provide a 12 foot wide (10 feet clear of obstruction) pedestrian access network walkway. This width shall be increased, where appropriate, based on the size of the parcel and the development.

This Harborwalk standard should be uniformly applied as a more restrictive provision throughout the harbor planning area. All nonwater-dependent use projects licensed by DEP shall provide walkways that, at a minimum, are 12 feet wide, with 10 feet clear of obstruction. I note that on the Barking Crab site (but nowhere else in the harbor planning area) such walkway may be within a building structure and not clear to the sky, as discussed further below.

2. Open Space/ Lot Coverage Requirements

- State Waterways Regulation --
310 CMR 9.51(3)(b) (Conservation of Capacity for Water-Dependent Use) & 9.53(2)(b)1 (Activation of Commonwealth Tidelands for Public Use): At a minimum, at least 50% of the project site must be reserved as open space for water-dependent activity and public access. The open space must be located on land (*i.e.*, cannot include watershed) and be accessible to the general public at all times. On Commonwealth Tidelands, a maximum of 50% of the required open space (*i.e.*, 25% or more of the total project site) can be devoted to streets and ways.
- City Provision --
All projects within the harbor planning area must comply, at a minimum, with the 50% open space area requirements of the Waterways Regulations. However, only a maximum of 20% of the lot area can be devoted to streets and ways, and surface parking lots are not allowed.

As a result of this more restrictive provision, all nonwater-dependent use projects licensed by DEP within the harbor planning area shall provide open space that, at a minimum, meets the gross area requirements and programmatic standards of the Waterways Regulations (except where specific substitute provisions apply). In no case shall the amount of streets and ways exceed 20% of the project site, within the harbor planning area.

3. Upper Floor Accessory Uses on the Ground Floor

- State Waterways Regulation --
310 CMR 9.53(2)(c) and 9.02 (Activation of Commonwealth Tidelands for Public Use): A project within Commonwealth Tidelands must provide Facilities of Public Accommodation on the ground floor of all buildings containing Facilities of Private Tenancy (FPTs). At a maximum, ground-floor accessory uses to upper floor FPTs must not exceed 25% of the area of the building footprint.
- City Provision --
The City in its MHP restricts the amount of ground floor space that can be devoted to upper floor FPT accessory uses to 20% of the building footprint. Further, residential lobbies and entrances cannot front along the waterside of any building(s).

As a result of this provision, the amount of ground floor space that is accessory to upper floor FPTs associated with nonwater-dependent use projects licensed by DEP within the harbor planning area shall not exceed 20% of the building footprint. In addition, all ground floor accessory uses shall be oriented so that they do not front along the waterside of any building(s).

The remainder of Chapter 7 provides useful guidance that will assist DEP with licensing decisions within the harbor planning area. For example, the Urban Design Guidelines and Universal Access Design Standards will assist DEP in determining whether licensing applications

contain sufficient design detail to assure compliance with the City's vision for the harbor planning area.

I am confident that design details will be addressed adequately through the combined reviews of MEPA and the Chapter 91 licensing processes, with project decisions being informed through public comment and appropriate consultation with municipal agencies. DEP is in agreement with this approach and will require detailed information on the application of the above design standards as part of any license application for nonwater-dependent use projects in the harbor planning area.

B. General Approach to Determinations on Substitute Provisions

The MHP proposes various combinations of substitute provisions for different Districts and parcels within the harbor planning area. These substitute provisions, which fall into five categories, are summarized in Table A.

Table A - Proposed MHP Substitute Provisions

| Waterways Requirement | Districts and Parcels for which Substitute Provision(s) Requested |
|--|---|
| Facilities of Private Tenancy 310 CMR 9.51(3)(b) | Inner Harbor District Barking Crab |
| Setback Requirements (Water-Dependent Use Zone) 310 CMR 9.51(3)(c) | Inner Harbor District Fan Pier Pier 4 Barking Crab Fort Point Historic District South 60 Necco Court only |
| Open Space/ Lot Coverage 310 CMR 9.51(3)(d) | Inner Harbor District McCourt/Broderick Parcels A, B, C, & D Barking Crab Fort Point Historic District North McCourt Parcels E & F City-owned Sleeper Street Parcel Fort Point Historic District South – 60 Necco Court |
| Height 310 CMR 9.51(3)(e) | Inner Harbor District Fan Pier Pier 4 McCourt/Broderick Parcels A, B, C, & D Barking Crab Fort Point Historic District North Parcel E on Sleeper Street only McCourt Parcels E & F City-owned Sleeper Street Parcel Fort Point Historic District South – entire area 60 Necco Court (80' in 55' zone) differs from Remainder of District |
| Activation of Commonwealth Tidelands for Public Use 310 CMR 9.53(2)(b) (Open Space Management) | Inner Harbor District McCourt/Broderick Parcels A, B, C, & D Barking Crab Fort Point Historic District North McCourt Parcels E & F City-owned Sleeper Street Parcel Fort Point Historic District South 60 Necco Court |

The framework for my evaluation of these proposed substitute provisions is established in the MHP regulations at 301 CMR 23.05(3)(c) and (d). In general, to approve a substitute provision, I must determine that the MHP specifies alternative requirements that will promote, with comparable or greater effectiveness, the state tidelands policy objectives expressed in the

corresponding provisions of the Waterways Regulations. In order to make this determination, each proposed substitute provision requires the following analysis.

First, I must find that the substitute provision satisfies the specific standard for that category set forth in 301 CMR 23.05(3)(c). (These standards are summarized in Table B.) In certain cases, I have found that a substitute provision as proposed fails to meet the standard in subsection (c), and it must be modified or disallowed.

Second, when there is a proposed substitute provision which meets the subsection (c) standard, and which would be less restrictive than the corresponding Waterways requirement, subsection (d) requires that the MHP include “other requirements that, considering the balance of effects on an area-wide basis, will mitigate, compensate, or otherwise offset any adverse effects on water-related public interests.” 301 CMR 23.05(3)(d). Collectively referred to as offsets, these additional measures should be applied within reasonable proximity of the locus of adverse effects that need to be offset, in order to avoid or minimize inequity in the distribution of public benefits and detriments. 301 CMR 23.05(3)(d) requires that the analysis and data of the Plan be organized in a manner that clearly identifies the substitute provisions proposed. The plan must establish the nature and extent of the differential effects that the substitute provision will have with respect to the tidelands policy objectives in question.

As discussed in the Scope, the level of analysis of adverse effects, or impacts, is dependent on the degree to which the Waterways regulations are relaxed, the significance of benefits associated with proposed offsetting measures, and other relevant circumstances such as the characteristics of the built environment in the area in question. These circumstances might include, for example, the scale and density of existing structures; the degree of urbanization of the area in question; and the relationship between proposed development activities and the adjoining waterfront or watershed.

Offsets can be quantitative or qualitative, but they must be sufficiently specific to provide certainty in Chapter 91 licensing. So long as the focus of the enhancements is on the quality of the pedestrian ground-level experience, the range of approvable offsets can be quite broad. (See Scope, p. 10-11). The City’s vision for the South Boston waterfront relies heavily on the use of offsets to support the proposed substitute provisions. Recognizing this approach, and in response to the significant public comment I have heard, my review of the proposed substitute provisions pays particular attention to how the proposed offsets will achieve ground-level conditions that promote use and enjoyment of the waterfront by all.

The above framework for evaluating each of the proposed substitute provisions is summarized in Table B. To avoid needless repetition of approval standards, the table lists the five Waterways Requirements for which substitute provisions are proposed, a summary of the Waterways requirement, and the corresponding subsection (c) approval standard of the MHP Regulations. I have evaluated substitute provisions proposed in the Plan on a subdistrict-by-

subdistrict basis. Where appropriate or necessary my decision reflects a parcel-by-parcel approach within the context of each planning subdistrict.

C. Determination on Proposed Substitute Provisions

As described in more detail in the following sections, I have determined that the proposed substitute provisions contained in the South Boston Waterfront MHP specify alternative requirements that, subject to the conditions specified herein, will promote with comparable or greater effectiveness the state tidelands policy objectives reflected by the minimum requirements of the Waterways Regulations at 310 CMR 9.51(3)(b)-(e) and 9.53(2)(b). Specifically, I have determined that the alternative requirements and conditions will ensure that:

- No significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent use purposes;
- New or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline;
- Buildings for nonwater-dependent use will be relatively condensed in footprint;
- In general, new or expanded buildings for nonwater-dependent use will be relatively modest in size; and
- Nonwater-dependent use projects on Commonwealth Tidelands will establish the project as a year-round locus of public activity.

Project proponents must submit a Chapter 91 license application to DEP, as described in 310 CMR 9.11. Projects within the area governed by the South Boston MHP must conform to the approved MHP, as required by 310 CMR 9.34(2). Unless an alternate requirement is specified in the approved MHP, project proponents must also meet all applicable substantive standards of the Waterways Regulations. DEP will substitute as licensing requirements the limitations or numerical standards as specified in the MHP for certain standards prescribed in the regulations at 310 CMR 9.51(3) (a) through (e), 9.52(1)(b)(1), and 9.53(2)(b) and (c). Offsets for any adverse impacts from the substitutions as identified in the MHP will also be expressed as enforceable conditions of the Chapter 91 license.

When numerical limitations in the MHP, including those that define “building envelopes,” are expressed as maximum or minimum amounts, these limitations will substitute for the maximum or minimum limits identified in the regulations. This approach is appropriate for much of the MHP planning area, because without information about specific development plans, substitutions and offsets can only be expressed generally. In the relatively unusual circumstance that available information allows substitutions and corresponding offsets to be specifically identified in the MHP to compensate for any adverse impacts, DEP will apply these specific substitutions and offsets as the appropriate standards for licensing. Where offsets and substitutions are both particularized and more stringent than the underlying baseline Chapter 91 regulations, they may serve as amplifications under 310 CMR 9.34(2)(b)2. DEP must “adhere to the greatest reasonable extent” to provisions in the MHP which amplify discretionary requirements of the waterways regulations.

The area-specific information available for the Inner Harbor Subdistrict, particularly in the Fan Pier and Pier 4 area, has allowed an extensive analysis of the building heights, open space, and setback substitute provisions, the resulting impacts, and the specific public benefits beyond the Chapter 91 baseline that will serve as offsets. The Scope required a demonstration that the total massing achievable under the MHP must be comparable to that achievable under Chapter 91, which is expressed in the MHP as an aggregate amount of 3.87 million sf. As discussed below, I have found that the offsets required in the MHP will compensate for any shadows and other adverse effects created by buildings of this mass and configuration. DEP will specify the offsets required in the MHP as enforceable conditions for the licensing of projects on Fan Pier and Pier 4 with an aggregate massing not to exceed 3.87 million square feet (plus or minus a *de minimis* design adjustment of no more than 1%). Additional detail on the offsets, as well as the baseline Chapter 91 requirements in 310 CMR 9.00, must be presented in the Chapter 91 license application. Provision of public water-related facilities, including support for water transportation, are baseline requirements unless specifically identified as an offset. The Chapter 91 license conditions will provide detail on the baseline and offset public amenities to ensure full and enforceable activation of the waterfront.

This density, together with the building envelopes and specified offsets, provides the requisite stringency and detail to qualify as an area-specific amplification under 310 CMR 9.34(2)(b)2. This approach complements the corresponding regulations and will not unreasonably affect DEP's exercise of discretion in the implementation of 310 CMR 9.00; to the contrary, DEP licensing appropriately will reflect the careful identification of impacts and selection of offsets for a prescribed level of development that will achieve commensurate public benefits in this area. Pursuant to 301 CMR 23.04(6), the approved plan is not effective for the purposes of project licensing under 310 CMR 9.00, until such time as the City has enacted relevant zoning bylaws and regulations necessary to implement the plan and, as discussed in Section XI below, submitted copies to me for final review.

VIII. EVALUATION OF REQUESTED SUBSTITUTE PROVISIONS: INNER HARBOR DISTRICT

A. General Description of District and Current Projects

The Inner Harbor District is described in the *Public Realm Plan* and the MHP as a focus for more intensive development. Much of the area is currently vacant land, used only for surface parking. Public transportation improvements now underway – the Central Artery / Tunnel project, the MBTA’s Silver Line, and new surface streets – will enormously expand the capacity and ease of transportation access. Three major development projects, totaling 10 million sf, have been proposed and are currently undergoing MEPA review: the Fan Pier project (described as 3.3 million sf in its DEIR, EOEA #12083), the McCourt Gateway project (described as 3.4 million sf in its ENF, EOEA #12227), and the Massport Commonwealth Flats masterplan (described as 3.3 million sf in its DEIR, EOEA #11882). The Pier 4 site, though not currently undergoing public review, is another site with strong development potential, described as 1.2 million sf in the MHP.

43 acres, or about one-third of the Inner Harbor District, lies within the harbor planning area. (Another three acres of land within Chapter 91 jurisdiction is undergoing separate review under an MOU between Massport and DEP – see Section VI.A of this Decision.) The area within jurisdiction includes the entirety of the Fan Pier and Pier 4 project sites, parts of the McCourt property, and the small parcel on the Fort Point Channel where the Barking Crab restaurant is located.

B. Proposed Height Substitute Provisions – Fan Pier and Pier 4

The substitute height provisions proposed in the MHP for the Fan Pier and Pier 4 sites are the most significant departure from the Chapter 91 standards in the entire harbor plan, and they have been the focus of much of the public comment that I have received. As described in Section 10.2.2. of the MHP, these provisions are aimed at implementing the urban design principles of the Public Realm Plan:

- Small blocks reflective of Boston’s scale and urban design character.
- View corridors to the waterfront.
- Base building elements which create street walls no greater than 75 to 85 feet high, to frame a low-scale pedestrian environment.
- Tower elements with a floorplate not to exceed 25,000 square feet, set back from the street wall to minimize the impacts of massing.
- Building heights that step back from the waterfront, maintaining the tradition of Boston’s waterfront neighborhoods.

On the Fan Pier, Chapter 91 would allow heights that begin at 55 feet, and would step upward to over 150 feet along most of Old Northern Avenue, with a maximum at 280 feet in the extreme southwest corner of the site, next to the courthouse. On Pier 4, Chapter 91 would allow a maximum height of no more than 55 feet over nearly the entire site. Figure 2 shows the Chapter 91 baseline heights. The following table summarizes the proposed substitute height provisions

under the MHP, which are shown on Figure 3. (As a preliminary matter, note that in Section VI previously, I have already required on separate grounds a potential reduction in the maximum height limit on the Fan Pier site, in order to preserve compatibility of new development with the flight path from Runway 27 at Logan Airport.)

Fan Pier: Proposed Height Substitute Provision (310 CMR 9.51(3)(e))

- Moving landward from the setback area (Water-Dependent Use Zone) along the fan edge, proposed height zones step up from 175 feet, to 250 feet, to 275 feet, and finally to 300 feet in the vicinity of Old Northern Avenue and Courthouse Way. (Maximum heights along Old Northern Avenue area are potentially decreased in this decision, consistent with requirements relating to Logan Airport described in Section VI, while maintaining the principle of stepping up from the waterfront.)
- For the remaining two parcels along Old Northern Avenue, the proposed height zone is 250 feet (decreased in this decision for Parcel H to 175 feet, as proposed by the City).
- The proposed maximum height for the civic site on Parcel J is 60 feet (increased in this decision to 75 feet).

Pier 4: Proposed Height Substitute Provision (310 CMR 9.51(3)(e))

- A proposed 200-foot no-build zone will be located at the seaward end of the pier.
- Moving landward from the no-build zone three height zones are proposed: the first zone allows heights of up to 100 feet; the second zone allows heights of up to 200 feet (decreased in this decision to 170 feet); and the final zone, extending to Old Northern Avenue, allows heights of up to 250 feet (subject to the limitations relating to Logan Airport).

Approval Standards and Method of Analysis

In analyzing the substitute height provisions, I must determine whether they meet the specific approval standard set forth at 301 CMR 23.05(3)(c)(5): “the plan must specify alternative height limits and other requirements which 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.”

I must also determine whether the proposed offsets and other mitigation measures are proportional to the adverse effects attributable to the height substitute provisions. Under the regulations, the burden is on the municipality to show that the proposed provisions “will promote, with comparable or greater effectiveness, the state tidelands policy objectives.” 301 CMR 23.05(3)(d).

This section of the Decision discusses the Fan Pier and Pier 4 project sites together, because of the need to look at this part of the district as a whole. However, for clarity of subsequent permitting, my determinations on each proposed substitution and offset are stated on a project-by-project basis.

The area constituted by Fan Pier and Pier 4 is relatively unbuilt, consisting largely of surface parking lots. Previous Boston Harbor plan decisions have looked to characteristics of the built environment to assess whether proposed heights were relatively modest in size. As guided by the MHP regulations, in my analysis I have also looked to the nature of the harbor in question, the community's vision for its waterfront, and comparisons of proposed massing to that attainable by strict application of the Waterways requirements.

Public comment and the City's Draft Request for Scope identified clearly that height would be a significant issue for the Inner Harbor District. Recognizing that the unbuilt nature of the surrounding environment would not facilitate my determination, my Scope for the South Boston MHP included specific requirements that now inform my review of proposed substitute provision for height in the Fan Pier/Pier 4 area.

In my Scope, I required a comparative massing analysis, comparing the building heights and massings allowable under Chapter 91 with those allowable under the MHP. Further, I required that the cumulative massing (measured in total square feet of development) for significant geographic areas such as the Fan Pier and Pier 4 sites, taken together, should be comparable to that allowable under the Waterways Regulations. I further encouraged that the Inner Harbor District be planned to provide a vibrant publicly-accessible destination, with building heights stepping down to the water.

In addition to massing, my Scope also focused on how the substitute height provisions could cause significant wind and shadow impacts to the pedestrian ground-level experience, particularly in the area of the Fan Pier Cove. To assess these impacts, the Scope required the City to conduct an alternatives analysis that compared wind and shadow conditions at the ground level for development allowable under the MHP substitute height provisions, compared with those for development compliant with the baseline Chapter 91 height limits. Should this analysis identify negative impacts, offsetting measures that are designed to enhance the pedestrian experience must be incorporated into the plan. The public benefits of such offsets must be proportional to the impacts attributable to the substitute provisions.

The MHP must include an effective strategy that achieves a base level of assurance that wind, shadow, and other conditions (such as massing discussed above) will be conducive to water-dependent activity, proposed ground-level uses, and public access. Specific mitigation features may be finalized in the MEPA, Article 80, and Chapter 91 processes, when project design has advanced to a higher level of detail.

Comparability of Massing

The MHP indicates that the proposed massing for the Fan Pier will be approximately 3.2 million square feet. According to the MHP, this is equal to a massing attainable under the Waterways Regulations. For the Pier 4 site, the MHP proposes heights, massings, and Floor Area Ratios (FARs) comparable to those that would be allowed on Fan Pier. According to the MHP, the maximum development to be allowed on Pier 4 under future zoning would be approximately 1.2 million sf, or nearly twice the amount allowable under the Chapter 91 requirements (670,000 sf). Thus, the total massing of the Fan Pier and Pier 4 sites allowable under the MHP would be 4.4 million sf, compared with the aggregate total of 3.87 million sf allowable under Chapter 91. To assure that the MHP has satisfied the “relatively modest in size” standard set forth in the Municipal Harbor Planning Regulations, it is a condition of this decision that the total aggregate massing of development on the Fan Pier / Pier 4 portion of the Inner Harbor subdistrict shall not exceed the total aggregate massing of 3.87 million sf attainable under the Waterways Regulations, exclusive of the approximately 127,000 sf of civic and cultural uses identified by the City and described above, and plus or minus a *de minimis* design adjustment of no more than 1%, bringing the maximum buildout to approximately 3.91 million square feet. Thus the maximum buildout on Fan Pier shall be approximately 2.927 million sf and the maximum buildout on Pier 4 shall be approximately 981,700 sf, both sites excluding civic spaces.

Wind Impacts

I have reviewed the qualitative wind analysis provided for Chapter 91 baseline and MHP build-out conditions in the Inner Harbor District. As allowed under the Scope, I have also reviewed the more detailed wind tunnel analysis included in the Fan Pier DEIR submitted to MEPA in April 2000. Interpretation of these results is complex and depends, among other things, on a statistical analysis of wind direction and duration, seasonal climate variability, and the nature of proposed ground level uses.

Based on my review of these analyses, and recognizing that the Fan Pier project has been modified subsequent to the DEIR to include increased area for the Public Green, I have concluded that ground-level wind conditions of the MHP build-out scenario are generally less favorable than those anticipated by the Chapter 91 baseline scenario. As a significant exterior open space feature of the Fan Pier project and this MHP, I am particularly concerned with anticipated wind conditions in the area of the Public Green, classified generally as “Uncomfortable” in the summary of projected mean annual wind speeds presented in the Fan Pier DEIR. I do note that the worst conditions would occur when sustained winds blow from the east. Such easterly winds are typically associated with storms that limit outside activity.

With respect to Pier 4, I have concluded, based on the MHP analysis, that pedestrian-level wind conditions will range generally from “comfortable for short periods of sitting and standing” to “comfortable for walking” along all sides of Pier 4. Possible exceptions to this general observation may occur during periods of easterly storm winds, when wind speed that are “uncomfortable for walking” will be encountered at several locations along the pier. I would anticipate, however, a corresponding decrease in pedestrian waterfront activity at those times.

Considered alone, I do not find that the level of adverse wind impacts predicted under the MHP analysis would require additional offsets. As proposed in the MHP, I concur that building design features and other mitigation can ensure that the resulting wind conditions will be conducive to water-dependent activity for those areas most critical to the public pedestrian experience: the Harborwalk; the Fan Cove; and the Cove edges of Pier 4. I am concerned, however, that the performance standard for wind is less strict than that typically applied City-wide.

Therefore, as a condition of this Decision, I am requiring that for all projects seeking height substitute provisions, ground-level ambient wind speeds should not exceed City “pedestrian safety/comfort wind standards” for assessing the relative wind comfort of pedestrians (as they may be revised in the future). Based on these current standards, I understand that: 1) the effective gust velocity (31 miles per hour) should not be exceeded more than 1% of the time and 2) a derivation of the Melbourne criteria will be used to ensure that wind speeds at critical locations will be suitable for anticipated pedestrian uses. See, e.g., Boston Zoning Code, Sections 38-16, 43-17. I will look to the MEPA/Chapter 91/Article 80 processes to evaluate appropriate design modifications and mitigation features that will ensure that these standards are achieved for the Fan Pier, and other projects as they progress in design. Those measures determined through the MEPA process as necessary to achieve this standard, shall be included as conditions of all Chapter 91 licenses. I also want to note that the level of adverse wind impacts is an additional factor that has led me to modify the levels of required offsets for the Fan Pier project, as discussed in more detail below.

Shadow Impacts

I have reviewed the comparative shadow impacts analysis provided for Chapter 91 baseline and MHP build-out conditions in the Inner Harbor District. As allowed under the Scope, I have also reviewed the more detailed shadow analysis included in the Fan Pier DEIR submitted to MEPA in April 2000, and additional shadow studies provided by the BRA during the consultation process.

Because of sun orientation, the MHP and DEIR shadow studies for the Inner Harbor District generally, and for Fan Pier specifically, indicate that significant percentages of the proposed public areas located near the water’s edge will be affected adversely by shadow, when compared with the Chapter 91 baseline conditions. This impact can be more acute in the cooler border seasons, when people are venturing out to enjoy the first days of spring or taking advantage of the last days of fall.

The shadow diagrams in the MHP as submitted show that on October 23, during the morning approximately 70% of the Courthouse Park, 60% of the fan edge park, 75% of the Public Green, and 80% of the southerly Cove edge open spaces would have been shadowed. During the afternoon, approximately 90% of the fan edge park, 40% of the Public Green, and 70% of the Cove southerly edge open spaces would have been shadowed. Based on this general analysis, I concluded that the public outside experience at the Fan Pier site during these “bridge” seasons required further protection, as appropriate for Commonwealth Tidelands.

To further assess the nature of these impacts, as requested, the BRA produced additional shadow studies evaluating a series of alternative heights, down to 150 feet, for Buildings “E”, “F”, “H”, and “I. These additional studies show that given the area’s geographic orientation with respect to the sun, shadow impacts would not be improved significantly through lower building heights. Therefore, as described in more detail below, among the conditions of my approval of this height substitute provision is the requirement that the proposed building on Parcel “H” be reduced in size and height, and that a significantly larger area of the site be dedicated to additional public open space (coupled with additional public open space throughout the Water Dependent Use Zone).

With respect to Pier 4, my review of the Chapter 91 baseline and MHP shadow studies indicates that, due to its orientation with respect to the sun, at various times of the day almost any level of development on the pier will impact adjacent ground-level conditions. Indeed, the analysis shows clearly that, given the narrowness of the pier, increased building heights do not greatly worsen the level of shadow affecting public areas adjacent to the water’s edge.

Based on the shadow diagrams, the level of morning shadow coverage anticipated for October 23 appears to be on the order of 70% for the west side of the pier; 15% for the end of the pier; and 0% for the east side of the pier. In the afternoon, due to the site’s orientation, with the exception of the west side, which remains at approximately 70%, these levels increase to approximately 75% for the end and 60% for the east side. Based on these general observations and in order to maximize the pedestrian level experience along Pier 4, I am requiring that, as discussed in more detail below in the context of height offsets, the proposed 200-foot “No Build Zone” be maintained as open space, and that the setback along the eastern side of the Cove (the western side of Pier 4) be significantly widened.

Proposed Offsets

To compensate for increased wind, shadow, and other adverse impacts to water-related public interests caused by substitute height provisions, the Plan contains a formula that quantifies both the degree of impacts, in terms of areas subject to additional shadow, and the level of offsets required. Under the formula, height-related impacts are quantified as the net area within a designated shadow protection zone (SPZ) that would be subject to new shadow (Net New Shadow, or NNS), beyond that generated under Chapter 91 baseline conditions, for at least one hour on October 23. The SPZ as shown in the MHP includes varying size waterfront open spaces and watersheet areas adjacent to the shoreline (but excludes additional open space created as an offset, beyond the 50% minimum). The plan estimates the NNS created by potential new buildings on the Fan Pier site at 253,745 sf (subsequently reduced by the reduction of the Parcel H building), and on the Pier 4 site at 34,639 sf.

The plan contains a menu of potential public benefits that can be used to offset the impacts attributable to increased heights (see Sections 8.9, 10.32, and 10.4.2). Each category of offsets is

weighted according to the relative value of the public benefit it provides. In this manner, the plan proposes to offer a combination of flexibility and predictability for the project-specific offsets, to be determined based on the study of actual project impacts as part of the MEPA/Article 80 review and Chapter 91 licensing process.

- Provision of additional open space area in excess of that required under the Waterways Regulations. (2 SF shadow offset by 1 SF of open space)
- Dedication of a site for a freestanding building for civic and/or cultural use. (1:1 offset for the actual building footprint)
- Enhancement of the proposed wave attenuation structure (breakwater) for the Cove, to accommodate public access and fishing, including amenities such as benches, lighting, fishing pole rental, and fish cleaning stations. (1:1 offset)
- Provision of 4-Season Rooms, offering interior public space with enhancements and amenities in excess of the Waterways requirements for FPAs. (1:1 offset)
- Provision of Upper-level FPAs. (0.25:1 offset)

The MHP specifies that certain specific offsets must be provided within the Fan Pier project to satisfy the formula: additional open space within the Public Green at the south side of the Fan Pier Cove, the dedication of Parcel J as a cultural/civic site for the new home of the ICA, two 4-Season Rooms, and enhancement of the breakwater. The specified offsets in the MHP for the Pier 4 site consist of an unidentified cultural/civic/educational facility and a 4-Season Room (no specific size required for either one). The menu specified in the MHP also proposes that up to 50% of the required offsets for a project could be provided in the form of public water-related facilities, water transportation subsidies, and water transportation services, through a method of calculation to be defined later.

I am supportive of the formula approach to quantifying height-related impacts and offsets in this MHP. However, based upon the public comments and consultation with the environmental agencies, I have serious reservations about certain categories of proposed offsets. The history of ensuring viable public access to interior spaces in return for the allowance of additional project density, and the quality of the spaces so created, has been extremely disappointing. For that reason, I am disallowing the use of the 4-Season Rooms and second floor FPAs as offsets.

Based upon my consultation with DEP, I have concluded that significant public water-related facilities, water transportation subsidies, and water transportation services should be considered as Chapter 91 baseline license conditions. Therefore, only water transportation commitments over and beyond the Chapter 91 baseline requirements may be used for the purposes of offsetting the net new shadow (and only for up to 15% of a project's total offset requirement). For water transportation benefits to count as an offset, they must be of a type or duration beyond that required under Chapter 91, and they should typically be provided off-site or as a generally available subsidy. An example of a water transportation benefit that qualifies would include free tickets for children's fares on trips to the Boston Harbor Islands. As a separate provision, I will allow up to 10% of a project's total required offsets to be provided in the form of improvements to public access facilities within the Boston Harbor Islands National Park Area.

In response to the strong public support for high quality, pedestrian-usable open space, I am adding the following additional category of offset. Bearing in mind that under the MHP no more than 20% of a total project site may be occupied by streets and ways, I am granting an offset, at a ratio of 1:1, calculated as the difference between 20% of the project site area and the area actually devoted to streets and ways. This offset is only available to projects in which at least 55% of the project area is set aside for open space.

In summary, to address the above concerns and provide more specificity in terms of the nature and timing of the benefits, my approval is subject to the following conditions:

- 1) To avoid inequity in the assignment of offset responsibility, net new shadow calculations shall be calculated as the net new shadow created separately by each project licensed under Chapter 91. Net new shadows shall not include any areas shadowed by structures in existence, on- or off-site, as of January 1, 2001.
- 2) The first three categories of offsets listed above (additional open space, footprint of civic building, and publicly accessible breakwater) shall qualify as offsets.
- 3) 4-Season Rooms and Upper-level FPAs shall not qualify as potential offsets.
- 4) Maximizing pedestrian-usable open space shall qualify as an offset, calculated as the difference between 20% of the project site area and the area actually devoted to streets and ways, at a ratio of 1:1, and provided that at least 55% of the project area is devoted to open space.
- 5) No more than 15% of the total required offsets may be provided in the form of water transportation benefits in excess of the baseline Chapter 91 requirements, as described above.
- 6) No more than 10% of the total required offsets may be provided in the form of improvements to public access facilities within the Boston Harbor Islands National Park Area.
- 7) I recognize that the area of net new shadow to be offset will not be determined until such time as final building designs have been completed. I am requiring, therefore, that this area calculation be determined during the MEPA process and used by DEP in the Chapter 91 licensing process for final offset specification. Future Chapter 91 licenses must include clear and enforceable conditions ensuring that offsets will be provided in a timely fashion, commensurate with the accrual of project-related private benefits.

Project-specific Determinations and Conditions

Fan Pier

Based on the forgoing analysis, including the potential adverse impacts arising from substitute height provisions, and the need to ensure compatibility with the MBTA's Silver Line project by strengthening the pedestrian and visual link between the Courthouse station headhouse and the Fan Pier Cove, I am imposing the following additional conditions regarding required

height offsets for the Fan Pier project. (These are in addition to the potential height reductions required in Section VI to protect the flightpath for Runway 27 at Logan Airport.) I agree with the public comments suggesting that offsets should be used to maximize open space area beyond the minimum required in the MHP. Therefore, I am accepting with conditions the City's proposed modification of the MHP, which provides that the building on Parcel "H" shall be reduced in size, increasing the total width of the Public Green to approximately 270 feet (subject to final design, engineering, and wind mitigation studies), and that it shall be reduced in height to a maximum of 175 feet. I find that this change, together with increases in the Water Dependent Use Zone, will produce an increase in the total area of open space equal to the area that would have been created by the total elimination of Parcel H. I am pleased to acknowledge that as a result, at least 56% of the total Fan Pier site would be devoted to open space. In addition, the reduction in the portion of the site devoted to streets will ensure that over 40% of the site will be devoted to pedestrian-usable open space – virtually the same area that will be devoted to buildings.

The enlargement of the Public Green, the enlargement of waterfront setbacks all around the Cove and along the Fan edge park, and the elimination of a street between the Public Green and the Fan Pier Cove, responds directly to the public comments I have received seeking a strong commitment to "green" and "useable" open space. At the Public Green, these changes will result in significant open space area (approximately the size of the popular Post Office Square). Enhanced by the resulting visual connection from Old Northern Avenue to Boston Harbor, this park should serve to invite the public to the waterfront. Based on my evaluation of the October 23 shadow study, the reduced height and width of Building H will render this area more inviting from late morning until early evening.

In summary, the modified MHP will require the following fixed offsets for the Fan Pier site:

- 1) 42,400 square feet of additional open space, in excess of 50% of the site area, at a ratio of 2:1;
- 2) Approximately 21,000 square feet of publicly accessible space on the surface of the breakwater, at a ratio of 1:1;
- 3) 15,500 square feet of the footprint of the civic building on Parcel J, at a ratio of 1:1; and
- 4) Approximately 30,000 square feet of pedestrian-usable open space, calculated as part of the 20% of the site area that could be devoted to streets and ways, at a ratio of 1:1.

If other offsets are required under the formula, they may be provided from any of the above categories. In addition, the following offsets may be used:

- No more than 15% of the total allowable offset in the form of water transportation benefits in excess of the baseline Chapter 91 requirements; and
- No more than 10% of the total allowable offset as improvements to water-related public access facilities within the Boston Harbor Islands National Park Area.

Also, because of the reduced footprint and increased setback for the proposed civic building on Parcel J, I will allow an increase in the allowable height for a civic building on Parcel J

to 75 feet. I find that this increase will have no significant increase in shadows or other adverse impacts on public waterfront access.

Pier 4

I am approving the substitute height provisions proposed for the Pier 4 site, with the condition that the maximum height in the second zone shall be no greater than 170 feet (as opposed to 200 feet in the MHP). I am generally satisfied with the combination of offsets to be provided as part of the Pier 4 project, subject to the general conditions stated earlier, the changes to the WDUZ discussed below, and to the following project-specific condition.

The area encompassed by Pier 4 is long and relatively narrow. I am allowing building heights in excess of those allowed under Chapter 91, therefore, subject to the condition that the 200-foot “No Build Zone” currently proposed for the end of the pier be maintained as pedestrian-usable open space. Relative to the menu of offsets, the area of open space landward of the WDUZ (approximately 100 feet) may be used for the purposes of final offset specification at the ratio 1SF of open space per 2 SF of net new shadow. This additional open space shall be programmed to the maximum extent possible so that the result is a functional open space area adjacent to the waterfront that enhances the pedestrian-level experience. As with the Fan Pier site, I am pleased to acknowledge that at least 56% of the total Pier 4 site will be devoted to open space, and that over 40% of the project site will be devoted to pedestrian-usable public open space, exclusive of streets.

A final condition of my approval shall be the incorporation of the urban design principles, including the limitations on heights of base elements and footprint of tower elements, into final zoning for all Inner Harbor sites. As conditioned herein, I find that the substitute height provisions for the Fan Pier and Pier 4 sites meet the standards set forth at 301 CMR 23.05(3)(c)&(d).

C. Proposed Setback Substitute Provisions: Fan Pier and Pier 4

The Waterways Regulations establish uniform dimensional requirements for a “water-dependent use zone” (WDUZ), to ensure that sufficient space along the water’s edge will be available to accommodate water-dependent activity and public access. On the Fan Pier site, the baseline WDUZ requirement under the Regulations would be 100 feet. On Pier 4, because of its narrow configuration, the baseline WDUZ under the Regulations would be 100 feet at the end of the pier, and approximately 26 feet, along both sides of the pier. The MHP proposes the following modifications to the WDUZ. In each case, reductions in the setback on some parts of the site would be offset by increased setbacks in other areas, resulting in each case in a total area for the WDUZ that is equal to or greater than the total area required under the Regulations.

Fan Pier: Proposed Water-Dependent Use Zone Substitute Provision (310 CMR 9.51(3)(c))

- 140 feet along the fan edge (increased in this decision to 150 feet).
- Varies between 50 and 65 feet along the Cove edge (increased in this decision to between 60 and 75 feet).
- 20 feet around the proposed civic site (increased in this decision to at least 30 feet at the narrowest point, and generally striving for 40 feet).
- Total area of reconfigured WDUZ calculated in the MHP as 152,298 SF, which is slightly greater than the Chapter 91 compliant WDUZ area of 151,548 SF. (Detailed areas as provided in Fan Pier DEIR.) The changes described in this decision will increase the total area of the WDUZ still further.

Pier 4: Proposed Water-Dependent Use Zone Substitute Provision (310 CMR 9.51(3)(c))

- 30 feet along the Cove edge of Pier 4 (increased in this decision to 46 feet).
- 200 feet at the seaward end of Pier 4 (decreased in this decision to 100 feet as a required minimum, with the additional 100 feet to be provided as an offset for height substitute provisions).
- 18.5 feet along the easterly edge of Pier 4 (increased in this decision to approximately 26 feet, as required by the Waterways Regulations).
- Total area of reconfigured WDUZ calculated in the MHP as approximately 61,697 SF, equal to Chapter 91 compliant WDUZ area of approximately 61,697 SF. The changes described in this decision will increase the total area of the WDUZ still further.

Analysis

The proposed Fan Pier WDUZ is one component of a well-crafted strategy to activate the waterfront. As reconfigured in the MHP, and as further modified in this decision, the WDUZ will accommodate approximately 1,700 linear feet of new Harborwalk within the Fan Pier site and support a variety of uses proposed along the water's edge and for the watershed. Based on my review, I have concluded that these alternative setback distances specified for Fan Pier, in the form of a reconfigured WDUZ, will ensure that new or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to the project shoreline. I also note that the enlarged 150-foot setback along the fan edge will accommodate a publicly accessible tidal pool. The tidal pool, to be maintained with assistance from the New England Aquarium and the Children's Museum, will present educational opportunities for school children, contributing significantly to the destination value of the waterfront. I am persuaded that the reconfigured WDUZ will, with comparable or greater effectiveness, devote sufficient space along the water's edge to water-dependent use and public access. Therefore, the approval standards are met.

Development of the Pier 4 parcel will also result in the addition of approximately 1700 feet of continuous pedestrian access network and lateral connections to the City's Harborwalk system. Because the modified setbacks would be implemented concurrently with a substitute provision that would allow greatly increased building heights, attention to the pedestrian experience is critical -- particularly in the context of a narrow parcel such as Pier 4. I am therefore requiring that minimum Chapter 91 setback distances, as they apply to piers (310 CMR

9.51(3)(c)), must be maintained for the entire parcel, clear-to-the-sky and not within building arcades. Further, the setback on the west side of Pier 4 (the east side of the Cove) shall be further widened to 46 feet to provide an enlarged area for public activity, and a stronger link between the Public Green and the ICA on the Fan Pier site and the open space at the end of Pier 4. Coupled with the additional open space provided as a partial offset to increased building heights, I believe that strict application of the Waterways requirements will ensure that sufficient space will be provided along the water's edge to accommodate water-dependent activity and public access. Since the WDUZ for Pier 4 will now comply with the Waterways requirements, corresponding offsetting measures are no longer required.

D. Proposed Open Space and Height Substitute Provisions: McCourt/Broderick Parcels A, B, C, and D

The third major development site within the Inner Harbor District is the McCourt/Broderick parcel, an L-shaped area of undeveloped land comprising approximately 25 acres between Old Northern Avenue and Summer Street. Unlike the Fan Pier and Pier 4 sites, however, only a relatively small portion of the McCourt/Broderick land, totaling about two acres, falls within Chapter 91 jurisdiction and the harbor planning area of this MHP. Within the Inner Harbor District, parts of Parcels "A", "B", and "C," totaling approximately 61,000 SF of land, lie within Chapter 91 jurisdiction. Parcel "D," which contains approximately 12,000 SF, lies entirely within c. 91 jurisdiction. In addition, the Fort Point Historic North District discussed in Section VIII below contains two additional McCourt/Broderick parcels: Parcel "E", lying entirely within Chapter 91 jurisdiction and measuring approximately 8,100 SF, and the portion of Parcel "F" that is within Chapter 91 jurisdiction, which measures approximately 4,600 SF.

The MHP proposes height substitute provisions for the McCourt properties within the Inner Harbor District that are intended to implement the urban design principles described above for the Fan Pier and Pier 4 projects: view corridors to the water; lower base building elements that frame pedestrian-scaled streets; taller tower elements set back from the street; and an overall stepping of building heights back from the waterfront. In addition, the MHP proposes substitute provisions for open space that would permit the aggregation of required open space in locations that would better serve the public's interest in waterfront access and enjoyment. The individual substitute provisions for height and open space are summarized below. As with the Fan Pier and Pier 4 projects, my analysis discusses the various parcels as part of a larger whole, supplemented with specific findings and conditions for individual parcels.

I also note that the MHP does not propose any substitute provisions for the existing restaurant parcel at the southeast corner of Pier 4 and Northern Avenue. This appears to be consistent with the treatment of the Barking Crab parcel – at that location also, there would be no substitute provisions, other than height, applicable if ownership were combined with other development parcels.

Proposed Open Space Substitute Provision (310 CMR 9.51(3)(d))

- Permit less than 50% of the project site (potentially down to 0%) to be reserved as open space for water-dependent activity and public access.

Proposed Substitute Provision for Exterior Open Space Requirements Specific to Commonwealth Tidelands (310 CMR 9.51(3)(c))

- Permit less than 50% of the project site (potentially down to 0%) to be reserved as quality exterior open space that is available to the public for active and passive recreation.

Analysis

The Waterways Regulations contain two numerical open space standards, the combined effect of which on Commonwealth Tidelands is to limit the site coverage of nonwater-dependent buildings so that at least 50% of the project site consists of exterior open spaces for active or passive public use and enjoyment. These requirements can be modified through the MHP process, provided that the Plan contains alternative requirements that will ensure building footprints are relatively condensed in order that exterior open space is available to accommodate water-dependent activity and public access and, in the case of Commonwealth Tidelands, sufficient to establish the site as a year-round locus of public activity.

The MHP requests substitute provisions to the above open space requirements of the Waterways Regulations for each of the McCourt/Broderick parcels within the harbor planning area. The plan would permit 100% lot coverage (and, therefore, 0% open space). For Parcels “A”, “B”, “C”, and “D”, the proposed offset would be an equal area of open space provided somewhere on the project site, either inside or outside of Chapter 91 jurisdiction.

I am mindful that because of the fragmented nature of these parcels, a strict application of the Waterways Regulations limits the potential to create significant and continuous open space. I believe that the flexibility of the MHP regulations provides a mechanism by which the open space requirements for the discrete McCourt/Broderick parcels can be addressed through an off-site aggregation program, while providing enough specificity to meet regulatory standards. Under the following conditions, this open space program will focus on the creation of two significant areas of urban open space, with expanded possibilities for public recreation. The first, to be achieved through the dedication of Parcel E as public open space, will expand the MBTA Mitigation Park along the Fort Point Channel. The second, to be located adjacent to the expanded the Fan Pier Public Green on the Cove, will form a significant visual and physical link between the waterfront and the Courthouse Station headhouse on New Northern Avenue.

I am, therefore, approving the open space substitute provisions, subject to the following conditions.

- 1) McCourt/Broderick Parcel “E” (8,100± SF), located immediately adjacent to the MBTA Mitigation Park (approximately three-quarters of an acre) off Sleeper Street, should be designated as public open space (subject to future masterplanning, as described below).

- 2) The off-site open space area requirements for McCourt/Broderick Parcels “A”, “B”, “C”, “D”, and “F” shall be aggregated off-site on Parcel “E” within the Fort Point Historic North District, at a ratio of 1:1, until such time as the total area of Parcel “E” has been developed as public open space.
- 3) Remaining open space requirements for McCourt/Broderick Parcels “A”, “B”, “C”, “D”, and “F” shall be aggregated off-site on the McCourt Fan Pier Gateway Project property (as it is referred to in the MEPA ENF filing) at the ratio of 1.25:1. (In other words, when open space is aggregated out of jurisdiction, the resulting area shall be 25% greater than that required under the Waterways Regulations.)
- 4) All open space aggregated outside the harbor planning area shall be located adjacent to lands subject to Chapter 91 jurisdiction and establish a visual connection to the waterfront. I would encourage strongly that the open space provided outside the harbor planning area be located adjacent to the Fan Pier Public Green, or at the Courthouse Square location. Should Parcel C be developed after the completion of the McCourt Gateway project, open space may be aggregated outside of jurisdiction on Parcel C, subject to the same conditions set forth in (3).
- 5) All open space provided must meet the standards for open space on Commonwealth Tidelands.
- 6) All open space must be provided concurrent with the impacts associated with individual projects.
- 7) The City shall develop a system that accounts for the status of aggregation program, maintain a running balance tracking the amount of open space, where it has been provided, and which McCourt Parcel it shall be credited to. Using this open space accounting system, the City shall include a certification of open status to DEP as part of its Section 18 recommendation on Waterways licenses.

Proposed Height Substitute Provision (310 CMR 9.51(3)(e))

- Parcel “A” – 200-foot maximum height for new or expanded buildings for nonwater-dependent use.¹
- Parcels “B” and “C” - 250-foot maximum height for new or expanded buildings for nonwater-dependent use.
- Parcel “D” - 75-foot maximum height for new or expanded buildings for nonwater-dependent use.

Strict compliance with the Waterways height requirements (310 CMR 9.51(3)(e)) would result in maximum vertical envelopes for Parcel “A,” “B,” and “C” ranging from 55 feet to 150

¹ Although the MHP text at one point describes the maximum height as 250’, the BRA has confirmed that the 200’ height shown in Figure 8-5 is correct.

feet. For Parcel “D,” the Waterways Regulations would restrict heights to range between 55 feet and approximately 88 feet.

Analysis

To approve a substitute provision for building height, I must make the same determinations as described above for the Fan Pier / Pier 4 project area. Because only relatively small areas of Parcels “A”, “B”, and “C” fall within Chapter 91 jurisdiction, I find that the potential ground level impacts would be largely the result of development located outside the harbor planning area. Evaluation of the wind and shadow studies included in the MHP indicates that impacts on the public ground-level experience associated with development of the McCourt/Broderick parcels will generally be equal to or less than the impacts of similar heights on the Fan Pier and Pier 4 parcels.

For Parcels A, B, and C, I am approving the above substitute provisions to the height requirements of the Waterways Regulations (310 CMR 9.51(3)(e)). I encourage strongly, however, that to the maximum extent possible, the proposed buildings should be oriented as shown in Figure 8-5 of the MHP, where the 75-foot tall base element is located to coincide with Chapter 91 jurisdiction. Impacts shall be identified and quantified during the Article 80/MEPA processes with the results used to inform the final specification of offsets during the Chapter 91 licensing process. The MHP provides that measures intended to offset any shadow impacts resulting from increased building heights on Parcels “A”, “B”, and “C” will be identified using the same approach as that described above for the Fan Pier and Pier 4 height offsets. I am approving that approach, subject to the same general conditions identified above in Section B. The preferred offset shall be additional open space at the locations identified above.

For Parcel “D”, I am persuaded that the proposed maximum height envelope of 75 feet will result in a building that is modest in size, with massing comparable to that attainable under the Waterways requirements. Further, based on the results of the wind and shadow studies presented in the MHP, it would appear that ground-level conditions will be conducive to pedestrian-level activities with impacts less than or equal to those associated with a Chapter 91 build condition. I am, therefore, approving the height substitute provision as proposed and concur with the City’s assertion that further offsets (beyond what I have already specified for open space above) are not required for Parcel “D”.

E. Barking Crab Parcel

The Barking Crab site is the smallest individual site in the harbor planning area. Located largely on an existing pile field over the Fort Point Channel between the Old and New Northern Avenue bridges, this parcel is occupied by the well-known restaurant, Neptune Lobster & Seafood Co., and Neptune Marine Services, a marine service business with public docking facilities.

In my October 20, 1999 Scope, I requested that the MHP develop a planning vision for this parcel, including appropriate analysis and other information that would support any substitute

provision requests. Although the MHP does discuss a variety of possible future uses, neither this document, nor the comment letter that I received from the Barking Crab, frame general development goals for this small isolated parcel. My evaluation of the proposed substitute provisions is, therefore, general. I have sought to balance expansion potential against site constraints that conflict with tidelands policy objectives, in a way that will allow it to continue to function viably as a popular public waterfront destination. I must emphasize, however, that except for the height substitution, these substitute provisions only apply to the existing constrained site.

Proposed Height Substitute Provision (310 CMR 9.51(3)(e))

- 75 foot maximum height for new or expanded buildings for nonwater-dependent use.

Analysis

As specified in the Waterways Regulations (310 CMR 9.51(3)(e)) the height of new and expanded buildings for nonwater-dependent use, located over the water or within 100 feet of the high water mark, shall not exceed 55 feet. When a substitute height provision is proposed for a nonwater-dependent use structure located over flowed tidelands, I must rely on the MHP to provide reasons that support a positive determination. In this instance the MHP has acknowledged that the area immediately to the south of this site, in the Fort Point Historic subdistrict, has wharf structures that are 75 to 80 feet high, built right on the edge of the channel. Permitting a 75 foot height on this site would be consistent with the existing character of the built environment, without harming the pedestrian experience along this portion of the waterfront.

Proposed Water-Dependent Use Zone Substitute Provision (310 CMR 9.51(3)(c))

- Zero feet, provided the first floor of any new structure incorporates a 12-foot wide Harborwalk.

Analysis

The Waterways Regulations establish a WDUZ that parallels the shoreline, varying in width in proportion to the lot depth or pier dimensions, to prevent the encroachment of nonwater-dependent use buildings along the shoreline of a waterfront site. The width of the WDUZ can be modified through appropriately structured substitute provisions of an MHP, provided that sufficient space along the water's edge is reserved to accommodate water-dependent activity and public access. The MHP substitute provision standards provide that no such modification may allow construction of new nonwater-dependent use buildings immediately adjacent to the project shoreline (301 CMR 23.05(3)(c)3.).

As proposed, the substitute provision would allow a new building to be located immediately on the project shoreline, conflicting directly with this absolute criterion. In my view, the presence of an existing structure is not justification for the omission of a WDUZ from future development plans. With public space along the shoreline at a premium in Boston Harbor, I am convinced that creative site planning must ensure that sufficient setback is provided.

I recognize that the Barking Crab parcel is confronted with severe site constraints, and that strict application of the Waterways regulations would result in a WDUZ of 25 feet. Because of the configuration of the parcel, this setback would not sustain new or expanded construction plans. I am requiring, therefore, that a minimum twelve (12)-foot wide WDUZ be provided concurrent with any new or expanded nonwater-dependent use building construction. This setback shall be measured from the seaward edge of the public access structure and will, in conjunction with the waterside access structure itself, result in a public space along the Fort Point Channel. This waterside access structure can be a waterside walkway that combines access for both boat docking and walking access, a cantilevered structure, or an interior arcaded walkway within the first floor of the new structure. In this manner, I am satisfied that, for the case of new or expanded construction, sufficient space along the water's edge will be available to accommodate water-dependent activity and public access. If such a combined boat access and walkway would not be feasible to accommodate ADA requirements, then the proponent may satisfy any ADA requirements with a harborwalk along the existing Sleeper Street sidewalk, in addition to the 12-foot-wide waterside access.

As provided in the MHP, this substitute provision would be extinguished and the provisions of the Waterways Regulations would apply should the Barking Crab be combined with other adjacent properties.

Proposed Open Space Substitute Provision (310 CMR 9.51(3)(d))

- Permit less than 50% of the project site (and potentially 0%) to be reserved as open space for water-dependent activity and public access.

Proposed Substitute Provision for Exterior Open Space Requirements Specific to Commonwealth Tidelands (310 CMR 9.51(3)(c))

- Permit less than 50% of the project site (and potentially 0%) to be reserved as quality exterior open space that is available to the public for active and passive recreation.

Analysis

In the absence of an MHP, properties located entirely on Commonwealth Tidelands must adhere strictly to two open space requirements of the Waterways Regulations (310 CMR 9.51(3)(d) and (310 CMR 9.51(3)(c))). The MHP has proposed substitute provisions to both of these standards. While the new minimum setback area will result in the creation of some open space area, I am also requiring that any new development on this site would require payment into the Open Space Fund discussed below. Based on my review of the information provided, I am

persuaded that this area, combined with the waterside access described above, will satisfy the minimum requirements of the Municipal Harbor Planning Regulations.

Proposed Substitute Provision for Facilities of Private Tenancy (310 CMR 9.51(3)(b))

- FPTs to be permitted on pile-supported structures.

Analysis

The Waterways Requirements prohibit the location of facilities of private tenancy (FPTs) such as housing, offices, and other private nonwater-dependent development on any pile-supported structures over flowed tidelands (310 CMR 9.51(3)(b)). Communities can modify this requirement through the MHP process, substituting alternative requirements that will maintain waterfront areas immediately adjacent to the WDUZ generally free of uses that conflict with, preempt, or discourage water-dependent activity or public use and enjoyment of the waterfront. Where FPTs are allowed over water, proportional offsetting measures must be provided, to prevent significant privatization of waterfront areas immediately adjacent to the WDUZ.

As discussed earlier, I am aware of the significant site constraints that limit expansion possibilities and perhaps the long-term economic viability of resident business operations. Nevertheless, accommodation of individual development objectives must be viewed within the context of broader state tidelands policy objectives developed to protect the interests of the public inherent in these lands. To effect an appropriate balance between these competing interests, I am approving this substitute provision, allowing FPTs over water, subject to the conditions that follow.

- 1) FPTs shall be prohibited on the first, second and top floors of any new or expanded structure for nonwater-dependent use. FPTs shall be permitted on any intermediate floor(s). Existing piles may be replaced, as necessary, to accommodate the new or expanded structure in a safe manner. In no case, however, shall the extent of the new pile-field expand beyond the limits of the existing pile field.
- 2) As an offsetting measure to increased height, a reduction in the WDUZ, and allowing FPTs over water, the entire top floor of the new or expanded building shall be dedicated as a Public Observation Area in accordance with the following performance standards.
 - A) The public area must comprise 100% of the gross floor area of the top floor of any new or expanded building;
 - B) The public area must be capable of being enclosed and made available and comfortable for all-season use;
 - C) The public area must incorporate appropriate amenities such as restrooms, seating, and pay phones;
 - D) The public area must be fully accessible to the public, including provisions for handicapped access. I will expect the top floor to be publicly accessible seven days a week. The specific hours of accessibility, however, may be determined by DEP as part of the Chapter 91 licensing process;

- E) The public area must be identified prominently by appropriate signage that encourages the public to use the site; and
 - F) Although not a strict requirement, I would encourage that people using the public area be able to take advantage of any food service operation located within the building. However, visitors to the Public Observation Area need not purchase food or use any other service at the site as a condition of access.
- 3) Any new development at the site may not displace or interfere with water-dependent uses at the site. If the exterior docking facilities, marine services, and interior space dedicated to water-dependent uses are fully retained upon redevelopment of the site, FPTs in the new or expanded structure shall be permitted on the second floor. The site owner has commendably supported water-dependent uses for many years. Allowing additional FPTs on the second floor will provide an incentive to continue this support for much-needed docking facilities and marine services in the Inner Harbor.

IX. EVALUATION OF REQUESTED SUBSTITUTE PROVISIONS: FORT POINT HISTORIC NORTH DISTRICT

As identified in the *Public Realm Plan* and the MHP, the Fort Point Historic District comprises approximately 74 acres of land along the Fort Point Channel, between New Northern Avenue and the Gillette industrial facility. About 29 acres lie within Chapter 91 jurisdiction and are included in the harbor planning area. For purposes of my analysis, I have made a distinction between the Fort Point Historic North subarea, which comprises the late 19th/early 20th century brick warehouses built by the Boston Wharf Company and others, and the Fort Point Historic South subarea, which comprises 11 acres of vacant land recently purchased by the Gillette Company. This section of the Decision deals with Fort Point Historic North; Fort Point Historic South is discussed in Section X, in conjunction with the Fort Point Industrial district.

As described in the MHP, the City's primary planning objective for Fort Point Historic North is to maintain the historic integrity of the district. For the six infill parcels identified in the MHP, the purpose of the proposed substitute provisions would be to allow the aggregation of required open space at locations that better serve the public's trust rights in waterfront access and enjoyment. The plan proposes substitute provisions to the open space requirements of the Waterways Regulations (310 CMR 9.51(3)(d) and 310 CMR 9.53(2)(b)) for McCourt/Broderick Parcels "E" and "F", and for three additional in-fill parcels located at 33 Sleeper Street, 11-13 Sleeper Street, and 321-323 Congress Street. The Sleeper Street parcels are located only partially within the harbor planning area with a combined area in Chapter 91 jurisdiction of approximately 13,700 SF. These parcels are currently used to provide parking for an adjacent residential complex. The Congress Street parcel, measuring approximately 12,700 sf, lies entirely within the harbor planning area. It is also used for parking. The City-owned site (actually three separate parcels, totaling approximately 10,400 SF) is located on the west side of Sleeper Street, adjacent to Parcel "E" and the MBTA Mitigation Park.

As proposed in the plan, proposed heights for all infill parcels will range from 75 to 85 feet, approximately 50 feet less than the maximum allowable chapter 91 heights. (See Figures 4 and 5.) I am accepting these heights as more restrictive substitute provisions, pursuant to the Municipal Harbor Planning Regulations.

Proposed Open Space Substitute Provision (310 CMR 9.51(3)(d))

- Permit less than 50% of the project site (and potentially 0%) to be reserved as open space for water-dependent activity and public access.

Proposed Substitute Provision for Exterior Open Space Requirements Specific to Commonwealth Tidelands (310 CMR 9.51(3)(c))

- Permit less than 50% of the project site (potentially down to 0%) to be reserved as quality exterior open space that is available to the public for active and passive recreation.

Analysis

The City's request for open space substitute provisions is based on the historic character of the surrounding built environment, with brick warehouse structures occupying virtually the entire lot area. The MHP proposes that the impacts on public trust rights in the waterfront of reduced open space on the infill parcels would be offset principally with contributions to the City's Open Space Fund (OSF). These contributions would be dedicated to the design, construction, and maintenance of a future open space parcel along the South Boston waterfront. Contribution amounts would be based on the area of open space that would be required under Chapter 91, and computed as follows: a one-time assessment of \$75 per SF for the design and construction of an urban park; and an annual assessment of \$2 per SF for maintenance. The actual off-site open space areas would be identified at a later date.

I believe that the flexibility of the MHP process offers the means by which the development goals and open space requirements for these in-fill parcels can be achieved through the implementation of an off-site aggregation program. I am persuaded that strict application of the 50% lot coverage standard in the Waterways Regulations would not further the public's interests and that it would not provide meaningful open space.

However, I have received considerable public comment that is concerned about the enforceability of this approach to MHP offsets, and about the lack of specificity regarding the location and timing of public open spaces to be provided. Under the Municipal Harbor Planning Regulations, an offset must be located within reasonable proximity of the locus of adverse effects. 301 CMR 23.05(3)(d). I have therefore recommended that two specific parcels shall be identified as public open space to satisfy the offset requirement. For the McCourt/Broderick parcels, open space offsets for Parcels "A" through "D" and "F" shall be satisfied through the development of public open space on Parcel E. The conditions of this approval are stated above in Section VIII.D of this Decision.

For the three other infill parcels, the open space offset requirement should be satisfied by dedication of the financial contributions toward the development of public open space on the city-owned parcel on Sleeper Street, which measures approximately 10,400 sf. In this manner, an 18,000 sf expansion of the open space area along the waters of Fort Point Channel, largely free from the effects of wind and shadow, would be made available to the public for active and passive recreation. I am, therefore, approving the open space substitute provisions, subject to the following additional conditions:

- 1) The City-owned parcel located on Sleeper Street, immediately adjacent to the MBTA Mitigation Park and Parcel "E", should be designated as the specific locus for investment of the Open Space Fund, unless the City can propose an alternative site that meets the same standards.
- 2) 33 Sleeper Street, 11-13 Sleeper Street, and 321-323 Congress Street shall participate in the City's Open Space Fund as provided in the MHP, in accordance with the schedule of contribution proposed in the MHP. (Note: While I am not convinced that a one-time assessment of \$75 per SF is sufficient to acquire open space, I am persuaded

that if the designated parcel is owned by the City, sufficient funds will be available for the design and construction of a quality urban space.)

- 3) The Open Space Fund contributions of 33 Sleeper Street, 11-13 Sleeper Street, and 321-323 Congress Street should be used specifically for the design and construction of open space on the City-owned Sleeper Street parcel, compatible with and supplemental to open space designs for the MBTA Mitigation Park and Parcel "E".
- 4) At a minimum, the final design and construction of open space provided to meet these requirements shall satisfy the Chapter 91 standards for open space located on Commonwealth Tidelands.
- 5) All open space commitments must be provided concurrent with the individual development projects. However, overall project work may be phased; for example, one project's contribution may be sufficient to fund the design of a proposed open space, with construction dependent upon contributions from other projects. If necessary, any shortfall in funding beyond the project-specific contributions shall be made up from other sources to fully complete the design and construction of designated open spaces.
- 6) The City shall develop a system that accounts for the status of the aggregation program, and shall maintain a running balance of the parcel to which open space funds are to be credited. Using this open space accounting system, the City shall include a certification of open space status to DEP as part of its Section 18 recommendation on Waterways licenses.

Finally, I recognize that detailed open space planning for the Fort Point Historic North District has not advanced beyond the preliminary stages. Should the civic/cultural uses masterplan conclude that Parcel "E" and/or the City-owned parcel is better suited for a civic or cultural use, and provided that waterfront public open space of an equal area and quality would be made available adjacent to the Fort Point Channel, I would consider such a change to be consistent with the conditions of this decision, and the substitute provisions for height would apply to such a civic/cultural building.

X. FORT POINT HISTORIC SOUTH AND FORT POINT INDUSTRIAL DISTRICTS

A. Fort Point Historic South District

The Fort Point Historic South District comprises over 11 acres of vacant land formerly owned by the Boston Wharf Company and recently purchased by the Gillette Company. I understand that when this MHP was being prepared, the Gillette Company was not known to have also purchased 60 Necco Court, directly abutting on the unbuilt land. Based on this information, I believe that it makes sense to incorporate 60 Necco Court into the undeveloped portion of the Fort Point Historic South District and address the proposed substitute provisions in the context of the larger planning area.

The MHP proposes an open space aggregation program for the “Remainder of Fort Point Historic South District.” I understand from DEP that when an area is in common ownership and submitted as one project, this approach is consistent with previous Chapter 91 licensing decision and no substitute provision is required. When viewed from this perspective, open space for 60 Necco Court can be provided as part of the open space aggregation program proposed for the larger planning area, thereby eliminating the need for any open space substitution provisions.

Although no substitution provision is required, based on the public comment I have received and subsequent discussions with CZM and DEP, I am requiring that, for purposes of Chapter 91 Licensing, the proposed open space aggregation program be developed in accordance with the following conditions.

- 1) At a minimum, the area of the aggregated open space shall be equal to the area that would be provided under strict application of the Waterways Regulations.
- 2) For a Chapter 91 license to be issued for an open space aggregation program, in the absence of substitute provisions, the entire area must be in common ownership. Consequently, the Chapter 91 License application for the entire Fort Point Historic South District must be developed and submitted to MEPA and DEP as one project. I would encourage the project proponent, in conjunction with the City, to consider undertaking the preparation of a Master Plan to facilitate the review process.
- 3) A management plan for the entire area, specifying guidelines for the location, management, and implementation of the open space aggregation program, shall accompany the MEPA submittal and public comment used to inform the Chapter 91 licensing process. The final management plan shall be included as a condition of the Chapter 91 license.
- 4) The Chapter 91 license shall include clear and enforceable conditions ensuring that open space will be provided in a timely fashion, commensurate with the accrual of project-related private benefits.
- 5) At a minimum, the aggregated open space shall meet the Chapter 91 standards for open space located on Commonwealth Tidelands and establish a strong relationship to the water. (Here I would commend the City for its open space guidelines that seek to bring people to the water and encourage it to expand on the open space plan that is depicted in Figure 8-2 of the MHP.)

- 6) The City shall develop a system that accounts for the status of the aggregation program, and maintain a running balance of the amount of and where open space has been provided. Using this open space accounting system, the City shall include a certification of the open space status to DEP as part of its Section 18 recommendation on Waterways licenses.

With open space requirements now satisfied through a District-wide aggregation program, I must only consider the outstanding substitute provision requests for height and setback. To facilitate my evaluation, I have combined the MHP requests into one substitute provision for each Waterways requirement that will apply to the entire Fort Point Historic South District.

Proposed Height Substitute Provision (310 CMR 9.51(3)(e))

- As shown in Figure 11-3 of the MHP, two height zones are proposed: the first zone extending south of Summer Street allows heights up to 150 feet; the second zone, covering the remainder of the District, allows heights up to 100 feet.
- The maximum height for any new or expanded building for nonwater-dependent use located on 60 Necco Court shall be 80 feet.

Analysis

Strict compliance with the Waterways height requirements (310 CMR 9.51(3)(e)) would result in a maximum envelope for the Fort Point Historic South District that restricts heights to 55 feet along the Fort Point Channel, sloping up to approximately 300 feet along A Street. Under the proposed substitute height provision in the MHP, increased height at one location is offset through a corresponding reduction in height at another location. (See Figures 6 and 7.)

Based on the analysis provided, it appears that the proposed MHP maximum height zones of 100 feet and 150 feet as proposed will result in a massing figure that is approximately one-half of that attainable under a Chapter 91 compliant alternative for the Fort Point Historic District. This would yield buildings that will clearly be relatively modest in size when viewed in the context of surrounding development. Further, based on the results of the wind and shadow studies presented in the MHP, it would appear that ground-level conditions will be conducive to pedestrian-level activities along Fort Point Channel with shadow impacts comparable to those associated with a Chapter 91 build condition. I am, therefore, approving the height substitute provision as proposed, including a maximum building height for 60 Necco Court of 80 feet. To the extent that the shadow impacts analysis requires further offsets, the formula approach may be employed, subject to same conditions imposed above.

Proposed Water-Dependent Use Zone Substitute Provision (310 CMR 9.51(3)(c))

- 12 feet along the edge of the Fort Point Channel for 60 Necco Court.

Analysis

The incorporation of 60 Necco Court into the planning area of the broader Fort Point Historic South District offers increased flexibility to this smaller parcel, allowing the reconfiguration of the WDUZ over the shoreline of the much larger District. Based on my review, I have concluded that an alternative setback distance specified for 60 Necco Court, in the context of a reconfigured WDUZ, can ensure adequately that new or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to the project shoreline. Further, I am persuaded that the reconfigured WDUZ will, with comparable or greater effectiveness, devote sufficient space along the water's edge to water-dependent use and public access.

Based on my approval of an 80-foot maximum height for 60 Necco Court, however, I am requiring that a minimum setback of 18 feet be maintained from the shoreline of the Fort Point Channel to any new nonwater-dependent use building. Further, this reconfiguration shall be accompanied by a corresponding increase in the setback distance(s) for other areas of the Fort Point Historic South District, such that, at a minimum, the area of the reconfigured WDUZ shall equal that achieved under the Waterways Regulations. Finally, the reconfiguration of the WDUZ to accommodate a smaller setback on 60 Necco Court, including calculations of net areas, shall be shown on one plan for the entire area and submitted to DEP as part of the Chapter 91 licensing application.

See Section X.B below for a response to Gillette's comments on potential adverse impacts of substitute provisions for the Fort Point Historic South District, as well as elsewhere in the harbor planning area.

B. Fort Point Industrial District

The Fort Point Industrial District comprises approximately 67 acres of land along the Fort Point Channel, most of which lies within Chapter 91 jurisdiction and the harbor planning area. The primary landowner is the Gillette Company, the largest industrial employer in the City. Gillette's 1.5 million sf facility employs over 2,600 workers, and produces more razors than any other factory in the world. As noted in Gillette's comment letter, DEP has determined the facility to be a water-dependent industrial user because of its daily withdrawals of 40 million gallons of water from the Channel (licensed to increase to 60 million gallons per day to accommodate future expansion). All materials deliveries and product shipping are carried by trucks along the A Street corridor. The facility also serves as Gillette's worldwide headquarters for research and development, information technology, and training.

The MHP describes the Fort Point Industrial District as "an industrial enclave." In response to concerns about potential conflicts between existing industrial activities and the new residential development proposed by the City within the Fort Point Historic South District, the plan describes buffer zones along the borders of the districts. The plan also expresses the goal of improving public access to the currently inaccessible Fort Point Channel shoreline, without interference with Gillette and other industrial activities. The plan does not propose any substitute provisions for this District.

As discussed above in Section IV, issues of district-wide transportation planning generally arise in MHP approvals only as a general matter of consistency with CZM Policies. Similarly, issues of land use regulation are generally outside of MHP approvals because they are not the subject of c. 91 licensing (except, of course, with respect to ground-floor FPA uses and FPT uses over water).

However, comments received from Gillette raise two specific sets of concerns regarding how new private development contemplated in the MHP might affect its water-dependent industrial uses:

- The negative impact of new automobile traffic in the A Street corridor upon truck access to the Gillette facility, and the need for a direct truck connection between A Street and the South Boston Haul Road.
- Potential friction between Gillette, as an existing water-dependent industry, and new residential and commercial land uses in the Fort Point Historic District.

In my Scope, I specifically required the City to “discuss, in detail, provisions that will make certain that existing water-dependent industrial operations are not impacted negatively as a result of land uses proposed for this area [Fort Point Industrial].” (Scope, p. 13) The MHP defers the discussion of land use buffers and transportation mitigation measures to protect truck routes and industrial uses to an undefined time in the future (MHP, p. 249). I am conditioning my approval of the Fort Point Historic South and Fort Industrial Subdistricts upon the completion of a further and more detailed masterplanning effort for this area, already begun by the City, in coordination with Gillette and other landowners and stakeholders. In addition to the transportation measures discussed above, the masterplan shall ensure:

- public access to high-quality waterfront open space along the Fort Point Channel,
- pedestrian links to the waterfront from inland areas, and
- compatibility of new development with the existing historic character of the built environment.

Pending completion of the master planning process described above, the substitute provisions in this MHP shall be effective on an interim basis for up to three years from the date of this decision. If the masterplan leads to proposed modifications to any of the substitute provisions discussed above, I would be receptive to an amendment to the MHP, limited in geographic area to these subdistricts. I note that, in any event, water-dependent industrial uses will continue to be regulated directly under Chapter 91 and the Waterways Regulations, and will not be affected by the MHP provisions.

XI. ENFORCEABLE IMPLEMENTATION COMMITMENTS

Pursuant to 301 CMR 23.05(5), the plan must include enforceable implementation commitments that will ensure that all measures to offset the effect of any plan requirement less restrictive than the corresponding requirement of the Waterways Regulations will be taken in a timely and coordinated manner. Chapter 14 provides a general discussion of future zoning measures that the City will pursue to ensure effective implementation of this plan.

I understand that once this MHP has been approved, amendments establishing permanent zoning will be drafted to codify the use and dimensional requirements within the harbor planning area, in accordance with the principles of the *Public Realm Plan* (MHP, p. 252-53). In addition, this zoning amendment will include general Standards and Guidelines for the Watersheet, Urban Design Guidelines, and Universal Design Guidelines (MHP, Chapter 7). A zoning amendment, which itself is subject to a public process, must be approved by the BRA and the Zoning Commission prior to final authorization by the Mayor.

Another form of permanent zoning is a Planned Development Area (PDA). PDAs, established through the use of overlay districts, provide greater flexibility (*e.g.*, greater heights) in exchange for additional project development controls. My Scope discussed PDAs in the context of substitute height provisions and offset specificity (Scope, p.9-10). Specifically, I was encouraged that a PDA-like approach, if developed “to ensure that wind, shadow, and other height related conditions (such as massing) at the ground-level will be conducive to water-dependent activity and public access to the waterfront, . . . may provide at least a partial framework for determining and establishing mitigating measures necessary to compensate or offset the adverse effects of increased height” (Scope, p.10).

Until such time as permanent zoning is adopted, development in the South Boston Waterfront District will be controlled through the use of an Interim Planning Overlay District (IPOD). Among other things, the South Boston Waterfront IPOD establishes interim height controls ranging from 35 feet to 150 feet and locations and requirements for PDAs. Within PDA areas, building heights can be increased to 300 feet, provided that the City’s Board of Appeals issues an IPOD permit. Under the provisions of the MHP, development will continue to be regulated through the existing IPOD until permanent zoning for South Boston has been adopted. However, I note that any PDA adopted under the IPOD is permanent in nature.

In my judgment, the groundwork is well established for the effective implementation of the policies and commitments set forth in the South Boston Waterfront MHP, as modified by the conditions of this Decision. The MHP Regulations at 301 CMR 23.04(6) require that for an approved plan to become effective for the purposes of 310 CMR 9.00 (the Waterways Regulations), I must determine that the City has met all relevant conditions of the approval decision, including but not limited to those related to the implementation of any ordinances/bylaws, regulations, capital improvements, programmatic initiatives, or organizational measures. When such implementation requires adoption or other formal action by a municipal body, the Secretary shall make this determination only if the municipal clerk has certified in writing that all such actions have been taken and has submitted copies of the enactments in

question to the Secretary. As with previous MHPs dependent on future codification of significant policies and commitments, I am comfortable approving this MHP subject to the conditions below in accordance with 301 CMR 23.04(6). (*See, e.g.*, discussion of amplifications, Municipal Harbor Plan Decision for the town of Chatham (1994) at pages 12 – 16.):

- 1) Prior to the adoption of PDAs or other forms of permanent zoning, the City shall submit a final draft of all bylaws, ordinances, regulations, etc., relevant to the implementation of this MHP and the conditions of this Decision, to the Secretary for review;
- 2) Upon adoption of the bylaws, ordinances, and regulations, the City shall provide the Secretary with a written certification from the City Clerk that such action has been taken, along with copies of the relevant enactment; and
- 3) In no case shall the provisions of this plan, as they relate to substitute provisions or other modifications of the Waterways Requirements (310 CMR 9.00), be applied by DEP to projects located in the harbor planning area, until such time as appropriate PDAs or other permanent zoning measures have been adopted.

In this manner, I am confident that, in addition to meeting the requirements of 301 CMR 23.04(6), any inconsistencies between City zoning, the Approved Plan and its conditions, and the Waterways Regulations (in which case the Waterways regulations would be applied strictly) can be avoided.

XII. EFFECTIVE DATE AND TERM OF APPROVAL

Except with respect to any portions of the Plan or any revisions thereto subject to further review and approval by the Secretary pursuant to any of the foregoing requirements and conditions, this Decision shall take effect as discussed above, in accordance with 301 CMR 23.04(6). As requested by the City of Boston, the Decision shall expire ten (10) years from this effective date unless a renewal request is filed prior to that date in accordance with the procedural provisions of 301 CMR 23.06 (recognizing that the term of approval is now ten years). No later than six months prior to such expiration date, in addition to the notice from the Secretary to the City required under 301 CMR 23.06(2)(b), the City shall notify the Secretary in writing of its intent to request a renewal and shall submit therewith a review of implementation experience relative to the promotion of state tidelands policy objectives. Nothing in the foregoing requirement, however, shall be construed to prejudice the City's right to seek renewal of the Approved Plan.

XIII. STATEMENT OF APPROVAL

Based on the planning information and public comment submitted to me pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the South Boston Waterfront District Municipal Harbor Plan. This approval is subject to all requirements, modifications, limitations, qualifications, and conditions set forth in this Decision.

The approved South Boston Waterfront District Municipal Harbor Plan ("Approved Plan") shall be the plan dated July 2000 and the conditions of this Approval Decision. For Waterways licensing purposes pursuant to 310 CMR 9.34(2), however, the Approved Plan shall not be construed to include any of the following:

1. Any subsequent addition, deletion, or other revision to the submitted plan dated July 2000, except as may be authorized in writing by the Secretary as a modification unrelated to the approval standards of 301 CMR 23.05 or as a plan amendment in accordance with 301 CMR 23.06(1); and
2. Any provision which, as applied to the project-specific circumstances of an individual Chapter 91 license application, is determined by DEP to be inconsistent with the Waterways Regulations at 310 CMR 9.00 or with any qualification, limitation, or condition stated in this Approval Decision.

Bound copies of the Approved Plan incorporating this Approval Decision as an attachment shall be kept on file by the Boston City Clerk, the Boston Redevelopment Authority (BRA), the Boston office of CZM, and the Boston office of DEP/Waterways.

Robert Durand
Secretary of Environmental Affairs

Date

Witnessed by:

Argeo Paul Cellucci
Governor

Date

Jane Swift
Lieutenant Governor

Date

Summary of Waterways Regulations and MHP Approval Standards

Table B

| Waterways Regulation for which Substitute Provision Proposed. | Corresponding Waterways Dimensional or Numerical Requirement | Corresponding MHP Approval Standards 301 CMR 23.05(2)(c) and (d) The proposed substitute provision must, with comparable or greater effectiveness,... |
|--|--|--|
| Facilities of Private Tenancy 310 CMR 9.51(3)(b) | Shall not be located on any pile-supported structures on flowed tidelands, nor at the ground level of any filled tidelands within 100 feet of a project shoreline | <ul style="list-style-type: none"> • specify alternative limitations and other requirements that ensure that no significant privatization of waterfront areas immediately adjacent to the water-dependent use zone will occur for nonwater-dependent purposes, • in order that such areas will be generally free of uses that conflict with, preempt, or otherwise discourage water-dependent activity or public use and enjoyment of the water-dependent use zone, as appropriate for the harbor in question. |
| Setback Requirements (Water-Dependent Use Zone) 310 CMR 9.51(3)(c) | Width of Water-Dependent Use Zone determined as follows: <ol style="list-style-type: none"> 1. Along portions of a project shoreline other than the edges of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the weighted average distance from the present high water mark to the landward lot line of the property, but not less than 25 feet; and 2. along the ends of piers and wharves, the zone extends for the lesser of 100 feet or 25% of the distance from the edges in question to the base of the pier or wharf, but no less than 25 feet; and 3. along all sides of piers and wharves, the zone extends for the lesser of 50 feet or 15% of the distance from the edges in question to the edges immediately opposite, but no less than ten feet. | <ul style="list-style-type: none"> • specify alternative setback distances and other requirements that ensure new or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, • in order that, sufficient space along the water’s edge will be devoted exclusively to water-dependent use and public access associated therewith, as appropriate for the harbor in question. |
| Open Space (Lot Coverage) 310 CMR 9.51(3)(d) | At least 50% of the project site must be reserved as open space for water-dependent activity and public access. A maximum of 25% of the open space are may include public streets and parking, provided it does not exceed the amount of public open space provided on-site. | <ul style="list-style-type: none"> • specify alternative site coverage ratios and other requirements, that ensure that, in general, buildings for nonwater-dependent use will be relatively condensed in footprint, • in order that an amount of open space commensurate with that occupied by such buildings will be available to accommodate water-dependent activity and public access associated therewith, as appropriate for the harbor in question. |
| Height 310 CMR 9.51(3)(e) | Nonwater-dependent use building heights restricted to 55 feet within 100 feet of the high water mark. Heights can increase one half foot for each additional foot over 100 feet that building is setback from high water mark. | <ul style="list-style-type: none"> • specify 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. |
| Activation of Commonwealth Tidelands for Public Use 310 CMR 9.53(2)(b) (Open Space) | When located entirely on Commonwealth Tidelands, at least 50% of the project site must be reserved as open space (with appropriate pedestrian amenities); available to the general public at all times for active and/or passive public recreation; and located at or near the water’s edge to the maximum extent possible. | <ul style="list-style-type: none"> • specify alternative requirements for public outdoor recreation facilities • that will establish the project site as a year-round locus of public activity. |

