

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

NO. SJC - 10482

JOHN MOOT, and others,
Plaintiffs - Appellants

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,
and others,
Defendants - Appellees

ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT

BRIEF OF AMICUS CURIAE, NAIOP MASSACHUSETTS

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I. STATEMENT OF INTEREST OF THE AMICUS CURIAE

The issue before this Court, whether an Act Relative to the Licensing Requirements for Certain Tidelands, St. 2007, C. 168, §§ 1-11 (the "Act") is a valid exercise of legislative authority to exempt certain landlocked tidelands from licensing under Massachusetts General Laws Chapter 91 ("Chapter 91"), has profound implications for property owners in the coastal areas of Massachusetts.

NAIOP Massachusetts, the Commercial Real Estate Development Association, ("NAIOP") is an association of over 1300 professionals and organizations involved in the ownership, management, development, redevelopment and financing of properties throughout the Commonwealth. NAIOP represents the commercial real estate industry through its effective public affairs advocacy at the legislative and regulatory levels. NAIOP is actively involved in commenting on and addressing issues concerning permitting and land use controls throughout Massachusetts. NAIOP's long and continuing experience with land use laws and regulations in Massachusetts enables it to address the issue before this Court. NAIOP became aware of the necessity for legislation as a result of this Court's

decision in *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007). NAIOP testified before the legislative committee and commented extensively on the bill prior to its enactment. Since its members are comprised of persons who will be substantially impacted by the decision in this case and since it has followed and commented upon the very legislation before the Court, NAIOP is in a unique position to address the issues presented in this case. NAIOP urges this Court to affirm the decision below and find that the Act is a valid exercise of legislative authority.

II. QUESTION PRESENTED

Whether the Superior Court (Smith, Jr., J.) properly concluded that An Act Relative to the Licensing Requirements for Certain Tidelands, St. 2007, c. 168, §§ 1-11, is a valid exercise of legislative authority to exempt from regulation under the provisions of Massachusetts General Laws Chapter 91 certain tidelands in Massachusetts.¹

¹The Superior Court also found that the exemption contained in the Act for landlocked tidelands applied to land located in Cambridge as part of the North Point project. This amicus addresses the authority and validity of the Act to exempt certain landlocked tidelands from licensing under Chapter 91, not the specific details of the Cambridge site. Nevertheless, if the tidelands are indeed landlocked and exempted from licensing by the Act, then this Court should affirm the finding of the Superior Court as to the North Point project.

III. STATEMENT OF THE CASE

This amicus adopts the recital of the Statement of the Case set forth in the brief of Defendant-Appellee Massachusetts Department of Environmental Protection.

IV. ARGUMENT

The "Act Relative to the Licensing Requirements for Certain Tidelands," St. 2007, c. 168, §§1-11 (the "Act") is a valid exercise of legislative authority to exempt certain landlocked tidelands from licensing under the provisions of Massachusetts General Laws Chapter 91 ("Chapter 91").

A. Authority over Tidelands

As this Court recognized in *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007) ("*Moot*") the provisions of Chapter 91 seek to regulate and protect the public's rights in the development of tidelands. *Id.* at 342. While the development of tidelands in Massachusetts has its beginnings in English common law, the adoption in Massachusetts of the so-called Colonial Ordinance of 1641-1647 gave ownership to the upland land owner of the flats between the high tide and the low tide lines, subject to the rights of the public for fishing, fowling and

navigation in that portion of said flats. *Butler v. Attorney General*, 195 Mass. 79, 84 (1907). The object of the Colonial Ordinance "was to encourage private wharfing below the high water level." *Michaelson v. Silver Beach Improvement Association, Inc.*, 342 Mass. 251, 257 (1961). Title to tidelands lying seaward of the low tide line generally is held by the Commonwealth for the benefit of the public. See *Opinion of Justices*, 365 Mass. 681, 685 (1974). The rights of the public to fishing, fowling and navigation (in the portion of tidelands located between the high and low tide lines) and the rights of the Commonwealth in tidelands located seaward of the low tide line are referred to generally as the "public trust rights." See *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194, 199 (2000). The questions that courts throughout the Commonwealth's history have been called on to answer are when and how the Commonwealth can both regulate and relinquish the public trust rights in tidelands.

In *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629 (1979) ("*Boston Waterfront*") the Court discussed the history of the rights of the public in tidelands between the high and

low tide lines, and in tidelands beyond the low tide line, in connection with the registration pursuant to G.L. c. 185, §1 of a parcel of land located at Lewis Wharf in the City of Boston. The Court recognized that the Legislature could authorize the extinguishment of the public's rights to fishing, fowling and navigation with the result that the private landowner would hold fee title absolute to such land. *Id.* at 636. See also, *Rauseo v. Commonwealth*, 65 Mass. App. Ct. 219, 223, 225 (2005). Such was the case with a portion of the property that was connected to, but not an issue in, *Boston Waterfront*. However, the question in *Boston Waterfront* was the status of ownership of a portion of a parcel of land on Boston Harbor that had been filled and built upon pursuant to statutory authority, but was located seaward of the historic low tide line and adjacent to the present day high tide line. The Court examined the statutes that granted authority for the filling of this area and for the construction of wharves. The Court concluded that the portion of the parcel at issue was in private ownership, but subject to a condition subsequent that such portion of land "may be used only for a purpose approved by the

Legislature as a public use.” *Id.* at 649. While the holding in *Boston Waterfront* appeared limited to determining the status of title to a small portion of land directly adjacent to the present day shoreline, the case had potentially long-ranging effects on all filled parcels of land.

The “history of the origins of the Commonwealth’s public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights.” *Fafard*, 432 Mass. at 199. In *Trio Algarvio, Inc. v. Commissioner of the Department of Environmental Protection*, 440 Mass. 94, 99–101 (2003) the Court analyzed the history of licensing of tidelands in Massachusetts, which has been administered by the Department of Environmental Protection (the “Department”) pursuant to the provisions of Chapter 91 and the regulations promulgated pursuant thereto at 310 Code Mass. Regs. §§9.01 et. seq. (the “Chapter 91 Regulations”).

In *Moot*, this Court invalidated a provision of the Chapter 91 Regulations which exempted landlocked

tidelands from the licensing requirements found in Chapter 91 (310 Code Mass. Regs. §9.04) because the Legislature had not delegated to the Department the authority to exempt landlocked tidelands from regulation under the provisions of Chapter 91 and the Department had no authority on its own to exempt such tidelands from regulation. "For more than one and one-half centuries, the Legislature has been fully cognizant of its authority to relinquish the public's rights in tidelands by means of appropriate legislation." *Moot*, 448 Mass. at 352.

B. The Act

In direct response to *Moot*, the Legislature passed the Act which, *inter alia*, exempts "Landlocked Tidelands"² from the licensing provisions found in Chapter 91. The question before this Court is thus whether the passage of the Act is a valid exercise of legislative authority to exempt Landlocked Tidelands from regulation.

² Defined in the Act (codified in Chapter 91, §1) as "filled tidelands, which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for any portion of such filled tidelands that are presently located: (a) within 250 feet of the high water mark of flowed tidelands; or (b) within any designated port area under the Massachusetts coastal zone management program."

Although directly affecting a parcel of land in East Cambridge, this case, not unlike the *Boston Waterfront* decision, will have ramifications for innumerable other properties in coastal areas of Massachusetts where such properties were created by the filling of tidal areas, whether such filling was accomplished by legislative authority or by licensing pursuant to Chapter 91 and its predecessor laws and regulations. Many areas of the City of Boston, for example, are located in what were once portions of Boston Harbor and the Charles River.³

Because of the adoption of the landlocked tidelands regulations by the Department in 1991, which exempted landlocked tidelands, no time-consuming and costly analysis needed to be undertaken by a landowner to determine whether a parcel was located on filled tidelands, the relation of the parcel to the historic shoreline, whether the parcel was encumbered by any residual rights of the public, or whether a further Chapter 91 licensing process was necessary for the development, redevelopment or change of use of such parcel. In the absence of such an exemption for

³ See Nancy S. Seasholes, *Gaining Ground, a History of Landmaking in Boston*, The MIT Press (2003), for a thorough discussion of the filling and creation of land in Boston from 1630 to 1995.

Landlocked Tidelands, such examination and analysis would be necessary to determine whether the title to the parcel is impacted by public trust rights (whether for fishing, fowling or navigation, or the broader rights of the type discussed in *Boston Waterfront*) and if so, whether the parcel need comply with the licensing requirements contained in Chapter 91 and the Chapter 91 Regulations, even if the parcel in question is located far from the present shoreline. Perhaps recognizing the impact of its decision in *Moot*, this Court granted and then extended a stay of its decision to enable the Legislature to act on this matter.

On November 15, 2007 the Governor signed into law the Act. The Legislature explicitly acknowledged this Court's holding in *Moot* and responded by balancing the retained rights of the public in tidelands and the rights of private landowners, especially those landowners with little or no connection to the current shoreline. This balance is reflected in the Legislature's decision to exempt Landlocked Tidelands from the licensing requirements contained in Chapter 91, §18, but to require that there be further regulatory review of benefits to the public in connection with certain development and redevelopment

in those areas that require licensing under Chapter 91, §§13 and 18, and in Landlocked Tidelands.

The Act adds to the definitions section of Chapter 91 (§1) an explicit definition of Landlocked Tidelands and in §18 exempts Landlocked Tidelands from the licensing requirements found in Chapter 91. The regulatory authority over Landlocked Tidelands does not, however, end with this exemption. The Act also inserts a new §18B into the provisions of Chapter 91. This section appoints the Secretary of Energy and Environmental Affairs as the administrator of tidelands and requires the Secretary to further review and analyze the public benefits resulting from development or redevelopment projects that are required to file an environmental impact report under G.L. c. 30 §§ 61, 62H ("MEPA") and (i) require licensing under §13 (projects in the Connecticut River or great ponds) or §18 (tidelands projects), or (ii) are located on Landlocked Tidelands. The Secretary may also require this public benefit review for development or redevelopment projects that are

required to file an environmental notification form under MEPA.⁴

For projects that require this public benefit review, the Act includes the factors to be considered by the Secretary, including “the purpose and effect of the development; the impact on abutters and the surrounding community; enhancement to the property; benefits to the public trust rights in tidelands or other associated rights, including, but not limited to, benefits provided through previously obtained municipal permits; community activities on the development site; environmental protection and preservation; public health and safety; and the general welfare.” The Act, §8 (codified as Chapter 91 §18B). The Secretary is also required to consider the differences in the nature of the tidelands involved and the practical impact of the public benefit when making the public benefit determination.

While the Act exempts Landlocked Tidelands from the licensing scheme imposed by the requirements of Chapter 91 and the Chapter 91 Regulations, the Legislature has mandated that the Secretary, as the

⁴The Act also adds a new §62I to G.L. c. 30 to require discussion of a project’s impacts on tidelands in the filings identified therein.

tidelands administrator, consider benefits to the public in connection with projects which are required to file an Environmental Impact Report under MEPA. It thus appears that the Legislature was fully cognizant that exempting projects from licensing was not tantamount to the abdication of all public review and comment over development in Landlocked Tidelands and that such review and comment furthers public trust rights.

C. Legislative Authority to Exempt Tidelands

The Appellant in this case argues that the Legislature exceeded its authority in enacting the Act. NAIOP urges the Court to instead find that the Act is a valid exercise of legislative authority and affirm the decision of the Superior Court.

Opinion of the Justices, 383 Mass. 895 (1981) provides a road map for analyzing legislative authority in this area. In that case the Senate asked the Court to answer to a series of questions about pending legislation one section of which had the effect of relinquishing all of the public's rights in tidelands that were filled and located landward of a certain line in the City of Boston. The stated purpose of the legislation was, *inter alia*, to clear

title to such land and free such land of any vestigial interests of the public alleged to result from the court's discussion of retained public rights in tidelands in *Boston Waterfront*. "Our conclusion is simply that the transfer or relinquishment of all of the Commonwealth's and the public's rights in tidelands is not constitutionally beyond the power of the Legislature." *Id.* at 902. The "legislation must be explicit concerning the land involved; it must acknowledge the interest being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer." *Id.* at 905. The court opined that the relinquishment of the public's rights in land that was previously filled and located landward of a line in the City of Boston satisfied these requirements. *Id.* at 920.

The Legislature has followed these requirements in the Act. The Legislature specifically found in its preamble to the Act that "exempting existing and future uses, structures and improvements on landlocked tidelands from the licensing requirements established by Chapter 91 of the General Laws, serves proper public purposes, including, but not limited to, maintaining marketable titles, continuing the

beneficial redevelopment and revitalization of landlocked tidelands, and encouraging public access to the waterfront." (the Act, §1, emphasis added). The Legislature has explicitly and with good reason identified the properties exempted from the licensing requirements of Chapter 91 - those properties located at least 250 feet from the present high water mark and separated from the water by a public way. Such former tidelands no longer have any useful connection to the water that could further public trust rights. The Act does not exempt from licensing any lands that are located on the water or that have meaningful connections to the present-day waterfront. Such lands will continue to be regulated and licensed as they have since the 1800's, thus preserving the public trust rights in those lands, whether the more limited rights of fishing, fowling and navigation, or the broader rights of the type identified in *Boston Waterfront*.

This Court may not attempt to substitute its judgment for the judgment of the Legislature. *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 138-139 (1949). The Legislature has looked at this issue, as a result of the Court's decision in *Moot*, and

concluded that the existing regulatory scheme for licensing tidelands in Massachusetts should contain the exemption that was previously provided for Landlocked Tidelands by the Department in the Chapter 91 Regulations. It further found that certain developments in tidelands should undergo additional scrutiny and review so as to protect the public's rights in tidelands, whether landlocked or otherwise. While it could be argued that the public benefit review contained in the Act is overly broad in those lands where the only public trust rights remaining are for fishing, fowling and navigation, this section provides guidance to the Secretary and requires the Secretary to consider the differences between the types of tidelands in this review.

In *Moot*, the Department argued that the administrative burdens that would be placed on the Department in connection with the analysis and licensing of landlocked tidelands would be too great and would take away from its efforts in protecting the public rights in true waterfront parcels. While noting the Department's expertise in these matters, the Court stated that it remained up to the Legislature to deal with these burdens. *Moot*, 448

Mass. at 352. Surely the Legislature recognized the burdens that would be placed on the Department without this exemption as well as the burdens on landowners - especially those landowners far removed from the current shoreline.

The stated public purposes contained and acknowledged in the Act, the interests exempted under the Act which are limited to Landlocked Tidelands, and the delegation given to the Secretary in connection with the review of certain developments in tidelands and Landlocked Tidelands, are all within the authority of the Legislature in carrying out its duties to protect public trust rights. "If the question is fairly debatable, we cannot substitute our judgment for that of the Legislature." *General Electric Co. v. Kimball Jewelers, Inc.* 333 Mass. 665, 675 (1956). See also *Commissioner of Revenue v. The Gillette Company*, 454 Mass. 72, 76 (2009).

We submit that the Legislature has responded in a thoughtful and measured way to the concerns expressed by the Court in *Moot* and that this Court should find that the enactment of the Act is well within the powers of the Legislature.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the Superior Court and find that the Act is a valid exercise of legislative authority.

Respectfully submitted,

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