



CITY OF SOMERVILLE, MASSACHUSETTS
JOSEPH A. CURTATONE
MAYOR

March 3, 2014

VIA HAND DELIVERY

Secretary Richard K. Sullivan, Jr.
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

RECEIVED
MAR 3 3 12:00
EOEFA

RE: Petition for Reconsideration of Approval of the City of Everett's Central Waterfront Municipal Harbor Plan

Dear Secretary Sullivan:

On behalf of the City of Somerville, this letter is a petition pursuant to 301 CMR 23.04(5), for reconsideration of your February 10, 2014 Decision on the City of Everett's Request for Approval of the Central Waterfront Municipal Harbor Plan Pursuant to 201 CMR 23.00 ("MHP Approval").¹

Somerville made comments on Everett's Central Waterfront Municipal Harbor Plan ("Everett MHP") during your review of the plan. For your convenience, those comments ("Somerville Comments") are attached as Exhibit 1. Somerville reaffirms those comments but will not repeat them here, except for those relating to the effects of the height of the proposed tower that is a part of the "Wynn Everett" version of the Everett MHP. Somerville respectfully suggests that you made a serious error by refusing to consider certain of those effects and, therefore, that there is a "compelling basis" for you to reconsider your decision to approve the Everett MHP.

¹ Somerville files this petition on behalf of its many citizens who walk, cycle, boat and otherwise recreate in the Chapter 91-protected areas along the Mystic River, both in Somerville and in other municipalities along the river, including, across the river from Somerville, in Everett. A copy of the vote of the Somerville Board of Aldermen joining this petition is enclosed. See *Ricmer Properties Inc. v. Board of Health of Revere*, 59 Mass. App. Ct. 173, 178 (2003) ("In such well-known matters of public concern, municipalities may be in a significantly superior position to individual citizens in representing the public interest, [citing *Sudbury v. Department of Pub. Util.*, 351 Mass. 214, 218 (1966).]")





The Wynn Everett version of the MHP alters height limitations so as to permit a roughly 400 foot casino and hotel tower in private tidelands adjacent to the Mystic River. (The maximum height otherwise permitted under applicable regulations at that distance from the river is 245 feet.) In its comments, Somerville stressed the potential impacts of such a tall building and stated that a viewshed analysis should have been required before approval of so marked a departure from regulatory requirements. Somerville Comments at 4. Such an analysis would consider “whether such a large structure . . . will be conducive to water-dependent activity and public access within the MHP area and adjacent river area . . . on both sides of the river, Draw 7 Park in Somerville and Baxter State Park. . . . Visibility concerns include areas both on the river and from across the river into Somerville.” *Id.*

The MHP Approval did not require that any such analysis be conducted, which Somerville believes is a serious error warranting reconsideration. To illustrate our concerns on this point, Somerville is including with this petition a rendering with views across the Mystic River from the new fish pier at Draw 7 Park in Somerville, an area of protected tidelands, showing the area of the Everett MHP with and without the Wynn Tower. On reconsideration, Everett should be required to produce similar images from various vantage points on the Mystic River watershed and in protected tidelands on either side of the river, showing what the view would be like from those points, given various build out scenarios, including with the proposed tower, with a build out that complies with regulatory height requirements and with any other possible alternatives that Everett wishes to have considered.

The basis for your decision on this issue is stated on Page 12 of the MHP Approval: “Impacts to views from height are not considered here since the focus of the Waterways regulations and MHPs are impacts to the public enjoyment of tidelands. Impacts associated with specific project approvals are considered during the MEPA process and subsequent permitting processes.” This conclusion (that the impact of a very tall building on views is not a factor to be considered in deciding whether to approve a municipal harbor plan) is not supported by the premises you state (that the regulatory criteria have to do with public enjoyment of tidelands and that impacts from project approvals are considered during MEPA and project permitting.)

First, an effect on views may very well constitute an “impact on the public enjoyment of tidelands.” As the enclosed renderings demonstrate, the experience of members of the public who are “enjoying” tidelands in the vicinity of the Everett Central Waterfront will be very much affected by the height of the buildings that are located there. The Waterways regulations specifically recognize this: “A nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use. . . . At a minimum, the Department shall act in accordance with the following provisions. 310 CMR 9.51



If the project includes new structures or spaces for nonwater-dependent use, such structures or spaces must be developed in a manner that protects the utility and adaptability of the site for water-dependent purposes by preventing significant incompatibility in design with structures and spaces which reasonably can be expected to serve such purposes, either on or adjacent to the project site. Aspects of built form that may give rise to design incompatibility include, but are not limited to:

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(b) the layout and configuration of buildings and other permanent structures, insofar as they may affect existing and potential public views of the water, marine-related features along the waterfront, and other objects of scenic, historic or cultural importance to the waterfront, especially along sight lines emanating in any direction from public ways and other areas of concentrated public activity;

310 CMR 9.51(2) (Emphasis added.) The regulations' recognition of the significance of "views" and "sightlines" and of the importance of considering these issues both for those who will use the site and those who will look at it reflects their basis in Chapter 91 of the Massachusetts General Laws and in the underlying Public Trust Doctrine that Chapter 91 codifies.²

The regulations governing review of Municipal Harbor Plans reinforce this conclusion.³ They provide that, for a proposed plan to be approved, it "must be consistent with state tidelands policy objectives and associated regulatory principles, as set forth in 310 CMR 9.00 of DEP." 301 CMR 23.05(2). Among the "primary state tidelands policy objectives with which the plan must be consistent are as follows: . . . 8. to ensure that nonwater-dependent use projects do not unreasonably diminish the capacity of any tidelands to accommodate water-dependent use, as

² See Higgins v. Department of Environmental Protection, 64 Mass.App.Ct. 754, 757 (2005). ("[T]he statute protects, for water-dependent purposes, the public's interest in views from public places, such as parks, and esplanades.")

³ It is worth noting that one of the two statutory bases cited for adoption of the harbor plan approval regulations is M.G.L. c. 21A, Section 2. (The other is c. 21A, 4A, which establishes the coastal zone management office.) Section 2 provides that "[t]he [executive] office [of Energy and Environmental Affairs] and its appropriate departments and divisions shall carry out the state environmental policy and in so doing they shall: . . . (11) promote the preservation and enhancement of natural, scenic, historic, and aesthetic qualities in both urban and rural areas; . . ."



provided in 310 CMR 9.51.” *Id.* Section 9.51 is quoted above; it contains the language about sight lines and by its terms applies both to specific project sites and to areas “adjacent” to them. And, as you note in the MHP Approval, 301 CMR 23.05(c)5 requires that, in the case of proposed relaxation of height limits, you make certain findings about size of the buildings as that may affect public access to and use of tidelands “as appropriate for the harbor in question.” In short, the regulatory structures, and the policies underlying Chapter 91, require that, before approving the Everett MHP, you consider the effect of the relaxation of height limitations on the aesthetic and visual experience of citizens “enjoying” protected tidelands.

It is unclear whether the other reason that the MHP Approval gives for not addressing these issues – that “[i]mpacts associated with specific project proposals are considered during the MEPA process and subsequent permitting processes” – means (1) that the aesthetic impacts of excessive height are a non-tidelands-related environmental impact (like increased off-site traffic, for example), which is not considered in the Chapter 91 approval process at all and is therefore not relevant to harbor plan approval or (2) that those impacts will be considered in the Chapter 91 licensing process – and therefore need not be considered as part of harbor plan approval. But neither of these survives analysis: As to the first, the discussion above demonstrates that the aesthetic effects in tideland areas of development in those same or other tidelands is an issue bearing on project approval under the Chapter 91 regulations.⁴

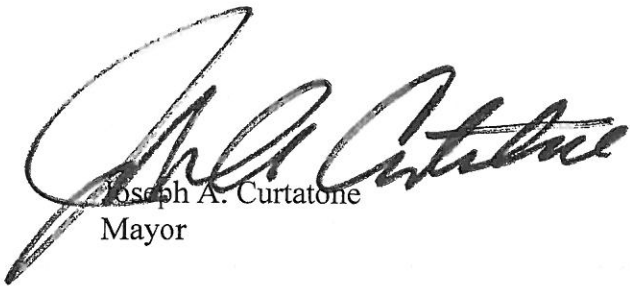
As to the second possible justification – that consideration of this issue will occur in the Chapter 91 licensing process and therefore need not be part of harbor plan approval – that is legally incorrect, and it would make no sense administratively. First, as is noted above, the Harbor Plan approval regulations require consideration of the requirements in specific provisions in the licensing regulations, including those that relate to the effect of the heights of buildings. Second, it would undermine the purpose of the harbor plan approval process, and would be of no help to municipalities and would-be developers, if a change made to a regulatory limitation (an increase in height or in lot coverage, for example) through the harbor plan process could be reversed in the licensing process. The point of the harbor plan review and approval process is, among other things, to establish different regulatory criteria in specific areas from the “generic” ones that would otherwise exist. It does not make sense to permit that to occur with respect to a particular regulatory limit and then to have the licensing process look at the same question – whether that regulatory limit can be relaxed consistent with the overall purposes of Chapter 91 – in the licensing process. To the extent that a municipality seeks relief from a specific regulatory limitation, and that limitation protects a Chapter 91-related interest, the time to consider the impact of granting the relief is when the relief is being granted.

⁴ It is also not clear what “subsequent permitting processes” (other than Chapter 91 licensing) will have jurisdiction to address this issue.



Thank you for your consideration of this petition. I urge you to reconsider your decision to approve the Everett MHP and to subject the plan to further review in light of the issues raised here.

Sincerely,



Joseph A. Curtatone
Mayor

Enclosures

cc: City of Somerville Board of Aldermen



CITY OF SOMERVILLE, MASSACHUSETTS
BOARD OF ALDERMEN

Docket # 196346

Mayor's Request
Miscellaneous Mayor's Request

Regular Meeting 2/27/2014
Item ID 8870

SUMMARY: Requesting that this Board join the City's petition for reconsideration regarding Secretary Richard Sullivan's decision on Everett's Central Waterfront Municipal Harbor Plan.

COMPLETE TEXT:

To the Honorable Board:

I respectfully that your Honorable Board of Aldermen join the City's petition for reconsideration regarding Secretary Richard Sullivan's decision on the City of Everett's Central Waterfront Municipal Harbor Plan.

City staff will be available to answer any questions you may have.

Thank you for your consideration on this matter.

Respectfully submitted,

Joseph A. Curtatone
Mayor

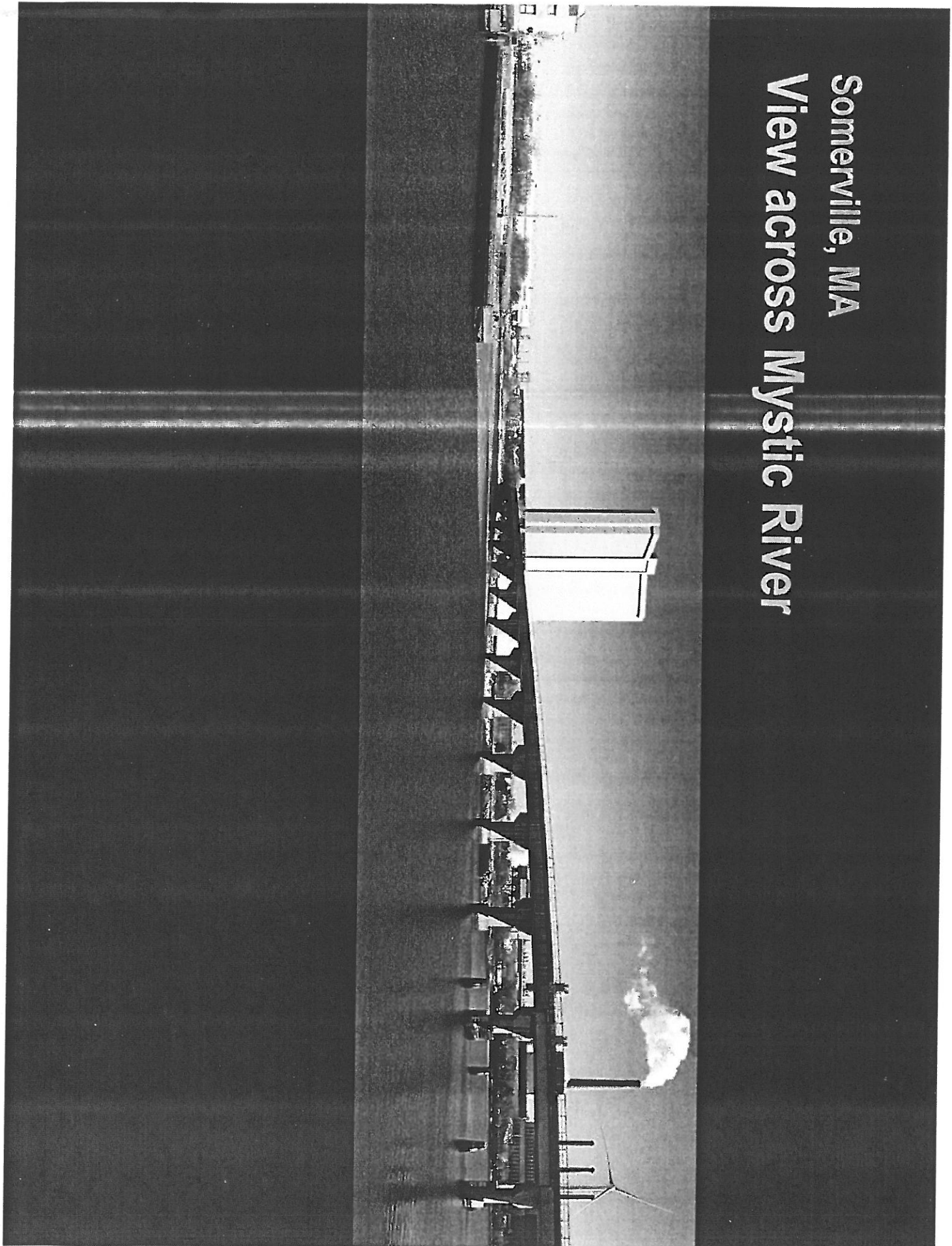
RESULT: APPROVED. [UNANIMOUS]
AYES: Connolly, Rossetti, Sullivan, White Jr., McLaughlin, Heuston, McWatters, Lafuente, Niedergang, Gewirtz, Ballantyne

ADOPTED BY THE BOARD OF ALDERMEN OF THE CITY OF SOMERVILLE,
MASSACHUSETTS, AT A REGULAR MEETING ON THE 27th DAY OF FEBRUARY,
2014.

ATTEST:


John J. Long, City Clerk

Somerville, MA
View across Mystic River



**Somerville, MA
View across Mystic River**

