

THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

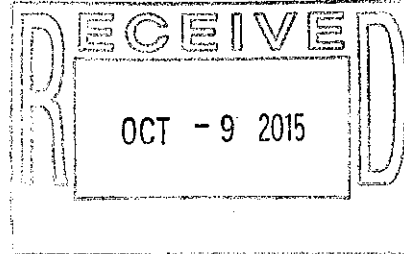
BOSTON, MA 02114

EDWARD B. McGRATH
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200

FAX: 617-626-7220

www.mass.gov/dala



October 7, 2015

Martin Suuberg
Commissioner
Department of Environmental Protection
One Winter Street, 2nd Floor
Boston, MA 02108

RE: Harborside Inn Condominium Trust
Dala No. DEP-06-1071, File No. UAO-BO-06-6Y001
Formerly Docket No. 2006-133

Dear Commissioner Suuberg:

Enclosed is the Administrative Magistrate's Recommended Final Decision in the above-captioned matter.

Sincerely,

Edward B. McGrath
Chief Administrative Magistrate

EBM/mbf

Enclosure

cc: Service List

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

In the Matter of:

Harborside Inn Condominium Trust

Docket No. DEP-06-1071
File No. UAO-BO-06-6Y001
Edgartown

RECOMMENDED FINAL DECISION

WATERWAYS – the change of a hotel, whose facility is subject to waterways licensing, to a timeshare condominium is a “change in use” of the filled tidelands at the site that requires relicensing under 310 C.M.R. § 9.05(1)(d).

Michael D. Vhay, Esq., and Valerie Moore, Esq. (Ferriter Scobo & Rodophele),
Boston, for the petitioner Harborside Inn Condominium Trust.

Samuel Bennett, Esq., Boston, for the Department of Environmental Protection.

JAMES P. ROONEY, Administrative Magistrate

Introduction

This is an appeal of an enforcement order issued by the Department of Environmental Protection (“DEP”) in 2006 and later amended in 2011.

On July 21, 2006, DEP issued a Unilateral Administrative Order to the Harborside Inn Condominium Trust, the owner of waterfront property in downtown Edgartown, Massachusetts, that contains filled Commonwealth and private tidelands ordering it either to show authorization for an area of purportedly unlicensed fill or to apply for a waterways license for that area. Harborside maintained that this area was licensed by License #3837, which was issued by the Department of Public Works in May 1956, and moved for summary decision on that basis. On August 15, 2011, I granted the motion in part, holding that the license did cover a portion of the area in contention, but

denied it otherwise because a material factual dispute existed as to whether the remainder of the contested area had previously been authorized.

On November 16, 2011, DEP issued an amended enforcement order, adding a new basis for requiring that Harborside apply for a waterways license. It asserted that the site, which used to be a hotel, had become a condominium, and that this “change in use” required relicensing.¹ Both parties have moved for summary decision on this issue.² I grant summary decision in favor of DEP.

Discussion

DEP’s Waterways Regulations provide that an owner of a property subject to waterways licensing, such as the property in question, must seek a license for:

any change in use of fill or structures from that expressly authorized in a valid grant or license or, if no such use statement was included, from that reasonably determined by the Department to be implicit therein, whether such authorization was obtained prior to or after January 1, 1984.

310 C.M.R. § 9.05(1)(d). This regulation implements a 1983 amendment to Chapter 91, which required relicensing of “[a]ny changes in use . . . of a licensed structure or fill.” M.G.L. c. 91, § 18.

In order to determine whether there has been a “change in use,” I must first determine what use had previously been authorized, either expressly or implicitly. There

¹ The parties stipulated that Harborside would not need to separately appeal this amended enforcement order.

² Harborside submitted affidavits from George B. Brush, Esq., Arthur W. Young III, Joseph Badot, and Bernard Hay. DEP submitted two affidavits from Andrea D. Langhauser, a DEP Waterways Program analyst, in support of its motion for summary decision. Harborside moved to strike both affidavits, principally on the grounds that Ms. Langhauser lacked the expertise to comment on the uses of the Harborside site and that it was improper for her to comment on the applicability of DEP regulations to the site. The motions are denied as Ms. Langhauser’s affidavit is within the proper scope of topics on which a waterways analyst may opine.

is no dispute that the last applicable license, the 1956 license, authorized the owner of the property "to build and maintain a timber bulkhead and to fill solid in Edgartown Harbor," but did not expressly describe what uses of the bulkhead or filled tideland were allowed. There is also no dispute that a hotel was operated on the property in 1956, and had been in operation since at least 1930. Presumably then, the licensed bulkhead and filled tidelands were to uses related to operating a hotel. Thus, the 1956 license implicitly authorized hotel-related uses.

In 1980, the owners of the Harborside Inn sold it to the Inner Harbor Realty Trust, which placed the property at issue in the Harborside Inn Condominium Trust.³ The Harborside Inn Condominium Trust has managed the Harborside Inn Condominium since then. (Young affid.)

It is this change from a privately owned hotel to a condominium that DEP contends is a change in use. DEP considers a hotel to be a "facility of public accommodation," a term its Waterways Regulations define as:

a facility at which goods or services are made available directly to the transient public on a regular basis, or at which advantages of use are otherwise open on essentially equal terms to the public at large (e.g., patrons of a public restaurant, visitors to an aquarium or museum), rather than restricted to a relatively limited group of specified individuals (e.g., members of a private club, owners of a condominium building).

310 C.M.R. § 9.02. Not only do the Waterways Regulations list a hotel as an example of a facility of public accommodation and contrast it with a condominium, which is not, they also list condominiums as an example of a "facility of private tenancy," which is defined as:

³ A restaurant on an adjoining property was separated from the Harborside Inn property as part of the 1980 transaction.

a facility at which the advantages of use accrue, on either a transient or a permanent basis, to a relatively limited group of specified individuals (e.g., members of a private club, owners of a condominium building) rather than to the public at large (e.g., patrons of a public restaurant, visitors to an aquarium or museum).

310 C.M.R. § 9.02.

Although the term “change in use” is not defined in the waterways regulations, if indeed the property changed from a facility made available to any member of the public for use to one available to only a limited number of individuals, then this would be a change in use sufficient to warrant a new licensing of the facility.

Harborside acknowledges the definitions in the waterways regulations, but asserts that the change to a condominium ownership did not change the use of the property as a hotel, and thus there has been no change in use. Unlike a condominium in which units are sold to individual owners and only those owners make use of the units, Harborside operates as a timeshare. Ninety-two units are timeshares, with each week of a vacation season that stretches from spring to fall available for purchase. Timeshares in the property are owned by approximately 1,400 people, with some using the weeks they purchased for themselves, while others rent out the rooms on their own or through Harborside, which advertises room availability. As a result, between 1997 and 2011, half of the occupancy was by timeshare owners, while the other half was by guests. (Badot affid.) Harborside adds that the change in the ownership structure has not changed the ability of the public to access the site. It maintains that the public is generally allowed on the site, and that to the extent the public is restricted, as, for example, when staff remove a member of the public who is disruptive, the approach did not change when the property became a condominium.

The Department does not contend that a mere change in ownership would be sufficient to require relicensing. It argues, however, that the change from a hotel to a timeshare was a change in use that limited access by transient guests because, using Harborside's own figures, after the property became a condominium, in practice only half the rooms were available for daily rental.

The regulatory provisions that apply here are part of revised Waterways Regulations DEP promulgated to implement 1983 amendments to M.G.L. c. 91. In considering the competing contentions, I interpret the term "change in use" liberally in order to implement the purpose of the statutory amendments. As former DEP Commissioner Daniel S. Greenbaum noted in a November 14, 1990 letter to the chairmen of the Committee on Natural Resources and Agriculture, old waterways licenses often were unclear as to the purpose for which they were issued. (DEP Ex. C.⁴) The 1983 amendment to Chapter 91 sought to avoid this problem in the future by requiring that each new license describe the "specific use to which the licensed structure or fill is restricted." M.G.L. c. 91, § 18. The legislature then went on to require that any changes in use, whether a use specified in a new license or use, specified or not, of a licensed structure or fill under an older license, would require relicensing. *Id.* DEP modified its regulations to require relicensing with each change in use. Commissioner Greenbaum thought that changes in use would be the primary triggers for relicensing "which befits the emphasis of the courts and legislature have placed on insuring that proper public purposes continue to be served while tidelands are held by private parties." (DEP Ex. C.)

⁴ DEP filed exhibits to both its summary decision motion and its later opposition to Harborside's motion for summary decision. Exhibits are those from its first filing unless otherwise noted.

The net result of the statutory and regulatory changes was to create a licensing regime in which any change in use required relicensing in order that DEP could evaluate whether the change was consistent with the public's retained interest in tidelands and consider what license conditions were appropriate as a consequence of the change.

In this light, a change from a hotel to a timeshare condominium is a change in use requiring relicensing. It is not clear that DEP was thinking specifically of condominiums⁵ as including timeshares when it defined facilities of private tenancy as including condominiums, and contrasted these private facilities with facilities of public accommodation, which include hotels but not condominiums. However, these two regulatory definitions show that DEP makes a clear distinction between facilities generally open to the public and those open to only a limited group of people. Although Harborside continues to offer rooms to guests for rental, its change to a condominium structure has created a group of 1,400 owners who have access as owners to the facility and make up fifty percent of the average occupancy. What had been a hotel in which all rooms were available on a daily basis to the public generally has become a facility in which only half the rooms are available to the public, while the rest are used by the facility's room's many owners.

Even if Harborside continues to provide the same level of public access to the site as it did when it was a hotel, which DEP disputes,⁶ this would mainly be a factor for DEP

⁵ A condominium includes" the land or the lessee's interest in any lease of such land" as has been established as a condominium. M.G.L. c. 183A, § 1.

⁶ DEP questions whether the members of the public, who are not guests, are ever really able to gain access to the Harborside facility, and notes that there is no prior license obligating the owners of the site to provide a particular level of access. It notes a sign at a gate to a walkway on the property that reads "Harborside Inn Owners and Guests Only." (First Langhauser affid.)

Much of the dispute here seems to concern efforts by Edgartown to establish a

to consider when deciding what conditions to impose during relicensing, rather than a reason to decline to require relicensing at all. That the change to a timeshare condominium may (or may not) have some relationship to the public's ability to access the facility is mere happenstance. Had a waterfront hardware store changed to a restaurant, for example, that would be change in use requiring relicensing, whether or not this change made any obvious difference to the public's ability to access the tidelands at the site.

DEP concedes, however, that a *de minimus* change would not require relicensing. The Waterways Regulations provide that minor project modifications that do not require relicensing include:

changes of use which maintain or enhance public benefits provided by the project and which represent an insignificant deviation from the original use statement of the license, in terms of function, character, duration, patronage, or other relevant parameters.

310 C.M.R. § 9.22(3)(b). Here, whether or not the general public has the same access to the site as before, the ability of the public to be guests of the facility has been reduced by half, and thus the change to a timeshare cannot be said to maintain the public benefits of the project. While the 1956 license did not specify a use, a minor modification of a property with an existing waterways license that did not specify a use could qualify for the minor modification exception to the relicensing requirement if the change in implicit use was minor. Here, the character of the facility has changed from a hotel to a timeshare, and its patronage has changed as a consequence of the numerous timeshare

waterfront public walkway in this portion of Edgartown Harbor, consistent with the Edgartown Harbor Plan. (Second Langhauser affid., Ex. A.) These public access issues are not presently before me. They are left to the relicensing process.

owners occupying generally half the facility's rooms. Consequently, the change for a hotel to a timeshare does not qualify as a minor project modification.

I note that the parties also debate the usefulness here of a guidance the DEP Waterways program issued on December 2, 1993. The guidance, titled "Criteria for Evaluating and Licensing Structures and Uses on Filled Commonwealth Tidelands which have undergone an unauthorized Change in Use or Structural Alteration prior to 1/1/84," describes five conditions that must be met for DEP to decide not to require relicensing "for the continuation of any existing unauthorized use or structure located on filled Commonwealth tidelands." (DEP Ex. F.⁷) While a guidance addressing continuation of use of unauthorized fill would potentially be applicable to the initial reason DEP sought to relicense Harborside – the presence of unauthorized fill at the site – the amended enforcement order focuses on a change in use, not a continuation of an existing use, and thus the guidance is inapplicable. Even if the conditions recited by the guidance were

⁷ The five conditions are:

- 1) no unauthorized substantial change in use or substantial structural alteration occurred on the project site prior to 1/1/84, and no unauthorized change in use or structural alteration has occurred since that date;
- 2) no unauthorized change from water-dependent use to a nonwater dependent use (including situations where the water-dependent use was followed by a period of a least five continuous years in which no legal occupancy occurred on the site) occurred on the site prior to 1/1/84;
- 3) the project site is not located within a Designated Port Area (DPA) or Area of Critical Environmental Concern (ACEC);
- 4) express authorization previously has been issued for all fill on the project site; and
- 5) in the case of nonwater-dependent uses, express authorization previously has been issued for some type of nonwater-dependent use on the project site.

SERVICE LIST

In The Matter Of: Harborside Inn Condominium Trust

Docket No. DEP-06-1071

File No. UAO-BO-06-6Y001

Representative

Party

Michael D. Vhay, Esq.
Ferriter Scobbo & Rodophele PC
125 High Street
Boston, MA 02110

PETITIONER
Trustees of Harborside Inn Condominium
Trust

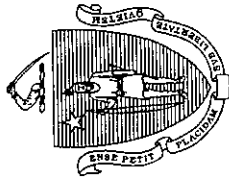
Samuel J. Bennett, Esq.
DEP – Office of General Counsel
One Winter Street, 3rd Floor
Boston, MA 02108

Department of Environmental Protection

Cc:

Quentin Walsh, Esq.
10 Francis Road
Wellesley, MA 02482

Date: **OCT - 7 2015**



The Commonwealth of Massachusetts
Division of Administrative Law Appeals
Bureau of Special Education Appeals
One Congress Street, 11th Floor
Boston, MA 02114

BOSTON MA 021

07 OCT 2015 PM 11:15

02 1P
0001929446 OCT 07 2015
MAILED FROM ZIP CODE 02114

\$000.703

Bridget Munster, Case Administrator
Department of Environmental
Protection
Office of the Commissioner
One Winter Street, 2nd Floor
Boston MA 02108

OCT 9 2015