

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

MITT ROMNEY
Governor

STEPHEN R. PRITCHARD
Secretary

KERRY HEALEY
Lieutenant Governor

ROBERT W. GOLLEDGE, Jr.
Commissioner

6 September, 2005

Save Our Waterfront, Inc.
P.O. Box 143
Nantucket, MA 02554

Mr. Jamie M. Fay
Fort Point Associates, Inc
286 Congress Street (6th Floor)
Boston, MA 02210

RE: File No. JD05-1293; 96 Washington Street, 97 Washington Street, 11 Salt Marsh Way, Units 1, 2, & 3, Tuckernuck Condominium 8, 9A, and 9B Salt Marsh Way; Units 1 & 2 Todd Building Condominium, 95 Washington Street; 97R Washington Street; 98 Washington Street; 58 Union Street, Nantucket, Filled Tidelands of Nantucket Harbor, Nantucket County

Dear Mr. Fay & Representatives of Save Our Waterfront, Inc.:

Enclosed is the Determination of Applicability for the referenced application issued pursuant to Waterways Regulations 310 CMR 9.06. This Determination may be recorded at the Nantucket County Registry of Deeds and a copy will be maintained in the Department files.

If you have questions, please contact me at the Waterways Regulation Program at (617)292-5615.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Lynch", written over a horizontal line.

Ben Lynch
Program Chief
Waterways Regulation Program

cc: Nantucket Board of Selectmen
Nantucket Planning Board
Nantucket Conservation Commission
Nantucket Harbormaster
DEP SERO
MCZM Cape and Islands Office
Great Harbor Yacht Club, c/o O'Neill and Associates
Leo Asadoorian, Blackwell Associates
E.Copley, ENSR

This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>

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WRP File No. JD05-1293

Municipality: Nantucket

Determination of Applicability- 310 CMR 9.00

From: Waterways Regulation Program, Issuing Authority

To:

Save Our Waterfront, Inc.
P.O. Box 143
Nantucket, MA 02554

Location of site: 96 Washington Street, 97 Washington Street, 11 Salt Marsh Way, Units 1, 2, &3, Tuckernuck Condominium 8, 9A, and 9B Salt Marsh Way; Units 1 & 2 Todd Building Condominium, 95 Washington Street; 97R Washington Street; 98 Washington Street; 58 Union Street, Nantucket

Mr. Jamie M. Fay
Fort Point Associates, Inc
286 Congress Street (6th Floor)
Boston, MA 02210

This determination is issued and delivered as follows:

- by hand delivery to person making request on _____ (date)
- by certified mail, return receipt requested on 3/6/05 (date)

Pursuant to 310 CMR 9.06, the Waterways Regulation Program has considered your request for a Determination of Applicability and its supporting documentation, and has made the following determination:

[x] The Determination is positive: The areas of land or water thereon, as described below, are presently subject to 310 CMR 9.00. The jurisdictional determination was based on the Department's decision to utilize as its primary determinative source the survey information contained on a Topographic Plan entitled "United States Coast and Geodetic Survey; F.M Thorne; Great Point and Nantucket Harbor; Topographic Survey made in 1887 by E.L. Taney; Scale 1:10,000, Register No. 1818." In making the this determination, the Department applied the standard described in 310 CMR 9.02 for the definition of Historic High Water Mark:

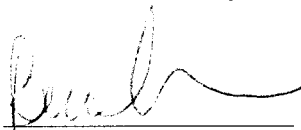
"Historic High Water Mark means the high water mark which existed prior to human alteration of the shoreline by filling, dredging, excavating, impounding, or other means. In areas where there is evidence of such alteration by fill, the Department shall presume the historic high water mark is the farthest landward former shoreline which can be ascertained with reference to topographic or hydrographic surveys, previous license plans, and other historic maps or charts, which may be supplemented as appropriate by soil logs, photographs, and other documents, written records, or information sources of the type on which reasonable persons are accustomed to rely in the conduct of serious business affairs.. Such presumption may be overcome by a clear showing that a seaward migration of such shoreline occurred solely as a result of natural accretion not caused by the owner or predecessor in interest....."

The Department finds that the filled tidelands on the project site are limited to those on the seaward (easterly) side of Washington Street, as determined by the registration of the above-referenced 1887 Topographic Plan on the project site. The Historic High Water Mark (HHWM) is approximately represented by the "1894 Shoreline" on Exhibit O: The Great Harbor Yacht Club Shoreline, 1834-Present," submitted with the April 2005 Request for Determination of Applicability filing by Fort Point Associates, Robert Paterson in association with Peter Koff, Esq.. In reviewing the successive topographic and hydrographic surveys, licenses, and other historic information pertinent to this determination, the Department determined that there was insufficient evidence presented in the filing to conclude that marsh areas on the western, landward side of Washington Street (described in Exhibit O as the "1894 Salt Marsh") were submerged at Mean High Water. In its determination, the Department relied on the plans and information submitted by all commentors, as well as review of the 1848 United States Coast and Geodetic Survey Topographic Plan Register No. 205, the 1887 United States Coast and Geodetic Survey Topographic Plan No. Register No. 1818, and used as an interpretive reference "Shore and Sea Boundaries, with Special Reference to the Interpretation and Use of Coast and Geodetic Survey Data," by Aaron Shalowitz, LL.M, Special Assistant to the Director, Publication 10-1, U.S. Department of Commerce, 1962.

[] The Determination is negative:

Issued by the Waterways Regulation Program.

IN WITNESS WHEREAS, said Department of Environmental Protection have hereunto set their hands this sixth day of September in the year two thousand and five.



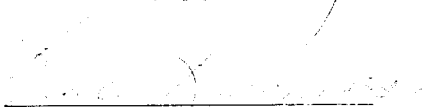
Ben Lynch
Program Chief
Department of Environmental Protection

This Determination does not relieve the applicant from complying with all other applicable federal, state, or local statutes, ordinances, by-laws or regulations.

COMMONWEALTH OF MASSACHUSETTS

Nantucket, s.s.

On this 6th day of September, 2005, before me, the undersigned notary public, personally appeared Ben Lynch, proved to me through satisfactory evidence of identification, which was personal knowledge of the notary to be the person whose name is signed on the preceding or attached document in my presence.



Notary Public

My commission expires July 4, 2007

NOTICE OF APPEAL RIGHTS:**A) Appeal Rights and Time Limits**

This determination is an action of the Department. If you are aggrieved by this action, you may request an adjudicatory hearing. A request for a hearing must be made in writing and postmarked within twenty-one (21) days of the date this determination was issued.

B) Contents of Hearing Request

Under 310 CMR 1.01(6)(b), the request must state clearly and concisely state the facts which are the grounds for the request, and relief sought. Additionally, the request must state why the determination is not consistent with applicable laws and regulations.

In addition, pursuant to 310 CMR 9.17(3), any notice of claim for an adjudicatory hearing must include the following information: the WRP File Number; name of the applicant and address of the project; the complete name, address, and telephone number of the party filing the request and, if represented by counsel, the name, address and telephone number of the attorney and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in section 9.02; a clear statement that a formal adjudicatory hearing is being requested; a clear and concise statement of the specific objections to the Department's determination, and the relief sought through the adjudicatory hearing; and a statement that a copy of the request has been sent to: the applicant and the municipal official of the city or town where the project is located. The original request and a copy of the check must be sent to:

Case Administrator
Department of Environmental Protection
One Winter Street, 2nd Floor
Boston, MA 02108

C) Filing Fee and Address

The hearing request along with a valid check payable to the Commonwealth of Massachusetts in the amount of one hundred dollars (\$100) must be mailed to:

Commonwealth of Massachusetts
Department of Environmental Protection
PO Box 4062
Boston, MA 02211

At the same time, pursuant to 310 CMR 9.17, a copy of this appeal shall be sent by certified mail or hand delivery to the applicant, and other parties to this proceeding, if any, and to the municipal official of the city or town where the project is located.

The request will be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver as described below.

D) Exceptions

The filing fee is not required if the appellant is a city or town (or municipal agency), county, or district of the Commonwealth of Massachusetts, or a municipal housing authority.

E) Waiver

The Department may waive the adjudicatory hearing filing fee for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file, together with the hearing request as provided above, an affidavit setting forth the facts believed to support the claim of undue financial hardship.