

Department of Environmental ProtectionDEPARTMENT OF ENVIRONMENTAL PROTECTION
Beverly Port Marina and City of Beverly

Docket No.: Docket No. 2010-003; 2010-021

File No.:

Case Name: Beverly Port Marina and City of Beverly

Date: October 12, 2011

Municipality: Beverly

Hearing Officer: /s/ Pamela D. Harvey, Presiding Officer

Title: RECOMMENDED FINAL DECISION ON RECONSIDERATION

The Massachusetts Department of Environmental Protection (the "Department") issued written determinations pursuant to M.G.L. c. 91 and 310 CMR 9.00 allowing the City of Beverly (the "City") to construct two related projects on Glover's Wharf along Beverly Harbor. The site is within a Designated Port Area ("DPA"), where activities are generally limited to water-dependent industrial uses, supporting DPA uses, and temporary uses. 310 CMR 9.32(1)(b). Beverly Port Marina ("BPM"), the adjacent property owner, appealed, alleging that the licenses did not meet the regulatory requirements and also asserting that the licenses must be denied because it had submitted a competing proposal that would better promote water-dependent-industrial use of the DPA as allowed under the regulations for DPAs. 310 CMR 9.36(5)(a). In a Final Decision, the Department's Commissioner adopted a Recommended Final Decision concluding that BPM had not clearly demonstrated through detailed plans and feasibility studies that its project could proceed or that its competing project would better promote water-dependent industrial use in the DPA because the City had committed to continue the use of the land for a restaurant and parking. [1] BPM filed a motion for reconsideration and a motion to re-open the hearing, arguing that the Final Decision unfairly imposed a new standard on BPM as a competing project proponent and that a re-opening of the hearing would provide an opportunity to provide evidence that its project in fact met the standard. The Department supported the motions summarily, and the City filed oppositions addressing each of BPM's contentions. I recommend to the Department's Commissioner that the motions to reconsider and to reopen the hearing should be denied. Indeed, the motions and responses confirm that the Final Decision is legally sound and factually correct.

A motion for reconsideration will be allowed only where there is a clearly erroneous finding of fact or ruling of law on which the final decision is based. 310 CMR 1.01(14)(d). A motion for reconsideration may be summarily denied where it repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered, and denied, or where it attempts to raise new claims or arguments. Id. The Commissioner may remand a case to a Presiding Officer for the purposes of receiving new evidence or for additional findings of fact or conclusions of law, including where the evidence to be introduced was not reasonably available for presentation at the hearing. 310 CMR 1.01(14)(e). [2]

Both the facts and applicable regulations are complex. Briefly, the City had purchased the site in 1995 using state funding obtained from the Department of Conservation and Recreation's Division of Conservation Services ("DCS") that restricts its uses to recreational purposes under a recorded Project Agreement. [3] The City proposed the construction of a new building for lease by the Black Cow restaurant as a supporting DPA use, water-dependent industrial use of the ground floor, public parking as a temporary use, a lay down area with public access along the Wharf, and the installation of pile-held floats for berthing of vessels seaward of the Wharf. The City executed an amended Project Agreement with DCS allowing these uses of the land. During the public comment period on the City's application for a c. 91 license, BPM submitted a competing project proposal to use the site as a boatyard with recreational uses on the ground floor of the existing building. The Department's waterways program proposed to issue licenses for the City's project, having rejected BPM's competing project because it had not been submitted according to the state's procurement law. During the hearing, the Department reversed its position on BPM's competing proposal, finding that BPM had met the eligibility requirements as a competing party and would provide a greater square footage of water-dependent industrial use at the site, resulting in a denial of the City's project. The City disputed the revised determination, arguing that the Department should reject BPM's competing proposal and issue the license for the Black Cow project as well as the adjacent pile-held floats on Glover's Wharf.

This case presents the first licensing decision in a DPA where a competing party submitted an alternate project proposal. The competing party regulation requires the Department to withhold a license from an applicant for a c. 91 license where another party makes a clear showing that it would promote water-dependent industrial use of the DPA to a greater extent and meets four criteria as a competing party.[4] 310 CMR 9.36(5)(a). Much of the hearing focused on the City's project and BPM's competing proposal, and how each had been designed to meet the requirements for a c. 91 license in a DPA with components of each project tailored to the restrictions on the parcel due to the Project Agreement. While BPM's proposed boatyard operation would expand a water-dependent industrial use in the DPA, BPM's feasibility study and subsequent testimony have not provided a clear showing that its project is feasible due to the restrictions on the parcel.[5] 310 CMR 9.36(5)(a)2. Even if DCS were to approve the use of the City's parcel as a boatyard, BPM's competing project is not feasible as a practical matter because the City is evidently unwilling to site a boatyard on its parcel. In addition, I concluded that BPM's competing proposal would not better promote water-dependent industrial use in the DPA because, although its proposed boatyard is a water-dependent industrial use, there is no evidence in the record to support a conclusion that the City will lease the parcel for a boatyard to BPM due to its commitment under the Project Agreement. See 310 CMR 9.36(5)(a).

In its motion for reconsideration, BPM identified several findings of fact and rulings of law that it asserts are clearly erroneous. BPM argued that it was not required to demonstrate that its project was feasible, or more particularly that it conformed to the Project Agreement. BPM further argued that the conclusion of law that it must demonstrate its competing project is feasible is clearly erroneous. BPM argued that it lacked notice of the legal standard and seeks an opportunity to present evidence that its competing use of the site as a boatyard has been approved by DCS. BPM provided an affidavit from Frank Kinzie asserting that Melissa Cryan of DCS had orally confirmed that the recreational uses proposed for the first floor of the building combined with the boatyard use of the site was acceptable.

For all the complexity of this case, the Final Decision rested on a simple proposition based upon the regulation. In order for the Department to determine that BPM's competing project, as described in the required detailed plans and feasibility studies, would promote water-dependent industrial use in the DPA to a greater extent than the City's proposed project, there must be a bona fide, viable competing project. BPM was not required to conform to the Project Agreement for the sake of compliance with DCS requirements, BPM was required as a competing party to make a clear showing that it met the four criteria as a competing party and that it would better promote water-dependent industrial use in the DPA. 310 CMR 9.36(5). Where BPM was not able to show that its project could move forward, it could not show that it would better promote water-dependent industrial use of the DPA, or indeed promote the DPA in any way. BPM did not make the requisite clear showing necessary to support a denial of a license to the City.

BPM additionally argued that feasibility was not an issue in the appeal and it was denied an opportunity to show that it conformed to the Project Agreement. BPM claims that it was denied procedural due process because it did not have notice of the regulatory requirements, but the regulatory provision at 310 CMR 9.36(5) was explicitly identified as an issue for adjudication. There were innumerable references to the Project Agreement and its restrictions on the property throughout the adjudication.[6] In addition, the regulation explicitly requires a clear showing of two criteria: 1) eligibility as a competing project, including the submission of detailed development plans and feasibility studies and 2) the competing project would better promote water-dependent industrial use in the DPA. BPM could not clearly show, however, either that its feasibility study supported a conclusion that its project was feasible or that its competing project would better promote water-dependent industrial use in the DPA because it had no reasonable likelihood of being implemented.

BPM's argument that the Department did not raise the question of the Project Agreement misstates the record. The Department explicitly asked BPM, with its feasibility study, to provide evidence that its project was consistent with the state recreational grant. BPM's own actions in contacting DCS show that it pursued this issue, as does the fact that it tailored the uses on the ground floor of the former McDonalds building to conform to the recreational uses expected by DCS. Regardless of whether BPM pursued this question under the rubric of a "fatal flaws analysis," a feasibility study, or simply information requested by the Department, BPM cannot claim that it was surprised by the question of whether its project can proceed under the restrictions imposed by the Project Agreement.

BPM argues that the Department should adopt a definition of feasibility study as a "combination of a market study and an economic analysis that provides an investor with knowledge of both the environment where a project exists and the expected return on investment to be derived from it." [7] BPM frames its inquiry to DCS as to whether its competing proposal would pass muster under the Project Agreement as part of a "fatal flaws analysis," to ascertain whether there were any obstacles which could prevent implementation of the project. BPM argues that at this preliminary stage, a project proponent is not required to show that it could obtain all necessary permits or approvals. Ironically, the more general dictionary definition of feasible is consistent with both the more technical definition BPM contends is correct and its "fatal flaws" analysis: whether a project is "capable of being done or carried out" asks the same question as whether obstacles prevent implementation or whether the project can be marketed and yield a return on investment. [8] BPM was not asked to show it had or could obtain all required approvals, only that it had proposed a bona fide, viable competing project that could be implemented on the City's land. [9]

The Final Decision did not err as to the roles of DCS and the Department as to the Project Agreement. The Final Decision considered whether BPM had shown that it could obtain approval from DCS but did not draw conclusions as to whether either project conformed to the Project Agreement or the requirements of the Urban Self-Help Program. The Recommended Final Decision place no weight on the opinions of BPM, or the other parties, as to interpretation of the Project Agreement. [10] The Final Decision was quite clear on this point, and need not be reconsidered here. For the same reason, I place no weight on the opinions of BPM, or the other parties, as to interpretation of the Project Agreement. With its motion for reconsideration and re-opening, BPM filed an affidavit from Frank Kinzie as to statements made by Ms. Cryan at a meeting, but reasonable persons in the conduct of this serious affair would expect to rely upon a documentation from the person with authority rather than hearsay. [11] The Final Decision properly relied upon the written communication from DCS filed by BPM with its direct testimony.

Even if BPM had filed the additional information in Mr. Kinzie's affidavit during the hearing, the outcome would not change for several reasons. First, the affidavit goes only to the issue of whether BPM's project is consistent with the Project Agreement. But I previously found that BPM's project is not feasible and would not better promote water-dependent industrial use of the DPA for another independent reason - the City's manifest unwillingness to lease the property to BPM. Second, the recreational uses proposed by BPM create an obstacle to licensing under c. 91. [12] BPM's motions and the affidavits of Frank Kinzie are consistent with an inference drawn from the testimony at the hearing, that DCS required BPM to provide recreational uses on the first floor of the building. BPM's feasibility study identified a boat rental operation, Freedom Boat Clubs, as a water-dependent and recreational use of the first floor of the existing McDonalds building. BPM described this business as offering boat rentals to customers as a less expensive alternative to boat ownership in a location with good retail visibility. DCS had explicitly approved that use under the Project Agreement. Under the Department's regulations, a recreational boat rental operation is a water-dependent use but not a water-dependent industrial use. [13] Further, the regulations governing supporting DPA uses explicitly prohibit new "recreational boating facilities" as a supporting DPA use. 310 CMR 9.02, Supporting DPA Use. BPM proposed boat rental operation, Freedom Boast Club, fits this definition, and therefore, it appears that the Department could not issue a c. 91 license for BPM's competing proposal in the DPA. [14] The Department could issue a c. 91 license for winter boat storage and boat repair as water-dependent industrial uses in the DPA, but BPM's competing proposal would be feasible only if DCS would approve the use of the parcel as a boatyard without also requiring recreational boating uses. For that reason, the absence in the record of evidence that DCS had approved the winter boat storage use without also requiring recreational uses was, in BPM's terminology, a "fatal flaw." [15]

The motion to re-open the hearing is also properly denied because the evidence contained in Mr. Kinzie's affidavit was available at the time of the hearing. BPM's argument that it was deprived of an opportunity to make its clear showing under the regulations, and did not know that it would be expected to make a clear showing, is inconsistent with the record. The regulation at 310 CMR 9.36 (5) related to competing proposals was specifically identified as an issue for adjudication. As BPM states in its Feasibility Study, the Department had asked BPM to provide information, including clarification of uses, a list of permits required and a timeline for approval, any feasibility studies conducted, documentation related to a fair market value offer, and evidence showing the project was consistent with the recreational grant, i.e., the Project Agreement. As described in the Recommended Final Decision, BPM stated it had requested a

letter but had not yet received it, then submitted for the record in the adjudicatory hearing the letter from Melissa Cryan approving the recreational uses but not the winter boat storage. Thus, the record indicated that Ms. Cryan had not ascertained whether BPM's entire proposal was satisfactory.

The Department concurred with BPM's motions for reconsideration and re-opening of the hearing. The Department stated that the legal basis of the Recommended Final Decision was erroneous because a requirement that a competing party show compliance with other laws and legal requirements would be difficult or impossible, and harder to obtain than a license. The Department also noted that the legal standard had not been argued during the hearing. The Department, however, did not articulate its view of what the legal standard for 310 CMR 9.36(5)(a)(2) should be, either during the hearing or for purposes of reconsideration. The Department did not explain why the standard for a competing party should be easy to meet, or why the Department should withhold a license to the City which met the applicable requirements for a license absent a clear showing by BPM that its competing project was feasible.[16] An assertion that the standard is too high does not constitute legal error requiring reconsideration.

Secondly, the Department stated that the Recommended Final Decision was erroneous because it referred to an EOEEA policy related to Article 97 and the Superior Court recently held that Article 97 is outside the Department's statutory authority. *Mahajan v. Boston Redevelopment Authority*, Sup. Ct. Civ. A. No. 10-0802-H (June 10, 2011). The Recommended Final Decision, however, explicitly referenced *Mahajan*, twice, clearly stating that the Department lacks jurisdiction to interpret Article 97. See Recommended Final Decision, n. 3 and n. 16. Finally, the Department stated that the Recommended Final Decision had failed to mention a footnote in one of its filings that, "on information and belief, DCS staff [had] verbally communicated to DEP that both projects appeared feasible from their standpoint." In fact, the Recommended Final Decision explicitly referenced this footnote, noting that the statement was not consistent with the letter from DCS in the record. See Recommended Final Decision, n. 14. While the Department argues that it was deprived of an opportunity to present evidence or conduct cross-examination on a crucial factual issue, its prior position was that analysis or testimony related to the Project Agreement was legally irrelevant to any regulation in 310 CMR 9.00 applicable to the project. See Recommended Decision at 23 and Department's Response to Presiding Officer's November 17, 2010 Request. Accordingly, the Department's Response to the Motions for Reconsideration and Re-Opening do not demonstrate that the Final Decision is clearly erroneous, legally or factually, or that any new evidence was unavailable for presentation at the time of the hearing.

I briefly address two additional issues raised in the motions. The Petitioner claims the burden of proof was improperly allocated. In the Department's administrative hearings, the burden of production and persuasion are typically placed upon the party contesting the Department's position. See 310 CMR 1.01(13)(c)1; 310 CMR 10.03(2); *Matter of Town of Hamilton, Town of Topsfield, Town of Wenham*, Docket Nos. 2003-065, 2003-079, 2003-068, Recommended Final Decision (January 19, 2006). In this appeal, on all issues except the competing proposal, BPM contested the Department's position. The Department's shift in position as to the competing proposal to a position consistent with BPM did not shift the burdens, however, because the regulations explicitly state that the competing party, BPM, is required to make a clear showing as to the merits of its competing project.[17] The City was not required to make the clear showing required under 310 CMR 9.36(5)(a)1-4.[18] BPM also argued that the Recommended Final Decision had materially and erroneously found that there was no evidence that Glover's Wharf had been used for water-dependent industrial uses since the DPA designation in 1978. This statement reflected the record of uses provided by the City but was not material to my conclusions.[19] BPM may not now file evidence related to prior uses of the site that it could have, and did not, file during the hearing.

In sum, the Final Decision properly determined that BPM's competing proposal did not meet the regulatory standard. Due to the City's unwillingness to lease the land to BPM and due to the restrictions on the City's parcel, BPM's project was not feasible and would not better promote water-dependent industrial use in the DPA. As proposed, BPM's competing project cannot be licensed under c. 91. BPM's project is not a barrier to the issuance of c. 91 licenses to the City's project, which may be licensed because it has met the requirements for licensing within a DPA.

NOTICE- RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Commissioner for his Final

Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

-
- [1] The Commissioner also adopted the conclusion that the City's project met the regulatory requirements for licensing, and therefore, would issue the licenses. BPM did not object to the portions of the Final Decision adopting the Recommendations that the City's project could be licensed because it conformed to the regulations, only to the finding related to its competing proposal.
- [2] The hearing rules allow the filing of a motion for reopening the hearing prior to issuance of a final decision, but the Commissioner may also order the reopening of a hearing through a remand. 310 CMR 1.01(14)(e).
- [3] See Petitioner's Exhibit 11, Appendix D, Urban Self-Help Program Project Agreement ("Project Agreement"), also filed with Petitioner's Motion to Re-Open the Hearing.
- [4] The four criteria are that the competing party 1) be an entity with the expertise and finances to implement the project; 2) have prepared detailed development plans including feasibility studies; 3) have tendered an offer at fair market value for water-dependent industrial use; and 4) have proposed license conditions to restrict uses for an appropriate period of time. 310 CMR 9.36(5)(a)1-4.
- [5] Due to the nature of the restrictions on Article 97 lands and the City's acquisition of the parcel, I also concluded that feasibility does not include materially changing the terms of Project Agreement or disposition of the parcel to remove the restriction.
- [6] While the parties addressed the question of the overlapping requirements for recreational uses and water-dependent industrial uses in the DPA, which would seem incompatible, in briefs after the hearing, there is no question that the parties had an opportunity to be heard on this point. As noted in the Recommended Final Decision, I sought the Department's views in particular because there was some likelihood it had reached this question in other cases or had consulted with staff at other agencies on the question.
- [7] BPM found this definition on a state website glossary related to "Smart Growth" at <http://commpres.env.state.ma.us/content/glossary.asp>.
- [8] BPM's Feasibility Study did not include any information related to return on investment, only general information on market demand. I considered numerous different definitions of "feasibility study" before concluding that what they had in common was reflected in the definition of "feasible," a study with the aim of determining whether something could or should be carried out.
- [9] BPM is correct that permits and approvals are generally acquired at licensing. But for BPM to argue that the Department should overlook an obstacle to development until the licensing stage assumes an outcome that is not supported by the record; the evidence simply does not support a conclusion that BPM is somehow entitled to obtain a license for its project on the City's property or that there is some fundamental unfairness in the issuance of a license to the City for its own project on its own land.
- [10] As the Recommended Final Decision explained, I looked to the DCS, specifically the written opinion of the Grant Manager Melissa Cryan, for interpretation of the Project Agreement because it is beyond the scope of the Department's authority, or my role as a Presiding Officer in this Department matter, to draw conclusions as to whether either project conformed to the Project Agreement or the Urban Self-Help Program.
- [11] No party identified Ms. Cryan as a witness. "Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." M.G.L. c. 30A s. 11(2), 310 CMR 1.01(13)(h). Hearsay evidence may be admissible in an adjudicatory hearing, and "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" *Covell v. Dep't of Soc. Servs.*, 439 Mass. 766, 785-86 (2003) (sufficient indicia of reliability was found where the hearsay was detailed and consistent and there was an absence of motive or reason to make false allegations); accord *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530, 517 N.E.2d 830 (1988) ("Factors to be considered [in determining whether there is sufficient indicia of reliability] include independence or possible bias of the declarant, the type of hearsay materials submitted, whether statements are

sworn to, whether statements are contradicted by direct testimony, availability of the declarant, and credibility of the declarant."). While Mr. Kinzie's testimony as to a meeting with Ms. Cryan would be admissible, his recollection of the meeting is not a substitute for a written communication from Ms. Cryan. Although BPM argued otherwise, the description of BPM's communication with DCS shows that BPM intended to propose a competing project that met the terms of the project agreement.

[12] BPM's letter dated March 18, 2009 provided with Mr. Kinzie's affidavit makes clear what can be inferred from the DCS letter dated March 25, 2009 that BPM had submitted with its direct testimony, that DCS had required BPM to use 100% of the ground floor of the McDonalds building for recreational uses.

[13] A "Public Recreational Boating Facility" is defined as "a facility for the berthing of recreational vessels at which all berths and accessory uses thereto are available for patronage by the general public on a seasonal or transient basis. 310 CMR 9.02, Public Recreational Boating Facility. A private recreational boating facility is defined as "a facility for the berthing of recreational vessels at which all berths and accessory uses thereto are not available for patronage by the general public, or where exclusive use of any such berth is available on a long-term basis" 310 CMR 9.02, Private Recreational Boating Facility. Recreational boating facilities are water-dependent uses pursuant to 310 CMR 9.12(2)(a)2. Offices and parking associated with a recreational boating facility are accessory to a water-dependent use pursuant to 310 CMR 9.12(3).

[14] It appears that the Department could potentially allow the six parking spaces for recreational users required by DCS and included in BPM's competing project as a supporting DPA use assuming they were not accessory to a recreational boating facility. BPM also proposed charter fishing and diving operations, which it characterized as a water-dependent industrial uses rather than a recreational use. It is not entirely clear whether charter fishing is properly categorized as "commercial passenger vessel operations," which the Department considered to be "waterborne passenger transportation facilities." See 310 CMR 9.12 ((2)(b)2. and 310 CMR 9.12(2)(a)8. It would not appear to be "commercial fishing" because the fish are not sold commercially. See 310 CMR 9.12 ((2)(b)4.

[15] The City noted that, in contrast, it had been required by the Department to allocate the first floor of the building to water-dependent industrial uses. There was also testimony at the hearing that DCS required "unfettered access," so that even if it would approve boat storage as a use the stored boats could not be secured by a fence or other restriction on access. In the "Project Description" section of BPM's Feasibility Study, BPM states that in combining the two properties "fencing would be re-established to provide security to stored boats."

[16] The Department, and perhaps also BPM, may have viewed the denial of a license to the City as a means to encourage a DPA master plan that could have allowed greater flexibility for the City, BPM, and perhaps other parcels in the Beverly DPA. The competing proposal provision unquestionably provides leverage to the competing party, but I could find no regulatory or policy support for a Department determination that would be based, essentially, on denial of a license to the City as an impetus to undertake DPA master planning. Setting aside the possibility of a DPA master plan, it would seem a Pyrrhic victory for a DPA to accept a competing project that could not move forward only to have the land remain vacant.

[17] BPM seeks remand to the Department's waterways staff to review the competing proposal under what it calls the new regulatory standard. While there are instances where remand to Department staff is warranted, here the Department staff did review the competing proposal, rejected the competing proposal and BPM filed an appeal to pursue its arguments in this appeal.

[18] Absent a failure of a petitioner to meet its initial burden of producing evidence, a case is decided upon which way the evidence preponderates. Permit conditions should reflect the regulatory standard and the predominating facts. The burden of proof is important where the evidence is weighted equally on both sides, in which case the party with the burden of proof fails. Such circumstances are rare, however, and parties are better served by focusing on placing into evidence facts with supporting legal argument to prove that their respective positions should prevail. See Matter of Horatio's Welding and Sheet Metal Inc., Docket No. 2004-024, Recommended Final Decision (June 13, 2007).

[19] The only evidence to which BPM refers that was in the record was the prior license for the floats; the evidence as to the parcel prior to its purchase by the City is unequivocal that it was used for a McDonald's

restaurant. Any evidence that BPM seeks to introduce on this point was available at the time of the hearing.

End Of Decision

© 2014 Social Law Library. All Rights Reserved.