

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 2, 2017

In the Matter of
Boston Redevelopment Authority

OADR Docket No. 2008-128 RM
DEP File No. Waterways Application
No. W07-2172-N

RECOMMENDED FINAL DECISION ON REMAND

INTRODUCTION

In September 2008, 10 residents of Boston's North End neighborhood ("the Petitioners") filed this appeal with the Office of Appeals and Dispute Resolution ("OADR") challenging a waterways license ("Chapter 91 License") that the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Boston Redevelopment Authority ("BRA" or "the Applicant") pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 ("Chapter 91" or "c. 91"), and the Waterways Regulations at 310 CMR 9.00. The Chapter 91 License authorized the BRA's redevelopment of a section of land that the BRA owns on the seaward end of Long Wharf in Boston known as Long Wharf Pavilion (also referred in this Decision as "the Project Site"). Specifically, the Chapter 91 License authorized the construction of a restaurant and other facilities ("the proposed Project") at Long Wharf Pavilion.

Currently pending is the BRA's and the Department's Joint Motion to Dismiss the

Petitioners' appeal of the Chapter 91 License as moot because of the following events that have occurred during the pendency of the appeal since April 2014:

First, in April 2014, the Superior Court vacated the Chapter 91 License that prompted the Petitioners' appeal and remanded the matter to OADR for additional findings based on consideration of the Petitioners' additional evidence challenging the License that had not been previously presented to OADR.¹ The additional evidence purported to show that Long Wharf Pavilion was within a "Section 6(f) Conservation Area" governed by Section 6 of the federal Land and Water Conservation Fund Act ("LWCFA"), 54 U.S.C. §§ 200301-200310, and as such, the BRA could not proceed with the proposed Project without the prior approval of the National Park Service ("NPS").

On remand to OADR, the prior Presiding Officer stayed the proceedings in the appeal after ruling that OADR lacked jurisdiction to adjudicate the issue of whether Long Wharf Pavilion was located within the LWCFA Section 6(f) Conservation Area because that was an issue for the federal courts to adjudicate. Stay Order, August 29, 2014 ("August 2014 Stay Order"), at pp. 1-3. At the time of the prior Presiding Officer's ruling, the BRA had already commenced litigation against the NPS in federal court strongly contesting the NPS's June 2014 final determination that Long Wharf Pavilion was within the LWCFA Section 6(f) Conservation

¹ As discussed below, at pp. 4-7, the Department's Commissioner affirmed the Chapter 91 License in January 2010 following a three day evidentiary Adjudicatory Hearing that the then Presiding Officer conducted in the case resulting in the Presiding Officer recommending that the Commissioner affirm the License. The Petitioners appealed the Commissioner's affirmance of the Chapter 91 License to Superior Court, where the Petitioners prevailed, but on the BRA's and the Department's appeal to the Supreme Judicial Court, the Superior Court's judgment vacating the Chapter 91 License was reversed and the matter was remanded to Superior Court for further proceedings pursuant to G.L. c. 30A, § 14. Mahajan v. Department of Environmental Protection, 464 Mass. 604 (2013).

Area and that the BRA could not proceed with the proposed Project without the NPS's approval. August 2014 Stay Order, at pp. 1-3.

The BRA failed to prevail in its federal court litigation against the NPS. In August 2015, the U.S. District Court for the District of Massachusetts ("U.S. District Court") ruled that Long Wharf Pavilion was within the LWCFA Section 6(f) Conservation Area and that the BRA could not proceed with the proposed Project without the NPS's approval. Boston Redevelopment Authority v. National Park Service, 125 F. Supp. 3d 325 (D. Mass. 2015). The U.S. District Court's judgment was affirmed by the United States Court of Appeals for the First Circuit ("the First Circuit") in September 2016. Boston Redevelopment Authority v. National Park Service, 838 F.3d 42 (1st Cir. 2016). The First Circuit's affirmance of the U.S. District Court's judgment conclusively established that Long Wharf Pavilion is within the LWCFA Section 6(f) Conservation Area and that the BRA cannot proceed with the proposed Project without the NPS's approval. Id. As a result of the First Circuit's affirmance of the U.S. District Court's judgment, the BRA in October 2016, withdrew its application before the Department for the Chapter 91 License.

As discussed fully below, I agree with the BRA and the Department that the events described above have rendered the Petitioners' appeal before OADR moot. Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioners' appeal as moot.

BACKGROUND

"The [P]roject [S]ite is a section of land at the eastern end of Long Wharf on which sits an open-air brick structure known as Long Wharf Pavilion. . . . Long Wharf is a designated national historic landmark, and is the site of water transportation, public transportation, hotels,

retail establishments, and restaurants. It is also part of the Boston Harborwalk, a pedestrian walkway that lines the waterfront.” Mahajan v. Department of Environmental Protection, 464 Mass. 604, 608-09 (2013).

“Considering the [P]roject [S]ite to be underutilized, the BRA proposed a plan [to the Department] in 2008 to redevelop [the Site] by enclosing and expanding the [Long Wharf] [P]avilion to accommodate a restaurant with outdoor seating, ‘takeout service,’ and a bar. Specifically, the BRA planned to expand the 3,430 square foot [Long Wharf] [P]avilion by 1,225 square feet. In addition to the restaurant, the proposed redevelopment [would] includ[e] shaded seating, restrooms, and several sets of binoculars, all available to the public independent of patronage of the restaurant. The proposed redevelopment [was] intended to allow year-round use of the [Long Wharf] [P]avilion and provide facilities and seating to the large number of pedestrians and water transit users who frequent the area.” Mahajan, 464 Mass. at 609-10.

PRIOR PROCEEDINGS

I. THE DEPARTMENT’S 2008 GRANTING OF THE CHAPTER 91 LICENSE TO THE BRA APPROVING THE PROPOSED PROJECT AND THE PETITIONERS’ APPEAL OF THE LICENSE TO OADR

“The [D]epartment granted the [C]hapter 91 [L]icense to the BRA on September 17, 2008 [approving the proposed Project], [and] [t]he [Petitioners] appealed [the License to OADR].” Mahajan, 464 Mass. at 610. “[The Petitioners] argued that the proposed restaurant would create unnecessary noise and damage public open space, parkland, and scenic quality.”

Id.

II. THE DEPARTMENT’S COMMISSIONER’S 2010 FINAL DECISION AFFIRMING THE CHAPTER 91 LICENSE

After conducting a three day evidentiary Adjudicatory Hearing on the Petitioners’ appeal

in late February and March 2009, the then Presiding Officer in the case issued a Recommended Final Decision on January 15, 2010 recommending that the Department's Commissioner issue a Final Decision affirming the Chapter 91 License because the Petitioners lacked standing to challenge the License and the Department had properly issued the License. In the Matter of Boston Redevelopment Authority, OADR Docket No. 2008-128, Recommended Final Decision (January 15, 2010), 2010 MA ENV LEXIS 60. On January 29, 2010, the Commissioner issued a Final Decision adopting the Presiding Officer's Recommended Final Decision in all respects, except for the Presiding Officer's finding that the Petitioners lacked standing to pursue the appeal, because in the Commissioner's view, the standing issue need not be reached as a result of the Petitioners' claims against the Chapter 91 License having failed on the merits. In the Matter of Boston Redevelopment Authority, OADR Docket No. 2008-128, Final Decision (January 29, 2010), MA ENV LEXIS 5.

III. THE PETITIONERS' 2010 SUPERIOR COURT APPEAL OF THE CHAPTER 91 LICENSE

The Petitioners appealed the Commissioner's Final Decision to Superior Court contending that "the [D]epartment [had] acted unconstitutionally and beyond its statutory authority when it issued the [C]hapter 91 license without obtaining a two-thirds vote of the [Massachusetts] Legislature as required by [Article] 97 of the Amendments to the Massachusetts Constitution."² Mahajan, 464 Mass. at 605, 610-11. The Petitioners also sought judicial review

² Article 97 provides that:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The [Massachusetts Legislature] shall have the power to enact legislation necessary or expedient to protect

of the Commissioner's Final Decision pursuant to G.L. c. 30A, § 14 "[contending] that the . . . [D]ecision was based on an error of law, and that the issuance of the [C]hapter 91 [L]icense was in contravention of G.L. c. 91 statutory and regulatory requirements." Mahajan, 464 Mass. at 611, n.12.

IV. THE SUPERIOR COURT'S 2011 (FIRST) JUDGMENT VACATING THE CHAPTER 91 LICENSE

In June 2011, "[o]n cross motions for judgment on the pleadings, the [Superior Court vacated the Chapter 91 License by] order[ing] declaratory relief [in favor of the Petitioners] and issu[ing] a writ of mandamus ordering the [D]epartment to enforce [Article 97]." Mahajan, 464 Mass. at 605, 610-22. In issuing its ruling, the Superior Court "did not consider the [Petitioners'] request for G.L. c. 30A review" of the Commissioner's Final Decision upholding the Chapter 91 License. Id., at 611, n.12.

V. THE SJC'S 2013 JUDGMENT REVERSING THE SUPERIOR COURT'S 2011 JUDGMENT VACATING THE CHAPTER 91 LICENSE

In March 2013, on the BRA's and the Department's appeal to the Massachusetts Supreme Judicial Court ("SJC"), the Superior Court's judgment vacating the Chapter 91 License was reversed; the SJC ruled that "[Article] 97 [did] not apply to the [P]roject [S]ite and, therefore, a two-thirds vote of the Legislature [was] not required to approve the [BRA's] planned

such rights.

In the furtherance of the foregoing powers, the [Massachusetts Legislature] shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise,

of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

(emphasis supplied).

development [of the Site].” Mahajan, 464 Mass. at 622. In addition, “[b]ecause the [Superior Court] did not review the issuance of the [C]hapter 91 [L]icense pursuant to G.L. c. 30A, § 14, [the SJC] remand[ed] the case to the Superior Court [to conduct that review] consistent with [the SJC’s ruling].” Id.

VI. THE SUPERIOR COURT’S APRIL 2014 AMENDED JUDGMENT VACATING THE CHAPTER 91 LICENSE

On remand, the Superior Court in April 2014 issued an Amended Judgment vacating the Chapter 91 License a second time and remanding the case to OADR “for additional findings based on consideration of the [Petitioners’] additional evidence” that was not before OADR during the 2009 evidentiary Adjudicatory Hearing discussed above, including a recently discovered 1980 map in the NPS’s files that purported to restrict Long Wharf Pavilion to outdoor recreational use pursuant to the LWCFA. Superior Court’s Memorandum of Decision and Order on Plaintiffs’ Motion to Present Additional Evidence . . . (December 12, 2013), at pp. 7-10; Superior Court’s Amended Judgment (April 16, 2014).³

The LWCFA, which is administered by the NPS, provides “‘financial assistance’ to states for ‘[p]lanning,’ the ‘[a]cquisition of land, water, or interests in land or water,’ and related ‘development’ all for ‘outdoor recreation’ purposes.” Boston Redevelopment Authority v. National Park Service, 838 F.3d 42, 45 (1st Cir. 2016). “This financial assistance comes with strings attached: Section 6 of the [LWCFA] forbids grant recipients from converting ‘property acquired or developed’ with [LWCFA] assistance to ‘other than public outdoor recreation use’ without prior NPS approval.” Id. “A parcel of land acquired or developed with the aid of an [LWCFA] grant becomes a so-called [LWCFA] Section 6(f) [Conservation] Area and — absent

³ The Petitioners’ additional evidence also included the 2012 and 2013 correspondence discussed below, at pp. 9-10, that took place between the NPS, the BRA, the Petitioners, and/or the Commonwealth’s Division of Conservation Services, regarding whether Long Wharf Pavilion fell within the LWCFA Section 6(f) Conservation Area.

[the NPS's] consent — must be preserved in perpetuity.” 838 F.3d at 45. “A funding recipient may convert the [LWCFA] Section 6(f) [Conservation] Area only if it furnishes substitute ‘recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.’” *Id.* “[L]ocal redevelopment agencies [such as the BRA] interested in receiving [LWCFA] grants apply [for such grants] through the state in which they are located.” *Id.* In the Commonwealth, the Executive Office of Energy and Environmental Affairs (“EEA”), through its Division of Conservation Services (“DCS”),⁴ is the state agency responsible for administering LWCFA grants. *Id.*

Here, “[w]hen the BRA acquired title to Long Wharf in the 1970s, the [W]harf was decrepit and in need of repairs, [and] [s]ince then, the BRA has developed Long Wharf into a thriving waterfront venue [by] . . . using in part,” nearly \$800,000 in LWCFA grant money that it applied for in 1980, and received from the NPS from 1981 and 1986. 838 F.3d at 45-46.⁵ In seeking the grant, the BRA was required to “submit a detailed application [to the NPS] that include[d], among other things,” an explanation of “the project type, scale, and expected cost.” *Id.*, at 45. The BRA was also required to submit a “‘project boundary map’ identifying the [LWCFA] Section 6(f) [Conservation] Area . . . subject to the [LWCFA] Section 6(f) restrictions.” *Id.*

In 2009, and while the Petitioners’ appeal of the Chapter 91 License was pending before OADR, the proposed Project “came to NPS’s attention, and[,] [as a result], the NPS instructed the Commonwealth to research whether the . . . [P]roject fell within the [LWCFA] Section 6(f)

⁴ DCS “offers grants to municipalities and non-profit organizations for land acquisition and park development,” <http://www.mass.gov/eea/grants-and-tech-assistance/grants-and-loans/dcs>, and “[is] the state partner with the [NPS] for the [LWCFA] program” August 2014 Stay Order, at p. 2.

⁵ The BRA actually applied for a \$825,000 grant in 1980, but as discussed above in the text, was awarded total grant money of “almost \$800,000.” 838 F.3d at 46.

boundaries established in 1980” when the BRA had applied for LWCFA grant money. 838 F.3d at 46. “Relying on a 1983 map in its files, the Commonwealth determined that the [Long Wharf] Pavilion area was outside the [LWCFA] Section 6(f) boundaries.” Id. The NPS agreed, and, accordingly, the BRA continued to go forward with the proposed Project. Id.

“In 2012, however, correspondence from retired NPS employees prompted [the] NPS to revisit its conclusion” that Long Wharf Pavilion was outside the LWCFA Section 6(f) Conservation Area. Id. “Upon further investigation, [the] NPS discovered in its files a map hand-labeled ‘6f boundary map 3/27/80.’ This 1980 map, which the [BRA and the NPS] agree[d] a NPS employee labeled, depicted a [LWCFA] Section 6(f) [Conservation] Area encompassing the entire northern side of Long Wharf (including the [Long Wharf] Pavilion area).” Id. “NPS staff noted that the 1980 map was consistent with other materials in the agency’s files describing the Long Wharf project and determined that the 1980 map was the official [LWCFA Section 6(f)] boundary map.” Id. As a result, “[the] NPS notified [DCS] of this determination [in December 2012],” and, “[DCS], in turn, told the BRA [in February 2013] that it could not convert the Pavilion area into a restaurant and bar without further NPS approval.” Id.; Electronic Mail (“E-mail”) Message of December 20, 2012 from Jack W. Howard, Manager, State and Local Assistance Programs, NPS/Northeast Region to Petitioner Sanjoy Mahajan (“December 2012 NPS E-mail Message to Petitioners”); E-mail Message of February 4, 2013 from Melissa Cryan of EEA’s DCS to Richard McGuinness, BRA (“February 2013 EEA/DCS E-mail Message to Department”); E-mail Message of May 23, 2013 from Jack W. Howard, Manager, State and Local Assistance Programs, NPS/Northeast Region to Petitioner

Sanjoy Mahajan (“May 2013 NPS E-mail Message to Petitioners”).

DCS also made the Department aware of the NPS’s determination that Long Wharf Pavilion fell within the LWCFA Section 6(f) Conservation Area. Letter of March 18, 2014 from Melissa Cryan of EEA’s DCS to Andrea D. Langhauser, Senior Planner, MassDEP Waterways Regulations Program (“March 2014 EEA/DCS Letter to Department”). On March 18, 2014, DCS informed the Department that “[i]n December 2012, [EEA] received a directive from the [NPS] on what [the] NPS consider[ed] to be the boundary map of record for the [LWCFA] grant that was awarded to the [BRA] for Long Wharf” and that “[t]his map encompass[ed] the entirety of Long Wharf[,] [and] therefore, [the proposed Project] [fell] with the [LWCFA] Section 6(f) [Conservation Area].” Id. DCS also informed the Department that “[i]f a Chapter 91 [I]icense [was] awarded to the BRA for the [proposed] [P]roject, the BRA [would] have to comply with Section 6(f)3 of the [LWCFA]” Id.

The BRA strongly contested the NPS’s determination that Long Wharf Pavilion fell within the LWCFA Section 6(f) Conservation Area. 838 F.3d at 46. “In April 2014, representatives of the BRA, the Commonwealth, and [the] NPS met to discuss [the] NPS’s determination and to give the BRA an opportunity to present its contrary view.” Id. “The BRA distributed photographs, maps, and reports, and the parties toured Long Wharf on foot.” Id. The NPS did not change its position, and in “that same month, it sent a letter to the Commonwealth confirming its determination that the [Long Wharf] Pavilion area fell within the [LWCFA] Section 6(f) Conservation Area. In June [2014], [the] NPS issued its final decision, accompanied by a detailed explanation of its reasoning.” Id.; Letter of June 20, 2014 from Jack W. Howard, Manager, State and Local Assistance Programs, NPS/Northeast Region to Maeve Vallely

Bartlett, EEA Undersecretary for the Environment (“June 2014 NPS Letter to EEA”).⁶ The BRA then filed suit in U.S. District Court in July 2014 appealing the NPS’s determination. 838 F.3d at 46. As discussed below, the BRA failed to prevail before the U.S. District Court and on appeal to the First Circuit.

VII. THE PRIOR PRESIDING OFFICER’S AUGUST 2014 STAY ORDER

After filing suit in U.S. District Court to challenge the NPS’s final determination that Long Wharf Pavilion fell within the LWCFA Section 6(f) Conservation Area, the BRA moved to stay the proceedings in this appeal pending the outcome of the federal court litigation. August 2014 Stay Order. The Department supported the BRA’s stay request, but the Petitioners opposed it. *Id.* The Petitioners opposed the BRA’s stay request contending that the additional evidence discussed above demonstrated “that the proposed [P]roject [was] within the [LWCFA] boundary,” and as such, the BRA was precluded from obtaining the Chapter 91 License authorizing the Project. *Id.*, at p. 2.

In August 2014, the prior Presiding Officer in the case granted the BRA’s stay request after “conclud[ing] that a stay [was] warranted because the determination of the [LWCFA] boundary on Long Wharf [was] outside [OADR’s] jurisdiction” to adjudicate and for the federal courts to adjudicate in the BRA’s litigation against the NPS. August 2014 Stay Order, at pp. 1-3. The prior Presiding Officer’s Stay Order was warranted and authorized by the Adjudicatory Proceeding Rules at 310 CMR 1.01(5)(a)3, which grants a Presiding Officer the authority to “stay [the proceedings in an] appea[l] where [a party’s] failure to previously obtain a final

⁶ In its final decision, the NPS noted “that the BRA [might be able to] pursue the [proposed] [P]roject under [the NPS’s] Public Facility policy” as set forth in the NPS’s manual entitled “Land and Water Conservation Fund State Assistance Program,” dated October 1, 2008 (“NPS Manual”). August 2014 Stay Order, at p. 2; June 2014 NPS Letter to EEA, at p. 3; NPS Manual, c. 8, § H, at pp. 8-12 to 8-13. There is no evidence in the Administrative Record, however, indicating whether the BRA has pursued, or plans to pursue that option with the NPS.

decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause.”

VIII. THE U.S. DISTRICT COURT’S AUGUST 2015 JUDGMENT AGAINST THE BRA AND THE FIRST CIRCUIT’S SEPTEMBER 2016 AFFIRMANCE OF THE COURT’S JUDGMENT

In August 2015, on cross-motions for summary judgment, the U.S. District Court (Saris, J.) affirmed the NPS’s determination that Long Wharf Pavilion fell within the LWCFCA Section 6(f) Conservation Area. Boston Redevelopment Authority v. National Park Service, 125 F. Supp. 3d 325 (D. Mass. 2015); 838 F.3d at 46. On appeal, the First Circuit affirmed the U.S. District Court’s judgment in September 2016. 838 F.3d at 46-51.

IX. THE BRA’S OCTOBER 2016 WITHDRAWAL OF ITS APPLICATION FOR THE CHAPTER 91 LICENSE AND ITS NOVEMBER 2016 JOINT MOTION WITH THE DEPARTMENT TO DISMISS THE APPEAL AS MOOT

Following the First Circuit’s affirmance of the U.S. District Court’s judgment, the BRA on October 31, 2016 submitted a written “Notice of Withdrawal” to the Department informing the latter that “on September 23, 2016, . . . the First Circuit [had] issued a Judgment . . . holding that the open pavilion on the northern side of Long Wharf--the subject of the BRA’s Chapter 91 License Application--[was] restricted to outdoor recreational use [under the LWCFCA],” and, as a result, “the BRA [would] no longer pursue its Chapter 91 Application.” Several days later, on November 4, 2016, the BRA and the Department brought their pending motion to dismiss the appeal as moot, which the Petitioners opposed on November 14, 2016.⁷ As discussed below, the BRA’s and the Department’s Joint Motion to Dismiss is meritorious, and, accordingly, should be

⁷ On November 15, 2016, I issued an Order directing the BRA and the Department to file a Joint Reply Memorandum by November 29, 2016 responding to the Petitioners’ arguments opposing the BRA’s and the Department’s Joint Motion to Dismiss the Petitioners’ appeal as moot. On November 16, 2016, I issued an Order granting the Petitioners’ request to file a Sur-reply Memorandum to the BRA’s and the Department’s Joint Reply Memorandum by December 13, 2016.

granted in a Final Decision by the Department's Commissioner dismissing the Petitioners' appeal as moot.

DISCUSSION

Under the Adjudicatory Proceeding Rules, 310 CMR 1.01(5)(a)2 and (5)(a)15.f.iii, a Presiding Officer may issue a Recommended Final Decision recommending the dismissal of an appeal as moot where the underlying claim in the appeal is moot. In the Matter of David Audette, OADR Docket No. 2009-066, Recommended Final Decision (March 12, 2012), 2012 MA ENV LEXIS 35, at 11, adopted as Final Decision (March 30, 2012), 2012 MA ENV LEXIS 34. "Ordinarily, litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976) (inmate's appeal of Superior Court judgment holding he lacked the right to personally appear at an early parole hearing rendered moot by his release from custody); In the Matter of Marc Sturtz, 410 Mass. 58, 59-60 (1991) (appellant ward's appeal of Probate and Family Court Judgment appointing ward's parents as his guardians rendered moot by probate judge's discharge of guardianship); Seney v. Morhy, 467 Mass. 58, 62 (2014) (appeal from expired harassment prevention order not moot where parties have continuing interest in case). The underlying principle supporting the dismissal of moot claims "is the general rule that courts decide only actual controversies." Sturtz, 410 Mass. at 59. However, there is an exception to this rule: "where the question [presented in the case] is one of public importance, is very likely to arise again in similar circumstances, and where appellate review could not be obtained before the question would again be moot." Acting Superintendent of Bournemouth Hosp. v. Baker, 431 Mass. 101, 103 (2000), quoting Attorney Gen. v. Commissioner of Ins., 403 Mass. 370, 380

(1988). In such cases, “[courts] do not hesitate to reach the merits of cases that no longer involve a live dispute so as to further the public interest.” Seney, 467 Mass. at 61.

The BRA and the Department contend that the Petitioners’ appeal of the Chapter 91 License should be dismissed as moot because “[t]here is no [longer any] underlying agency action by MassDEP for [the] Petitioners to appeal or for OADR to adjudicate” as a result of the Superior Court having vacated the Chapter 91 License in April 2014 and the BRA having recently withdrawn its Application for the License in October 2016 following the First Circuit’s September 2016 judgment against the BRA. Joint Motion to Dismiss, at p. 3. In opposition, the Petitioners contend that their appeal is not moot because “[b]ased on the federal court decisions [in the BRA’s litigation against the NPS], a finding can now be made [by OADR] that the proposed restaurant area is protected by a [LWCFA] easement,” and “[t]his finding, along with the decisions of both federal courts, should be submitted to the Superior Court,” which, according to the Petitioners, “is the forum where final disposition of this case should be made.” Petitioners’ Opposition to BRA’s and DEP’s Joint Motion to Dismiss, at p. 2. I disagree with the Petitioners’ contention that their appeal is not moot for the following reasons.

First, there is currently no Chapter 91 License issued by the Department approving the proposed Project for the Petitioners to challenge in OADR because, as discussed above, the Superior Court vacated the License in April 2014, when the Court remanded the matter to OADR for additional findings based on the Petitioners’ additional evidence showing that Long Wharf Pavilion falls within the LWCFA Section 6(f) Conservation Area. As a result of the Superior Court’s vacating of the Chapter 91 License and remand of the case to OADR, the Petitioners’ remaining “personal stake in [the] outcome” of the litigation was opposing the BRA’s attempts

to obtain another Chapter 91 License from the Department approving the proposed Project. Blake, supra; Sturtz, supra. The Petitioners ceased having this remaining “personal stake” in October 2016, when the BRA withdrew its application for the Chapter 91 License following the First Circuit’s affirmance of the U.S. District Court’s judgment upholding the NPS’s final determination that Long Wharf Pavilion falls within the LWCF Section 6(f) Conservation Area. Id. The BRA’s withdrawal of the application was an admission that it could not proceed with the proposed Project without the NPS’s approval.

The Petitioners’ attempt to avoid dismissal of their appeal on mootness grounds by relying on a statement that the prior Presiding Officer made in her August 2014 Stay Order that “based upon [the Petitioners’ additional evidence as discussed above, she] would conclude that the proposed [P]roject [was] within the LWCF boundary,” is unavailing because she ruled that the issue was “outside [OADR’s] jurisdiction” to adjudicate and for the federal courts to adjudicate in the BRA’s then pending litigation against the NPS in U.S. District Court. August 2014 Stay Order, at pp. 1-3. Undisputedly, both the U.S. District Court and the First Circuit adjudicated the issue against the BRA. The prior Presiding Officer’s statement is also unavailing because there is no longer an actual case or controversy for OADR to adjudicate as a result of the Superior Court having vacated the Chapter 91 License in April 2014 and the BRA having withdrawn its application for the Chapter 91 License in October 2016 following the First Circuit’s affirmance of the U.S. District Court’s judgment against the BRA that Long Wharf Pavilion falls with the LWCF Section 6(f) Conservation Area. Sturtz, supra.

Lastly, the Petitioners’ appeal should be dismissed as moot because while the issue of whether Long Wharf Pavilion fell within the LWCF Section 6(f) Conservation Area was “one of public importance” in the case, the Petitioners have failed to demonstrate that issue “is very

likely to arise again in similar circumstances [and] . . . appellate review [cannot] be obtained before the question [will] again be moot.” Baker, supra. The Petitioners are hard pressed to make such claims because the issue was conclusively adjudicated by the federal courts against the BRA and, as a result, the BRA can no longer claim that Long Wharf Pavilion falls outside the LWCFCA Section 6(f) Conservation Area and that it can proceed with the proposed Project or a similar project in the future without the NPS’s approval. It is also important to note that in its June 2014 final determination that Long Wharf Pavilion falls within the LWCFCA Section 6(f) Conservation Area, the NPS did not foreclose the possibility of the BRA advancing the proposed Project or a similar project in the future because the NPS noted that the BRA might be able pursue the proposed Project under the NPS’s Public Facility Policy.⁸

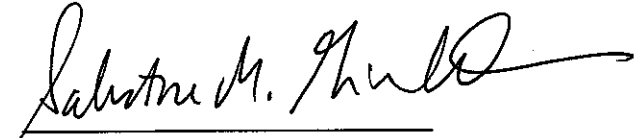
CONCLUSION

Based on the foregoing, I recommend that the Department’s Commissioner issue a Final Decision dismissing the Petitioners’ appeal in this case as moot. The Petitioners’ appeal is moot because there is no longer any underlying agency action of the Department for the Petitioners to appeal or for OADR to adjudicate as a result of: (1) the Superior Court having vacated the Chapter 91 License in April 2014 that the Petitioners had challenged in filing this appeal; (2) the First Circuit having affirmed in September 2016 the U.S. District Court’s judgment that the proposed Project site (Long Wharf Pavilion) is within the LWCFCA Section 6(f) Conservation Area, and as such, the BRA cannot proceed with the proposed Project without the NPS’s prior approval; and (3) the BRA having withdrawn in

⁸ See note 6 above, at p. 11.

October 2016 its application for the Chapter 91 License as a result of the First Circuit's ruling.

Date: 02/02/17


Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION ON REMAND

This decision is a Recommended Final Decision On Remand of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision On Remand in this matter. This decision is therefore not a Final Decision On Remand subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision On Remand is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision On Remand is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which [the] [F]inal [D]ecision [On Remand] is based is clearly erroneous." 310 CMR 1.01(14)(d). "[If] the motion repeats matters adequately considered in the [F]inal [D]ecision [On Remand], renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

Because this matter has now been transmitted to the Commissioner, no party shall file a

motion to renew or reargue this Recommended Final Decision On Remand or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In The Matter Of: Boston Redevelopment Authority (REMAND)
Docket No. 2008-128RM File No. W07-2172-N
Boston

Representative

Party

Denise A. Chicoine
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