

Designation Decision for the Mystic River Designated Port Area,
Charlestown Shore

Executive Office of Environmental Affairs
Office of Coastal Zone Management

December 16, 2002

I. Introduction

Pursuant to the Designated Port Area (DPA) regulations at 301 CMR 25.00, I issue this designation decision for the boundary of the Mystic River DPA, Charlestown shore.¹ Issuance of the decision concludes a three-part review and decision-making process, as follows.

In response to a request from the proponents of proposed artists live/work space at the Nancy Sales Building in the Fall of 2001, the Massachusetts Office of Coastal Zone Management (CZM) began a boundary review of the Charlestown shore of the Mystic River DPA pursuant to regulations governing the Designation Port Areas at 301 CMR 25.00. In January of 2002, two other property owners within the DPA requested that their properties be removed from the DPA. (See **Figures 1 and 2** of the boundary report, attached.) CZM then conducted a boundary review in accordance with the provisions of 301 CMR 25.03 that assessed the characteristics of the subject properties and the DPA as a whole. The review process concluded with a report that determined that the DPA boundary should be modified.² Over the course of our study, CZM conducted a series of public information meetings and met extensively with owners of DPA properties, city and state agency staff, and community representatives to gather information and comment on the DPA. The report was published on October 9, 2002 for a 30-day public comment period. Pursuant to 301 CMR 25.03(4), CZM held a public hearing on October 22, 2002 to solicit comment. CZM received eleven letters commenting on the report.

This designation decision summarizes and responds to key issues that have been raised by commenters and formally designates the DPA boundary. I have carefully considered all of the oral and written comments received in response to the boundary review report. Comments that provided substantive information regarding perceived impacts of the proposed modification, and commentary in support of, or opposition to, the regulatory and policy implications of our proposed approach, have been particularly useful to our work. I appreciate the time that all commenters have taken to participate in this boundary review process.

II. Summary of Boundary Review Report Recommendations

Three owners petitioned CZM to remove five specific parcels from the DPA:

Parcel	Owner
529 Main Street "Schrafft Center"	Schraffts Nominee Trust, John J. Flatley and Gregory D. Stoye, Trustees
465 Medford Street	465 Medford Nominee Trust, John J. Flatley and Gregory D. Stoye, Trustees

¹ For the purposes of this report, when the DPA under review is discussed, "DPA" shall mean the Charlestown shore of the Mystic River DPA unless otherwise indicated.

² See *Boundary Review of the Mystic River Designated Port Area, Charlestown Shore*, Executive Office of Environmental Affairs, Office of Coastal Zone Management, October 9, 2002.

425 Medford Street	425 Medford Nominee Trust, John J. Flatley and Gregory D. Stoye, Trustees
261-287 Medford Street “Nancy Sales Property”	Suffolk Medford Realty Trust, Michael J. Rauseo, Trustee
30-50 Terminal Street “Charlestown Commerce Center”	CCC Realty Trust, Donato Pizzuti, Trustee

After an analysis of the characteristics of the subject properties and the DPA as a whole, the boundary report concluded that the Schrafft Center does not meet the designation standard at 301 CMR 25.04 (2)(d). The boundary report further concluded that the properties at 465 and 425 Medford Street, the Nancy Sales Building, and the Charlestown Commerce Center do meet the designation standards at 301 CMR 25.04.³

The boundary report then considered the functional attributes of the DPA, pursuant to 301 CMR 25.04(3), and considered “all relevant factors affecting overall suitability [of the DPA] to accommodate water-dependent industrial use.” As informed by CZM’s analysis of the individual components, collective functionality, and land use context of the DPA, the report concludes that the capacity of the DPA to serve the interests of the Commonwealth for which it was originally designated can be substantially improved by the development of an industrial transportation corridor for truck and rail service into and out of the DPA.⁴ The transportation corridor would be located generally along the route of the existing Mystic Wharf Branch rail line, under Massport ownership as of November 19, 2002. Recognizing that land based transportation constitutes one of three essential infrastructure components critical to the ongoing viability of DPA land areas⁵, the report recommends that the Director of CZM exercise discretionary authority set forth at 301 CMR 25.03(5)⁶ to condition the final designation decision in a manner that will ensure the completion of a detailed transportation corridor feasibility study and related design and construction plans.

Although benefiting the DPA as a whole, the ability to develop a transportation corridor in this location will require substantial study and design and will have significant and direct impacts to both the 465 Medford Street and Nancy Sales properties. The report recommends that these properties be removed from the DPA, subject to conditions that will: 1) ensure the completion of a feasibility study; 2) result in the preparation of design and construction plans for the truck and rail corridor; and 3) facilitate construction by ensuring that, where necessary, land to accommodate necessary corridor geometry is available.

Thus, the boundary report concluded and recommended that the Schrafft Center be removed from the DPA pursuant to the designation standard at 301 CMR 25.04(d),

³ See *Boundary Report, op. cit.*, pp. 24-30.

⁴ See *Boundary Report, op. cit.*, pp. 39-41.

⁵ See 301 CMR 25.01(2), Purpose.

⁶ Pursuant to 301 CMR 25.03(5), “the Director [of CZM] may qualify, limit, or otherwise condition the designation decision *in any manner*[emphasis added] that serves the purposes of these regulations...”

that the Charlestown Commerce Center and the property at 425 Medford Street remain in the DPA pursuant to the designation standards at 301 CMR 25.04 (a)-(d), and that the 465 Medford Street and Nancy Sales Building properties be removed, subject to conditions, from the DPA pursuant to 301 CMR 25.03(5).

III. Response to Comments on the Boundary Report

The public comment letters reflect a range of opinion in support of and in opposition to the proposed modification of the DPA boundary. Comments critical of the recommendations of the boundary report are organized around three main issues that can be summarized as follows:

Use conflicts – The proposed DPA boundary would introduce residential/industrial use conflicts detrimental to existing and future industrial uses in the DPA.

Industrial transportation corridor – The proposed approach does not guarantee that the transportation corridor will be constructed.

Discretionary authority – The use of discretionary authority to condition the decision in a manner that will improve the transportation infrastructure of the DPA has no basis in the regulations.

Several commenters disagree with the proposal to remove the Nancy Sales Property, in particular, from the DPA because: 1) the proposed artist live/work use has residential characteristics; or 2) purely residential use may occur after the building is renovated. Commenters contend that such use is fundamentally incompatible with the operation of the DPA, and that the several commitments made by the owner to mitigate for such incompatibility are inadequate.

Other comments address the property at 465 Medford Street, and suggest that, if the property is removed from the DPA, such removal be conditioned by the imposition of a ‘sunset’ provision, by which the property would revert to the DPA at some point in the future. Conditions were suggested for the Schrafft Center as well, to prohibit future residential or other development of the property incompatible with DPA uses.⁷

I acknowledge that redevelopment of the Nancy Sales Property may introduce a residential use per se, or a use with residential characteristics, on the edge of the DPA depending on the extent to which the building is occupied by working artists. The owner’s reluctance to commit to the use of the Nancy Sales Property as formal artist live/work space has made the determination of potential impacts more ambiguous than would otherwise be the case. Nevertheless, I anticipate that the owner will, as he has repeatedly indicated, redevelop the building to provide artist live/work space. I believe

⁷ See letter from Erica P. Bigelow, Perkins, Smith & Cohen, attorney for U.S. Gypsum, to Thomas W. Skinner, CZM Director, November 8, 2002, attached.

that artist live/work space is an appropriate use for a property that sits between the residential neighborhood (across Medford Street) and the complex of industrial uses in the DPA, as it combines the attributes of each abutting use in an effective transitional and buffering manner.

I find that the design commitments made by the owner to incorporate sound-mitigating design elements, the legal protection afforded to DPA uses by legal arrangements described in the boundary report,⁸ and modified below, that prohibit the owner(s) and lease holders from objecting to potential impacts from industrial uses, and the fact that, when the transportation corridor is constructed, industrial traffic that now passes along all four sides of the building will pass only along the short north side, combine to provide sufficient protection to the interests of DPA uses.⁹

One commenter suggests that an Easement will more effectively protect the rights of existing and future DPA uses than the Restrictive Covenant proposed by the owner of the Nancy Sales Property.¹⁰ I agree, and have incorporated a condition to that effect in my designation decision (see below).

Several commenters suggest that the proposal to modify the DPA boundary in support of a major improvement in transportation infrastructure is flawed by the lack of conditions that would guarantee construction of the truck and rail route. The significance of the improvement bears strongly on my decision. The Boston Redevelopment Authority has determined that the transportation corridor will “improve roadway connections for truck transport [through and within the DPA]”, and will improve the quality of life for the neighborhood that abuts the DPA.¹¹ Community concerns are relevant because neighborhood objection to industrial traffic manifests itself in community opposition to the operation of DPA businesses themselves, to the detriment of state policy goals to protect maritime commerce. The Massachusetts Port Authority has determined that the transportation corridor represents a “unique opportunity to support economic development through the...enhancement of maritime industrial activity within [the] DPA.” Massport further asserts that the industrial transportation corridor will decrease the cost of handling freight and facilitate more efficient port operations, help attract new DPA business, help maintain existing businesses, and reduce environmental and community concerns.¹²

CZM’s own analysis indicates that a dedicated transportation corridor will provide substantial and long-term benefits to the viability and sustainability of current and future maritime industrial uses in the DPA. The boundary report finds that the corridor will enhance the potential of the DPA to attract new and support existing business by providing a direct truck route to Interstate 93 via Sullivan Square and a rail

⁸ See *Boundary Report, op. cit.*, p. 42

⁹ See *Boundary Report, op. cit.*, p. 42.

¹⁰ See *Exhibit A*, letter from Erica P. Bigelow, *op. cit.*

¹¹ *Harborpark Plan, City of Boston Municipal Harbor Plan*, 1990, p. 10.

¹² *Application for Funding by Massachusetts Port Authority to Seaport Advisory Council*, September 17, 2002.

connection to the regional and interstate rail network. Finally, as both the City and Massport conclude, and as was expressed to CZM by the residents of Charlestown, a dedicated transportation corridor responds directly to the concerns raised by the adjacent neighborhoods and the larger Charlestown community by removing approximately 70,000 truck trips per year from Medford Street.¹³

The significance of the transportation corridor to the interest of the DPA is manifest. However, the financial and political complexity of studying, designing, funding, constructing, and operating the truck and rail route are formidable, and have, to date, frustrated efforts to successfully make the new route a reality. I cannot require development of the transportation corridor by fiat, but can, in the interest of the DPA itself, and in support of the purposes for which it was established, leverage the development process by creating conditions that remove institutional impediments by formally structuring and meaningfully supporting a coordinated study and design process. My action will result in the completion of a designed and permitted industrial transportation corridor.

One commenter suggests that the prospect of developing the corridor will be improved by placing the study and design of the transportation corridor in the permitting context, and recommends using Massachusetts Environmental Policy Act (MEPA) review as the mechanism by which to do so. I agree, and have incorporated a condition to that effect in my designation decision (see below).

Finally, one commenter disagrees with the proposed use of discretionary authority to effect the modification of the boundary as proposed, arguing that such discretion exceeds my regulatory authority.¹⁴ I conclude otherwise, that the regulatory language in question is clear, and authorizes me to “qualify, limit, or otherwise condition the designation decision in any manner that serves the purposes of these regulations....”¹⁵

The boundary report carefully acknowledges that the regulations do impose important limitations on my discretion. First, the report states that the designation standards at 301 CMR 25.04, while not dispositive, do establish a presumption of suitability for a property to remain in or be removed from a DPA. As stated in the report, CZM “approach[es] any exercise of discretionary authority with care, recognizing that the purpose of the regulations establishes an extraordinarily high threshold to be met by any action that proposes to materially affect the outcome of the review...under [the designation standards at] 301 CMR 25.04.”¹⁶

Second, the boundary report develops policy guidance for those limited circumstances in which my discretion to condition a boundary review, such as the present case, will achieve results that are of substantially more benefit to the DPA than may be

¹³ See discussion at **Truck and Rail Access**, *Boundary Report*, *op. cit.*, pp. 10-12 and pp. 39-40.

¹⁴ Letter from Stephanie Pollack and John A. Pike, Conservation Law Foundation, to Tom Skinner, Director, CZM, November 8, 2002.

¹⁵ 301 CMR 25.03(5)

¹⁶ See *Boundary Report*, *op. cit.*, p. 39.

achieved by simply preserving the DPA land.¹⁷ In applying the clear language of 301 CMR 25.03(5), CZM is thus careful to affirm that: 1) the designation standards establish a high presumptive threshold that any proposed discretionary action must overcome; 2) the purposes of the regulations must be advanced significantly with any exercise of discretion; and 3) any discretionary action must clearly demonstrate that it will substantially improve the ability of the DPA to serve the purposes for which the it was designated.

As discussed in the boundary report¹⁸, the *Purpose* section of the regulations describes three essential infrastructure components critical for the on-going viability of DPA uses: a waterway and associated developed waterfront; backland area capable of supporting industrial facilities and operations; and *transportation and public utilities similarly capable of supporting industrial operations*.¹⁹ (Emphasis added.) Given that DPA space represents a composite of the attributes of these three components, the priority to preserve space to the maximum extent practicable must be informed by the respective contributions of each of the three elements in the context of the individual DPA under review. In this boundary review we are presented with the opportunity to significantly improve the transportation infrastructure of the DPA that will in turn increase the ability of the DPA to foster and support maritime industry, at a cost of a 6% diminution of the overall DPA land area.

In applying the policy guidance described above, and as discussed in the boundary report and described above, I conclude that the benefit to the DPA of the proposed boundary modification is substantial and will clearly advance the Commonwealth's interest for which the DPA was originally established.

III. Designation Decision

In conclusion, I determine, pursuant to 301 CMR 25.04(2), that the DPA boundary shall be immediately redrawn to exclude the land area of the Schrafft Center as illustrated at **Figure 9** of the boundary report, attached.

Further, pursuant to 301 CMR 25.04, I determine that the boundary of the DPA shall not be redrawn to exclude the properties at 425 Medford Street and 30-50 Terminal Street, the Charlestown Commerce Center.

For the properties at 465 Medford Street and the Nancy Sales Building, this designation decision hereby modifies the recommendations of the boundary report in two ways. First, both the Memorandum of Understanding and the contract to study and design the transportation corridor need to include a provision requiring that, if necessary, an Environmental Notification Form (ENF) is filed with MEPA subsequent to the

¹⁷ "If an action taken under 301 CMR 25.03(5) can be clearly demonstrated to substantially improve the capacity of the DPA to serve the interest of the Commonwealth for which it was originally designated, such action is warranted." *Ibid.*

¹⁸ See *Boundary Report, op. cit.*, p. 4.

¹⁹ 301 CMR 25.01(2)

feasibility study but prior to development of the final design. The cost of the ENF shall be included in the feasibility and design work to be underwritten by the owners of the Flatley and Nancy Sales Properties. The cost of materials developed for MEPA review subsequent to the MEPA certificate on the ENF, if any, shall be the responsibility of the project proponent. The intent of this requirement is to ensure that analysis and design of the transportation corridor is undertaken in the context of applicable review and permitting requirements.

Second, the owner of the Nancy Sales has previously agreed to provide a Restrictive Covenant, referred to in the boundary report that protects the interests of industrial uses from objection by the owner(s) of or at the Nancy Sales Property. After careful review, I determine that the Easement referenced above, and attached hereto, more appropriately protects the interests of the DPA; accordingly, at this time, I expect that the Easement will be executed in place of the Restrictive Covenant.

Given the foregoing, and pursuant to 301 CMR 25.03(5) and as described in the boundary report,²⁰ I determine that the DPA boundary shall be redrawn as illustrated at **Figure 10** of the report (attached) to exclude the Flatley property at 465 Medford Street at the time the agreement with the Executive Office of Transportation and Construction or its designee has been executed; after financing for the engineering studies and MEPA review is placed in escrow and a notice to proceed issued to an engineering firm to study and design the corridor; after execution of a deed restriction prohibiting future residential development of the property; after a formal acknowledgement that portions of land outside the existing railroad right-of-way will be made available for the transportation corridor has been received; and after the MOU described in the boundary report has been executed.

Given the foregoing, and pursuant to 301 CMR 25.03(5) and as described in the boundary report,²¹ I determine that the DPA boundary shall be redrawn as illustrated at **Figure 10** of the report (attached) to exclude the Nancy Sales property at the time the agreement with EOTC or its designee has been executed; after financing for the engineering studies and MEPA review is placed in escrow and a notice to proceed issued to an engineering firm to study and design the corridor; after execution of the Easement described above; after a demonstration that the lease/ownership waiver of objection described above has been implemented; and after the MOU described in the boundary report has been executed.



Thomas W. Skinner, Director
Executive Office of Environmental Affairs
Office of Coastal Zone Management

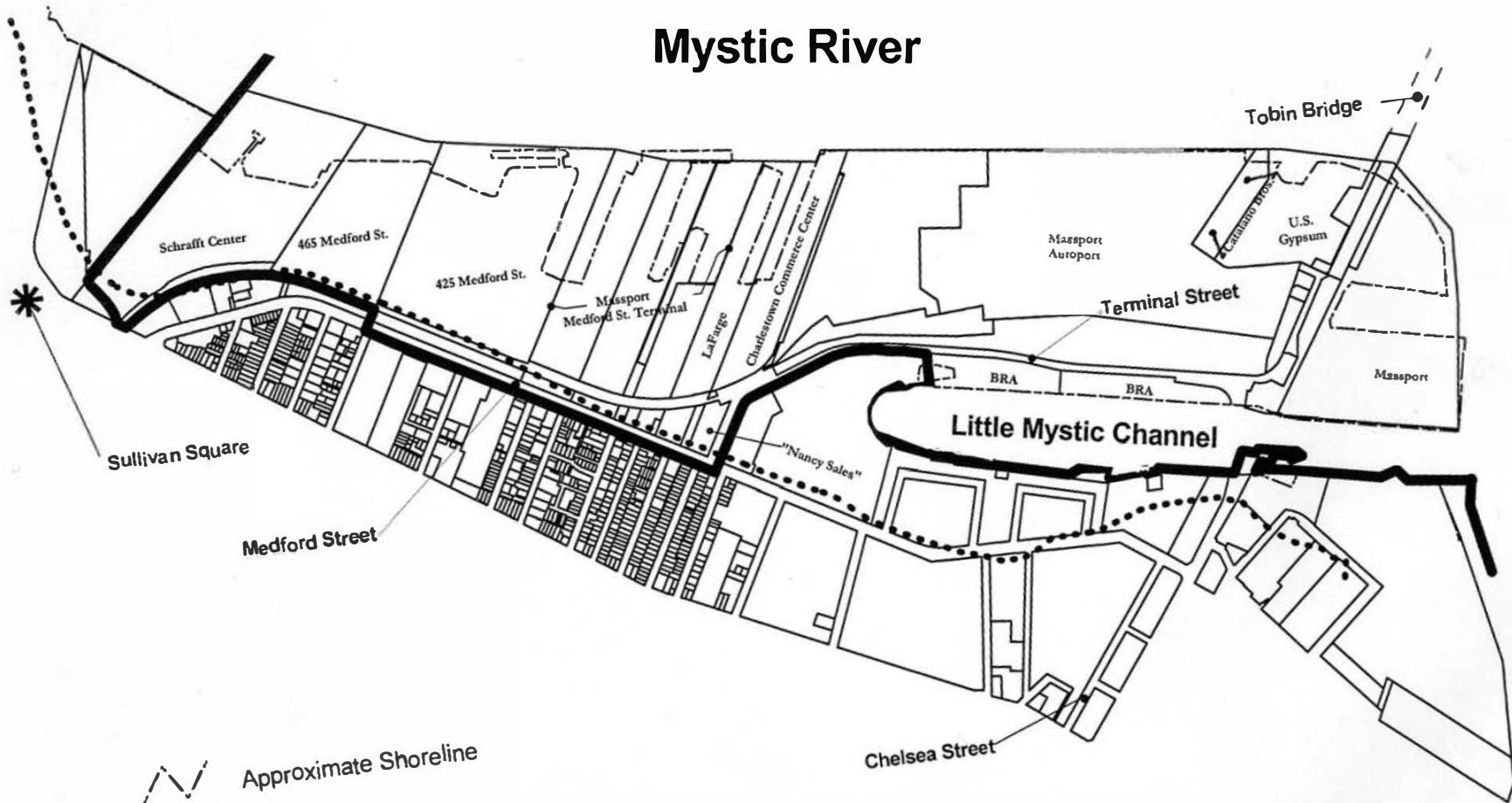
12-16-02

Date

²⁰ See *Boundary Report, op. cit.*, pp. 41-42.

²¹ See *Boundary Report, op. cit.*, pp. 42-43.

Mystic River



Approximate Shoreline

Approximate Parcel Line
(City of Boston Assessors Maps)

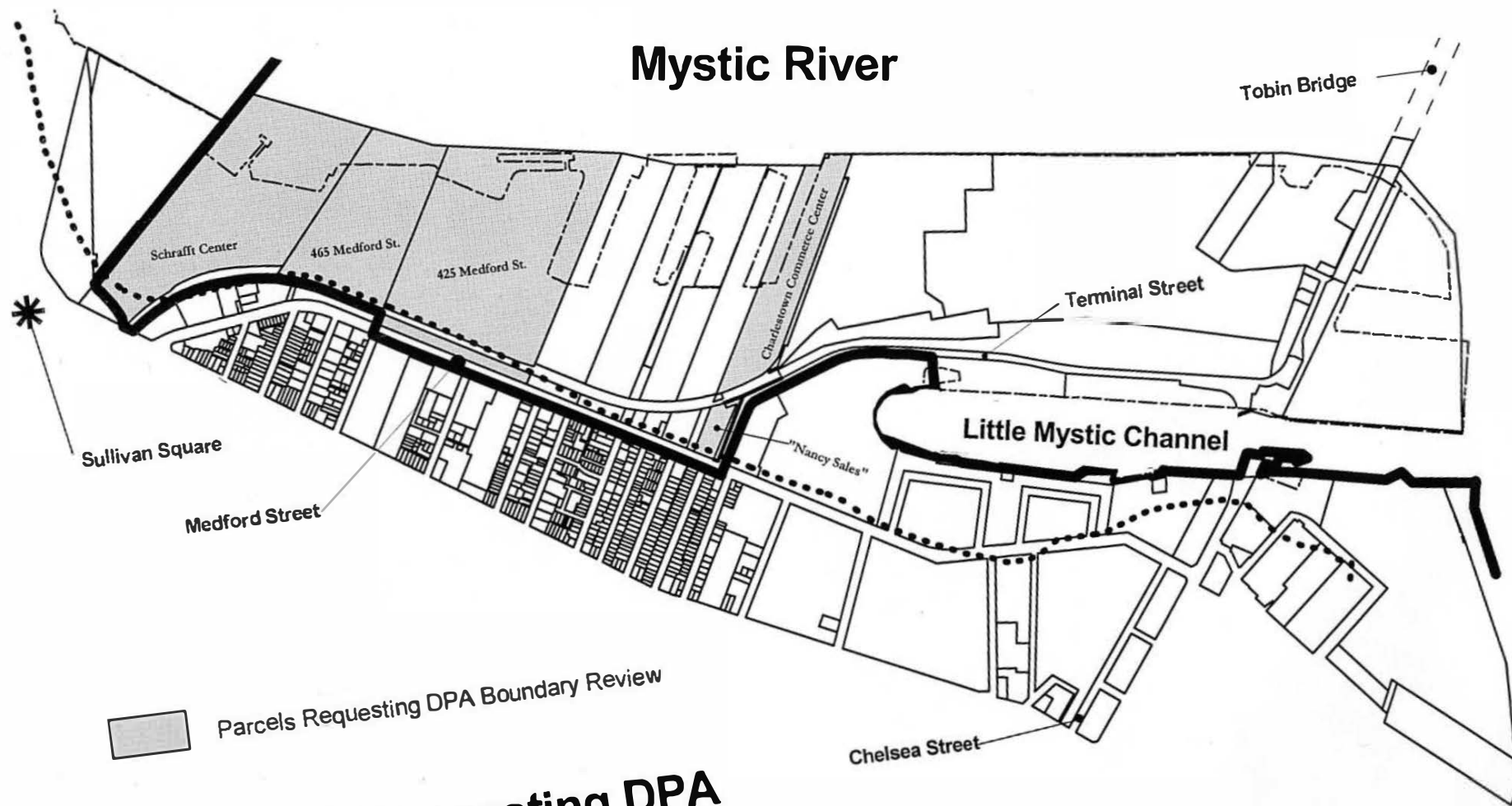
Approximate DPA Boundary Line

Historic High Water Line
(Approximate Location)



**Mystic River DPA
- Charlestown -
Figure 1**

Scale: 1" = 800' +/-






**Properties Requesting DPA
Boundary Review**

Figure 2

Scale: 1" = 800' +/-





-  Approximate Shoreline
-  Approximate DPA Boundary Line
(Modified to reflect removal of Schrafft Center)
-  Approximate Parcel Line
(City of Boston Assessors Maps)

Scale: 1" = 800' +/-



Figure - 9
Mystic River DPA
- Charlestown -
Modified to reflect removal of Schrafft Center

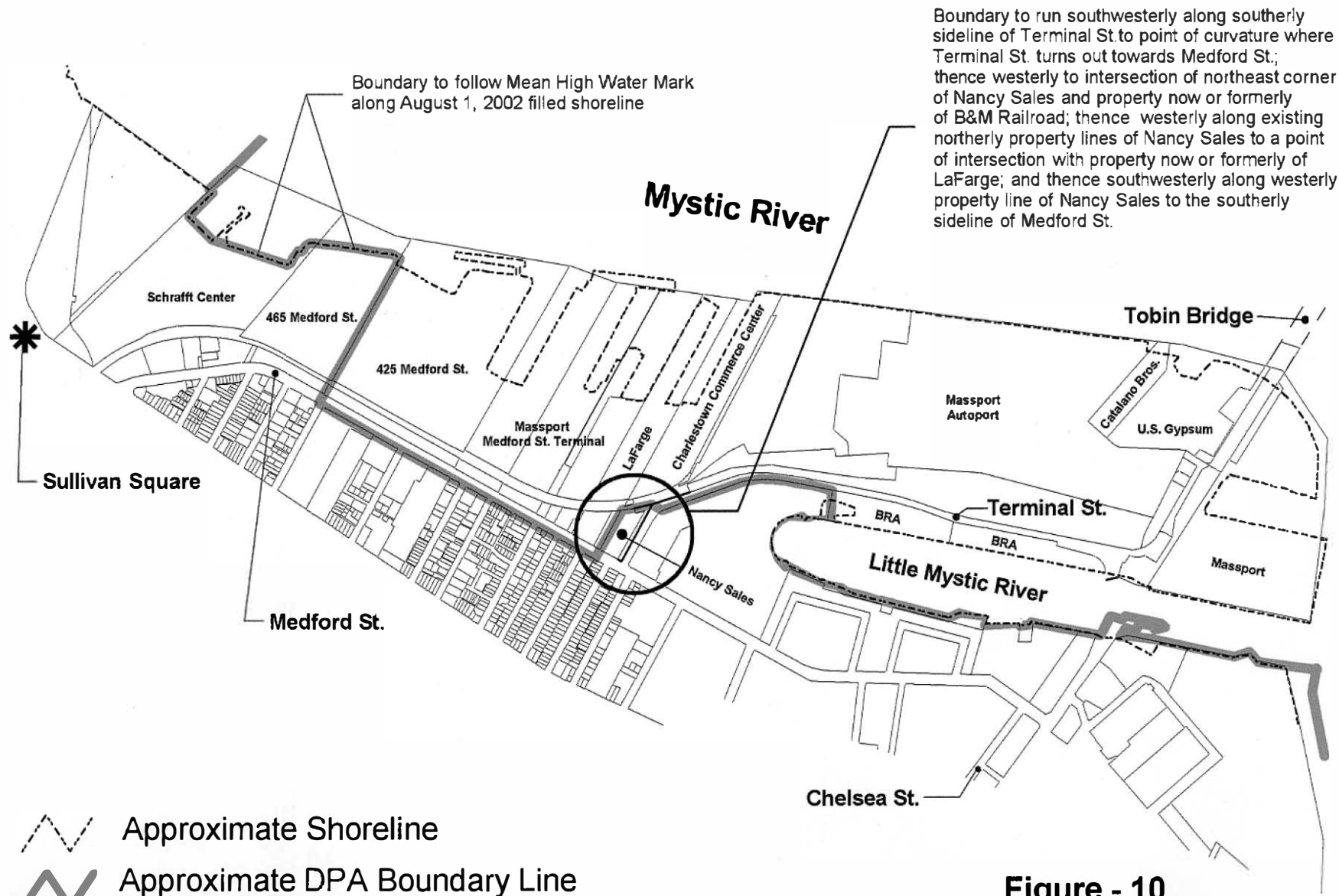


Figure - 10
Mystic River DPA
- Charlestown -

Modified to reflect removal of Schrafft Center, 465 Medford St., and Nancy Sales properties

Scale: 1" = 800' +/-



GRANT OF EASEMENT

_____ of _____ and its successors or assigns hereinafter referred to as the "Grantor", hereby grants to the Commonwealth of Massachusetts, US Gypsum Company, Catalano Brothers, LaFarge Cement Company [other record owners of all lots in the DPA] , and their successors or assigns, hereinafter referred to as the "Grantees", with QUITCLAIM COVENANTS, the Easement hereinafter described.

WITNESSETH:

WHEREAS, "Grantor" is the owner, in fee simple, of property more particularly described in Book____ Page _____, and referred to hereinafter as the "Property", also known as the Nancy Sales Building, [street address], which Property [*depending on status at time of grant either is a part of or adjoins*] the Charlestown Shore of the Mystic River Designated Port Area, as established by the Commonwealth of Massachusetts, acting by and through its Office of Coastal Zone Management (hereafter the "DPA")

WHEREAS, the Commonwealth of Massachusetts owns property in the DPA, more particularly described in Book____ Page _____, and shown as Lot _____ on a [plan to be prepared and attached]

WHEREAS, US Gypsum Company owns property in the DPA, more particularly described in Book____ Page _____, and shown as Lot _____ on a [plan to be prepared and attached]

WHEREAS, Catalano Brothers owns property in the DPA, more particularly described in Book____ Page _____, and shown as Lot _____ on a [plan to be prepared and attached]

WHEREAS, LaFarge Cement Company owns property in the DPA, more particularly described in Book____ Page _____, and shown as Lot _____ on a [plan to be prepared and attached]

[other owners]

WHEREAS, Grantor has requested approval to construct certain improvements to the Nancy Sales Building which will convert the property to non-maritime residential use; and

WHEREAS, Grantees and the DPA will be adversely impacted by the construction of such improvements; and

WHEREAS, Grantees have agreed not to object to such approvals, provided that the Grantor conveys to Grantees the within noise and vibration easement;

NOW THEREFORE, for valuable consideration, receipt of which is hereby acknowledged, Grantor hereby grants and conveys unto Grantees, for the use and benefit of the Grantees and the public, a perpetual easement on, over, across, and upon the Property, more particularly described as follows:

1) THE EASEMENT grants to Grantees, their licensees, tenants, business invitees and the public, the perpetual right, easement and privilege of passage of all lawful vehicular traffic, including trucks, tractor-trailers and semi-trailers, at all times – 24 hours a day, 7 days a week, and a perpetual easement for all noise and vibration appurtenant thereto which may otherwise constitute a nuisance or trespass resulting directly or indirectly therefrom on or within the described Property and air space, and which result directly or indirectly from the ground operations of vehicles at, over, across, on or in the vicinity of the Property by the Grantees, now and in the future, and regardless of whether arriving, departing or enroute, and recognizing that the quantity of such operations may increase in the future.

2) THE EASEMENT herein granted on, over, across, and upon the above described real Property encompasses the air space above the surface of Grantor's Property having the same boundaries as the above-described Property and extending from the surface upwards to the limits of the atmosphere of the earth.

3) THIS EASEMENT shall run with the land and be appurtenant to and for the benefit of all of the real property of the Grantees, comprising and known collectively as the DPA, and such other additional property or interest therein as shall be subsequently acquired or designated from time to time by the Office of Coastal Zone Management or its successors and assigns as constituting a part of the DPA, and the Easement shall be in gross for the benefit of Grantees and all other persons and entities who directly or indirectly use the easement as a result of any type of use of the property and facilities constituting the DPA, including ground and port operations.

4) All of the uses provided for in this easement shall be without any liability of Grantees or of any other person or entity entitled to the benefits of this easement for emotional injury to persons, animals or any other living thing, the diminution in value of any personal or real property, and discomfort or interference with the any media device, including televisions, stereos, radios or other audio equipment by, from, or arising from, noise and vibration generated from the operations described hereinabove and of truck and tractor-trailer traffic of all types. Except for damage to personal property located inside the building on the Property that occurs as the result of vibration, this grant expressly does not exclude claims by the Grantors or those claiming under them for physical or personal injury directly caused by any trucks utilizing the easement which does actual physical damage to the property or persons.

5) TO HAVE AND TO HOLD said easement in perpetuity unto the said Grantees, and their successors and assigns, until the Grantees' properties, the DPA, and all industrial uses therein shall be permanently abandoned and shall cease to be used for commercial, industrial or maritime-industrial purposes.

6) The Grantor, for itself, its heirs, successors, and assigns, does hereby covenant that it is lawfully seized of an indefeasible estate in the herein described property; that it has the right to grant and convey the estate, interest and easement herein conveyed; and that it will specially warrant and defend unto the Grantees and their assigns, forever, the quiet and peaceable use and enjoyment of the herein granted easement.

EXECUTED under seal this _____ day of _____, 2002.

COMMONWEALTH OF MASSACHUSETTS

, ss.

_____, 20__

Then personally appeared the above named * and acknowledged the foregoing as the free act and deed of *, before me

Notary public:

My commission expires: