

**DECISION ON THE CITY OF BOSTON'S  
REQUEST FOR APPROVAL  
OF THE  
EAST BOSTON MUNICIPAL HARBOR PLAN AMENDMENT  
PURSUANT TO 301 CMR 23.00**

**PART II:  
102-148 Border Street and 125 Sumner Street**

**March 4, 2009**

**Commonwealth of Massachusetts  
Executive Office of Energy and Environmental Affairs  
Ian A. Bowles, Secretary**

## I. INTRODUCTION

Today, as Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (EEA), I am approving, subject to the conditions noted below, portions of the amendment to the City of Boston's East Boston Waterfront District Municipal Harbor Plan ("Plan") dated May 2008. The original East Boston Municipal Harbor Plan was approved on July 15, 2002. This Decision on the amendment to the original 2002 Plan presents a synopsis of Plan content, together with a determination on how the Plan amendment complies with the standards for approval set forth in the Municipal Harbor Planning regulations at 301 CMR 23.00.

This Decision involves the balancing of private interests and public rights in tidelands, and I must look to balance local development goals and objectives with my responsibilities as trustee to protect and promote the public trust rights in these tidelands. Upon the City's request, I have agreed to issue my Decision in two separate phases for three separate sub-areas under consideration in this Plan amendment. This phased approach includes my December 17, 2008 Decision on Part I of the Plan amendment for the 6-26 New Street planning sub-area, and this Decision for Part II of the Plan amendment which includes the 125 Sumner Street and 102-148 Border Street ("Boston East") planning sub-areas.

Pursuant to the review procedures at 301 CMR 23.00, the Plan was submitted in May 2008. Following a review for completeness, the Massachusetts Office of Coastal Zone Management (CZM) published a notice of public hearing and 30-day opportunity to comment in the *Environmental Monitor* dated June 11, 2008. Oral testimony was accepted during a public hearing held in the City of Boston on June 23, 2008, and six written comment letters were received prior to the close of the public comment period on July 11, 2008. The review and consultation process led by CZM, included consultation between staff of CZM, the Waterways Regulation Program of the Department of Environmental Protection (MassDEP), and the Boston Redevelopment Authority (BRA). In reaching my approval Decision I have taken into account the oral and written testimony submitted by the public during the public comment period. I have also accounted for the special circumstances and unique challenges and opportunities of the planning sub-areas, including the existing Designated Port Area and in-fill parcels, local economic and development conditions, and the social and cultural characteristics of the neighborhood.

The Plan amendment for the East Boston Waterfront District reflects significant effort on the part of the City and many members of the public who participated in the public process. I would like to commend the efforts of the members of the Municipal Harbor Planning Advisory Committee who volunteered their time and effort over the course of many meetings over the past several months.

## II. PLAN CONTENT

The Municipal Harbor Planning Regulations (301 CMR 23.00) establish a voluntary process under which cities and towns may develop and submit Municipal Harbor Plans to the EEA Secretary for approval. These plans serve to promote and implement a community's planning vision for their waterfront and to inform and guide state agency decisions necessary to implement such a vision. Approved Municipal Harbor Plans provide licensing guidance to MassDEP in making decisions pursuant to MGL c. 91 and the Waterways Regulations (310 CMR 9.00). The approved harbor plans may establish alternative numerical and dimensional requirements (e.g., substitute provisions) to the requirements specified by the Waterways Regulations—such as increased building heights and footprints, modifications to interior and exterior public space requirements, and the location and amount and scale of public and private facilities—provided that adverse effects to public rights along the waterfront are mitigated with appropriate offsetting measures.

In 2002, the Secretary of Environmental Affairs approved the City's East Boston Waterfront District Municipal Harbor Plan. The Secretary's 2002 Decision approved substitute provisions related to setbacks, Facilities of Public Accommodation, and building height for two specific properties at that time – Hodge Boiler Works and Clippership Wharf. The City anticipated that the 2002 Plan would cover all properties within the planning area and would include a Designated Port Area (DPA) Master Plan. However, in the Secretary's 2002 Decision, it was determined that a DPA Boundary Review would be required before further planning for the properties within the DPA could proceed. CZM initiated the DPA Boundary review in December 2001 and allowed the planning to go forward for Hodge Boiler Works and Clippership Wharf with the understanding that site-specific substitutions, offsets, or amplifications related to the Waterways Regulations for other properties in the planning area would be addressed in a forthcoming amendment to the approved Plan. The DPA Boundary Review was completed in April 2003. As a result, the City's 2008 Plan amendment addresses site-specific substitutions and offsets for three specific parcels in the planning area: 6-26 New Street (Part I), 102-148 Border Street ("Boston East") and 125 Sumner Street (Part II).



Figure 1. East Boston Planning Area

### **III. STANDARDS FOR APPROVAL**

The Plan amendment contains the City's planning vision and other specifics to guide use and development of the East Boston planning area. It should be noted, however, that while these elements are commendable and important to the planning area, my approval today is bounded by the authority and standards as contained in 301 CMR 23.00 et seq. (Review and Approval of Municipal Harbor Plans) and is applicable only to those discretionary elements of the Chapter 91 Waterways regulations that are specifically noted in this Decision. This Decision does not supersede separate regulatory review requirements for any activity.

#### **A. Consistency with CZM Program Policies and Management Principles**

The Federally-approved CZM Program Plan establishes 20 enforceable program policies and 9 management principles which embody coastal policy for the Commonwealth of Massachusetts. The following is a brief summary of the Policies and Management Principles applicable to this portion of the amendment Plan area:

- Water Quality Policy #1 – Ensure that point-source discharges in or affecting the coastal zone are consistent with federally approved state effluent limitations and water quality standards.
- Water Quality Policy #2 – Ensure that non-point pollution controls promote the attainment of state surface water quality standards in the coastal zone.
- Habitat Policy #1 – Protect coastal resource areas including salt marshes, shellfish beds, dunes, beaches, barrier beaches, salt ponds, eelgrass beds, and fresh water wetlands for their important role as natural habitats.
- Habitat Policy #2 – Restore degraded or former wetland resources in coastal areas and ensure that activities in coastal areas do not further wetland degradation but instead take advantage of opportunities to engage in wetland restoration.
- Protected Areas Policy #3 – Ensure that proposed developments in or near designated or registered historic districts or sites respect the preservation intent of the designation and that potential adverse effects are minimized.
- Coastal Hazards Policy #1 – Preserve, protect, restore, and enhance the beneficial functions of storm damage prevention and flood control provided by natural coastal landforms, such as dunes, beaches, barrier beaches, coastal banks, land subject to coastal storm flowage, salt marshes, and land under the ocean.
- Coastal Hazards Policy #2 – Ensure construction in water bodies and contiguous land area will minimize interference with water circulation and sediment transport. Approve permits for flood or erosion control projects only when it has been determined that there will be no significant adverse effects on the project site or adjacent or downcoast areas.

- Coastal Hazards Policy #3 – Ensure that state and federally funded public works projects proposed for locations within the location zone will: not exacerbate existing hazards or damage natural buffers or other natural resources; be reasonably safe from flood and erosion related damage; not promote growth and development in hazard-prone or buffer areas, especially in Velocity zones and ACECs; and not be used on Coastal Barrier Resource Units for new or substantial reconstruction of structures in a manner inconsistent with the Coastal Barrier Resource/Improvement Acts.
- Ports Policy #3 – Preserve and enhance the capacity of Designated Port Areas to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands over which a state agency exerts control by virtue of ownership, regulatory authority, or other legal jurisdiction.
- Ports Management Principle #1 – Encourage, through technical and financial assistance, expansion of water dependent uses in designated ports and developed harbors, re-development of urban waterfronts, and expansion of visual access.
- Public Access Policy #1 – Ensure that developments proposed near existing public recreation sites minimize their adverse effects.
- Public Access Management Principal #1 – Improve public access to coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation. Link existing coastal recreation sites to each other or to nearby coastal inland facilities via trails for bicyclists, hikers, and equestrians, and via rivers for boaters.
- Public Access Management Principal #2 – Increase capacity of existing recreation areas by facilitating multiple use and by improving management, maintenance, and public support facilities. Resolve conflicting uses whenever possible through improved management rather than through exclusion of uses.
- Public Access Management Principal #3 – Provide technical assistance to developers of private recreational facilities and sites that increase public access to the shoreline.
- Public Access Management Principal #4 – Expand existing recreation facilities and acquire and develop new public areas for coastal recreational activities. Give highest priority to expansions or new acquisitions in regions of high need or limited site availability. Assure that both transportation access and the recreational facilities are compatible with social and environmental characteristics of surrounding communities.

Based on review of the documentation provided by the City and the assessment of CZM, I conclude that it meets the intent of each relevant policy statement and, as required by 301 CMR 23.05(2), I find the Plan consistent with CZM policies.

## **B. Consistency with Tidelands Policy Objectives**

As required by 301 CMR 23.05(3), I must also find that the Plan is consistent with state tidelands policy objectives and associated regulatory principles set forth in the state Chapter 91 Waterways Regulations of MassDEP (310 CMR 9.00). As promulgated, the Waterways Regulations provide a uniform statewide framework for regulating tidelands projects. Municipal Harbor Plans and associated amendments present communities with an opportunity to propose modifications to these uniform standards through the amplification of the discretionary requirements of the Waterways Regulations or through the adoption of provisions that, if approved, are intended to substitute for the minimum use limitations or numerical standards of 310 CMR 9.00. The substitute provisions of Municipal Harbor Plans, in effect, can serve as the basis for a MassDEP waiver of specific use limitations and numerical standards affecting nonwater-dependent use projects, and thereby reflect local planning goals in decisions involving the complex balancing of public rights in and private uses of tidelands.

The Plan contains clear guidance that will have a direct bearing on MassDEP licensing decisions within the harbor planning area. Included in this guidance are:

- provisions that are intended to substitute for certain minimum numerical standards in the regulations; and
- provisions that ensure regulatory compliance for the lands and waters within the East Boston DPA.

These provisions are each subject to the approval criteria under 301.CMR 23.05(3)(b)-(e), and as explained below, I find that all such criteria have been met.

### **Evaluation of Requested Substitute Provisions**

The general framework for evaluating all proposed substitute provisions to the Waterways requirements is established in the Municipal Harbor Plan Regulations at 301 CMR 23.05(2)(c) and 301 CMR 23.05(2)(d). The regulations, in effect, set forth a two part standard that must be applied individually to each proposed substitution in order to ensure that the intent of the Waterways requirements with respect to public rights in tidelands is preserved.

For the first part, in accordance with 301 CMR 23.05(2)(c), there can be no waiver of a Waterways requirement unless the Secretary determines that the requested alternative requirements or limitations ensure that certain conditions—specifically applicable to each minimum use limitation or numerical standard—have been met. The second standard, as specified in 301 CMR 23.05(2)(d), requires that the municipality demonstrate that a proposed substitution provision will promote, with comparable or greater effectiveness, the appropriate state tidelands policy objective.

A municipality may propose alternative use limitations or numerical standards that are less restrictive than the Waterways requirements as applied in individual cases, provided that the plan includes other requirements that, considering the balance of effects on an area-wide basis, will mitigate, compensate for, or otherwise offset adverse effects on water-related public interests.

For substitution provisions relative to the minimum use and numerical standards of 310 CMR 9.51(3)(a)–(e), any proposal must ensure that nonwater-dependent uses do not unreasonably diminish the capacity of tidelands to accommodate water-dependent uses. Similarly, substitute

provisions for nonwater-dependent projects on Commonwealth Tidelands must promote public use and enjoyment of such lands to a degree that is fully commensurate with the proprietary rights of the Commonwealth therein, and which ensures that private advantages of use are not primary but merely incidental to the achievement of public purposes, as provided in 310 CMR 9.53.

Table 1 contains a summary of the substitute provisions approved through this Decision for Boston East; Table 2 contains a summary of the substitute provisions approved through this Decision for 125 Sumner Street.

**Table 1 — Summary of Substitute Provisions for 102-48 Border Street (Boston East)**

Regulatory Provision	Chapter 91 Standard	Substitution	Offsetting Measures
310 CMR 9.51(3)(b): Setbacks for Nonwater-dependent Facilities of Private Tenancy	“nonwater-dependent Facilities of Private Tenancy shall not be located on any pile-supported structures on flowed tidelands, nor at the ground level of any filled tidelands within 100 feet of the project shoreline..”	Permit the reconfiguration of Facilities of Public Accommodation within 100 feet of the project shoreline to other appropriate locations to encourage public use and activation of the project site.	A minimum of 25% of the ground floor (excluding upper floor accessory uses) shall be devoted to Facilities of Public Accommodation, including but not limited to: gallery, archway, exhibition space, teaching space, maritime history interpretive exhibit space, community meeting room, and community center. These facilities will be located within the ground floor to effectively promote public use and enjoyment of the project site. The facilities will be managed and programmed to establish the project as a year-round locus of public activity.
310 CMR 9.51(3)(c): Building Setbacks from a Water-Dependent Use Zone	“new or expanded buildings for nonwater-dependent use, and parking facilities at or above grade for any use, shall not be located within a water-dependent use zone...”	A reconfigured WDUZ will be established that will allow a minimum setback from the project shoreline of 25 feet for buildings containing nonwater-dependent uses, as shown in the plans and diagrams in the Plan, while maintaining at least the same overall area (approximately 22,806sf) as the standard requirement.	The reconfigured WDUZ will provide setbacks along the waterfront and Harborwalk and setbacks in different areas of the site that are contiguous to the DPA and the proposed historic maritime interpretive area. Additionally, DPA improvements at the site will enhance water dependent uses.



Regulatory Provision	Chapter 91 Standard	Substitution	Offsetting Measures
310 CMR 9.52(1)(b)(1): Utilization of Shoreline for Water-Dependent Purposes	“...walkways and related facilities along the entire length of the Water-Dependent Use Zone; wherever feasible, such walkways shall be adjacent to the project shoreline and, except as otherwise provided in a municipal harbor plan, shall be no less than ten feet in width...”	The minimum width will be widened to 12 feet (10 feet clear).  These enhancements shall replace the existing standard of 10 feet.	The substitution directly benefits the public through enhanced access (open 24 hours/7 days per week); no offsetting public benefit is required.
310 CMR 9.51(3)(e): Height Standards and Related Impacts on Public Use or Access	For new or expanded non water-dependent use buildings, the height shall not exceed 55 feet within 100 feet of the high water mark nor increase by more than one-half foot for every additional foot beyond 100 feet.	The height of new or expanded buildings for nonwater-dependent building use shall not exceed 85 feet, as shown in the Plan’s massing and building diagrams	Offsetting public benefits are provided to offset the increase in net new shadow that would occur relative to standard height limits. Offsetting benefits will include: <ul style="list-style-type: none"> <li>• Provision of at least 2,201sf of open space in addition to the standard requirement to offset approximately 4,202sf of new shadow (1sf of additional public open space for every 2sf of net new shadow)</li> <li>• Open space shall include paved pedestrian access, amenities such as benches and special landscaping features, and public recreational features which will all be designed to promote public access and use.</li> </ul>

**Analysis of Requested Substitute Provisions: 102-148 Border Street (Boston East)**

The Boston East project site is situated on the southwestern edge of the East Boston waterfront along the west side of Boston Inner Harbor. The site is bordered by Boston Inner Harbor to the west; 170 Border Street to the north; Atlantic Works, Wigglesworth Machinery, and Boston Towing and Transportation properties to the south; and Border Street to the east. The site is approximately 14.2 acres, of which approximately 10.8 acres are watersheet.

The Boston East site is comprised of filled tidelands and the adjacent watersheet. The site was historically used for maritime industrial purposes and is currently vacant. The site contains building remnants, outfall pipe, bulkheads, abandoned marine railway, and dilapidated pile fields. The proposed mixed-use project, to be located on the non-DPA portion of the site, includes approximately 196 housing units, Facilities of Public Accommodation including a community art gallery (the McKay Community Gallery), public archway with interpretive historical exhibits and

displays, and artist live/work units. The project will also include public open space areas and Harborwalk along the waterfront.

In 2004, the City of Boston's Department of Neighborhood Development (DND) held a series of public meetings to receive community feedback regarding redevelopment of the Boston East site. Following these public meetings, DND issued a Request for Proposals (RFP) in 2006 seeking a developer for the site. The Plan indicates that DND designated a developer and intends to transfer the site through a land disposition process once the site is permitted. In consideration of the land disposition process, which will result in a transfer of ownership from a public agency to a private entity, I have determined that the plan for this site shall be reviewed according to the standards for private tidelands, and I am requiring that prior to the issuance of the final Chapter 91 license for the Boston East site, the City shall convey ownership of the site to the private entity as described in the Plan.

Throughout the East Boston MHP Amendment process, there has been a discussion of the existing arts community in East Boston, specifically the arts community located at 80 Border Street, between the New Street project site and the Boston East project site. The Atlantic Works Building at 80 Border Street houses 29 artist's studios, a gallery and a cultural exchange center. The success and strength of this well-established use is an attraction for other artists and arts uses, which could grow into an arts district along East Boston's waterfront. Recognizing that artists help to transform neighborhoods, and add to the cultural life and economic center of a community, the City has been working to retain existing spaces for artists and create new ones. Frequently, festivals, galleries, small performance spaces and small retail uses spring up through the work of resident artists, generating a vibrant street life that enhances the quality of neighborhoods for both the people who live there and people who visit.

During the MHP Amendment process, artist live/work was discussed as a potential Facility of Public Accommodation. Although the use is not currently considered a Facility of Public Accommodation, it is an appropriate ground floor use that can act as a buffer between residential uses and the DPA. The City encourages this use for this reason and because it may serve to activate the ground floor and adjacent open spaces. Moving forward, I anticipate a discussion with the City regarding artist live/work space and its connection to the goals of activating the waterfront with civic and cultural uses and amenities as well as protecting tidelands from future privatization.

#### Setbacks for Nonwater-dependent Facilities of Private Tenancy

To approve any substitute provision to the Chapter 91 standard at 310 CMR 9.51(3)(b), I must first determine that the Plan provides limitations and other requirements which ensure that no significant privatization of waterfront areas immediately adjacent to the Water-Dependent Use Zone will occur for nonwater-dependent purposes. Next, I must determine if the Plan provides appropriate alternative locations and other requirements to offset the proposed siting of non-water dependent Facilities of Private Tenancy within 100 feet of the project shoreline. Then, within the context of its Plan, the City must demonstrate that the substitute provision will meet this standard with comparable or greater effectiveness. My determination relative to whether or not these provisions promote this tideland policy with comparable or greater effectiveness is conducted in accordance with the Municipal Harbor Plan regulatory guidance discussed in detail below.

The Plan proposes a substitution to the Setbacks for Nonwater-Dependent Facilities of Private Tenancy requirement at 310 CMR 9.51(3)(b). At the Boston East site, the City proposes to allow Facilities of Private Tenancy within 100 feet of the project shoreline and to relocate Facilities of Public Accommodation beyond 100 feet of the project shoreline. The proposed offsetting measures includes relocating the required Facilities of Public Accommodation to other areas of the project site as appropriate to encourage public use and activation across the project site. The Plan provides additional guidance regarding the types of uses that may be appropriate for the site including, but not limited to: gallery, archway, exhibition space, teaching space, maritime history interpretive exhibit space, community meeting room, and community center.

As a result of my review, I believe that the proposed substitute provision will sufficiently offset the presence of private facilities within 100 feet of the project shoreline. I am approving the substitute provision subject to the following conditions:

- The location and size of the McKay Community Gallery shall be provided in substantial accordance with Figure 7-3 and as described in the Plan;
- The McKay Community Gallery shall be provided built out and rent free for the term of the license;
- The location and size of the public archway, and associated historic/interpretive activation features, shall be provided in substantial accordance with Figure 7-3 and as discussed in the Plan; and
- The location and type of the remaining required Facilities of Public Accommodation shall be determined during the MassDEP Chapter 91 licensing process.

#### Building Setbacks from a Water-Dependent Use Zone

To approve any substitute provision to 310 CMR 9.51(3)(c), I must first determine that the Plan specifies alternate distances and other requirements that ensure new or expanded buildings for nonwater-dependent use are not constructed immediately adjacent to a project shoreline, in order that sufficient space along the water's edge will be devoted exclusively to water-dependent use and public access associated therewith as appropriate for this area of the East Boston waterfront. Second, within the context of its Plan, the City must demonstrate that the substitute provision will, with comparable or greater effectiveness, meet this objective. My determination relative to whether or not these provisions promote this tideland policy with comparable or greater effectiveness is conducted in accordance with the MHP regulatory guidance discussed in detail below.

The Plan proposes a substitution to the Water-Dependent Use Zone (WDUZ) requirement at 310 CMR 9.51(3)(c). The City proposes a minimum setback distance of 25 feet for the WDUZ. As an offset for a narrower WDUZ, the Plan provides a reconfigured WDUZ that will maintain at least the same overall area (approximately 22,806sf) as required under the Waterways Regulations. The reconfigured WDUZ will provide setbacks along the waterfront and Harborwalk and setbacks in different areas of the site that are contiguous to the DPA and the historic maritime interpretive area. Additionally, as discussed below, DPA improvements will enhance the site for water-dependent uses.

As a result of my review, I am comfortable that the City has demonstrated that the proposed reconfiguration of the WDUZ will ensure with comparable or greater effectiveness that sufficient

public benefit will be provided to enhance water-dependent use and public access associated therewith as appropriate for this area of the East Boston waterfront. I am approving the substitute provision subject to the following condition:

- In no case shall the area of the reconfigured WDUZ be less than the area that would be obtained with a WDUZ configured in strict conformance with the dimensional requirement (approximately 22,806 sf).

#### Building Height

To approve any substitute provision to the height standard at 310 CMR 9.51(3)(e), I must first determine that the Plan specifies alternative height limits and other requirements that ensure that, in general, new or expanded buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground-level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for this location on the East Boston waterfront. The approval regulations focus on how a building's mass will be experienced at the public open spaces on the project site, especially along the waterfront and key pathways leading thereto. Within this context, I must apply the "comparable or greater effectiveness" test to determine whether the proposed substitution and offsetting measures will assure that the above objective is met. My determination relative to whether or not these provisions promote this tideland policy with comparable or greater effectiveness was conducted in accordance with the Municipal Harbor Plan regulatory guidance discussed in detail below.

The Plan requests a substitution of the Waterways requirements at 310 CMR 9.51(3)(e) that would allow non water-dependent buildings up to a height of 85 feet. The Plan included an analysis to assess the effects of increased massing associated with the proposed increase in building height. For the purposes of this comparison, the total massing of the proposed scenario was estimated and compared to similar estimates for a Chapter 91 compliant scenario.

Based on my review of the Plan, it appears that the proposed heights are generally consistent with those allowed under the Waterways Regulations. The resulting net new shadow and additional pedestrian-level winds attributable to the increased heights associated with the proposed substitute provision that would impact ground-level conditions or impair public use and enjoyment of the waterfront and its adjacent watershed appear to be relatively minor in scale. To offset the approximately 4,202 square feet (sf) of net new shadow, the Plan proposes an additional 2,201 sf of open space (1 sf of additional public open space for every 2 sf of net new shadow).

I conclude that the proposed substitute height provision will not impair water-dependent activity and public access to the waterfront, and subject to the following conditions, the proposed offsetting measures will appropriately serve to meet the objectives of 310 CMR 9.51(3)(e):

- There should be no less than 2,201 sf of additional open space provided to offset the additional building height and massing; and
- The additional open space shall be public accessible and include paved pedestrian access, amenities such as benches and special landscaping features, and public recreational features as described in the Plan.

### Utilization of Shoreline for Water-Dependent Purposes

To approve any substitute provision to the standard at 310 CMR 9.52(1)(b)(1), I must first determine that the alternative minimum width for the pedestrian access network, specified in the Plan is appropriate given the size and configuration of the Water-Dependent Use Zone and the nature and extent of water-dependent activity and public uses that may be accommodated therein. Within this context, I must apply the “comparable or greater effectiveness” test to determine whether the proposed substitution and offsetting measures will assure that the above objective is met. My determination relative to whether or not these provisions promote this tideland policy with comparable or greater effectiveness was conducted in accordance with the Municipal Harbor Plan regulatory guidance discussed in detail below.

The Plan proposes a substitution of the standards for Utilization of the Shoreline for Water-Dependent Purpose which requires a pedestrian access network with walkways to be no less than 10 feet in width along the entire shoreline. The proposed substitution would require a dedicated 12 foot wide public pedestrian accessway along the entire site. A minimum of 10 feet of this walkway along the waterway must be an unobstructed pedestrian pathway.

The City of Boston’s Harborwalk system is essential to improving public access along the waterfront, and the City considers it a critical aspect of this Plan. This substitute provision provides a minimum width of 12 feet (10 feet clear) and directly benefits the public through enhanced access this substitution with no further requirement for offset.

### **Designated Port Area Compliance**

Because portions of the site are within the East Boston Designated Port Area, the Plan was reviewed to confirm its consistency with the Chapter 91 DPA requirements. Specifically, I must find that the Plan preserves and enhances the capacity of the DPA to accommodate water-dependent industrial use and prevents substantial exclusion of such use by any other use eligible for licensing in the DPA pursuant to 310 CMR 9.32. My determination relative to whether or not the Plan is consistent with these requirements is discussed below.

Following the 2003 East Boston Designated Port Area Boundary Decision, the Boston East site contained two separate DPA areas. During the harbor planning process, the City requested that these two DPA areas be consolidated to facilitate better development opportunities for both the DPA area and non-DPA area of the site. CZM approved this consolidation which relocated the DPA to the southern portion of the project site with no net loss of DPA area.

In order to enhance the DPA portion of the site, as a condition, I am requiring improvements designed to make the parcel more suited for maritime-industrial uses and functions and to provide buffering elements. Such improvements may include the following:

- Removal of dilapidated pile fields;
- Restoration of seawalls and adjacent surfaces;
- Regrading and remediation of site;
- For the mixed-use building at 102-148 Border Street, provision of language in lease forms (or deeds) indicating the existence of nearby water-dependent industrial facilities and uses with operational characteristics as enumerated in 310 CMR 9.51(1);

- Use of appropriate construction materials (as described in the Plan), for the mixed-use building at 102-148 Border Street, to mitigate potential adverse impacts of neighboring water-dependent and marine industrial activities; and
- Provision of buffer, or transitional, land uses along the ground floor of the mixed-use building which is adjacent to the DPA.

I understand that DPA sites require long-term capital investment in their physical infrastructure to remain economically viable. It should be noted that sites that are under public ownership or control are eligible for funding through the Massachusetts Seaport Advisory Council. Such funding opportunities may include, but are not limited to, funding for site restoration, construction of maritime infrastructure, and dredging. If the City wishes to retain public ownership of the DPA portion of the project site, my staff and I will work with the City and the Seaport Council on ways to improve the site for maritime-industrial activities.

Based on the information provided in the Plan and the conditions as discussed above, I find that the Plan is consistent with the requirements of the Designated Port Area.

#### **Evaluation of Requested Substitute Provisions: 125 Sumner Street**

The 125 Sumner Street site is owned by the Boston Housing Authority (BHA), and is approximately 41,955 sf. All of the 20 three- and four-bedroom residential units are currently designated as affordable. The Plan indicated that although this parcel has been proposed for redevelopment, including the provision of additional affordable and market rate housing units, the planning process is in the very early stages and the project size is unclear. The City indicated that any proposed project for the site would retain at least the current number of affordable units and will add additional affordable units in accordance with the Mayor's Executive Order for Affordable Housing.

#### Activation of Commonwealth Tidelands for Public Use

To approve any substitute provision to the standard at 310 CMR 9.53(2)(c), I must determine that the quality of public benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy, are fully commensurate with the proprietary rights of the Commonwealth therein. The City must demonstrate that any private advantages are merely incidental to the achievement of public purposes.

The Plan proposes a substitution to the Activation of Commonwealth Tidelands for Public Use requirement at 310 CMR 9.53(2)(c). The City proposes to permit Facilities of Private Tenancy to occupy up to 75% of the ground floor (excluding upper floor accessory uses). As an offset for these ground-floor private facilities, the Plan proposes to provide a minimum of 25% Facilities of Public Accommodation (excluding upper floor accessory uses). The Plan provides additional guidance regarding the types of uses that may be appropriate for the site including, but not limited to: gallery, exhibition space, teaching space, maritime history interpretive exhibit space, community meeting room, and community center.

In consideration of the City's request to reduce the amount of required ground-floor Facilities of Public Accommodation, I believe that a reduction is justified given the laudable goals of the Boston Housing Authority to provide waterfront affordable housing at 125 Sumner Street to

City residents. The Waterways Regulations at 310 CMR 9.53(3)(c)(2) support these goals by allowing “affordable housing in residential developments in order to make waterfront tenancy and access available to a broader segment of the public than would be the case under prevailing market conditions”.

With respect to the mission of the Boston Housing Authority to provide affordable waterfront housing at this site and with the additional guidance the Plan provides in regards to the types of civic/cultural uses that the proposed substitution and offsetting measures, my review indicates that public benefits are commensurate with the proprietary rights of these tidelands, subject to the condition below:

- This substitution is only valid so long as the site remains under the ownership or control of the Boston Housing Authority with the primary purpose to provide affordable housing to City residents.

**Table 2 — Summary of Substitute Provisions for 125 Sumner Street**

Regulatory Provision	Chapter 91 Standard	Substitution	Offsetting Measures
310 CMR 9.53(2)(c) Activation of Commonwealth Tidelands for Public Use	“the project shall include interior space to facilities of public accommodation, other than public parking, with special consideration given to facilities that enhance the destination value of the waterfront by serving significant community needs...such space shall be at least equal in amount to the square footage of all Commonwealth tidelands on the project site within the footprint of buildings containing nonwater-dependent facilities of private tenancy...”	Permit Facilities of Private Tenancy to occupy 75% of the ground floor (excluding upper floor accessory uses)	A minimum of 25% of the ground floor (excluding upper floor accessory uses) shall be devoted to facilities of public accommodation including but not limited to: gallery, exhibition space, teaching space, maritime history interpretive exhibit space, community meeting room, and community center. These facilities will be located within the ground floor to effectively promote public use and enjoyment of the project site. The facilities will be managed and programmed to establish the project site as a year-round locus of public activity.

## **Implementation Strategy**

Pursuant to 301 CMR 23.05(4), the Plan must include enforceable implementation commitments to ensure that, among other things, all measures will be taken in a timely and coordinated manner to offset the effect of any plan requirement less restrictive than that contained in 310 CMR 9.00. The Plan provides an entire section that identifies actions required for its effective implementation. Specifically, it provides additional direction in the application and issuance of Chapter 91 licenses for the redevelopment sites in the planning area.

The Plan recommends that future offsite public benefits associated with the Chapter 91 licensing process, including any benefits for extended-term licenses, be directed toward implementation of provisions and elements contained in the Boston Inner Harbor Passenger Water Transportation Plan, the Port of Boston Economic Development Plan, or improvements to public access and public open space along the East Boston waterfront. The Plan also provides guidance on appropriate historic interpretive elements that could be incorporated during the Chapter 91 licensing process. The conditions relating to the substitute provisions that I have included in this Decision will be effectively implemented in the course of Chapter 91 licensing of the proposed developments at Boston East and 125 Sumner Street. The provisions of this Plan will also be implemented through the recently adopted amendments to the underlying zoning (East Boston Neighborhood District - Article 53). These zoning changes will permit the uses contemplated for these sites and will allow building heights that are consistent with the approved substitute provisions. Accordingly, no further implementation commitments on the part of the City are necessary, and I find that this approval standard has been met.



#### **IV. EFFECTIVE DATE AND TERM OF APPROVAL**

This Decision shall take effect immediately upon issuance on March 4, 2009. As requested by the City of Boston, the Decision shall expire 10 years from this effective date unless a renewal request is filed prior to that date in accordance with the procedural provisions of 301 CMR 23.06 (recognizing that the term of approval is now 10 years). No later than 6 months prior to such expiration date, in addition to the notice from the Secretary to the City required under 301 CMR 23.06(2)(b), the City shall notify the Secretary in writing of its intent to request a renewal and shall submit therewith a review of implementation experience relative to the promotion of state tidelands policy objectives.

## V. STATEMENT OF APPROVAL

Based on the planning information and public comment submitted to me pursuant to 301 CMR 23.04 and evaluated herein pursuant to the standards set forth in 301 CMR 23.05, I hereby approve the portion of the East Boston Waterfront District Municipal Harbor Plan Amendment pertaining to the 102-148 Border Street (Boston East) and 125 Sumner Street planning sub-area subject to the following conditions:

1. MassDEP should not issue its final Chapter 91 license until the City has conveyed ownership for the 102-148 Border Street (Boston East) site to a private entity as described in the Plan.
2. MassDEP should incorporate as conditions of any Chapter 91 license for the Boston East site, required improvements designed to make the parcel more suited for maritime-industrial uses and functions as previously noted in this Decision.
3. MassDEP should incorporate as a condition of any Chapter 91 license for the Boston East site the following items related to the location of Facilities of Public Accommodation:
  - The location and size of the McKay Community Gallery shall be provided in substantial accordance with Figure 7-3 and as described in the Plan;
  - The McKay Community Gallery shall be provided built out and rent free for the term of the license;
  - The location and size of the public archway, and associated historic/interpretive activation features, shall be provided in substantial accordance with Figure 7-3 and as discussed in the Plan; and
  - The location and type of the remaining required Facilities of Public Accommodation shall be determined during the MassDEP Chapter 91 licensing process.
4. MassDEP should incorporate as a condition of any Chapter 91 license for the Boston East site the following item related to the reconfigured Water Dependent Use Zone:
  - In no case shall the area of the reconfigured WDUZ be less than the area that would be obtained with a WDUZ configured in strict conformance with the dimensional requirement (approximately 22,806 sf).
5. MassDEP should incorporate as a condition of any Chapter 91 license for the Boston East site the following items related to the open space offset for additional building height:
  - There should be no less than 2,201 sf of additional open space provided to offset the additional building height and massing; and
  - The open space shall be publicly accessible and include paved pedestrian access, amenities such as benches and special landscaping features, and public recreational features as described in the Plan.
6. MassDEP should incorporate as a condition of any Chapter 91 license for the 125 Sumner Street site the following item related to the amount of required FPAs:
  - This substitution is only valid so long as the site remains under the ownership or control of the Boston Housing Authority with the primary purpose to provide affordable housing to City residents.

For Chapter 91 Waterways licensing purposes pursuant to 310 CMR 9.34(2), the Approved Plan shall not be construed to include any of the following:

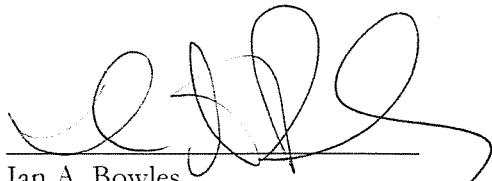
1. Any subsequent addition, deletion, or other revision to the final Approved Plan, except as may be authorized in writing by the Secretary as a modification unrelated to the approval standards of 301 CMR 23.05 or as a plan amendment in accordance with 301 CMR 23.06(1).
2. Any determination, express or implied, as to geographic areas or activities subject to licensing jurisdiction under M.G.L. Chapter 91 and the Waterways regulations; in particular, the approximate locations of the historic high and low water marks for the harbor planning area has been provided by MassDEP for planning purposes only, in order to estimate the area and nature of filled tidelands in said area, and does not constitute a formal ruling of jurisdiction for any given parcel.
3. Any proposed modifications to the Waterways Regulations, express or implied in the Plan document as submitted, that have not been approved explicitly by this Approval Decision.
4. Any provision which, as applied to the project-specific circumstances of an individual license application, is determined by MassDEP to be inconsistent with the waterways regulations at 310 CMR 9.00 or with any qualification, limitation, or condition stated in this Approval Decision.

In accordance with 310 CMR 9.34(2), in the case of all waterways license applications submitted subsequent to the Plan's effective date, MassDEP will seek conformance with applicable provisions of the approved Plan. It will apply as well to all pending applications for which no public hearing has occurred or where the required public comment period has not expired by the effective date of the approved Plan.

The City shall prepare a final, approved East Boston Waterfront District Municipal Harbor Plan Amendment ("Approved Plan") to include:

- a. The plan dated May 2008;
- b. Materials submitted during the consultation session; and
- c. This approval Decision.

Copies of the final Approved Plan shall be provided to CZM and MassDEP's Waterways Program, kept on file at the Boston Redevelopment Authority, and made available to the public through the City's website and/or copies at the public library.

  
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Ian A. Bowles  
Secretary of Energy and Environmental Affairs

3/4/09  
\_\_\_\_\_  
Date