

COPY

**COMMONWEALTH OF MASSACHUSETTS  
Executive Office of Energy and Environmental Affairs  
Department of Environmental Protection  
One Winter Street, Boston, MA 02108**

February 11, 2016

\_\_\_\_\_  
\_\_\_\_\_  
Matter of Wynn MA, LLC  
\_\_\_\_\_  
\_\_\_\_\_

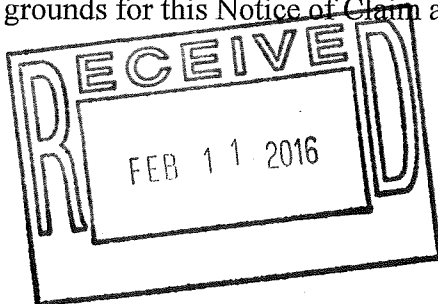
)  
)  
) Docket No. \_\_\_\_\_  
) Waterways Application No. W15-4480-N  
) Everett, MA  
)

**NOTICE OF CLAIM**

The petitioner, Mayor Joseph A. Curtatone, in his capacity as Mayor of the City of Somerville ("Somerville," or the "City"), and acting on behalf of the City, respectfully requests an adjudicatory hearing with respect to the Written Determination pursuant to G.L. c. 91 and G. L. c. 30, § 61 (the "Written Determination") issued to Wynn MA, LLC ("Wynn") for the construction of the proposed Wynn Resort Casino (the "Casino," or "Project"). Although dated January 22, 2016, the Written Determination was not received by the City until February 3, 2016.

Somerville submits that the Written Determination does not conform to the waterways regulations promulgated by the Department of Environmental Protection ("DEP") and set forth at 310 CMR 9.00. Moreover, the prerequisites to the issuance of the Written Determination – including the approval of a municipal harbor plan by the Secretary of the Executive Office of Energy and Environmental Affairs (the "Secretary"), the Secretary's issuance of a certificate on Wynn's Second Supplemental Final Environmental Impact Report ("SSFEIR") to conclude his review under the Massachusetts Environmental Policy Act ("MEPA") and the MEPA regulations at 301 CMR 11.00, and the Secretary's issuance of a public benefit determination pursuant to G.L. c. 91, §18B – are all flawed and based on legally untenable grounds and are the subject of pending appeals by the City. The City asserts that the Written Determination was issued inappropriately given that the prerequisite administrative actions upon which it relies are subject to the appeals identified above and thereby are not final, rendering the Written Determination premature and therefore invalid.

The grounds for this Notice of Claim are set forth in more detail below.



**I. WATERWAYS APPLICATION FILE NUMBER, APPLICANT, PROJECT ADDRESS**

Waterways Application File No.: W15-4480-N

Applicant: Wynn MA, LLC  
3131 Las Vegas Blvd. South  
Las Vegas, NV 89109  
Contact: Robert DeSalvio

Represented by:

Fort Point Associates  
Jamie Fay, President  
31 State Street, 3<sup>rd</sup> Floor  
Boston, MA 02109

Project Address: One Horizon Way, Everett, Massachusetts

**II. REQUEST FOR FORMAL ADJUDICATORY HEARING**

Joseph A. Curtatone, as Mayor of Somerville, requests a formal adjudicatory hearing on the Written Determination (hereinafter, the "Adjudicatory Appeal").

**III. STATEMENT OF FACTS**

**A. The Casino Project**

1. Wynn proposes to construct the Casino pursuant to Chapter 194 of the Acts of 2011, entitled "An Act Establishing Expanded Gaming In The Commonwealth," and G.L. c. 23K, as amended (the "Gaming Act"), and the regulations adopted by the Commission and set forth at 205 CMR 1.00, *et seq.* (the "Gaming Regulations"). The site for the Casino is an approximately 33.9-acre parcel of land located on Horizon Way and Lower Broadway (Route 99) in Everett (the "Casino Site," or "Site"). The Site borders the Mystic River, as does the City of Somerville.

2. According to Wynn's SSFEIR, the Project entails over 3,000,000 square feet of development, including a gaming facility with a total of 4,580 gaming positions; a 629-room, 386± foot high hotel<sup>1</sup> comprising 621,774± square feet; 629,391± square feet of retail, food and beverage space, gym/spa space, lobbies, lounges, meeting/convention rooms, and back-of-the house space; a 1,627,751± square foot on-site parking facility, including 2,930 parking spaces; and 800 off-site parking spaces for employees. In prior reports, the number of on-site parking spaces has been reported as 3,700, then reduced to 3,400, then reduced further to 2,930, without

<sup>1</sup> Descriptions of the height of the hotel vary between 373 and 386 feet in various filings made by Wynn.

any reduction in the 1,627,751± square feet of area dedicated to parking facilities.

3. The Project entails a substantial amount of dredging in the Mystic River and shoreline alteration to construct improvements and attempt to address hazardous waste contamination caused by past industrial uses of the Casino Site. This work reportedly includes dredging approximately 17,335 cubic yards of sediment over approximately 68,140 square feet of the Mystic River below the mean low water mark.

4. The Site is bordered by the Mystic River on the south and an embayment on the east. According to Wynn's reports, the Site includes approximately 1,600 linear feet of shoreline along the flowed tidelands of the Mystic River. Approximately 8.3 acres of the Site are located below the present mean high water mark of the Mystic River. A substantial amount of the Site – approximately 10.63 acres – is filled tidelands below the historic mean high water mark.

5. The Site is listed as a confirmed hazardous waste disposal site by DEP pursuant to G.L. c. 21E, due to its former use as a Monsanto Chemical manufacturing site. It is required by law to be cleaned up to a level that presents no significant risk, regardless of whether the Casino is built.

#### **B. Somerville**

6. Somerville, a city of approximately 78,000 residents in a four square-mile area, is the densest city in New England. The City is on the south side of the Mystic River directly across from the Casino Site. The boundary between Somerville and Everett is located at or about the thread of the Mystic River.

7. At its closest point, the Casino Site is approximately 76 feet from Somerville; this is where the Site nears Somerville's municipal boundary in the Mystic River. Other areas of the Site are within 150 feet of Somerville. By road, the distance from the Casino Site to Somerville is approximately 1.2 miles. Roadways and traffic infrastructure connecting the Site to Somerville include Sullivan Square, Mystic Avenue, Route 28, Broadway (Route 99), Cambridge Street, and I-93. The Site is most directly connected to Somerville by Broadway (Route 99) and the I-93 Sullivan Square/Broadway exit through Sullivan Square to Route 99. Sullivan Square, which borders Somerville at East Broadway, is a gateway into Somerville from multiple directions. Current traffic conditions in Sullivan Square negatively impact numerous intersections within Somerville, and exacerbation of these conditions due to Casino traffic will further degrade Somerville intersections.

8. Several of Somerville's residential neighborhoods are among the closest residential neighborhoods to the Casino Site, closer than most Everett neighborhoods. These include East Somerville, Ten Hills, and the residential portions of Assembly Square, an urban renewal project in which the City and real estate developers have invested an enormous amount of time, money, and other resources. Many of the closest commercial areas to the Casino Site are found in Somerville as well, including Assembly Square, Innerbelt, East Somerville, and Union Square. The Site is less than 1,200 feet from Assembly Square, less than 3,500 feet from Somerville's Ten Hills residential neighborhood, and approximately 1.3 miles from Somerville City Hall. Due to its density, the City has less public parkland than many municipalities, but one

park that has been available to Somerville is Draw 7 Park, situated on the Mystic River across from the Casino Site.

9. Somerville has invested heavily in the mixed-use redevelopment of Assembly Square and is in the midst of planning the redevelopment of nearby Union Square. The City is also committed to investments in other underutilized neighborhoods, including Boynton Yards and Innerbelt. It has invested in substantial efforts to provide affordable housing and to develop a mixed-use, pedestrian-friendly, public transit-oriented community in which local businesses can flourish. The City's vision and comprehensive planning efforts are documented in its comprehensive plan known as "Somervision," which was adopted in 2012.

### **C. Permitting of the Casino**

#### ***The Gaming License and MEPA Review***

10. Wynn has been granted the only Category 1 gaming license (the "Gaming License") to be issued for a casino in "Region A" pursuant to the Gaming Act and the Gaming Regulations. "Region A" comprises Suffolk, Middlesex, Essex, Norfolk and Worcester counties. The Gaming License effectively grants Wynn a monopoly over the resort casino industry in Massachusetts's most populous region.

11. While applying for the Gaming License, Wynn also submitted filings under MEPA and the MEPA regulations, which culminated in the Secretary's issuance of a certificate dated August 28, 2015, determining that Wynn's Second Supplemental Environmental Impact Report ("SSFEIR") complied with MEPA (the "SSFEIR Certificate"). The SFEIR Certificate was issued close to one year after the Gaming Commission voted to award Wynn the Casino License.

#### ***The Municipal Harbor Plan***

12. Also while Wynn was applying for the Gaming License, the City of Everett submitted a draft Everett Central Waterfront Municipal Harbor Plan dated October 15, 2013 (the "MHP") to the Executive Office of Energy and Environmental Affairs ("EOEEA") and EOEEA's Office of Coastal Zone Management ("CZM"). The MHP envisioned two possible build-out scenarios, one of which was the "Wynn Scenario." The Wynn Scenario modified the normally applicable height limitations (approximately 245 feet at the relevant distance from the Mystic River) to allow for construction of a 400-foot tall casino and hotel as part of the proposed "Wynn Everett project." Except in downtown Boston, no building in the Commonwealth (on tidelands or not on tidelands) is as tall, except for one in Springfield, and no municipal harbor plan has ever established height limits that would permit a building as tall as the one proposed in the Wynn Casino Scenario.

13. By letter dated February 10, 2014, the Secretary approved the MHP.

#### ***The Chapter 91 Application, Public Benefit Determination, and Written Determination***

14. On or about August 24, 2015, Wynn submitted an application for a Chapter 91 license for the Project (the "Chapter 91 Application"). Among other things, the Chapter 91

Application requested that the license be granted for a 99-year term.

15. On September 25, 2015, the Secretary issued a public benefit determination for the Project pursuant to G.L. c. 91, §18B (the “Public Benefit Determination”). By law, the Public Benefit Determination must be incorporated into the record of the Chapter 91 Application.

16. By letter dated October 9, 2015, Mayor Joseph A. Curtatone, acting on behalf of Somerville, provided written comments on the Chapter 91 Application within the public comment period established by DEP. DEP has acknowledged timely receipt of these comments.

17. On or about January 22, 2016, DEP issued the Written Determination. As noted, Somerville did not receive a copy of the Written Determination until February 3, 2016.

18. The Written Determination proposes to grant a Chapter 91 license for the Project, subject to certain conditions, and purports to include Section 61 Findings made by DEP pursuant to MEPA and the MEPA Regulations. Moreover, the Written Determination proposes that this Chapter 91 license be granted for a term of 85 years, which is 55 years beyond the usual term of 30 years. See 310 CMR 9.15.

Additional facts concerning the Gaming License, the MHP, the MEPA process, the Public Benefit Determination, and the Written Determination are set forth in Section IV below.

#### **IV. SPECIFIC OBJECTIONS TO THE WRITTEN DETERMINATION**

##### **A. Chapter 91 and the Waterways Regulations**

1. Extended License Term. DEP’s proposal to grant a license with an extended term violates the waterways regulations at 310 CMR 9.15(1)(b). The Written Determination proposes to grant Wynn an 85-year license for a proposed non-water dependent use building and project. This is an extraordinary term that far exceeds the usual 30-year term pursuant to 310 CMR 9.15(1)(a), and does so without the necessary documentation and justification. The following points are notable:

- (a) The Site includes approximately 19.04 acres of tidelands, 10.74 of which are filled tidelands and 8.3 of which are flowed tidelands. The license term for flowed tidelands cannot exceed 65 years, except that where a site includes both flowed and filled tidelands, DEP may, upon request of the applicant, establish a single weighted average term for the entire project based upon the relative amounts of the surface area of the flowed and filled tidelands. In the Chapter 91 Application, Wynn requested a 99-year term, not a weighted average, and failed to provide justification for that 99-year term.<sup>2</sup> Insofar as 85 years is meant to be a weighted average, it does not comply with 310 CMR 9.15(1)(b) given that approximately 44% of the tidelands on-site are flowed tidelands. In the event that the 85-year term is not a weighted average, the Written Determination does not

---

<sup>2</sup> Insofar as Wynn later provided some additional documentation for its request after submitting the Chapter 91 Application, it is questionable whether this is procedurally proper to the extent it denied the public an opportunity to see and comment on this documentation.

comply with the regulations because it fails to articulate any meaningful basis for the term proposed and therefore is flawed and invalid.

- (b) Pursuant to the waterways regulations at 310 CMR 9.15(1)(b), 310 CMR 9.13(3), and 310 CMR 9.14; applications for an extended term for projects on Commonwealth tidelands require a public hearing on the extended term request. Further, DEP must issue written findings regarding the basis for an extended term. The Casino Site includes Commonwealth tidelands. It is not clear that the general public hearing on the Chapter 91 Application addressed this specific hearing requirement, or that the discussion of the term in the Written Determination constitutes written findings as required by 310 CMR 9.15(1)(b). In all events, the Written Determination does not contain written findings sufficient to satisfy the requirements of 310 CMR 9.15(1)(b) or other waterways regulatory provisions, and therefore an 85-year license term is not warranted or compatible with the regulations or the public interest.
- (c) The height and massing of the Project is extraordinary, if not unprecedented, but the proposed public amenities offer little more than the regulatory minimum. Among other things, the Written Determination proposes to require only that 4.36 acres of the Site be maintained as public open space; this is no more than the minimum 1:1 ratio of building footprint to open space required in the ordinary course by the waterways regulations.<sup>3</sup> Given the extraordinary height and massing and the private benefit conferred upon Wynn, the public amenities are insufficient to support a license term nearly three times what is ordinarily allowed. Far greater public benefits are required to support the extended license term and a finding that the project serves a proper public purpose that provides greater benefit than detriment to the rights of the public in tidelands.
- (d) In sum, Wynn has asserted that an extended term is warranted but has not met the regulatory burden of providing sufficient justification that an extended term is warranted given the expected life of the structure, typical financing requirements, consistency with a municipal harbor plan, the appropriateness of long-term dedication of tidelands to the proposed use in the particular location, and other relevant factors. The proposed 85-year term is beyond that allowed and violates the Department's own regulations given the lack of justification for the extended term, compounded by the intense massing on the Site for non-water dependent uses.

2. Proper Public Purpose. The Written Determination and supporting record is insufficient to support a determination that the Casino serves a proper public purpose which provides greater benefit than detriment to the rights of the public, as required by 310 CMR 9.31(2).

---

<sup>3</sup> While the Chapter 91 Application asserts that 6.38 acres of open space will be provided, the calculation of this space is unclear (the open space plan itself is not drawn to scale) and appears to categorize all jurisdictional areas of the Casino Site not occupied by a building footprint – including driveways – as open space. In all events the Written Determination proposes only to require open space of “not less than 4.36-acres (the area equal to size of footprint of building in jurisdiction) with no obstacles for safe, free and universally accessible public passage.”

- (a) For nonwater-dependent projects such as the Casino, DEP presumes that a project serves a proper public purpose which provides greater benefit than detriment only if the project (i) complies with 310 CMR 9.51 and 9.52 and any additional standards for activating Commonwealth tidelands, if applicable; and (2) if located in the coastal zone, complies with the standards governing consistency with the policies of the CZM Program.
- (b) The Written Determination and underlying record do not support this presumption or a finding that the Casino complies with 310 CMR 9.51. Among other things, 310 CMR 9.51(2) requires that non-water dependent use structures “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,” considering such factors a surface coverage, scale, layout, and configuration of buildings. The regulation expressly acknowledges that non-water dependent structures may impact existing and potential public views of the water and marine-related features along the waterfront, and create wind, shadow, and other conditions at the ground level environment that affect users of water-dependent facilities. For purposes of 310 CMR 9.51, compliance with the height, mass and other building limitations of a municipal harbor plan is a minimum condition; it does not relieve DEP from its duty to protect water-dependent uses, navigability, and other overriding purposes of Chapter 91 and the waterways regulations at 310 CMR 9.00, let alone the rights of the public in tidelands. For reasons that include, but are not necessarily limited to, the deficiencies with respect to the analysis of the effect of building height and mass discussed below, DEP has erred in concluding that 310 CMR 9.51 has been satisfied.
- (c) Even if the Casino were entitled to a presumption that it serves a proper public purpose which provides greater benefit than detriment to the rights of the public, the presumption is rebuttable where (a) the basic requirements specified in 310 CMR 9.31(1) have not been met; or (b) a clear showing is made by a municipal, state, regional, or federal agency that requirements beyond those contained in 310 CMR 9.00 are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting....” 310 CMR 9.31(3). In this instance, the basic requirements of 310 CMR 9.31(1) have not been met for the reasons, among others, that the Project does not comply with MEPA and the MEPA regulations or the requirement for a valid public benefit determination pursuant to G.L. c. 91, §18B. Moreover, throughout the MEPA process, the Mayor of Somerville and officials for other municipalities raised issues showing that conditions beyond the usual requirements of 310 CMR 9.00 are necessary to prevent overriding detriment to public interests that they are responsible for protecting. These issues include, but are not necessarily limited to, the impacts attributable to the height and mass of the proposed building; the traffic caused by the use of tidelands for so massive and dense a project; the effect of this traffic on air quality and environmental justice communities, both within and outside of waterfront areas; the implications of decreased parking on-site; the effect of the

Casino on parklands, public spaces, and other open spaces in Somerville; the effect of increased boat traffic on the Mystic River, including, but not limited to, the use of the river as a transportation network; the balance between private gain and public benefit with respect to the Casino; and the extent to which public amenities are part of the controlled casino experience, serve to attract people to the casino more so than to the waterfront, and result in the types of issues recognized by the Gaming Act.<sup>4</sup> Accordingly, Somerville is entitled to rebut any presumption that the Casino serves a proper public purpose providing greater public benefit than detriment.

3. Unassessed Impacts of Building Height, Mass, and Density.

- (a) As the Chapter 91 Application acknowledges, even assuming the validity of the MHP (discussed below), the 386± foot tall building can only be authorized by a Chapter 91 license if it is shown to have “no more adverse wind, shadow and other conditions.”
- (b) The Application is incomplete regarding quantification of the projected wind and shadow effects of the Project. The description of the studies, methodology, and results is insufficient to ensure the accuracy of these projections<sup>5</sup> and in all events is limited to ground conditions on adjacent on-site tidelands for purposes of assessing the Casino’s compliance with the MHP. Moreover, the studies appear to have been focused predominantly, if not solely, on the impacts within the tidelands portion of the Project site, not on the impacts to tidelands and other properties in the vicinity. Discussion of off-site impacts is selective, at best, and insufficient to meet the regulatory burden of the applicant. For instance, the wind analysis appears to show that in the winter the Project will shift wind impacts away from the site and toward Somerville. It also shows the most pronounced wind conditions at ground level immediately adjacent to the Site.
- (c) The Chapter 91 Application and the Written Determination fail to demonstrate that there will be no impact of the building on navigation due to wind impacts (which, as noted, are being shifted toward the water in Somerville’s direction),

---

<sup>4</sup> Notably, many of Somerville’s comments bear on issues intended to be served by the CZM policies with which the Project is required to be consistent, including, but not limited to, Growth Management Policy #1 (“*Encourage sustainable development that is consistent with state, regional, and local plans and supports the quality and character of the community*”), Public Access Policy #1 (“*Ensure that development (both water-dependent or nonwater-dependent) of coastal sites subject to state waterways regulation will promote general public use and enjoyment of the water’s edge, to an extent commensurate with the Commonwealth’s interests in flowed and filled tidelands under the Public Trust Doctrine*”), and Public Access Policy #2 (“*Improve public access to existing coastal recreation facilities and alleviate auto traffic and parking problems through improvements in public transportation and trail links (land- or water-based) to other nearby facilities... Ensure that adverse impacts of developments proposed near existing public access and recreation sites are minimized*”). Somerville stands in a better position to assess the Project’s impacts on Somerville than does CZM.

<sup>5</sup> For instance, the Application introduces a March 5, 2015 report by Novus Environmental entitled “Pedestrian Wind Assessment, Wynn Everett Resort & Casino.” The Novus report acknowledges that “there are some limitations with this modeling technique, specifically in the ability to simulate the turbulence, or gustiness, of the wind.” Yet it provides virtually no discussion of these limitations beyond this initial admission.



glare, and other conditions not limited to wind and shadow impacts on nearby pedestrian walkways and open space. For instance, more than one marina exists in the vicinity, yet there is no assessment of the impacts on boating, whether by sail or motorized. Pursuant to 310 CMR 9.35, no licensed project can “significantly interfere with public rights of navigation which exist in all waterways.” Such interference includes projects that “generate water-borne traffic that would substantially interfere with other water-borne traffic in the area at present, or the future...” or “impair in any other substantial manner the ability of the public to pass freely upon the waterways...” The applicant failed to demonstrate that this burden was satisfied and, therefore, the Written Determination is invalid because it fails to ensure that navigation is not negatively impacted.

### **B. Chapter 91 and the Public Benefit Determination**

1. Pursuant to G.L. c. 91, §18B, the Secretary must complete “a public benefit review for any proposed project that is: (i) subject to the licensing provisions of section 13 or 18; or (ii) is geographically located on landlocked tidelands, and in either case is required to file hereafter an environmental impact report pursuant to chapter 30.” See also 301 CMR 13.02. Following this review, the Secretary must “make a public benefit determination, the goal of which shall be to publish on the public record a written public benefit determination of the project.” G.L. c. 91, § 18B.

2. The criteria that the Secretary must consider in making a public benefit determination include the following:

- (a) the “purpose and effect of the development”;
- (b) the “impact on abutters and the surrounding community”;
- (c) “enhancement to the property”;
- (d) “benefits to the public trust rights in tidelands or other associated rights, including, but not limited to, benefits provided through previously obtained municipal permits”;
- (e) “community activities on the development site”;
- (f) “environmental protection and preservation”; and
- (g) the “public health and safety” and “the general welfare”.

See G.L. c. 91, § 18B and 301 CMR 13.04. Where a project undergoes mandatory public benefit review, the “proponent shall include in ... the environmental impact report (at the proponent’s election) detailed information describing the nature of the tidelands affected by the project and the public benefit of the project,” with specific reference to and evaluation of the criteria described above. See 301 CMR 13.03(a). The applicable regulations require that “[t]he public shall have the opportunity during the MEPA public comment period(s) to comment on whether the project provides a public benefit, and the proponent shall have the opportunity to submit additional information during the MEPA process.” See 301 CMR 13.03(b). For projects requiring a Chapter 91 license, the Secretary must make a public benefit determination within 30 days after issuing a certificate concluding the MEPA process. See 301 CMR 13.03(d).

3. On September 25, 2015, the Secretary issued the Public Benefit Determination for the Casino. In the Public Benefit Determination, the Secretary concludes, "I hereby determine that the above-referenced [Wynn Everett] project will have a public benefit," and, "I hereby determine that the project will have a positive public benefit to public trust rights in tidelands." He also directs Wynn to file a copy of the Public Benefit Determination with DEP and states that DEP "will then have the authority to enforce the conditions outlined herein and in the Public Benefit Determination pursuant to the statute."

4. On October 23, 2015, Somerville commenced a civil action appealing the Public Benefit Determination (the "Public Benefit Determination Appeal"). The Public Benefit Determination Appeal, which is docketed as Civil Action No. 2015-03218-BLS2, is still pending.

5. A valid Public Benefit Determination is a legal prerequisite to issuance of a Chapter 91 license.

6. The Public Benefit Determination does not adequately assess the criteria required by Chapter 91, §18B, and the Secretary's regulations at 301 CMR 13.04. Particularly lacking are evaluations of the purpose and effect of the Project, its impact on surrounding communities such as Somerville, and the effect on environmental protection and preservation, public health and safety, and the general welfare. Most of the determination focuses on the cleanup of contamination, which is required by law regardless of whether the Casino is built, and on facilities to enhance public access to the waterfront, which are required by G.L. c. 91 and the Department's waterways regulations and do not rise to a level warranting the proposed 85-year license term. The Public Benefit Determination wholly fails to weigh the detriments against the benefits or to consider the extraordinary private benefit that would be conferred upon Wynn by issuance of a Chapter 91 license.

7. A substantial portion of the proposed use of tidelands is as a driveway, garage and hotel that will draw thousands of vehicles directly into the waterfront. The impact of these uses on surrounding communities is demonstrated by the extensive commentary and traffic engineering peer review submitted by Somerville, Boston, the Attorney General, and others throughout the MEPA process. The Public Benefit Determination does not account for these impacts.

8. The Public Benefit Determination asserts, without support, "The project has been designed to avoid, minimize, and mitigate potential environmental impacts including traffic generation, wastewater, water use, GHG emission, air pollution, and impacts associated with climate change." This assertion is not supported by the MEPA record on which the Public Benefit Determination is based. That record fails to address key impacts, such as traffic impacts in Sullivan Square, which serves as a gateway to Somerville, and on several intersections within Somerville.

9. The Public Benefit Determination is not sufficient for purposes of being incorporated into DEP's record or for purposes of empowering DEP to "enforce the conditions outlined herein and in the Public Benefit Determination pursuant to the statute," as proclaimed in the Public Benefit Determination itself. Those "conditions" are not clearly identified and are so

ambiguous as to be unenforceable. The Written Determination violates the regulations by failing to impose clear and enforceable conditions to realize and preserve the alleged public benefits of this project and mitigate the public detriment.

10. The validity of the Public Benefit Determination, which by statute is required to be filed with the Division of Administrative Law Appeals in the event of an appeal under Chapter 91, is subject to de novo review in the Adjudicatory Appeal.

### C. The MHP

1. The Project does not comply with the standard height limits imposed by the waterways regulations and, but for the provisions of a valid municipal harbor plan, could not be approved under Chapter 91. Accordingly, a valid municipal harbor plan is a legal prerequisite to issuance of the Written Determination.

2. As noted, the Secretary approved the MHP by letter dated February 10, 2014. Prior to that approval, Somerville commented on the MHP at CZM's November 4, 2013 public hearing and by letter dated November 20, 2013. Following the Secretary's approval, Somerville petitioned for reconsideration of the approval. On March 24, 2014, the Secretary denied Somerville's petition for reconsideration. On July 28, 2014, Somerville appealed the Secretary's approval of the MHP (the "MHP Appeal"). The MHP Appeal is docketed as Middlesex Superior Court Action 2014-04839.

3. On September 19, 2014, the Attorney General's Office moved to dismiss the MHP Appeal, stating:

While the MHP itself is not reviewable at this tentative planning stage, and while the MHP's substitute provisions are indeed binding on the Department during the Chapter 91 licensing process, any impacts associated with a particular project are subject to MEPA review, and the substitute provisions themselves would be subject to challenge (by an individual or entity with standing at the time) as part of the Chapter 91 Regulations during any Superior Court appeal of a Chapter 91 licensing decision for this project, just as the legality of any governing statute or regulation can be challenged in such an appeal (again, by a plaintiff with standing).

4. On August 24, 2015, the Superior Court dismissed the MHP Appeal on grounds that Somerville lacked standing to challenge the MHP. Somerville has since appealed that decision to the Appeals Court.

5. The Written Determination fails to address the pending MHP Appeal. In the event that the Secretary's approval of the MHP is vacated, remanded, and/or made subject to conditions, the Written Determination is unlawful. The Written Determination contains no provision or limitation in the event the MHP is invalidated.

6. As set forth in Somerville's MHP appeal, the delegation of authority to the Secretary to regulate tidelands and the public's rights in the tidelands pursuant to the municipal harbor plan regulations at 301 CMR 23.00 is unlawful. Accordingly, DEP is not required to, and cannot, subjugate its review of the Chapter 91 Application to the provisions of the MHP. To the extent the waterways regulations require DEP to subjugate its authority under Chapter 91 to the MHP, they are unlawful.

7. The validity of the MHP is subject to review in the Adjudicatory Appeal. Alternatively, insofar as the validity of the MHP is not subject to review in the Adjudicatory Appeal, the Adjudicatory Appeal should be stayed pending a decision by the Appeals Court on the reviewability of the MHP in Somerville's MHP Appeal.

#### **D. MEPA**

1. During the License Proceedings, Wynn submitted filings under MEPA and the MEPA regulations. On May 31, 2013, Wynn submitted an Expanded Environmental Notification Form (the "Expanded ENF") to EOEEA, which the Secretary determined complied with MEPA and the MEPA regulations by certificate dated July 26, 2013 (the "Expanded ENF Certificate").

2. On or about December 16, 2013, Wynn submitted a Draft Environmental Impact Report ("DEIR") to EOEEA, which the Secretary determined complied with MEPA and the MEPA regulations by certificate dated February 21, 2014 (the "DEIR Certificate").

3. On or about June 30, 2014, Wynn submitted a Final Environmental Impact Report to EOEEA (the "Initial FEIR"), which the Secretary determined did not comply with MEPA and the MEPA regulations by certificate dated August 15, 2014 (the "Initial FEIR Certificate").

4. After the Initial FEIR Certificate determined that Wynn had not complied with MEPA, the Gaming Commission: (a) voted on September 16, 2014 preliminarily to grant Wynn the Gaming License; (b) entered into a Gaming License agreement with Wynn on September 17, 2014; (c) voted on November 6, 2014 formally to award the Gaming License to Wynn; and (d) issued the a written decision for the Gaming License on or about November 20, 2014.

5. On February 17, 2015, Wynn submitted a Supplemental Final Environmental Impact Report ("SFEIR") to EOEEA, which the Secretary determined did not comply with MEPA by certificate dated April 3, 2015 (the "SFEIR Certificate").

6. On July 15, 2015, Wynn submitted the SSFEIR to EOEEA, which the Secretary determined complied with MEPA on August 28, 2015 via the SSFEIR Certificate. The Expanded ENF Certificate, DEIR Certificate, Initial FEIR Certificate, SFEIR Certificate, and SSFEIR Certificate are referred to here as the "Secretary's Certificates."

7. At each step of the MEPA process, Somerville provided comments to EOEEA. These comments include: (a) a letter dated July 12, 2013, commenting on the Expanded ENF; (b) a letter dated February 11, 2014, commenting on the DEIR; (c) a letter dated August 8, 2014, commenting on the Initial FEIR; (d) a letter dated March 26, 2015, commenting on the SFEIR; and (e) a letter dated August 21, 2015, commenting on the SSFEIR.

8. On September 25, 2015, Somerville commenced a civil action appealing the Secretary's determination, through the Secretary's Certificates, that Wynn had complied with MEPA and the MEPA regulations (the "MEPA Appeal"). The MEPA Appeal, which is docketed as Civil Action 2015-2911-BLS2, is still pending.

9. The Written Decision was issued prematurely and unlawfully prior to the resolution of the MEPA Appeal.

## **V. SOMERVILLE'S STATUS AS AFFECTED MUNICIPALITY AND AGGRIEVED PERSON**

1. Pursuant to the waterways regulations at 310 CMR 9.17(1), any person aggrieved by DEP's decision to grant a license who has submitted written comments within the public comment period, and the "municipal official in the affected municipality(s) who has submitted written comments within the public comment period," both have a right to an adjudicatory hearing on a written determination. See 310 CMR 9.17(1)(b) and (d).

2. Joseph A. Curtatone, as Mayor of Somerville, submitted comments within the public comment period, and Somerville is both an affected municipality and an aggrieved person. Mayor Curtatone is Somerville's chief executive officer.

3. The Casino will substantially impact municipal services and require substantial additional expenditures by Somerville in order to provide such services. In particular, Wynn intends to implement a water transportation program to service the Casino. As Wynn has acknowledged, this will require that Somerville make certain improvements to facilitate water transportation and fund staffing and other public safety initiatives related to increased use of water transportation. Somerville exercises police functions over the Mystic River and has an agreement to dock boats at a slip in the Winter Hill marina and has opened a new police substation at Assembly Square near the marina. Somerville's police and fire departments will be tasked with addressing the public safety concerns attributable to the increased water, pedestrian, and car traffic.<sup>6</sup> The police department has stated that it will need to staff a marine unit, which presently it does not have, and has undertaken steps to develop this unit, which will require at least 3-4 additional officers. The marine unit will require training by the Commonwealth of Massachusetts Harbormasters and Maritime Professionals, the Massachusetts Maritime Academy, and/or similar organizations. The City will have to invest in two or more marine vessels.

4. The increased demand for Somerville's public safety services includes, but is not limited to, the following:

(a) The increased boat traffic that will result directly or indirectly from the Casino will require more frequent operation of the locks at the Amelia Earhart dam, which are located in Somerville;

---

<sup>6</sup> Last year a car drove off of the Amelia Earhart dam and into the Mystic River.

(b) Both above and below the locks, marinas and boathouses on the Mystic River in Somerville – which include the Winter Hill Marina and Blessing of the Bay boathouse – will be faced with increased watercraft traffic. Smaller watercrafts, such as kayaks, sculls and canoes, will have to deal with the effects of this traffic, which include wake issues caused by more frequent, larger watercraft activity.

(c) The Mystic River waterway is subject to fire and police mutual aid between municipalities, as are the surrounding roadways (Sullivan Square, Cambridge Street, Route 923 and Route 28) and the Casino Site itself.

(d) Outside activities at the casino, such as public performances and fireworks, will bring pedestrian and vehicular traffic to the Somerville side of the river, particular at Assembly Square. Community paths are planned (1) along the Mystic River through Somerville under the commuter rail track to Boston, and (2) for the Everett side from Medford, with consideration for crossing the river over the dam. The proposed footbridge, in particular, would impact the Somerville side of the river, as well as the river itself, due to construction, usage, and public safety measures.

5. The wind study accompanying the Chapter 91 Application shows pronounced wind effects on the Somerville side of the Mystic River. Any glare from the building will likewise affect Somerville. Glare and wind have the potential to affect Draw 7 Park, one of the few public parks in the area that has been available to Somerville's residents and visitors. Somerville's Transportation and Infrastructure Division has invested staff time and public funds in proposing improvements to Draw 7 Park.

6. The Chapter 91 Application lacks clarity and precision as to where dredging and dewatering will take place in relation to Somerville's municipal boundary in the river. These activities will affect Somerville directly or indirectly. Adjacent to the Casino Site, the Mystic River is not wide; equipment used for dredging and barges used for dewatering and dredge removal will have to use the Somerville side of the river for their operations. The Written Determination lacks measures to address the impact that the dredge and fill operations will have on the Somerville side of the river, and navigability in general.

7. Somerville's status as an affected municipality was recognized during the proceedings on Wynn's application for the Gaming License via the City's designation as a "surrounding community" as defined in the Gaming Act. A "surrounding community" is a municipality that will experience or is likely to experience "impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment." G.L. c. 23K, § 2.

8. Despite Somerville's close proximity to the Casino Site, Wynn initially did not recognize Somerville as a "surrounding community." Somerville thus petitioned the Gaming Commission for "surrounding community" status, at which point Wynn conceded and recognized Somerville as a surrounding community. As a result, Wynn was required to enter into a "surrounding community agreement" with Somerville setting forth the "conditions to have a gaming establishment located in proximity to the surrounding communities ... provided

however that the agreement shall include a community impact fee for each surrounding community and all stipulations of responsibilities between each surrounding community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment.” G.L. c. 23K, § 15(9).

9. Wynn and Somerville did not agree on a surrounding community agreement. They proceeded to arbitration in accordance with the Gaming Commission’s regulations at 205 CMR 125.01(6) and its guidelines for arbitration of surrounding community agreements. This arbitration was so-called “baseball style” arbitration in which each party submits a best and final offer (“BAFO”) and a panel of three arbitrators chooses between the two BAFOs without modifying either. On May 9, 2014, the panel of arbitrators issued its Report and Arbitral Award. The panel voted two in favor, one against, adopting Wynn’s BAFO. The Report and Arbitral Award included a lengthy dissent by former Secretary of Commonwealth Development, Douglas I. Foy.

10. On June 12, 2014, Wynn and Somerville entered into an agreement entitled, “Surrounding Community Agreement By and Between the City of Somerville, Massachusetts and Wynn MA, LLC” (the “Surrounding Community Agreement”). The Surrounding Community Agreement reflected Wynn’s BAFO in the arbitration. The Surrounding Community Agreement includes stipulations of known impacts acknowledging that, among other things, (a) “the proximity of the Project to the Assembly Row and Assembly Square developments may result in additional pedestrian and vehicular traffic in Somerville,” and (b) the “project may have an impact on municipal services and require additional expenditures by Somerville in order to provide such services.” The Surrounding Community Agreement also acknowledges that “Wynn intends to implement a water transportation program to service the Project” and requires Wynn to make a payment “to enable Somerville to make certain improvements to facilitate water transportation and to fund staffing and other public safety initiatives related to increased use of water transportation.”

## **VI. RELIEF SOUGHT**

Somerville respectfully requests that the Written Determination be vacated and remanded to DEP’s Waterways Program for consideration of the issues raised in this Notice of Claim and/or in the Adjudicatory Proceeding. Should the Written Determination be reissued after such consideration, it should contain specific changes to address, among other things, a reduction of the license term, an increase in public amenities, and public safety concerns with respect to the increased water transportation and other impacts on Somerville resulting from the Casino.

## VII. PETITIONER AND PETITIONER'S COUNSEL INFORMATION

Petitioner: Mayor Joseph A. Curtatone  
City of Somerville  
Somerville City Hall  
93 Highland Avenue  
Somerville, MA 02143  
Phone: (617) 625-6600  
Facsimile: (617) 625-3434  
[jcurtatone@somervilledma.gov](mailto:jcurtatone@somervilledma.gov)

Petitioner's Counsel: Gareth I. Orsmond  
(603) 373-2014  
[gorsmond@pierceatwood.com](mailto:gorsmond@pierceatwood.com)  
Donald R. Pinto, Jr.  
[dpinto@pierceatewood.com](mailto:dpinto@pierceatewood.com)  
(617) 488-8175  
Pierce Atwood LLP  
100 Summer Street, 22nd Floor  
Boston, MA 02110  
Facsimile: (617) 824-2020

Francis X. Wright, Jr., City Solicitor  
[fwright@somervillema.gov](mailto:fwright@somervillema.gov)  
Jason Grossfield, Assistant City Solicitor  
[jgrossfield@somervillema.gov](mailto:jgrossfield@somervillema.gov)  
City Hall, Law Department  
93 Highland Avenue  
Somerville, MA 02143  
(617) 625-6600, ext. 4400  
Facsimile: (617) 776-8847

## VIII. STATEMENT OF SERVICE OF NOTICE OF CLAIM

A copy of this Notice of Claim has been sent by certified mail on this date to the following:

- 1) Wynn MA, LLC  
Attention: Robert DeSalvio  
3131 Las Vegas Boulevard South  
Las Vegas, NV 89109  
Phone: (702) 770-7000  
Facsimile: (702) 770-1518  
[Robert.Desalvio@wynnresorts.com](mailto:Robert.Desalvio@wynnresorts.com)



Courtesy Copy (via regular mail):

Tony Starr, Esq.  
Mintz Levin Cohn Ferris Glovsky and Popeo PC  
1 Financial Center  
Boston, MA 02111  
Phone: (617) 348-4467  
Facsimile: (617) 542-2241  
tstarr@mintz.com

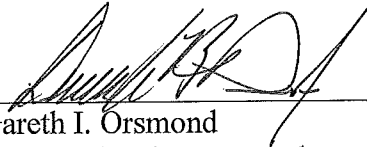
- 2) Fort Point Associates, Inc.  
Attention: Jamie Fay, President  
31 State Street, 3<sup>rd</sup> Floor  
Boston, MA 02109  
Phone: (617) 357-7044  
Facsimile: (617) 357-9135  
jfay@fpa-inc.com
- 3) Mayor Carlo DeMaria  
Mayor's Office  
Everett City Hall  
484 Broadway  
Everett, MA 02149  
Phone: (617) 394-2270  
Facsimile: (617) 381-1150  
mayorcarlo.demaria@ci.everett.ma.us

## **IX. CONCLUSION**

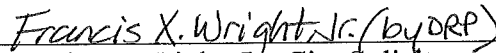
For the foregoing reasons, Somerville asserts that the Written Determination was based on an inadequate record and on inadequate findings, does not properly justify the proposed extended license term, does not protect the public's interest and rights in tidelands, and does not does not comply with Chapter 91 and the waterways regulations at 310 CMR 9.00.

Respectfully submitted,

Mayor Joseph A. Curtatone,  
As Mayor of, and on behalf of, the CITY OF SOMERVILLE,  
By its attorneys,



Gareth I. Orsmond  
[gorsmond@pierceatwood.com](mailto:gorsmond@pierceatwood.com)  
Donald R. Pinto, Jr.  
[dpinto@pierceatwood.com](mailto:dpinto@pierceatwood.com)  
PIERCE ATWOOD LLP  
100 High Street, Suite 2250  
Boston, MA 02110  
(603) 373-2014



Francis X. Wright, Jr., City Solicitor  
[fwright@somervillema.gov](mailto:fwright@somervillema.gov)  
Jason Grossfield, Assistant City Solicitor  
[jgrossfield@somervillema.gov](mailto:jgrossfield@somervillema.gov)  
City Hall, Law Department  
93 Highland Avenue  
Somerville, MA 02143  
(617) 625-6600, ext. 4400

Dated: February 11, 2016