



Hand-delivered

June 6, 2014

Andrea Langhauser, Waterways Program  
Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

**Re: Chapter 91 License Amendment Application for Daly Field, Nonantum Road, Boston and  
Newton – Application No. w14-4141**

Dear Ms. Langhauser:

We are writing to convey the comments and concerns of the Charles River Watershed Association, Conservation Law Foundation their respective members, and twelve Massachusetts citizens on the above-referenced license application amendment. For the reasons discussed below, the application does not comply with either G.L. c. 91, or the Waterways Regulations.

A License Amendment is inappropriate.

This Application does not qualify as a license amendment within the terms of 310 CMR 9.24 because it is substantial in its change of use and proposed structural alteration as those terms are defined in 310 CMR 9.02. Section 18 of G.L. c. 91 provides explicitly: “Any changes in use or structural alteration of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by this Department of a new license in accordance with the provisions and procedures established in this chapter.” (Emphasis added).

The 1913 license (No. 80) on which this amended license is based only authorizes the dredging of the Charles River in the Watertown area with “the excavated material to be deposited on the shore along the southerly bank of the river” as shown on the accompanying plan. The fact that unauthorized uses and structures may have been allowed on this site in the past does not change that fact or the very limited nature of the 1913 license.

The current proposal is not just a major change from the *status quo* conditions; it is completely beyond any uses or structures identified in the existing license. Indeed, the conversion of use and lease is an Article 97 disposition that required legislative approval pursuant to Ch. 223 of the Acts of 2012. This project requires a new license if these activities, uses and structures are to be approved by the Commonwealth.

A new license is required to develop and specify the uses.

G.L. c. 91, §18 also specifies that the license conditions “shall state...the specific use to which the licensed structure...is restricted.” Developing and imposing such conditions can only take place through a formal licensing procedure since the existing dredge and fill license is silent with respect to such issues.

This is not a restoration or maintenance project.

The Project involves construction of two new NCAA- compliant synthetic turf fields, a clay softball infield, new building with locker rooms and bathrooms, concession stand, tennis courts, new sports lighting and scoreboard systems, press boxes, and 200-seat spectator seating. This high intensity sports complex is not by any stretch of the imagination a “restoration” project.

Nor do we understand why this project is described as being “restorative” of the athletic fields as if they were a legal, authorized use of the site. The only reference to such a procedure is found in 310 CMR 9.22(i)(c). This project does not meet these procedural conditions as the current uses and structures were never authorized and are not exempted from licensing as pre-existing uses or structures. At best, this project is the enhancement of an unauthorized use of Commonwealth tidelands.

The project is not water-dependent.

“Water-dependent uses” are defined as:

those uses and facilities which require direct access to or location in, marine or tidal waters and which therefore cannot be located in-land, including but not limited to: marinas, recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site.

G.L. c. 91, §1 (emphasis added).

Parkland can be an existing water-dependent use as defined in 310 CMR 9.12 (2)(a)(4) (“parks, esplanades . . . that promote use and enjoyment of the water by the general public and are located at or near the water’s edge, including but not limited to any park adjacent to a waterway and created by a public agency”). However, this is not a blanket inclusion as 310 CMR 9.12(2)(f)7. makes clear.<sup>1</sup> Here, that parkland does not retain its water dependency following an Article 97 conveyance and disposition to a private entity.<sup>2</sup> We note that the four foot high fence with 20 feet of netting above it in the tidelands operate to cut the project off from the water.

<sup>1</sup> Pursuant to 310 CMR 9.12(2)(f)7., Mass DEP “shall not find the following uses to be water-dependent: . . . 7. parks, esplanades, boardwalks, and other pedestrian facilities other than those described in 310 CMR 9.12(2)(a)(4).” Under 310 CMR 9.12(3), “A use is accessory to a water-dependent use if it is “customarily associated with and necessary to accommodate a principal water-dependent use. Such a finding shall be made only if the proposed use is: (a) integral in function to the construction or operation of the water-dependent use in question, or provides related goods and services primarily to persons engaged in such use; and (b) commensurate in scale with the operating of the water-dependent use in question. (Emphasis added). These sections support a finding that this project is not water dependent. This is compelling given the Article 97 conversion of this public parkland.

<sup>2</sup> The applicant has said on multiple occasions and in filings that crew facilities are not planned on the site.

Only the limited waterfront portion of the project, *i.e.*, the pedestrian path adjacent to the river qualifies. The balance of the project area, which is former tidal flats and commonwealth tidelands and the proposed uses and structures, are non-water-dependent. None of the other uses proposed qualify under 310 CMR 9.12(1) and (2)(a). Accordingly, the project area in Chapter 91 jurisdiction is subject to the affirmative obligation for public benefits to the general public in 310 CMR 9.53. This is, rightfully, a demanding and stringent test, and has not been met here.<sup>3</sup> Pursuant to the restricted use hours in Ch. 223, the general public will be excluded from use of the fields and tennis courts for virtually all of the weekday primetime use hours in the spring and fall. For a fuller recitation of the limited hours available for public use, we refer you to CRWA's comment letter on the Final Environmental Impact Report attached hereto, a copy of which was previously provided to the Waterways Program.

#### Tidelands structure impacts.

MassDEP in its comments on the Final Environmental Impact Report requested that the proponent evaluate alternatives for controlling the runoff from the pedestrian pathway adjacent to the Charles" to minimize erosion and control the release of contaminants." "[T]he FEIR is silent on how the steep bank will be stabilized and stormwater managed to minimize scour erosion from runoff." In addition, the applicant is proposing soil berms (total of 5,200 s.f.) for spectators in the commonwealth tidelands. The slopes up to the berms next to the footpath are steep and will be subject to erosion when people climb up them to view sports events. Given that the area subject to a chapter 91 waterways license is exempt from the Wetland Protection Act Riverfront Area regulations (310 CMR 10.58(6)(i)), it is appropriate that MassDEP impose conditions in the license that will ensure that runoff and erosion from the pathway is minimized and that the proponent add informal steps to the berms, or alternative measures to reduce erosion from uncontrolled desire paths.

MassDEP should also require relocation of the two athletic light towers from the commonwealth tidelands.

The slopes up the berms next to the footpath are steep and will be subject to erosion if/when people walk/scramble up them to view sports events. We urge the Commission to require the proponent to add informal steps or alternative measures to reduce erosion from uncontrolled desire paths.

#### Additional Requirements

The applicant has committed to keeping the facility open for public use at all times throughout the year. This should be an explicit license condition. DCR has agreed in its MEPA comments that the facility can

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<sup>3</sup> The purpose of the waterways regulations is to "protect and promote the public's interest in tidelands . . . in accordance with the public trust doctrine . . . and to foster the right of the people to . . . the natural, scenic, historic, and esthetic qualities of their environment[.]" 310 CMR 9.01(2). Accordingly, "The Department shall take into account any factor affecting the quantity and quality of benefits provided to the public, in comparison with detriments to public rights associated with facilities of private tenancy . . .", 310 CMR 9.53, and a nonwater- dependent project shall "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." *Id.*

be used between the hours of 6 a.m.-9 a.m. and the applicant has counted these hours in its calculations of "open" hours. Accordingly, any license should specify necessary lighting so that the general public can actually utilize the facility in the early morning hours and after sunset. Facility signage, including on restrooms, should make it clear that the facility is open to the public and should clearly invite the public to enter and make full use of the complex. Information on how to sign up for field use and when fields and courts are not reserved through permitting should be prominently displayed. An electronic monitor with daily scheduling information (and open times) for each field and the courts should be located near the entrance of the facility and also made available via the internet. The pedestrian walkway should be clearly marked as public. No Simmons College signage should be allowed or signage that implies that this is a facility only for Brighton Allston residents. Reserved parking spaces should be provided and clearly marked for the public's use in both the Community Rowing and Daly Rink lots.

Thank you in advance for your consideration of these comments.

Sincerely,



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Charles River Watershed Association



Peter Shelley, Esq.  
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And

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