**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

July 15, 2016

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In the Matter of OADR Docket No. 2016-004

Wynn MA, LLC DEP File No. Waterways

Application No. W15-4480-N

Everett, MA

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**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The City of Somerville, by its mayor, Joseph A. Curtatone, has brought this appeal challenging the Written Determination and Draft Conditions (“Chapter 91 License”) that the Boston Office of the Massachusetts Department of Environmental Protection (“the Department”) issued to Wynn MA, LLC (“Wynn”) on January 22, 2016, pursuant to the Massachusetts Public Waterfront Act, G.L. c. 91 (“Chapter 91” or “c. 91”), the Waterways Regulations at 310 CMR 9.00 and the Massachusetts Environmental Policy Act, M.G.L. c. 30 § 61. The Chapter 91 License authorized Wynn’s proposed remediation and redevelopment of the former Monsanto Chemical Plant property located on the shores of the Mystic River in Everett, Massachusetts into a resort casino (“the proposed project” or “resort casino”). Somerville contends that the Department erred when it issued the Chapter 91 License to Wynn, and requests that the Chapter 91 License be vacated and remanded to the Department’s Waterways program for further consideration of the issues raised in this appeal. Wynn and the Department dispute Somerville’s claims and request that the Chapter 91 License be affirmed. Wynn has also moved to dismiss Somerville’s appeal, contending that Somerville lacks standing to bring the appeal because it is neither an “aggrieved person” nor an “affected municipality” as those terms are defined by 310 CMR 9.17(1)(b) and (d). Somerville contends that it has standing as both.

In its appeal, Somerville raised a number claims of error by the Department in issuing the Chapter 91 License, including claims involving air pollution, traffic, and actions taken by the Commonwealth’s Secretary of Energy and Environmental Affairs that are relevant to Wynn’s casino project but not within the scope of this Chapter 91 licensing process. Those claims were dismissed.[[1]](#footnote-1) The issues that remained for a hearing were as follows:

1. Whether Somerville has standing to appeal either as an “affected

municipality” or as an “aggrieved person”; and

2. If Somerville has standing:

(a) whether the project as proposed will not significantly interfere with navigation in the Mystic River;

(b) whether the Department correctly determined that the casino project serves a proper public purpose; and

(c) whether the Department properly determined that an extended license term of 85 years is appropriate.

I conducted an evidentiary Adjudicatory Hearing (“the Hearing”) on June 2, 2016 to resolve Wynn’s claim that Somerville lacks standing to appeal and Somerville’s claims that the Chapter 91 License issued by the Department is invalid. The parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions. The witnesses who appeared at the Hearing were cross-examined under oath on the written testimony they had filed prior to the Hearing.

After considering the evidence presented at the Hearing and in the Administrative Record, as well as the parties’ arguments and the applicable law, I recommend that the Commissioner issue a Final Decision finding that Somerville has standing to challenge the Chapter 91 License as an “aggrieved person” and approving the Chapter 91 License with the following modifications:

(1) a modified license term of 50 years (from the present 85 year term), (2) modification to Special Waterways Condition 4 to require a minimum of 6.38 acres of open space network, and (3) an additional condition requiring Wynn to operate its ferry service for the duration of the license term. I also recommend that the Commissioner consider requiring Wynn to contribute sufficient funds to enable the Commonwealth’s Department of Conservation and Recreation (“DCR”) to establish a fishing pier along the eastern embankment of the DCR property south of the Amelia Earhart Dam and a canoe/kayak launch in Gateway Park north of the Amelia Earhart Dam. These projects would complement the multi-purpose dock at the casino site and provide additional activation of the Mystic River waterfront and greater access to the watersheet for smaller crafts, consistent with the City of Everett’s Municipal Harbor Plan.

**REGULATORY FRAMEWORK**

The regulatory context of this case was recently described in the case In the Matter of The Landing Group, Inc., Docket No. 2014-025, 2015 MA ENV LEXIS 85 (October 27, 2015), adopted by Final Decision, 2015 MA ENV LEXIS 84 (October 29, 2015):

“Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property.” Boston Waterfront Development Corporation v. Commonwealth, 378 Mass. 629, 631 (1979). Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters. [Id. at 632;](https://advance.lexis.com/document/?pdmfid=1000516&crid=57899060-ee1c-4fd7-9824-02b521570ac9&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5HCH-WFY0-00FG-V2ND-00000-00&pddocid=urn%3AcontentItem%3A5HCH-WFY0-00FG-V2ND-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr2&ecomp=14qhk&earg=sr2&prid=243e7302-d3ae-42eb-901e-996c6711da86) Arno v. Commonwealth, 457 Mass. 434, 449 (2010). Thus, "[a]t common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown [and eventually the Massachusetts Bay Colony, followed by the Commonwealth] but subject to the rights of the public to use the coastal waters for fishing and navigation.” Opinion of the Justices, 365 Mass. 681, 684 (1974).

“In the 1640's, faced with an underdeveloped coastline and a need for wharves to promote commerce in the colonies, 'the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line,' i.e., to include tidal flats.” Arno, 457 Mass. at 449 (quoting Opinion of the Justices, 365 Mass. at 685). However, “this ownership always had strings attached,” Boston Waterfront, supra at 637, because the Colonial Ordinance of 1641-1647, which authorized the transfer of title to private individuals, “expressly specifie[d] that the public [was] to retain the rights of fishing, fowling and navigation" in the area between the high and low water marks, otherwise known as tidal flats.” Arno, (quoting Opinion of the Justices, supra at 685).

This body of law that retains public access rights is generally known as the public trust doctrine. Matter of Boston Boat Basin, Docket No. 2012-008 and 009, Recommended Final Decision (October 18, 2013), Adopted by Final Decision (November 14, 2014). Under the public trust doctrine the Commonwealth holds tidelands in trust for public use. See Boston Waterfront, 378 Mass. at 629; Arno, 457 Mass. at 449. Tidelands generally include flowed tidelands below the high water mark and filled tidelands below the historic high water mark. See [310 CMR 9.02](https://advance.lexis.com/document/?pdmfid=1000516&crid=57899060-ee1c-4fd7-9824-02b521570ac9&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5HCH-WFY0-00FG-V2ND-00000-00&pddocid=urn%3AcontentItem%3A5HCH-WFY0-00FG-V2ND-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr2&ecomp=14qhk&earg=sr2&prid=243e7302-d3ae-42eb-901e-996c6711da86). The traditional uses of tidelands, called water-dependent uses, include fishing, fowling, and navigation. Moot v. Department of Environmental Protection, 448 Mass. 340, 342 (2007); Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 198 (2000). The legislature delegated authority to the Department under Chapter 91 to “preserve and protect” the public's rights in tidelands by allowing only water-dependent uses or another proper public purpose. G.L. c. 91, § 2; See Fafard, 432 Mass. at 200. The Department is not authorized, however, to relinquish public rights; only the legislature may do that, and only under prescribed circumstances in furtherance of its fiduciary role. Moot, 448 Mass. at 352; Opinion of the Justices, 383 Mass. at 905. The regulations that govern this case are the Waterways regulations, 310 CMR 9.00.

**BACKGROUND/FACTS**

Because the casino project will be built on land subject to the Massachusetts Public Waterfront Act, M.G.L. c. 91, Wynn was required to obtain the Chapter 91 License from the Department authorizing the casino project at issue. See Jurisdictional Determination, (JD13-3943), dated July 29, 2013. Wynn filed a Chapter 91 License Application with the Department on August 24, 2015. A Public Notice of the license application was published in the Boston Herald on September 6, 2015 and the Department conducted a public hearing on the application on September 24, 2015. A public comment period remained open until October 9, 2015. Somerville Mayor Curtatone submitted written comments on the application to the Department on October 9, 2015.

The City of Somerville is located across the Mystic River from Everett. At its closest point, Somerville’s municipal boundary in the Mystic River is approximately 76 feet from the project site. Somerville has jurisdiction over those portions of the Mystic River within its municipal boundary. The entirety of Wynn’s casino project will be constructed within the municipal boundaries of the City of Everett.

The Department issued the Chapter 91 License to Wynn on January 22, 2016. The Chapter 91 License authorized Wynn’s proposed remediation and redevelopment of the former Monsanto Chemical Plant property on the shores of Mystic River in Everett, Massachusetts into a resort casino. The Mystic River is to the south of the casino site and an embayment is to the east. The resort casino would be located on flowed and filled tidelands of the Mystic River. Determination at 1, ¶ 2. The total project site is 29.5 acres, 19.04 acres of which are jurisdictional tidelands comprised of 10.74 acres of previously authorized filled tidelands and 8.3 acres of flowed tidelands. Id. The proposed project includes the following elements:

(1) remediation pursuant to M.G.L. c. 21E and the Massachusetts Contingency Plan (“MCP”), 310 CMR 40.000 of a contaminated waste site which the Department identifies as disposal site 3-13341;[[2]](#footnote-2)

(2) construction of a 26-story hotel tower with 629 guest rooms surrounded by a 1-2 story podium building;

(3) construction of a 3-level underground parking garage;

(4) development of 6.38 acres of publicly accessible open space along the Mystic River, which will include internal roadways, landscaping and plantings, connecting walkways, lighting, an overlook with railings, a shade pavilion, an event lawn, and a 20-foot wide publicly accessible waterfront walkway known as “Harborwalk”, which will include lighting, landscaping, benches, railings, trash receptacles, bike racks, and way-finding and interpretive signs;

(5) the interior ground-level of the resort casino will consist of Facilities of Public Accommodation (“FPA”)[[3]](#footnote-3) including casino gaming; restaurants and bars; retail; convention, event and meeting spaces; atrium and lobby; and public restrooms;

(6) maintenance dredging of the navigational channel; and

(7) installation of a multi-purpose pile-held floating dock facility to serve water shuttles, water taxis, and transient recreational vessels.

As described in the Determination, the proposed project also includes placement of 32,000 cubic yards of new fill on filled tidelands located landward of the mean high water mark. On the waterside, the proposed project also includes removal of existing abandoned structures currently in the flowed tidelands; placement of 1,990 cubic yards of fill seaward of the mean high water mark; installation of a sheet pile bulkhead; installation of a stone riprap slope; new stormwater outfalls; and restoration of a salt marsh and coastal bank as a “living shoreline.” Determination at 2. The resort casino will be located within the Development Site Harbor Planning Area of the City of Everett’s Municipal Harbor Plan (“MHP”). Id. at 3.

The Department determined that the casino project consisted of uses that were both water-dependent and nonwater-dependent and reviewed Wynn’s Chapter 91 License application as a nonwater-dependent project in accordance with 310 CMR 9.12(1).[[4]](#footnote-4) Nonwater-dependent uses at the casino project include the use of filled Private Tidelands for restaurants, retail shops, parking, a hotel, underground utilities and the gaming casino. Water-dependent uses at the casino project include the use of filled tidelands for public access and enjoyment of waterfront open space, shoreline stabilization, docking facilities, dredging of the navigation channel, and discharge and conveyance of stormwater.

The Department determined that as conditioned the casino project complied with all the applicable standards of the Waterways regulations, including those provisions for nonwater-dependent uses at 310 CMR 9.51 and 9.52. Because no activities, fill or structures are planned within the limited Commonwealth Tidelands portion of the property, the Department determined that 310 CMR 9.53 did not apply.[[5]](#footnote-5) The Department determined that the casino project complies with the Decision of the Commonwealth’s Secretary of Energy and Environmental Affairs on the City of Everett Central Waterfront Municipal Harbor Plan; that the project met the setback requirement for Facilities of Private Tenancy (“FPT”) since there are no FPT nor any ground level parking within 100 feet of the project shoreline; and the project meets the lot coverage requirements of 310 CMR 9.51(3)(d) by providing more than 50% of open space on the project site that is within chapter 91 jurisdiction.

The Department determined that Wynn designed the building to address sea level rise as required by 310 CMR 9.37(2), and additionally, though not required by the regulations, Wynn will be locating critical infrastructure and HVAC equipment above the ground floor elevation, and is designing service areas and the underground garage entryways to prevent the intrusion of flood waters.

The Department determined that as conditioned the casino project serves a proper public purpose that provides a greater benefit than detriment to the rights of the public in the tidelands as required by 310 CMR 9.31(2)(b). The Department’s basis for this determination included consideration of the following elements of the project: the remediation of a vacant, contaminated site with an inaccessible waterfront and dormant watersheet into an active year-round waterfront destination that will provide 6.38 acres of publicly accessible open space; a 29,000 square foot waterfront walkway (1,450 feet in length along the shore of the river, and 20 feet wide for its entire length) which will include lighting, landscaping, benches, railings, trash receptacles, bike racks, and way-finding and interpretive signs; a multi-purpose floating dock that will accommodate water transportation vehicles, police and fire boats, and provide publicly-available docking spaces; and Facilities of Public Accommodation (“FPA”) on the entire ground floor of the casino building, even though they are not required because the building is located on filled Private Tidelands.

The Department issued the Chapter 91 License with an extended term of 85 years because it determined that the requirements of 310 CMR 9.15(1)(b) for such an extended term were met with the conditions imposed and with the supporting documentation that Wynn had provided to the Department. The factors the Department considered in reaching this determination included the following: appropriateness of long-term dedication of tidelands on the casino site; consistency with state and local planning objectives as articulated in the MHP; the extent of private investment in and long-term maintenance of on-site public amenities, including commitments to reduce Inflow and Infiltration into the public sewer system; Brownfield redevelopment; accommodating sea level rise in the building design; and a commitment to achieving Gold Level LEED Certification,[[6]](#footnote-6) including putting a “green roof” on a portion of the podium building. As further basis for the extended term, the Department cited letters submitted by Wynn’s structural engineer and financing agent, attesting to the expected life of the structure and the financing requirements for the project.

The casino project will be located in an area of the City of Everett subject to that city’s Municipal Harbor Plan, titled “Everett Central Waterfront Municipal Harbor Plan” (“MHP”). The Municipal Harbor Plan was approved by the Commonwealth’s Secretary of Energy and Environmental Affairs on February 10, 2014 pursuant to 301 CMR 23.00, Review and Approval of Municipal Harbor Plans. Among the purposes of the MHP is the activation of portions of the Mystic River waterfront that have long been inactive and/or inaccessible. MHP at 1-1. Through implementation of the MHP, Everett intends to improve bicycle and pedestrian connections to and along the river. MHP at 1-1. The stated goals of the MHP are to:

1. Preserve and promote water-dependent uses where appropriate;
2. Improve public access to and use of the waterfront;
3. Activate water’s edge and watersheet;
4. Provide opportunities for water transportation and recreational boating;
5. Provide improvements and amenities to encourage the public’s use;
6. Manage/improve environmental resources, including the water quality of the Mystic and Malden Rivers;
7. Support appropriate private and public development consistent with the intent of the state waterways programs;
8. Plan for climate change and sea level rise;
9. Generate jobs/new revenues to support the local economy; and
10. Reconnect existing neighborhoods through better pedestrian and bicycle access.

MHP at 1-8 through 1-9. Everett intends to achieve these goals through the development of high quality open space, public amenities, programming in public spaces, multi-purpose docking facilities, and small boat access and fishing piers, among other things. MHP at Chapter 4.

Four witnesses testified for Somerville at the Hearing: (1) Thomas R. Hill; (2) David Fallon; (3) Robert Golledge, Jr.; and (4) M. Shawn Krantz.

1. Thomas R. Hill is a marine surveyor with over 25 years of experience in that field. In that capacity he routinely investigates marine matters involving commercial and recreational vessels, including personal injury claims, property losses and marine use issues. He has conducted over 7,500 investigations. He also has over 45 years of practical and operational experience in boating and maritime industries. He has captained vessels in the Gulf of Mexico, the Caribbean Sea, and within the coastal waterways from Maine to South Florida. In addition, he served as a mate and master of several commercial and recreational marine vessels up to 100 feet long. Mr. Hill has also been involved with professional boating associations, and with regulatory boards concerned with waterways issues, including serving as Chair of the Gloucester Waterways Commission for five years, Chair of the Gloucester Waterways Board for nine years, and a member of the Massachusetts Passenger Vessel Association for six years.[[7]](#footnote-7)

2. David Fallon is the Chief of Police of the City of Somerville, a position he has held since September 2014. He has served Somerville as patrolman, sergeant, lieutenant, and deputy chief of its Police Department. He is retired from the Air Force, and is a graduate of Western New England College and the FBI National Academy. Among his responsibilities as Chief of Police is meeting all of the City’s public safety needs.[[8]](#footnote-8)

3. Robert Golledge, Jr. is an environmental consultant focusing on environmental and public health matters including permitting of large and complicated projects. He has over 20 years of environmental regulatory experience, including within the Department as its Commissioner, Regional Director of its Central Regional Office, and approximately four to five years of direct involvement with the Wetlands and Waterways program in management, supervisory and staff-level capacities. Mr. Golledge also served as the Commonwealth’s Secretary of Environmental Affairs in 2006.[[9]](#footnote-9)

4. M. Shawn Krantz is a founding partner and managing member of Brownstone Capital, LLC, a commercial real estate consulting and investment firm. He has 33 years of involvement in the commercial real estate industry. He is involved in the acquisition and ownership of income-producing properties in the mid-Atlantic region, and since 2000 his company has been involved in the acquisition of 14 properties totaling over one million square feet. In his prior experience of 14 years with Bank of America and Banc of America Securities, he originated, structured, underwrote and/or reviewed debt on all major types of commercial real estate. His prior experience also includes work as a commercial underwriter and lender. Mr. Krantz is an adjunct faculty member and program advisor at Georgetown University, teaching Real Estate Investments. He has also taught real estate finance and real estate investment courses. He has participated in debt financing and equity structuring of over one thousand commercial properties, and has reviewed commercial and residential loan requests totaling several billion dollars. He is familiar with the criteria lenders use to evaluate lending risks and potential returns on commercial loans.[[10]](#footnote-10)

Two witnesses testified for Wynn at the Hearing: (1) Robert DeSalvio and (2) Patrick Johnston.

1. Robert DeSalvio is the president of Wynn MA, LLC and has worked on the development of Wynn’s casino project since 2014. He is responsible for strategic planning as it relates to project operations during the development phase and overseeing all aspects of the project once the development is complete. He will have direct oversight of the Wynn multi-purpose pile-held floating dock facility.[[11]](#footnote-11)

2. Patrick Johnston is a police officer in the Patrol Operations Division of the City of Everett Police Department and has worked for the department since 2000. He served in the Navy for three years and worked as a Quartermaster in the Navigation Division. He was involved in establishing the City of Everett’s Police Marine Unit. He has extensive experience as a boater on the Mystic River, including in his professional capacity and on his personal vessels, as well as in Boston Harbor and other areas of Massachusetts Bay.[[12]](#footnote-12)

Two witnesses testified for the Department at the Hearing: (1) Frank Taormina and

(2) Ben Lynch.

1. Frank Taormina is a Regional Planner in the Waterways Regulation Program of the Division of Wetlands & Waterways in the Department’s Bureau of Water Resources. He has held this position since June 2014. He holds a Bachelor’s Degree in Geography with a concentration in Economic and Environmental Planning, and a Masters Degree in Regional Planning. Prior to his tenure with the Department, he worked for the City of Salem’s Department of Planning and Community Development for eleven years, as a Planner and Conservation Agent and as a Planner and Harbor Coordinator. His responsibilities at the Department include reviewing Chapter 91 license/permit applications, policy development, participation in reviewing municipal harbor plans, among other things, and he has written and issued 37 Waterways licenses, 12 with extended license terms.[[13]](#footnote-13)

2. Ben Lynch is the Section Chief of the Waterways Regulation Program for the Department and has held this position since 2002. It is his responsibility to review and approve each Chapter 91 license and since 2002 he has reviewed and approved more than 4,000 licenses. He has a graduate degree in Landscape Architecture and Planning and worked for fifteen years in the private sector in planning, construction, and real estate development before coming to the Department in 1995. He has been directly involved in reviewing approximately 70 Chapter 91 licenses with extended license terms and has reviewed and approved more than 3000 water-dependent licenses. He also has been a regular operator of a recreational vessel for more than 25 years.[[14]](#footnote-14)

**ISSUES FOR RESOLUTION AND BURDEN OF PROOF**

As stated above, the issues for resolution in this appeal are:

**1.** Whether Somerville has standing to challenge the Chapter 91 License as either an “affected municipality” or a “person aggrieved”; and

**2.** If Somerville Petitioner has standing to challenge the Chapter 91 License:

(a) Whether the project as proposed will not significantly interfere with public rights of navigation in the Mystic River, per 310 CMR 9.35(2)(a)?

(b) Whether the Department correctly determined that the project serves a proper public purpose per 310 CMR 9.31(2)(b)?

(c) Whether the Department correctly applied 310 CMR 9.15 when it determined that an extended license term of eighty-five (85) years is appropriate?

In this case, Somerville had the burden of proving at the Hearing that the Department erred in issuing the Chapter 91 license to Wynn. In the Matter of Renata Legowski, OADR Docket No. 2011-039, Recommended Final Decision (October 25, 2012), 2012 MA ENV LEXIS 128, at 7-8 (party challenging Chapter 91 determination has burden of proof), adopted as Final Decision (November 5, 2012), 2012 MA ENV LEXIS 131. Specifically, Somerville had the burden of proving by a preponderance of credible evidence through the sworn testimonial and documentary evidence of their witnesses that the Department erred in issuing the Determination. Id.

**I. STANDING**

**A. The Jurisdictional Nature of Standing**

Standing “is not simply a procedural technicality.” Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975); In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), at 13, adopted as Final Decision (July 7, 2015). It “is a jurisdictional prerequisite to being allowed to press the merits of any legal claim.” R.J.A. v. K.A.V., 34 Mass. App. Ct. 369, 373 n.8 (1993); Ginther v. Commissioner of Insurance, 427 Mass. 319, 322 (1998) (“[w]e treat standing as an issue of subject matter jurisdiction [and] . . . of critical significance”); see also United States v. Hays, 515 U.S. 737, 115 S.Ct.2431, 2435 (1995) (“[s]tanding is perhaps the most important of the jurisdictional doctrines”).

Here, Somerville has asserted two bases for standing: (1) as “the municipal official in the affected municipality” and (2) as a “person aggrieved.” If Somerville satisfies either jurisdictional condition then the case may proceed to the merits. Conversely, if neither condition is met, then the appeal will be dismissed for lack of standing.

**B. Somerville, acting by and through its mayor does not have standing pursuant to 310 CMR 9.17(1)(d) as “the municipal official in the affected municipality”**

Pursuant to 310 CMR 9.17(1)(d), “the municipal official in the affected municipality(s) who has submitted written comments within the public comment period” has a right to an adjudicatory hearing on a decision of the Department to grant or deny a waterways license. In this case there is no dispute that Somerville Mayor Curtatone submitted written comments to the Department during the public comment period on Wynn’s Chapter 91 License application. However, neither Chapter 91 nor the implementing regulations, 310 CMR 9.00 define “affected municipality”. [[15]](#footnote-15)

In its Motion to Dismiss for Lack of Standing (“MTD”),[[16]](#footnote-16) Wynn argued that both Chapter 91 and the implementing regulations, 310 CMR 9.00, establish a special role for certain municipalities deemed to be particularly affected by the outcome of a licensing decision. Those municipalities are those “where the work is to be performed” and are afforded formal participation in the Chapter 91 licensing process. M.G.L. c, 91, §18, ¶¶ 1, 4, 5, and 8. For example, a copy of a Chapter 91 license application must be provided to the planning board of the municipality where the work is to be performed, the Department must notify specified municipal officials in the city or town where the work is to be performed, and a public hearing on a license application for a nonwater-dependent use must be held in the affected city or town. The regulations contain similar provisions. See e.g. 310 CMR 9.11(3)(c)3.b. and 9.13(1)(a)1. Wynn’s argument in a nutshell is that “affected municipalities” have special procedural rights in the Chapter 91 licensing process because the work will occur within their municipal boundaries. It is these municipalities that play an active special role, and these municipalities that have a right under 310 CMR 9.17(1)(d) to appeal the Department’s decision to issue a Chapter 91 license. Wynn contends that Somerville is not one of those municipalities because none of the work associated with Wynn’s casino project will occur in Somerville. Wynn further argues that Somerville’s status as a “surrounding community” in the context of the Gaming Act, M.G. L. c. 23K, and the Gaming Regulations, 205 CMR 1.00, are unrelated to these Chapter 91 proceedings.

The Department concurs with Wynn’s argument, and further argues that where the term “affected municipality” is not defined, the reasonable interpretation requires that it mean the municipality where the work is to be performed. Both Wynn and the Department argue that Somerville’s interpretation of the “affected municipality” provisions of Chapter 91 and the Waterways Regulations could lead to absurd results because any municipality claiming a licensed project would affect it – have an influence on – would therefore have a right to appeal a Chapter 91 license.

Somerville argues for the ordinary dictionary meaning of “affect”, and because Wynn’s Chapter 91 License will have an influence on Somerville or cause a change in Somerville, it falls within the meaning of 310 CMR 9.17(1)(d). Citing the rules of statutory construction, Somerville also argues that where “affected municipality” is used in the appeal provision but “where the work is to be performed” and “where the project is located” are used in others, the meaning should be interpreted more broadly, because a Chapter 91 license for a major project can have effects beyond the borders of the municipality in which the project will be constructed.

I find Wynn’s and the Department’s arguments persuasive that Somerville does not have standing as the affected municipality for standing purposes under 310 CMR 9.17(1)(d). The limited case law on the issue, In the Matter of Massachusetts Highway Dept. and Metropolitan District Commission, supra, supports their position. The regulation says “the affected municipality” (emphasis added), not “an” affected municipality. Context matters, and in the context of the regulations, Wynn’s and the Department’s interpretation of “the affected municipality” is more reasonable. I find as a matter of law that Somerville is not “the affected municipality” for purposes of appealing a Chapter 91 license.

**C. Somerville has Demonstrated its Standing as a “Person Aggrieved” Pursuant to 310 CMR 9.17(1)(b)**

310 CMR 9.17(1)(b) allows “any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period” to file an administrative appeal challenging the Department’s grant of a c. 91 License. The regulations define “person” as “any individual, partnership, trust, firm, corporation, association, commission, district, department, board, municipality, public or quasi-public agency or authority.” 310 CMR 9.02. An “aggrieved person” is defined as:

any person who, because of a decision by the Department to grant a license or permit, may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public and which is within the scope of the public interests protected by M.G.L. c. 91 and c. 21A.

Id.

“A ‘person aggrieved’ as that term is used in [310 CMR 9.02 and 310 CMR 9.17(1)(b)] must assert ‘a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. . . . Of particular importance, the right or interest asserted must be one that the statute . . . intends to protect.’” In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co., OADR Docket No. 2015-009, Recommended Final Decision (February 5, 2016), 2016 MA ENV LEXIS 3, at 25, adopted as Final Decision (February 25, 2016); In the Matter of Ronald and Lois Enos, OADR Docket No. WET-2012-019, 2013 MA ENV LEXIS 21, at 16-17, adopted as Final Decision, 2013 MA ENV LEXIS 20; In the Matter of Norman Rankow, OADR Docket No. WET-2012-029, 2013 MA ENV LEXIS 45, at 26-27, adopted as Final Decision, 2013 MA ENV LEXIS 79; In the Matter of Town of Southbridge Department of Public Works, OADR Docket No. WET-2009-022, Recommended Final Decision, at p. 4 (September 18, 2009), adopted as Final Decision (October 14, 2009); In the Matter of Onset Bay Marina, OADR Docket No. 2007-074, Recommended Final Decision (January 30, 2009), 16 DEPR 48, 50 (2009), adopted as Final Decision (April 1, 2009); Compare, Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 27-28 (2006) (definition of “person aggrieved” under G.L. c. 40B).

“To show standing, a party need not prove by a preponderance of the evidence that his

or her claim of particularized injury is true.” Entergy Nuclear Operations, Inc, supra, 2016 MA ENV LEXIS 3, at 27. As the Massachusetts Appeals Court explained in Butler v. Waltham, 63 Mass. App. Ct. 435 (2005):

[t]he “findings of fact” a judge is required to make when standing is at issue . . . differ from the “findings of fact” the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. “Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge.”

63 Mass. App. Ct. at 441; see also In the Matter of Hull, Docket No. 88-22, Decision on Motion for Reconsideration of Dismissal, 6 MELR 1397, 1407 (July 19, 1999) (party must state sufficient facts which if taken as true demonstrate the possibility that injury alleged would result from the allowed activity); Enos, 2013 MA ENV LEXIS 21, at 17-18; Rankow, supra, 2013 MA ENV LEXIS 45, at 28-29; compare Standerwick, supra, 447 Mass. at 37 (plaintiffs’ case appealing zoning decision cannot consist of “unfounded speculation to support their claims of injury”).

To demonstrate standing to appeal the Chapter 91 license in this case as a “person aggrieved” pursuant to 310 CMR 9.17(1)(b), Somerville was required to provide proof: (1) that it submitted written comments on Wynn’s application for c. 91 License within the public comment period and (2) put forth a minimum quantum of credible evidence in support of its claims that Wynn’s proposed Project as approved by the Department’s Determination will or might cause Somerville to suffer an injury in fact, which will be different either in kind or magnitude from any injury, if any, that the general public could suffer and which is within the scope of the public interest protected by G.L. c. 91 and G.L. c. 21A. 310 CMR 9.02; 310 CMR 9.17(1)(b). If Somerville meets that threshold, then it may proceed through the “[s]tanding . . . gateway . . . to [the] inquiry on the merits” regarding whether the Department properly issued the c. 91 License to Wynn. Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). As discussed below, Somerville met that threshold.

There is no dispute that Somerville is a municipality and therefore is a “person” for purposes of standing under 310 CMR 9.02 and 310 CMR 9.17(1)(b). There is also no dispute that Somerville’s mayor submitted written comments on Wynn’s license application during the written comment period. But the question of “aggrievment” was hotly contested in Wynn’s Motion to Dismiss for Lack of Standing and at the Hearing. Both Wynn and the Department assert in their closing briefs that Somerville failed to put forth a minimum quantum of credible evidence demonstrating that the Wynn casino project as approved by the Department might cause Somerville to suffer an injury in fact, within the scope of the interests protected by Chapter 91, that is different in kind or magnitude from any injury the general public could suffer. Wynn’s Closing Brief at 4-5; Department’s Final Brief at 2. I disagree with Wynn and the Department, and credit the testimony of Somerville’s witnesses, Mr. Hill and Chief Fallon, as it relates to this issue. I will note that the proof of standing threshold is low, Butler, supra, and as will be clear from the discussion below on the issue of interference with navigation, evidence that I find credible for purposes of standing may not carry the same weight relative to another issue.

The casino project is planned as a world-class luxury resort. DeSalvio PFT at ¶ 1. It is reported to have a development cost of $2 billion. As noted above the casino project will develop a long-vacant, inaccessible piece of property on the Mystic River in Everett with a 373-foot high hotel tower, a waterfront promenade, and over six acres of developed open space, with landscaping, lighting, an overlook into the river, and a floating multi-purpose dock. Written Determination at 1-2; DeSalvio PFT at ¶ 1, 13. One of the purposes of the project is to attract the public to the waterfront. Lynch PFT at ¶ 19-20. Boaters are participants of opportunity and pre-planning. Hill Transcript at 92.[[17]](#footnote-17) Boaters are creatures of opportunity who do things to entertain themselves, and a significant number of them act on impulse. Hill Tr. at 94. In Mr. Hill’s opinion, based on his many years of experience and his review of pictures and drawings of the planned casino project, many boaters will come by boat to the Mystic River just to see the casino from the water because the Wynn casino will be unlike anything already on the Boston-area waterfront, and the novelty aspect of the casino project will last for three or four years. Hill Tr. at 98-104; Johnston Tr. at 241.

Chief Fallon testified that Somerville’s jurisdiction in the Mystic River includes water above and below the Amelia Earhart Dam and Locks. Fallon PFT at ¶ 5. Since January 2013 the Somerville Police Department (“SPD”) has responded to thirteen incidents or requests for assistance on or about the Mystic River. Fallon PFT at ¶ 6, Exhibit A. When he became Chief of Police in 2014, Mr. Fallon tasked the SPD’s Homeland Security Unit with exploring the potential to build-out a marine unit to address the need for increased development in the area, especially Assembly Square and the Wynn casino. The casino is within 100 yards of Somerville. Fallon PFT at ¶ 7, Exhibit B. The needs of the SPD for marine capabilities in the Mystic River will increase as a result of the project, including a need to deal with intoxicated boaters. Fallon PFT at ¶ ¶ 9-10. The SPD will need to acquire a significant amount of equipment to create its marine unit. Fallon PFT at ¶ 11. The Surrounding Community Agreement between Wynn MA, LLC and the City of Somerville provides funding for only a limited portion of the cost. Fallon PFT at ¶ 12. Without additional marine law enforcement resources, Somerville will be unable adequately to address increase in public safety needs resulting from the casino project. Fallon PFT at ¶ 13. It is Chief Fallon’s responsibility to prepare for a police response to boating activities on the Mystic River relating to the Wynn casino. Fallon Pre-Filed Rebuttal Testimony (PFR) at ¶ 3. The Wynn casino will introduce new and different uses of the Mystic River as a new destination for boat traffic and no condition will prevent users of the river from entering Somerville’s jurisdictional waters. Id.

Officer Johnston testified for Wynn opposed to Somerville’s claim of standing to appeal. Officer Johnston has spent in excess of 10,000 hours travelling the Mystic River by boat. Johnston PFT at ¶ 10. There is very little boat traffic on the Mystic River Monday through Friday. Johnston PFT at ¶ 18. The area of the Mystic River where the Wynn casino will be built is a pass-through area, not a destination, with between 30 and 150 boats passing through depending on the day of the week and whether there is a holiday. Johnston PFT at ¶ 19. The Wynn dock will generate an increase in boat traffic compared to existing conditions on the Mystic River. Johnston Tr. at 247-249. It was Johnston’s opinion that boat traffic related to the casino will not enter Somerville’s water because of the navigational buoy in the river. Johnston PFT at ¶ ¶ 20, 24. He testified that if boaters stray into Somerville’s waters, Somerville has a responsibility to ensure public safety within its jurisdiction in those waters. Johnston Tr. at 254.

The evidence described above demonstrates that Somerville has public safety responsibilities within the Mystic River that might be affected by the Wynn casino. If the Wynn casino generates substantial boat traffic on the Mystic River then Somerville could suffer an injury in fact that is different in kind from any injury that might be suffered by the general public. In terms of knowledge of this specific water body, Officer Johnston has the most experience of all the witnesses who testified, with over 10,000 hours on the water. However, Mr. Hill has a greater general knowledge of boats and boating based on his extensive experience navigating his personal vessels up and down the Atlantic Coast and his professional experience investigating claims involving boats and maritime issues. I credit his testimony that boat traffic may substantially increase on the Mystic River as a direct result of the Wynn casino. It is not unreasonable to conclude that a $2 billion resort casino on the shores of a river will be something that boaters will want to come to see, even if they have no intention of going to the casino itself. Those boaters might cause sufficient traffic in the river, and may travel into Somerville’s jurisdictional water, where harm or mishaps may occur.

While I do not find Mr. Hill’s testimony persuasive as to the issue involving interference with navigation, as detailed below, I do find that his testimony together with that of Chief Fallon have provided a “minimum quantum of credible evidence” to push Somerville across the standing threshold. It is a low threshold to pass given that it is reasonable to expect that a brand new development on the scale of the Wynn casino will attract people to its waterside by boat. It is entirely plausible that many of those boaters will travel up river through the Amelia Earhart Dam and Locks, turn around, and return through and in the waters of Somerville’s jurisdiction. As Officer Johnston acknowledged, Somerville has a public safety responsibility within its waters. Protecting the public safety is an interest of Chapter 91. See 310 CMR 9.01(2). Chief Fallon has testified that Somerville requires a police marine unit to ensure the safety of the public on the Mystic River. I am persuaded by these witnesses that the Wynn casino might cause Somerville to suffer an injury in fact (financial outlay resulting from the need to police its waters) that is different in kind from that the general public might suffer (because the general public does not have public safety responsibilities).

**II. THE PROJECT AS PROPOSED WILL NOT SIGNIFICANTLY INTERFERE WITH PUBLIC RIGHTS OF NAVIGATION IN THE MYSTIC RIVER**

The standards set forth in 310 CMR 9.35 for preserving water-related public rights prohibit a project from significantly interfering with public rights of navigation in the waterway. 310 CMR 9.35(2)(a). The regulation directs the Department to find that this standard is not met when the project will “generate water-borne traffic that would substantially interfere with other

water-borne traffic in the area at present, or in the future as may be evidenced by documented projections.” 310 CMR 9.35(2)(a)1.g. A project not meeting this standard cannot be permitted. Id.; See Matter of David Fuhrmann, Docket No. 2013-037, *Recommended Final Decision*, 2015 MA ENV LEXIS 17, \*41 (February 15, 2015), adopted as Final Decision, 2015 MA ENV LEXIS 16 (April 8, 2015).

The focus of the regulation is not on whether a project results in a net increase in boat traffic, but on the impact of that boat traffic on the public’s use of the waterbody. Id. at \*42. Alleged interference that is merely an inconvenience or not based on actual facts does not constitute “significant interference.” Matter of Oliveira, Docket No. 2010-017, *Recommended Final Decision* (January 7, 2011). Whether interference with navigation is significant may depend on the type and frequency of the interference and who is experiencing it. Matter of Fuhrmann, supra, at \*63. In the present appeal, Somerville had the burden of proving by a preponderance of the evidence that Wynn’s casino project will generate water-borne traffic that would substantially interfere with other water-borne traffic in the Mystic River. While the same evidence presented may be sufficient to meet the lower threshold for standing, I find that Somerville has failed to meet its burden on the merits of this issue.

Although Somerville presented evidence from its witness, Mr. Hill, on the issue of interference with navigation, in neither its pre-hearing brief nor its closing brief does it address this issue. Wynn argued in both its pre-hearing and closing briefs that Somerville has failed to meet its burden of proof on this issue. In particular, Wynn argues that Mr. Hill’s opinion lacks a factual basis. Pointing out that Mr. Hill used as points of comparison Marina Bay in Quincy and Cape Ann Marina and Resort, Wynn argues that neither of these facilities is comparable to the Wynn dock because both are full-scale marinas with significantly more capacity than the 10 slip Wynn dock will have. Wynn argues that I should give no weight to this testimony. Wynn also argues that Mr. Hill’s calculated estimates of expected boat traffic have no basis in fact. Finally, Wynn points out that Mr. Hill as much as admitted that the Wynn project will not result in significant interference with navigation. The Department argues four points: first, that there is presently no substantial water-borne traffic in the area of the casino project; second, that Mr. Hill admitted that he had no basis for any specific prediction about the number of boats that may come to the casino; third, Mr. Hill did not testify that the Wynn dock itself would generate water-borne traffic but that such traffic would arise from boaters who came to the Wynn dock without reservations; and fourth, that it is not the Wynn dock that will generate the water-borne traffic but the amenities within the casino building.

The gist of Mr. Hill’s testimony on navigation is that the resort casino will activate not only the boating communities docked at marinas and boat clubs at locations above the project on this river, but boaters from all over New England who will travel by boat at least to see the project, and this will result in a significant increase in boat traffic in the vicinity of the casino. Mr. Hill did not do any analysis of how many people who go to casinos also own boats. Hill Tr. 25:12-15. Mr. Hill has no experience forecasting attendance at a casino. Hill Tr. 26:2-6. He has never traveled by boat through the Amelia Earhart Dam and Locks. Hill Tr. 28:21-23. He has never gone past the Wynn site by boat. Hill Tr. 29:9-15. He offered testimony that the Mystic River has a restricted channel width and shallow areas outside the channel in the area between the Wynn casino and the city of Somerville, that “pose a navigational risk and safety concern for boat traffic.” Hill PFT at ¶ 7. He also testified that the section of the river upstream of the Amelia Earhart dam and locks “is used extensively by recreational boaters.” Hill PFT at ¶ 8. The 400-600 boats that are docked and stored at the four upstream yacht clubs “may make transit through the locks to gain access to the coastal waters of Massachusetts and beyond.” Id. In his opinion, there will be a significant increase in boat traffic in the local area during and after the construction of the Wynn casino. Id. at ¶ 15. He opines that recreational boating is a destination-based activity, and the Wynn casino will draw boaters from across New England as a destination for dining shopping, gaming and other recreational activity. He compares the casino project’s impact on boating activity to Marina Bay in Quincy and the Cape Ann Marina and Resort, and opines that he expects the Wynn casino “to have a comparable and likely greater effect on the region’s maritime boating community than these two examples, which are relatively modest in size and attraction compared to the Resort Casino.” Id. at ¶ 15. In forming his opinion about the increased boat traffic to be expected, Mr. Hill predicted that with 155,000 boats in Massachusetts, and another 300,000-400,000 boats in the other New England states, if only 10% of these boats travelled to the casino there would be an additional 45,000 to 55,000 individual boat trips into an area that historically has been subject mostly to local boat traffic. Id. at ¶ 16. However, Mr. Hill did not conduct any analysis to support his prediction and I do not accord this testimony more than a little weight. Hill Tr. 50:1-5, 22-24. Mr. Hill further opined that while the casino will be a destination that draws tens of thousands of boats to its shores, the planned multi-purpose dock, which has limited capacity, is not only too small to accommodate the number of boats Wynn expects to accommodate, but is “woefully inadequate for the likely boating activity that this area will experience”. Hill PFT at ¶ 22. Boaters unable to dock at the Wynn dock will likely try to anchor in the Mystic River, resulting in heavy congestion, a confusing maritime environment and interference with public navigation. Id. at ¶ 23. With no comparable attraction on the Boston waterfront, the Wynn casino will, in Mr. Hill’s opinion, result in a change in the use of the waterways around it, and it is likely that a significant portion of the New England boating community will come by boat to see the Wynn casino. Hill PFR at ¶ 9.

While Mr. Hill’s testimony may have been enough to push Somerville across the standing threshold, the preponderance of the evidence demonstrates that the casino project will not significantly interfere with navigation. The testimony of Wynn’s witness, Officer Johnston, was persuasive on the issue. Johnston PFT at ¶ 29. Indeed, notwithstanding his testimony, Mr. Hill as much as conceded the claim when he testified that “[n]owhere in my Pre-Filed Direct testimony do I claim that the project will ‘significantly interfere with the public right of navigation’… it is not a prediction that I can make based on the information available to me.” Hill PFR at ¶ 2. Because “significant interference” or “substantial interference” is the standard, Mr. Hill’s failure to conclude that the project will “generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or in the future as may be evidenced by documented projections” limits the value of his testimony. More importantly, even without Mr. Hill drawing this conclusion himself, I do not give much weight to his evidence on the issue for the following reasons.

While Mr. Hill’s specific experience with the Mystic River is limited, and he observed the site of the Wynn casino on only three occasions, all in preparation for this case, he does have significant experience in the maritime industry that qualifies him to offer his opinions. However, I find his comparisons of the Wynn casino and its dock to the facilities at Cape Ann and Quincy Bay not to be apt comparisons. As detailed in the testimony of Officer Johnston, those facilities are significantly larger, with Cape Ann having 265 slips and Quincy Bay having 686 slips. In addition, both facilities are full-service marinas, offering services for boaters that will not be offered by Wynn. As the Department points out in its brief, the Wynn dock is barely a marina as that term is defined in the regulations. Further, on cross-examination, Mr. Hill compared the anticipated experience of New England boaters with his own experience traveling south to Florida by boat by way of Atlantic City. The available marine facilities near to the casinos in the Marina District in Atlantic City are quite significant, with the Frank S. Farley Marina, located at the Golden Nugget Casino Resort, offering 630 floating slips for boats up to 300 feet long, and providing hook ups for water, cable and electricity. The marina at Harrah’s, when it existed, had 65 slips and could accommodate boats up to 125 feet long.[[18]](#footnote-18) To compare these marinas to the Wynn dock is to compare apples and bananas. The marinas used by Mr. Hill for comparison are not analogous to what Wynn proposes to build. His testimony is largely speculative and not based on actual data from which he could draw his conclusions. A few conversations with people who own boats and stated to Mr. Hill that they intended to visit the Wynn casino is not persuasive. Therefore, I do not accord this testimony much weight. It is hard to imagine that boaters would travel to a destination without knowing in advance what type of facility might be available to accommodate them. All of Mr. Hill’s reference points were designed to attract and service large numbers of boats by offering full-service marine services. Wynn’s dock will accommodate water traffic that plans to come its way, but it is not designed as a “destination for boaters” as Mr. Hill believes. I do not find the Wynn dock to be comparable to either the two Massachusetts marinas or Atlantic City’s casino-related marina.

While there is no doubt that the Wynn resort casino will attract boaters, as detailed above, Wynn has not designed its multi-purpose dock as a full-scale marina intended to attract and service throngs of boaters to the casino. Rather, consistent with the City of Everett’s Municipal Harbor Plan, Wynn has designed a multi-purpose docking facility to accommodate water transportation and recreational touch and go boating. WD at Finding 10; MHP at § 4.3.1 It is designed to remediate and activate a waterfront and watersheet that are and long have been inactive and inaccessible to the public. The measure of compliance is whether the project as proposed meets the requirements of the regulation that it not generate water-borne traffic to a degree that will substantially interfere with public rights of navigation. Mr. Hill is probably correct that the Wynn casino will be a destination for many people, but his opinion that it will be a destination for boaters to the point of significant interference with navigation is unsubstantiated with factual evidence. Mr. Hill concedes that the Wynn casino will not cause significant interference with navigation.

Countering Somerville’s claim that navigation will be significantly interfered with by Wynn’s casino project, the Department witness, Mr. Lynch, testified that the Wynn facility is a moderately-sized dock located in a cove with no similar facilities nearby and located well outside of the normal navigational routes used in this part of the Mystic River, and for those reasons the facility would not significantly interfere with navigation. Lynch PFT at ¶ 32. In Mr. Lynch’s opinion, which he bases on his observations both as a reviewer of c. 91 licenses at the Department for approximately 21 years and as an experienced operator of a recreational vessel for over 25 years, there is a direct correlation between the size of a docking facility and the services it offers and the level of navigational activity it will generate. Id. The moderate size of the Wynn dock and the limited berthing capacity will discourage recreational boaters from using it as the primary way to travel to the Wynn casino. Id. This section of the Mystic River is lightly traveled. Lynch PFT at ¶ 33; Johnston PFT at ¶ ¶ 11, 18, 19. Johnston acknowledges that the Wynn casino will result in an increase in boating traffic, but does not believe the increase will be significant. Johnston believes the location of the Wynn dock could have accommodated a much larger marina, with ten times the capacity for boats as the Wynn dock will accommodate.

I find that the preponderance of the evidence, including the testimony of Mr. Lynch and Officer Johnston, weigh in favor of a conclusion that the proposed project will not significantly interfere with public rights of navigation, and will not generate water-borne traffic that would substantially interfere with water-borne traffic in the area at present (which is minimal most of the time) or in the future as may be evidenced by documented projections (of which there have been none produced by Somerville). Somerville has failed to prove by a preponderance of the evidence that the proposed project will significantly interfere with public rights of navigation in the Mystic River.

**III. THE DEPARTMENT CORRECTLY DETERMINED THAT THE PROJECT SERVES A PROPER PUBLIC PURPOSE IN COMPLIANCE WITH 310 CMR 9.31(2)(B) BECAUSE THE CASINO PROJECT PROVIDES APPROPRIATE FACILITIES FOR WATER-DEPENDENT ACTIVITY IN COMPLIANCE WITH 310 CMR 9.52(1)(A)**

Chapter 91 establishes the Department’s responsibilities to preserve and protect public trust rights in tidelands by ensuring that tidelands are used only for water-dependent uses or another proper public purpose. M.[G.L. c. 91, §§ 2](https://advance.lexis.com/document/?pdmfid=1000516&crid=3a66ee34-5852-4589-a500-4f40c98b65dd&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pddocid=urn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr3&ecomp=14qhk&earg=sr3&prid=c72abc9f-6aeb-45d2-abc0-22164370a105), [14](https://advance.lexis.com/document/?pdmfid=1000516&crid=3a66ee34-5852-4589-a500-4f40c98b65dd&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pddocid=urn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr3&ecomp=14qhk&earg=sr3&prid=c72abc9f-6aeb-45d2-abc0-22164370a105), and [18](https://advance.lexis.com/document/?pdmfid=1000516&crid=3a66ee34-5852-4589-a500-4f40c98b65dd&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pddocid=urn%3AcontentItem%3A5JWB-N8G0-00FG-V349-00000-00&pdcontentcomponentid=232350&pdteaserkey=sr3&ecomp=14qhk&earg=sr3&prid=c72abc9f-6aeb-45d2-abc0-22164370a105). The regulation at 310 CMR 9.31(2) provides that:

No license or permit shall be issued by the Department for any project on tidelands or Great Ponds, except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands.

For a project determined to be non-water dependent, like the Wynn casino, the Department presumes the project serves a proper public purpose providing greater benefit that detriment to the public’s rights in the tidelands if the project “complies with the standards for conserving and utilizing the capacity of the project site to accommodate water-dependent use,[[19]](#footnote-19) according to the applicable provisions of 310 CMR 9.51 through 9.52.” 310 CMR 9.31(2)(b)1; See also In the Matter of Boston Boat Basin, LLC, Docket No. 2013-021, Recommended Final Decision, 2016 MA ENV Lexis 20 (January 14, 2016). 310 CMR 9.52 requires that a project such as this “devote a reasonable portion of such lands to water-dependent use, including public access in the exercise of public rights in such lands.” A project with a water-dependent use zone (“WUDZ”), which this is, must also include at least the following:

one or more facilities that generate water-dependent activity of a kind and to a degree that is appropriate for the project site, given the nature of the project, conditions of the water body on which it is located, and other relevant circumstances.

310 CMR 9.52(1)(a). Determining whether a project includes such facilities requires the Department to “give particular consideration to”:

facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers, waterfront boardwalks and esplanades for public recreation, and water-based public facilities as listed in 310 CMR 9.53(2)(a).[[20]](#footnote-20)

Somerville contends that the Wynn casino does not meet the regulatory standards cited above and therefore does not serve a proper public purpose. The gist of Somerville’s argument is that the casino project does not meet these standards because the proposed facilities that generate water-dependent activity will not generate activity of a kind and to a degree that is appropriate for the project site given the nature of the project, the conditions on this portion of the Mystic River, and other relevant circumstances required by the regulation. In its closing brief, Somerville argues that the casino project fails to serve the public’s rights in the tidelands for fishing, fowling and navigation. From Somerville’s perspective, the only aspect of the project that serves these rights is the multi-purpose dock. The focus of Somerville’s attention through its witnesses, Mr. Hill and Mr. Golledge, is on the multi-purpose docking facility, which Somerville argues does not meet the standard because it will not “generate activity of a kind and to a degree that is appropriate to the project site given the nature of the project, the conditions of the portions of the Mystic River at issue, and other relevant circumstances, as 310 CMR 9.52(1)(a) requires.” Hill Tr. at 105; Golledge PFT at ¶ ¶ 67, 69. In Somerville’s view, the balance of the project’s components do not serve these interests. Wynn and the Department both argue that the facilities for water-dependent activity comply with 310 CMR 9.52(1)(a) and that Somerville has failed to meet its burden of proof on this issue.

The Wynn casino includes two facilities along its shoreline that are intended to generate water-dependent activity: the 435-foot multi-purpose dock and the 1,450-foot long by 20-foot wide waterside walkway to be known as the “Harborwalk.” The Department determined that the project as conditioned complies with all applicable standards of the Waterways regulations, including the special provisions for non-water dependent use projects at 310 CMR 9.51 and 9.52. WD, Finding 8. The Department further determined that the project as conditioned serves a proper public purpose that provides greater benefit than detriment to the rights of the public in the tidelands in accordance with 310 CMR 9.35(2)(b). WD, Finding 10. In making this finding the Department stated:

The proposed project involves the remediation of a presently vacant and contaminated site with an inaccessible waterfront and dormant watersheet into an active year-round destination by providing 6.38 acres of publicly accessible open space, a 1,450-foot long by 20-foot wide waterfront walkway with associated appurtenances along the Mystic River, installation of a water transportation docking facility, and the entire ground floor of the resort casino building will be programmed for use a Facilities of Public Accommodations (FPA).

WD, Finding 10.

**The Multi-purpose Docking Facility**

The multi-purpose dock consists of a floating pile-held dock, aligned along the northwest shore of the cove adjoining the casino project site. It is approximately 435 feet long. DeSalvio PFT at ¶ 3. The dock’s width will range from 12-30 feet and will connect to the Harborwalk by a series of ramps. Id. The dock will provide dedicated slips for an Everett Police Boat and an Everett Fire boat. It will have one slip for the Wynn water shuttle, and two slips for water taxis to drop off and pick up passengers. The remaining slips are designed to accommodate approximately ten boats, depending on the vessel size, and are intended for transient recreational vessels to drop and go or tie up for short periods of time, i.e. 3 to 4 hours. Id. The dock will not offer marina facilities, such as fueling, waste discharge, bathroom facilities or marine repairs. Boaters will not be able to tie up their boats overnight. Id. at 4.

Wynn’s witness, Mr. DeSalvio, will have direct oversight of the dock’s operations, including development of management protocols, scheduling, routes and operations of the Wynn shuttle, and hiring the supervisory personnel who will oversee dock operations. Id. at 2. A qualified dock master will supervise activities at the dock and will be on duty at least from 6 AM until 2 AM, the period during which the Wynn shuttle will operate. Id at 5. A reservation system will be employed to handle transient recreational boaters wishing to tie up at the dock. Id. The dock is set up to accommodate boats 24-42 feet long; larger boats may be accommodated if special arrangements are made. Wynn plans to publicize its dock reservation system and boat size restrictions. Id. Wynn will provide, through an experienced water transportation contractor, a regularly scheduled water shuttle with service between the casino, the Seaport District and downtown Boston. DeSalvio PFT at ¶ 7. The dock will also accommodate water taxis to drop off and pick up passengers. Id. The Wynn shuttle will originate at existing public docking facilities at the World Trade Center and Long Wharf in Boston. Id. at 8. The Wynn shuttle will be available to the public for what Wynn describes as fares similar to those existing for other similar services. Id. at 10. The casino project will provide significant public open space primarily at the end of the peninsula nearest the Mystic River. This open space will be landscaped and improved with amenities including a public gathering space, outdoor seating and viewing areas, lighting and signage, and will be available to the public 24 hours a day. Id. at 13. Wynn will also construct an open space connector to DCR’s Gateway Park, linking Wynn’s Harborwalk to Gateway Park’s bike and pedestrian pathway. The Gateway Park Connector[[21]](#footnote-21) will provide an additional three acres of open space that will allow public access along this section of the Everett waterfront for the first time. Id. at 15. This testimony from Mr. DeSalvio was uncontroverted. Mr. Hill’s testimony largely centered on the dock being too small to accommodate the expected traffic, and his questioning of why a project intended to attract the public would be so restrictive in its docking space. Hill Tr. at 19-24.

One does not need to be a casino enthusiast to recognize and acknowledge the benefit that accrues to a city when a long-dormant contaminated waste site is cleaned up and brought back to useful life. Chapter 91 recognizes this type of work as a public benefit. 310 CMR 9.01(2)(d) specifically identifies revitalization of unproductive property along urban waterfronts as a purpose of the Waterways regulations.

Somerville’s arguments that the Department erred in finding that the casino project serves a proper public purpose are unpersuasive. I find that a preponderance of the evidence proves that the project complies with the standards for conserving and utilizing the capacity of the project to accommodate water-dependent uses. The project includes at least eight of the fifteen water-dependent uses specified in the regulation. The dock is not the only measure. It is a significant water-dependent use given that the waterfront presently has no such facilities and is currently inactive. With the Wynn dock, there will not only be places for recreational vessels to tie up for periods of time, but dedicated space for water shuttles and taxis to drop off and pick up passengers, and the creation of an entirely new water transportation system in the form of the Wynn ferry, which will operate 20 hours a day. I find that the facilities for water-dependent activity comply with 310 CMR 9.52(1)(a).

However, I recommend that Special Waterways Condition 4 be amended to require a baseline of 6.38 acres of open space network at the site. The Condition presently requires a baseline of only 4.36 acres. I further recommend that license conditions be added to ensure that the public’s rights in the tidelands, in particular the public’s ability to access the watersheet in the Mystic River, are encouraged and protected. Requiring as a condition of the license that Wynn operate the ferry for the duration of the license term is one such condition. Wynn has presented its proposed water shuttle service as a significant component of its casino project. DeSalvio PFT at ¶¶ 7-10. The Chapter 91 license does not specifically require Wynn to operate the ferry service. Mr. Lynch testified that the Department has not required a water transportation subsidy [or service] if the relevant municipal harbor plan does not require it for a particular project, but neither did he cite any prohibition on the Department doing so in the absence of such a requirement. Lynch Tr. at 264-266. One of the goals of the Everett Municipal Harbor Plan is to afford the public the opportunity to access the watersheet, and access to the Everett waterfront by ferry is strongly supported by the city and the community. See MHP at 4.3. Such a condition is appropriate for the casino project. In addition, I recommend that Wynn be required as a condition of this license to make significant monetary contributions to DCR for the fishing pier and boat launch projects that are planned to be undertaken in and near Gateway Park. See MHP at 4.3.2 and 4.3.3. These recommended added conditions would furnish more waterfront amenities, complement the water-dependent uses at the casino site, and encourage greater activation of the Mystic River waterfront and greater access to the watersheet for smaller crafts, consistent with the City of Everett’s Municipal Harbor Plan.

**IV. LICENSE TERM**

The Department approved a license term of 85 years for the casino project. WD, Finding 12. A standard Chapter 91 license has a term of 30 years. 310 CMR 9.15(1)(a). Wynn requested an extended term license of 99 years and submitted to the Department its justification for the extended term. In appropriate circumstances the Department may issue a license for a term longer than 30 years, taking into consideration the factors contained in 310 CMR 9.15(1)(b). That section provides that for a project which will be constructed on flowed tidelands, the term shall not exceed 65 years, and for a project constructed on filled tidelands, no license shall be issued for longer than 99 years. The regulation further states that for a project that includes both filled and flowed tidelands, such as the Wynn casino, “… the Department may upon the request of the applicant establish a single weighted average term for the entire project, or a portion thereof as deemed appropriate by the Department based on the relative amounts of the surface area of the flowed and filled tidelands associated therewith.” 310 CMR 9.15(1)(b)1. An applicant is required to justify an extended term based on the following five factors:

[1] The expected life of the structure; [2] typical financing requirements; [3] consistency with a municipal harbor plan, if any; [4] appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location; and [5] other relevant factors.

310 CMR 9.15(1)(b)2 (numerical references supplied). The regulation states the factors but does not prescribe the weight the Department must give to each as it considers the request. Necessarily, then, the decision to include an extended term in a Chapter 91 license involves an exercise of discretion by the Department’s staff. The burden was on Somerville to prove that the extended license term was not justified.

A. The Weighted Average Calculation

Somerville argues that the Department’s weighted average calculation that led to its approving an 85 year term for Wynn’s Chapter 91 License is flawed and unprecedented, and

only included the building footprint, not all the associated site improvements. Somerville asserts that the Department’s method of calculating the weighted average license term has no basis in 310 CMR 9.15(1)(b)1 and excluded a majority of the filled tidelands affected.

Wynn requested a license term of 99 years. Wynn did not request that a weighted average be established based on the relative amounts of filled and flowed tidelands at the project site. Taormina Tr. at 256: 14-20. The Department’s witness, Mr. Taormina, who calculated the license term, determined that a weighted average term had to be calculated because the project site included both filled and flowed tidelands. Taormina PFT at ¶ 4. Mr. Taormina equated “total footprint” with “surface area” in making his calculation. Id. The plain language of 310 CMR 9.15(b)1. gives the Department discretion when a project includes both filled and flowed tidelands. The regulation does not say “only if the applicant” requests a weighted average. There does not appear to be a direct prohibition on the Department doing what it did in this case, and apparently has done in other cases involving filled and flowed tidelands. Similarly, the regulation clearly states that the Department has discretion to include the entire project or a portion of it in the calculation, and Somerville has provided no support for its claim that this was error.

B. The Expected Life of the Structure

Somerville argues that Wynn submitted no credible evidence to the Department regarding the expected life of the structure and typical financing requirements. In support of its request for an extended license term of 99 years Wynn submitted a letter from Roy A Pedersen, AIA. Somerville distills this letter as follows:

“[I]f the structure is built in accordance with the construction documents, and if there are no ‘unusual natural or man-made scenarios,’, and if the structure is properly maintained, and if the individual building systems are replaced as needed, then ‘it is reasonable to expect that the development could remain useful for its intended purpose’ during the extended term of the license (emphasis added).”

City of Somerville’s Opposition to Wynn Ma, LLC’s Motion for Summary Decision Regarding Extended License Term and the Department’s “Response” to that Motion, March 29, 2016, at 4-5. The Department’s response was that as long as the documentation is not obviously defective, the Department may rely on it, and the Department should not be expected to have such documentation truth-checked by outside experts. Department’s Response to Applicant’s Motion for Summary Decision Regarding Extended License Term at 3. The Department compares the current situation to plans stamped by an engineer. Id. The comparison is not apt, given that Mr. Pedersen’s letter contains no certification or stamp, is unsworn, and contains numerous hedges. Wynn did not offer any additional evidence on this issue. In its submittal, Wynn stated:

The design life of the structure is expected to be at least 99 years with regular maintenance and systems upgrades, which are needed to maintain its use as a resort. The building’s lifespan will be supported by regular maintenance including periodic replacement of critical building components and systems. A letter from a registered architect that explains the design life of the proposed structure is attached.

One would expect the developer of a project of this magnitude to maintain it. I do not find the materials submitted by Wynn in support of this factor sufficient to justify a 99 year term. The testimony of Mr. Krantz informs the issue. According to Wynn’s filings with the United States Securities and Exchange Commission (“SEC”), Wynn depreciates its buildings and improvements based on their estimated useful lives within a range of 10-45 years. Krantz PFT at ¶ 18 and Ex. B. The estimated useful life of buildings and improvements for purposes of calculating depreciation is influenced by the expected physical life of those assets. Krantz PFT at ¶ 14. Because the burden is on the applicant to justify an extended license term, based on this criterion an extended term was not justified.

C. Typical Financing Requirements

Wynn argues that I should disregard the testimony of Somerville’s witness, Mr. Krantz, regarding the propriety of the 85 year license term because of his lack of experience with Chapter 91, and because the Department’s experience is more relevant to this consideration. Wynn Ma, LLC’s Post-hearing Closing Brief, June 21, 2016, at 13-15. Mr. Krantz’s testimony, however, was uncontroverted by either Wynn or the Department. Somerville has shown through this testimony that the letter from Wynn’s lender, Deutsche Bank, was not credible and does not justify an extended 85 year license term. Krantz PFT at ¶ 10. Because the burden is on the applicant to justify an extended license term, based on this criterion an extended term was not justified.

Mr. Krantz testified for Somerville on the issue of financing and I credit his testimony and find it persuasive. He is qualified based on his training and experience as an expert in commercial financing, and I do not consider his lack of specific experience with c. 91 to affect his credibility or the weight to be given to his evidence. According to Mr. Krantz’s testimony, an 85 year term is not justified based on typical financing requirements. Krantz PFT at ¶ 6. Wynn submitted a letter from Deutsche Bank dated October 30, 2015 in support of its request for a 99 year license term. That letter stated “Given the magnitude of the investment, an extended license term of 99 years *is necessary* to assure the site’s long-term viability and value preservation.” (emphasis added). As Mr. Krantz pointed out in his testimony, the Written Determination proposed a license term of 85 years, yet Deutsche Bank has not withdrawn its commitment to finance the project. Krantz PFT at ¶ 10.(a). It is Mr. Krantz’s opinion that the Deutsche Bank letter lacks credibility for this and other reasons, including internal inconsistencies in language and the lack of specific information about the terms of the loan that would inform an opinion on what license term is necessary for financing. Krantz PFT at ¶¶ 10(b) and 10(c). In his opinion, the Deutsche Bank letter “is not the type of document that a person in the financing or development industry, exercising sound judgment, would rely on to establish that an 85-year license term is necessary for financing.” Krantz PFT at ¶ 10(d).

The statement in the Deutsche Bank letter that a 99 year term is necessary lacks merit because the useful economic life of a commercial building generally does not exceed 45-50 years. Krantz PFT at ¶ 14. Commercial real estate lenders typically limit the amortization period of commercial loans to 25-30 years exclusive of construction periods. Id. For a loan with a typical amortization period of 25-30 years, “…the fact that the subject lease or license extends beyond 50 years is essentially irrelevant to the lender….” Krantz PFT at ¶ 16. The Massachusetts Gaming Commission assumed there would not be any debt at the end of the 15-year gaming license term. Krantz PFT at ¶ 12; Exhibit A to Krantz PFT. In his testimony, Mr. Krantz made extensive comparisons to other casino projects around the world and from these comparisons concluded that a license term of 40-50 years is adequate for Wynn to obtain financing. Krantz PFT at ¶¶ 22-27. The Deutsche Bank letter submitted by Wynn to the Department regarding financing requirements is, in my estimation, self-serving and conclusory and lacking in factual foundation.

As to these two factors under 310 CMR 9.15(1)(b)2 (the expected life of the structure and typical financing requirements), Wynn’s documentation fell short of what the Department should expect as justification for an extended term. Mr. Krantz’s testimony was not contradicted by Wynn or the Department. Wynn did not provide any evidence at the Hearing to bolster its justification for an extended license term of 85 years based on these two factors. The letter regarding the expected life of the structure falls short of what the Department should expect as justification because it lacks any factual basis for its conclusions. Somerville has proven by a preponderance of the evidence that as to these two factors an extended license term was not justified.[[22]](#footnote-22) The question then becomes whether the justification on the three remaining factors warrants an extended term.

As to the remaining three criteria of 310 CMR 9.15(1)(b)2, Somerville acknowledges that the Department has discretion when it evaluates them but argues that the discretion must be rational in light of the circumstances. Here, Somerville argues, it was not. Somerville rested its case on the testimony of its witness, Mr. Golledge.

D. Consistency with the Municipal Harbor Plan

Somerville argues 310 CMR 9.31(1)(c) requires “conformance” with a MHP, and that conformance with a municipal harbor plan requires more than the “consistency” requirement in 310 CMR 9.15, and must mean more in context of extended term. “Consistency” merely gets an applicant the 30 year baseline. Golledge PFR at ¶ 6. A water transportation subsidy as a condition of the license should have been required, because the Everett Municipal Harbor Plan approval from the Secretary of EEA recommended that. Golledge PFR at ¶ 23, Exhibit D (p. 23). In Mr. Golledge’s opinion, the Department largely ignored the EEA Secretary’s recommendations in the MHP for conditions that would benefit the public and justify an extended term, and many of these relate directly to the public rights in the tidelands, e.g. fishing (pier), navigation (boat launch). Id. 310 CMR 9.31(1)(c) prohibits the Department from issuing a license for any project unless the project “conforms to applicable provisions of a municipal harbor plan, if any, and local zoning law, according to the provisions of 310 CMR 9.34.”

310 CMR 9.34(2)(a) relating to conformance with a municipal harbor plan provides, in part:

If the project is located within an area covered by a municipal harbor plan, said project must conform to the provisions of said plan to the degree applicable under plan approval at 301 CMR 23.00: *Review and Approval of Municipal Harbor Plans*.

Given that Somerville contends that the MHP was tailored to the casino project, Golledge PFT ¶ at 19, in light of the numerous ways this casino project directly tracks Everett’s MHP, I do not see how a failure to include the Secretary’s *recommendation* for a water transportation subsidy renders the Department’s determination that the casino project is consistent with the MHP to be in error. As to each of the stated goals of the MHP, the casino project includes elements designed to meet those goals, and the Department determined the casino project as conditioned was consistent with the MHP. I find that a preponderance of the evidence supports an extended license term based upon this factor.

E. Appropriateness of long-term dedication of tidelands to the proposed use(s) in the particular location and “other relevant factors”

Mr. Lynch testified that when analyzing the “appropriateness” factor under 310 CMR 9.15(1)(b)2, the Department typically looks to the public benefits provided by the project beyond those that are strictly required for compliance under the approved MHP and the regulatory standards for nonwater-dependent use project. Lynch PFT at ¶¶ 18, 25. The Wynn casino’s public benefits greatly exceed the baseline standards of compliance with a MHP and the performance standards in the regulations. Id. at ¶ 19. Among the benefits Mr. Lynch considered were the provision of significant Facilities of Public Accommodation (“FPA”) that will draw the public to the waterfront where none were required by regulation; the provision of a significant, new urban waterfront park that will be open to the public 24 hours a day, when there is no regulatory requirement to provide it; Wynn’s voluntary commitment to expand an open space network offsite; and open space of 6.38 acres, constituting 59% of the total jurisdictional area. Id. In Mr. Lynch’s determination, the Wynn casino project will provide a “transformative FPA” use in this location, and will serve as a powerful destination for access to the water, which is a fundamental interest of the statute and the regulations. Id. at ¶ 20. The Wynn casino presented an opportunity to fully remediate for unrestricted public access a site that has prohibited any public access due to contamination, and to allow and encourage public access. Mr. Golledge did not find these justifications compelling. Golledge PFT at ¶¶ 45-46, and the casino project’s public benefits “slightly above average, at best, if not average.” Golledge Tr. at 139.

Mr. Lynch considered the cleanup of the project site to be a “relevant factor” for an extended license term because “revitalizing unproductive property along urban waterfronts, in a manner that promotes public use, among other things” is one of the purposes of Chapter 91. Lynch PFT at ¶ 21. Mr. Golledge discounts this because (a) Wynn, as owner of the property, is required to clean it up pursuant to M.G.L. c. 21E and (b) the site is out of compliance and subject to an Administrative Consent Order (“ACO”) issued by the Department. Mr. Golledge’s testimony is not persuasive for the following reasons.

While Wynn does have an obligation as owner of the property to comply with Chapter 21E, the ACO was entered into by Wynn’s predecessor in interest at the site in order to extend regulatory deadlines, a not uncommon practice in the waste site cleanup program for complicated brownfields sites. This is no reflection on Wynn. Mr. Lynch considered Wynn’s commitments to go beyond what was required by other applicable regulations to be sufficient justification for the extended license term. These included Wynn’s approach to building design and construction as detailed above. Lynch PFT at ¶¶ 21-23. Mr. Golledge considered the weight given by the Department to these other factors was arbitrary and an abuse of discretion, including the Department crediting Wynn for its LEED Gold design, Inflow and Infiltration reduction, accounting for sea level rise, which Mr. Golledge contends is prudent planning rather than provision of any public benefit. Golledge PFT at ¶ 46. LEED certification is not related to public trust concerns and should carry little if any weight. Id. Mr. Golledge testified that these “other factors” are not relevant. Golledge PFT at ¶ 46. As for the 21E cleanup, it was error to credit this because it is not related to c.91, and 21E cleanup is not a benefit cited by the EEA Secretary in his public benefit determination. Golledge PFR at ¶ 9. In Mr. Golledge’s opinion, the public benefits relied on by the Department to justify an extended term of 85 years largely ignore the EEA Secretary’s recommendations and are only slightly better than average benefits. Mr. Golledge considered this license term for this project a “clear outlier.” Golledge Tr. at 195.

The Department’s witness, Mr. Lynch, has extensive experience issuing Chapter 91 licenses, many with extended terms. His experience in this area is significantly more extensive than that of Mr. Golledge. With his experience, I would expect Mr. Lynch to have developed a good understanding for what an appropriate license term is under the specific set of circumstances of each license. As to the other factors, Mr. Lynch considered them and determined a term of 85 years was appropriate. Because I discount the first two factors, and credit Mr. Krantz on the “typical financing” factor, a re-weighing of the factors is warranted to determine whether a term greater than 30 but less than 85 years is justified by the evidence. The factors should not be viewed in a vacuum but the cumulative information about all of them all should be considered to determine an appropriate license term. The preponderance of the evidence on these other factors justifies an extended license term. The proposed stipulation filed by Wynn and the Department informs my recommendation that an extended license term of 50 years be approved.

**V. CONCLUSION**

I find that Somerville has provided a minimum quantum of credible evidence on the issue of its standing as an aggrieved person. I find that as to the remaining issues, Somerville has failed to prove by a preponderance of the evidence that the Department erred in issuing the Chapter 91 License to Wynn. The preponderance of the evidence supports the Department’s Chapter 91 license, except as to the license term. Based on the flaws in the consideration of the extended 85 year license term, I recommend that the Commissioner issue a Final Decision approving the Chapter 91 license, but with the following modifications: (1) a modified license term of 50 years, (2) modification to Special Waterways Condition 4 to require a minimum of 6.38 acres of open space network, and (3) an additional condition requiring Wynn to operate its ferry service for the duration of the license term.

As noted above at Footnote 22, Wynn and the Department proposed to stipulate to a license term of 50 years. I recommend that the Commissioner adopt this Stipulation as part of his Final Decision. I also recommend that the Commissioner consider requiring Wynn to contribute sufficient funds to enable DCR to establish a fishing pier along the eastern embankment of the DCR property south of the Amelia Earhart Dam and a canoe/kayak launch in Gateway Park north of the Amelia Earhart Dam to complement the multi-purpose dock at the casino site and provide additional activation of the Mystic River waterfront and greater access to the watersheet for smaller crafts, consistent with the City of Everett’s Municipal Harbor Plan.

Date: 7/15/2016 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Jane A Rothchild

Presiding Officer

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1. See *Ruling on Wynn’s Motion to Dismiss for Failure to State Claims on Which Relief can be Granted* (4/21/16). [↑](#footnote-ref-1)
2. Wynn intends to conduct response actions at the disposal site, including assessing the nature, source and extent of the contamination; evaluating risks related to disposal site conditions; assessing whether cleanup actions are necessary; and, if necessary, selecting and implementing the most appropriate actions. See Draft Revised Public Involvement Plan, February 11, 2016. <http://public.dep.state.ma.us/fileviewer/Default.aspx?formdataid=0&documentid=337984> [↑](#footnote-ref-2)
3. Facilities of Public Accommodation are defined at 310 CMR 9.02 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). Facilities of public accommodation may be either water-dependent, accessory to water-dependent, or nonwater-dependent, and shall include but are not limited to:

   - public restaurants or entertainment facilities;

   - theaters, performance halls, art galleries, or other establishments dedicated to public

   presentation of the fine arts;

   - hotels, motels, or other lodging facilities of transient occupancy;

   - educational, historical, or other cultural institutions open to the public;

   - interior spaces dedicated to the programming of community meetings, informational displays,

   special recreational events, or other public activities;

   - sports or physical fitness facilities open to the public;

   - open spaces, pedestrian walkways, or outdoor recreation facilities open to the public;

   - retail sales or service facilities;

   - ferry terminals, transit stations, and other public transportation facilities;

   - marina berths for transient use; and

   - vehicular ways open to the public or parking facilities open to the public, including users of facilities of public accommodation. [↑](#footnote-ref-3)
4. This section provides in part that “The Department shall classify as a water-dependent use project any project which consists entirely of: (a) uses determined to be water-dependent in accordance with 310 CMR 9.12(2); and/or

   (b) uses determined to be accessory to a water-dependent use, in accordance with 310 CMR 9.12(3). Any other project shall be classified as a nonwater-dependent use project.” [↑](#footnote-ref-4)
5. 310 CMR 9.53 provides applicable standards when fill or structures will be placed on Commonwealth tidelands, which are defined at 310 CMR 9.02. [↑](#footnote-ref-5)
6. LEED, Leadership in Energy and Environmental Design, is a third-party verification system for “green” building. See USGBC.org [↑](#footnote-ref-6)
7. Pre-Filed Testimony of Thomas R. Hill, April 13, 2016 (Hill PFT), ¶¶ 1-4. [↑](#footnote-ref-7)
8. Pre-Filed Testimony of David Fallon, April 13, 2016 (Fallon PFT), ¶¶ 1-3. [↑](#footnote-ref-8)
9. Pre-Filed Testimony of Robert Gollege, Jr., April 14, 2016 (Golledge PFT), ¶¶ 1-2. [↑](#footnote-ref-9)
10. Pre-Filed Testimony of M. Shawn Krantz, April 11, 2016 (Krantz PFT), ¶¶ 1-4. [↑](#footnote-ref-10)
11. Pre-Filed Testimony of Robert DeSalvio, May 12, 2016 (DeSalvio PFT), ¶¶ 1-2. [↑](#footnote-ref-11)
12. Pre-Filed Testimony of Patrick Johnston, May 13, 2016 (Johnston PFT), ¶¶ 1-2, 4-5, 9. [↑](#footnote-ref-12)
13. Pre-Filed Testimony of Frank Taormina, (Taormina PFT) ¶¶ 1-4. [↑](#footnote-ref-13)
14. Pre-Filed Testimony of Ben Lynch, (Lynch PFT) ¶¶ 1-4 [↑](#footnote-ref-14)
15. But see, generally In the Matter of Massachusetts Highway Dept. and Metropolitan District Commission, *Decision and Order on Motion to Dismiss for Lack of Standing*, Docket No. 96-079, 3 DEPR 216 (December 2, 1996)(City of Cambridge found to have standing as an affected municipality because a portion of the Charles River Crossing would pass through it) and cases cited therein, and In the Matter of Massachusetts Highway Dept. and Metropolitan District Commission, *Decision and Order on Cambridge’s Motion to Renew and Reargue Claims Dismissal*, Docket No. 96-079, 1997 MA ENV. Lexis 166 (January 8, 1997). [↑](#footnote-ref-15)
16. Wynn’s Motion to Dismiss was filed on March 9, 2016, and I advised the parties that I would defer my ruling on the Motion until after the Hearing. [↑](#footnote-ref-16)
17. “Transcript” is the Transcript of the Hearing and will be noted hereafter as “[witness] Tr. at….” [↑](#footnote-ref-17)
18. <http://atlantic-city-online.com/frequently-asked-questions-about-atlantic-city/> [↑](#footnote-ref-18)
19. Water-dependent uses are specified at 310 CMR 9.12(2)(a) and include but are not limited to:

    marinas, boat basins, channels, facilities for fishing, swimming, diving, and other water-based recreational activities, parks, esplanades, boardwalks, and other pedestrian facilities that promote use and enjoyment of the water by the general public and are located at or near the water's edge, waterborne passenger transportation facilities, such as those serving ferries, cruise ships, commuter and excursion boats, and water shuttles and taxis, dredging for navigation channels, boat basins, and other water-dependent purposes, and subaqueous disposal of the dredged materials below the low water mark, and navigation aids, marine police and fire stations, and other facilities which promote public safety and law enforcement on the waterways. [↑](#footnote-ref-19)
20. This last clause is inapplicable to this project because Commonwealth Tidelands are not involved in this case. [↑](#footnote-ref-20)
21. The Gateway Park Connector will be permitted via a separate Chapter 91 license. Wynn is required by Special Waterways Condition 8 to apply for the Gateway Park Connector license within two years of the issuance date of this license. [↑](#footnote-ref-21)
22. After Somerville filed its Pre-Filed Direct Testimony and prior to the hearing on June 2, 2016, Wynn and the Department filed a Motion to Adopt Stipulation Regarding License Term. This motion is part of the administrative record in this case. The proposed stipulation was for a 50-year extended license term for the Chapter 91 license, and was based on Wynn’s review of Mr. Krantz’s testimony. Wynn maintained that the Department’s determination complied with 310 CMR 9.15, but offered to stipulate to a shorter term to resolve the issue. Somerville did not agree to the proposed stipulation. [↑](#footnote-ref-22)