COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108

June 30, 2015

Matter of Boston Boat Basin LLC

Docket No. 2012-008 and 2012-009
Determination of Applicability
Parcel 28300, Commercial Wharf

RECOMMENDED FINAL DECISION ON RECONSIDERATION

The appeal concerns a Determination of Applicability issued by the Department of Environmental Protection (the "Department") pursuant to M.G.L. c. 91 ("Chapter 91") for property owned by the Commercial Wharf East Condominium Association ("CWECA") on Commercial Wharf along Boston's waterfront. The Request for Determination of Applicability ("RDA") was filed by Boston Boat Basin, LLC, the owner of the marina which is located at the seaward end of Commercial Wharf. The Request was limited to a portion of CWECA's property used for parking and vehicular access (the "RDA area"), and did not include CWECA's granite building. The Department determined that the area was subject to jurisdiction and that the nonwater-dependent uses lacked authorization under Chapter 91. The Final Decision adopted the Recommended Final Decision that sustained the Department's Determination. CWECA filed a motion for reconsideration of the Final Decision. A motion for reconsideration may be granted only where the Final Decision is based upon a finding of fact or conclusion of law that is clearly erroneous. 310 CMR 1.01(14)(d). I recommend that the motion for reconsideration be denied.

PROCEDURAL BACKGROUND

Requests for Determination of Applicability may be filed with the Department for a decision as to whether an area or use is subject to jurisdiction under Chapter 91, the state law that

promotes water-dependent uses and public access along the waterfront. A nonwater-dependent use is a use, such as residential parking facilities, that does not require direct access to the water and could be located away from the water. 310 CMR 9.12(2); 310 CMR 9.12(2)(f)3; 310 CMR 9.12(3)(b); 310 CMR 9.12(4). The Request for Determination of Applicability filed by Boston Boat Basin specified an area used for parking and vehicular access situated between CWECA's granite condominium and Boston Boat Basin's marina property. A second Request was filed for CWECA's granite condominium building which is located immediately landward of the RDA area, and the Department's separate Determination is subject to a separate appeal. As to the RDA area in this appeal that is used for parking and access, the Department issued a Positive Determination of Applicability, concluding that the RDA area is located over both flowed tidelands and filled tidelands seaward of the historic low water mark and therefore subject to geographic jurisdiction as Commonwealth tidelands under Chapter 91. The Department further concluded that the current nonwater-dependent use of the RDA area lacked authorization under any legislative act or license issued pursuant to Chapter 91. This Determination of Applicability was challenged by CWECA, which claimed that the use of the RDA area was properly authorized. CWECA moved for summary decision and Boston Boat Basin and the Department filed oppositions. I issued a Recommended Final Decision on October 18, 2013 granting summary decision against CWECA and upholding the Department's Determination.

The Department's Commissioner held in abeyance the issuance of a Final Decision and later recused himself, delegating decisionmaking to a Deputy Commissioner. The Commissioner attempted a negotiated resolution with the parties to this appeal and the second appeal that had been filed on the Determination made by the Department on CWECA's granite condominium building. The negotiations lapsed after several months of effort. CWECA filed a Motion to

Reopen Proceeding and Take Discovery in this proceeding, and Boston Boat Basin and the Department filed oppositions. I denied the motion because it was improperly filed.[1] After the Commissioner's Final Decision was issued, CWECA filed its Motion for Reconsideration which was opposed by Boston Boat Basin.

STANDARD FOR RECONSIDERATION

For reconsideration, a party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." See 310 CMR 1.01(14)(d). In addition, a motion for reconsideration may be summarily denied where it "repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments." Id. It is well settled that a party seeking reconsideration of a Final Decision has the heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); Matter of LeBlanc, Docket No. 08-051, Recommended Final Decision on Reconsideration (February 4, 2009), adopted by Final Decision (February 18, 2009); Matter of Jody Reale, OADR Docket No. WET-2010-012, Recommended Final Decision on Reconsideration (July 29, 2010), adopted as Final Decision on Reconsideration (July 30, 2010); Matter of Patriots Environmental Corp., OADR Docket No. 2011-016, Recommended Final Decision on Reconsideration (January 29, 2013), adopted as Final Decision on Reconsideration (February 7, 2013); Matter of Jodi Dupras, OADR Docket No. WET-2012-026, Recommended Final Decision on Reconsideration (August 28, 2013), adopted as Final Decision (September 5, 2013). Moreover, reconsideration may not be based on the party's disagreement with the result established in the Final Decision. Matter of

[1] A Motion to Reopen the Proceeding is inappropriate eight months after a summary decision and Recommended Final Decision. After a Recommended Final Decision is issued and transmitted to the Commissioner, the parties are clearly instructed to file nothing further until after a Final Decision has been issued. See Ruling on Motion to Reopen the Proceeding.

Frank A. Marinelli, OADR Docket No. 1985-032, Decision on Motion for Reconsideration, adopted as Final Decision on Reconsideration (January 6, 1998); Patriots Environmental, supra; Dupras, supra.

DISCUSSION

CWECA offered three related grounds for reconsideration. First, CWECA argued that it was denied due process because the Department's Determination of Applicability was not supported by credible evidence that the RDA was not properly authorized and CWECA had been unable to file its own evidence. CWECA argued that I failed to view the material facts in the light most favorable to it as the party against whom summary decision was entered, and that it was entitled to all reasonable inferences. Cannon v. Cannon, 69 Mass. App. Ct. 414, 416 (2007). Second, CWECA also argued that the Final Decision had misinterpreted Chapter 663 of the Acts of 1964. Third, CWECA claimed that the Commonwealth's Department of Public Works ("DPW") had authorized the RDA area consistent with chapter 91. CWECA's arguments, however, were made at the time of summary decision. Summary decision was neither premature nor a denial of due process. See Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-786 (1980) (administrative summary judgment procedure is proper to avoid needless adjudicatory hearings); Matter of Lowe's Home Centers, Inc., Docket No. WET-2009-013, Recommended Final Decision (June 19, 2009), adopted by Final Decision (June 30, 2009), Matter of SEMASS Partnership, Docket No. 2012-015, Recommended Final Decision (June 18, 2013), adopted by Final Decision (June 24, 2013). CWECA's argument and supporting affidavits that the RDA was properly authorized failed. Argument made in a motion for summary decision cannot be reargued in a motion for

reconsideration. Because the motion reiterates arguments raised in summary decision and adequately covered in the Final Decision, I address only the main points raised by CWECA.

CWECA argued it was error to credit the Department's assertion that no license existed, because the Department had produced no evidence that it did not exist. CWECA claimed that the Department has overturned precedent and long-standing property rights. CWECA argued that the Department failed to meet the standard of substantial evidence in M.G.L. c. 30A, s. 14(7) and overturned precedent and long-standing property rights. CWECA asserted that it was denied an opportunity to cross-examine witnesses related to events 40 years ago involving the 1964 legislation and communications by the DPW and the Boston Redevelopment Authority during the 1970s, which would have shown proper authorization. CWECA contended that the DPW licensing system differed from the Department's, and the DPW's interpretation of its regulations is entitled to deference, citing Mullally. Mullally v. Waste Mgt. of Mass., 452 Mass. 526, 533 (2008) at n. 13 (administrative interpretation developed during, or shortly before, litigation entitled to less weight than long-standing administrative interpretation).

CWECA's argument is based on the premise that the redevelopment of Commercial Wharf would not have taken place without proper approval of the Boston Redevelopment Authority and the Department of Public Works, the Department's predecessor. CWECA's claim that it was entitled to an inference that the RDA area was authorized is without merit. CWECA conceded that the Department's file did not contain a copy of a license for the RDA area and has not produced a copy of a recorded license or asserted that a license was recorded. Chapter 91 and 310 CMR 9.00 acknowledge authorization through legislation or a license. 310 CMR 9.01(1) and (2). CWECA supported its Motion for Summary Decision with affidavits and exhibits. CWECA's evidence includes an opinion accompanying a request for confirmation that further

approval is not required. See Reck affidavit and Exhibits. But this type of correspondence does not constitute actual approval nor would an informal approval substitute for licensing. The only correspondence from the Department of Public Works is a letter from Chief Engineer John Hannon dated December 16, 1976 stating that work at Commercial Wharf to replace damaged or missing pilings was maintenance of an existing structure that did not require licensing. This correspondence is clearly not an authorization of the use of the RDA area for parking and vehicular access. CWECA's claim that the DPW and the BRA actually authorized the RDA area in the 1970s, an approval somehow obscured by the DPWs licensing system, is wholly conjecture.

The argument that the Department should defer to the DPW's interpretation of its regulatory authority is also without merit. CWECA has identified no regulation administered by the DPW that suggests that authorization in the 1970s did not require a license. Even if it had, the Department is bound by its own regulations, which require either a license or legislative grant. CWECA seems convinced that there is some evidence of some type of approval that would should that the building was properly authorized and no further approval is required. CWECA implies that someone at the DPW or the BRA 40 years ago could now testify that an informal communication was intended as sufficient authorization. Even if such an individual were identified, an informal communication is not sufficient, as clearly addressed in the Final Decision.

Even if a license were issued, it would be void if not properly recorded. Licenses must be recorded by the licensee; failure to record renders the license void. Tilton v. City of Haverhill, 311 Mass. 572 (1942); 310 CMR 9.26(2). The evidence is undisputed that the Department's file does not contain a copy of a license, but further, CWECA has not produced a

copy of a properly recorded license for the RDA area. There is no evidence to even suggest that a license related to the use of the RDA area for parking and access was issued. The reasonable inference from the fact that a property owner cannot produce a copy of a timely recorded license is that the property owner does not have authorization. Under these circumstances, no further inquiry is necessary by the Department for purposes of administering its responsibilities under Chapter 91.

CWECA argued that the Final Decision did not consider the legislative grant as authorization for the redevelopment of Commercial Wharf. More specifically, CWECA argued that the Recommended Final Decision misinterpreted Chapter 663 of the Acts of 1964, citing to Section 5 and to a footnote in the Recommended Final Decision in which I refer to Broude v. Mass. Bay Lines, Case No. 265538 (Mass. Land Ct., June 27, 2005), 13 L.C.R. 332(2005). The Recommended Final Decision did discuss the redevelopment legislation. Section 5 of Chapter 663 is quoted in its entirety in Footnote 26 of the Recommended Final Decision, and states that "Nothing herein shall affect or impair the powers and responsibilities of the department with respect to tidewaters within any portion of the area covered by such plan which is not subject to a license granted as provided in section 3." Chapter 663, s. 5. CWECA, pointing to the text related to the area which is not subject to licensing, argued that I failed to consider "licensing" during the 1970s. However, CWECA provides no support for the proposition that the legislation is referring to anything other than the plain meaning: the issuance of a license by the Department of Public Works, the Department's predecessor in the issuance of tidelands licenses.

Broude is a case involving an easement and rights pursuant to the assignment of a lease of a dock, and whether it may be used for the operation of a commercial facility near Harbor Towers. Broude v. Mass. Bay Lines at 8 and 12. In its Motion for Reconsideration, CWECA

asserts that "Broude affirmatively stands for the proposition as outlined in the Opinion of the Justices of the Senate (sic) that the Legislature has the power to transfer the public trust rights in tidelands or change the public purpose for which they were originally granted, just as the Legislature did in Chapter 663." See Opinion of the Justices, 383 Mass. 895 (1981). Broude does not stand for that proposition, nor does it cite to the Opinion of the Justices or otherwise evaluate Chapter 663 from the perspective of legislative release or transfer of public trust rights. The Opinion of the Justices is quite specific as to the required legislative action:

> The authority of the Legislature to abandon, release, or extinguish the public interest in submerged land is not without limits. Where the Commonwealth has proposed the transfer of land from one public use to another, the legislation must be explicit concerning the land involved; it must acknowledge the interest being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer.

Id. at 905. While Chapter 663 informs what was contemplated by the parties as to the scope of the easement, Chapter 663 clearly fails to meet the test as to the public's rights in tidelands.

Finally, CWECA argues that the Final Decision erred by not recognizing that the Department of Public Works approved the use of the RDA area in a manner consistent with Chapter 91 and Chapter 663 of the Acts of 1964. CWECA claims that the decades of use of the RDA area were based on the DPW's approval, which is not negated by the fact that the Department has no record of a Chapter 91 license. CWECA argues that in the most favorable light the evidence shows that the RDA area was authorized by the DPW either as an express delegation of public trust obligations or in accordance with its practices at the time. CWECA relies on Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 457 Mass. 663 (2010), which stated that the EFSB legislation operated as an overlay to Chapter 91 and allowed the EFSB to stand in the place of the Department in deciding whether to issue the equivalent of a Chapter 91 license. There are important differences, however, between the EFSB

legislation, M.G.L. c. 164, s. 69K, and Chapter 663. In Alliance to Protect Nantucket Sound, the Supreme Judicial Court ruled that M.G.L. c. 163, s. 69K is a sufficiently express delegation of authority to the EFSB. Chapter 663 contains no delegation of authority, and instead allows the BRA to approve applications for licenses issued by the DPW.

CWECA implies that it should be able to continue its reliance on DPW "approvals" under the Urban Renewal Plan, and the Department is somehow at fault for failing to recognize its special status. Chapter 663, however, is not devoted specifically to Commercial Wharf but instead describes an area that extends from Northern Avenue at Fort Point Channel to the south along the entirety of the Boston Harbor waterfront to Hanover Street at the Coast Guard Station. This area includes the most prominent wharves in Boston. There is no evidence that the Department has ever recognized the Urban Renewal Plan as an authorization for purposes of Chapter 91.[2] In fact, these similarly situated prominent properties are typically governed by licenses issued by the Department pursuant to Chapter 91. CWECA is correct that timing matters, as some of these licenses were issued under the 1978 version of the regulations. After the Boston Waterfront case and the 1983 statutory revisions to Chapter 91, as part of the Department's promulgation of new regulations in 1990, the Department implemented a formal amnesty program, under regulatory amnesty provisions, which allowed the filing of applications under the standards of the 1978 regulations for continued use of unauthorized structures. 310 CMR 9.28. Some buildings along the waterfront, such as Rowes Wharf, that were licensed under the 1978 regulations contain uses that would not be allowed under the current regulations. The Department is now bound by its current regulations.

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[2] These wharves appear on a map of downtown Boston between Northern Ave. at Fort Point Channel and Hanover strett at the Coast Guard Station: Fosters Wharf, Rowes Wharf, India Wharf, Central Wharf, Long Wharf, Commercial Wharf, Lewis Wharf, Sargents Wharf, Union Wharf, Lincoln Wharf, Battery Wharf, and Constitution Wharf. See Arrow Street Atlas, Metro Boston (2000).

CONCLUSION

For the reasons stated, I recommend that the Department's Commissioner issue a Final Decision on Reconsideration that denies reconsideration on the grounds that the Final Decision contains no error of fact or law. The Department properly determined that the RDA area is subject to jurisdiction and that the nonwater-dependent uses lack authorization under Chapter 91.

Pamela D. Harvey
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision may be appealed and will contain a notice to that effect.

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 Reconsideration 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 Boat Basin, LLC
Docket No. 2012-008 2012-009	File No. RDA - Positive Boston
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Date: June 30, 2015