COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-10559

JOSEPH V. ARNO,

Plaintiff-Appellee

v.

COMMONWEALTH OF MASSACHUSETTS,

Defendant-Appellant

ON APPEAL FROM ORDERS OF THE LAND COURT
AND THE JUDGMENT OF THE SUPERIOR COURT IN
NANTUCKET COUNTY

BRIEF OF THE APPELLANT
COMMONWEALTH OF MASSACHUSETTS

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STATEMENT OF ISSUES

1. Whether the Commonwealth's appeal from the trial court's 2004 and 2005 orders was timely, where it was filed within 60 days of the final Judgment that fully and finally resolved the controversy between the parties in the trial court.

2. Whether the Commonwealth or the public or both retain any property or public rights in or over Arno's registered filled tidelands on Nantucket, which, prior to filling, were submerged lands (Commonwealth tidelands) and flowed flats (private tidelands).

3. Whether the trial court erred in its determination that the test for regulatory jurisdiction over work on filled tidelands under the Public Waterfront Act, G.L. c. 91, is whether the Commonwealth or the public hold any property rights in those tidelands.

STATEMENT OF THE CASE

The Public Waterfront Act, G.L. c. 91, §§1-63 (Chapter 91), regulates water and nonwater dependent use and development of filled and flowed tidelands lying below the historic high water mark.[1] This case concerns Joseph Arno's request for an exemption from the application of Chapter 91's licensing requirements to his proposed project on former submerged lands and flats. Arno reasons that his filled tidelands were registered in 1922, and that the registration process eliminated Chapter 91 jurisdiction over his property--

[1] Chapter 91, its regulations, and the decisions of the trial court are included in an Addendum (Add.).

despite the fact that his land would not exist without two licenses issued under that law. He thus seeks to rely on the purposes of one statute--the Land Registration Act, G.L. c. 185--to undermine the purposes of another--Chapter 91. These two statutes, however, peacefully coexist.

This dispute arose after the Department of Environmental Protection (Department or DEP) approved Arno's application for a Chapter 91 license, subject to certain conditions. RA 267. Unhappy with those conditions, Arno requested an adjudicatory hearing and filed a single count complaint in the Land Court. RA 15. Arno's complaint sought a declaratory judgment that Chapter 91 does not apply to his property because neither the Commonwealth nor the public hold any property rights in his land. RA 18. Arno argues that a Waterways Encumbrance, reserving "any and all public rights . . . in and over the [land] below mean high water mark" (RA 79) *refers to the high water mark as* it existed in 1922. Next, he argues that neither the Commonwealth nor the public hold any property rights above that line and, as a consequence, Chapter 91 does now apply to his project.

The trial court judge (Piper, J.), acting as justice of the Land Court, agreed with Arno and entered partial summary judgment, establishing a water line that the 1922 registration proceedings declined to determine, and placing that line seaward of Arno's proposed project. Add.1 at 16-17. Having adjudicated that line, the trial court held that the registration proceedings had "extinguished" any public property rights landward of that line. *Id.* at 23. Later, the trial court judge (now acting as a justice of the Superior Court by assignment to resolve an issue of jurisdiction) held that Chapter 91 does not apply when there are no public property rights in the land. Add.2 at 6-7. Based on the earlier order, the court then held that Arno did not need a Chapter 91 license for his proposed project. *Id.* at 7. A final judgment issued, which concluded the case at the trial court level. Add.3.

The Commonwealth timely appealed from that judgment. RA 431. Arno moved to strike the appeal as it related to the Land Court's earlier orders, arguing that the interdepartmental transfer of part of the case (along with the judge) to the Superior Court created two separate cases for purposes of appellate

review, and that the Commonwealth had missed the deadline for appealing the earlier orders. RA 433. The trial court agreed, and entered an order striking the appeal of the earlier orders. Add.4. The Commonwealth appealed from that order. RA 445. The clerk of the Land Court sent separate notices of assembly, which were later consolidated on the Commonwealth's motion.

This Court accepted Arno's application for direct appellate review.

STATEMENT OF FACTS

I. THE PUBLIC TRUST DOCTRINE AND THE PUBLIC WATERFRONT ACT, G.L. c. 91.

This case arises against a rich background of centuries of judicial decisions and legislative acts regarding the use and regulation of the Massachusetts waterfront. Because the background "legal concepts are more than mere historical curiosities," *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 632 (1979), they warrant review.

A. The Public Trust Doctrine and the Colonial Ordinance of 1641-47.

The public trust doctrine expresses the "government's obligation to protect the public's interest in" tidelands and tidewaters. *Trio Algarvio, Inc. v. Comm'r Dep't of Envtl. Protection*, 440 Mass.

94, 97 (2003)(citation omitted). The doctrine is rooted in Roman and English law. Under English law, the King held title to the soil below ordinary high water mark (the *jus privatum* or property right), JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 27 (1847), while the sovereign held the people's water-based rights in trust for public use (the *jus publicum* or right to regulate public interests in the sea shore). *Id.*; *see also Commonwealth v. Roxbury*, 9 Gray 451, 484 (1857). That "the *jus privatum*, or right of soil, [is] vested in an individual owner, does not necessarily exclude the existence of [the] *jus publicum*." *Weston v. Sampson*, 8 Cush. 347, 354 (1851).[2] The two rights are distinct and severable. *Roxbury*, 9 Gray at 493 (1857) ("two distinct powers"); *Commonwealth v. Alger*, 7 Cush. 53, 90 (1851).

Through the Colonial Ordinance of 1641-47, the colonial government extended the property of littoral owners to the low water mark. *Storer v. Freeman*, 6

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[2] *See New York v. New York & S.I. Ferry Co.*, 68 N.Y 71, 79 (1877)(grant of title, does not "divest [the State] of the right to regulate the granted premises in the interest of the public and for protection of commerce and navigation."); *Attorney General v. Parmeter*, 147 Eng. Rep. 345, 352 (1811) (grant of the *jus privatum* "must be considered as subject to that public right [the *jus publicum*], which cannot be disturbed.").

Mass. 435, 438 (1810). This departure from English common law was intended to induce the construction of private wharves to promote economic development in the new colony. *Id.* Even after this grant, however, land between ordinary high and low water (flats), or 100 rods (1650 feet) seaward of the high water mark, whichever is less, "always had strings attached." *See Boston Waterfront*, 378 Mass. at 637. In other words, it was a grant of only the *jus privatum*. Under the Colonial Ordinance, littoral owners thus had a right to reclaim flats without governmental approval, as long as they did not materially impair the public right of navigation. *Drake v. Curtis*, 1 Cush. 395, 413 (1848); *Kean v. Stetson*, 5 Pick. 492, 502-03 (1827); *Roxbury*, 9 Gray at 519 (note). But, at least until they were built upon, they remained subject to the public's right to use the water. *See id. at* 519.

B. The Public Waterfront Act and Its Protection of the Public's Interest in the Waterfront and Tidewaters.

During the first half of the 19th century, "private development spurred by the Colonial Ordinance and various wharfing statutes became rapid and chaotic." *Trio Algarvio*, 440 Mass. at 99. In response, the Legislature established a commission to define

"such lines . . . beyond which no wharves shall be extended" in Boston Harbor. Res. 1835, c. 40. And, in 1837, the Legislature adopted such a line. St. 1837, c. 229.

In 1866, the Legislature extended regulatory oversight to all tidelands below the high water mark, St. 1866, c. 149, §4, and rendered any structure built "without authority of the legislature, or in a[] manner not sanctioned by the board" a "public nuisance" *per se*. *Id.* §5. To administer this new power, the legislature created a *permanent board* with "general care and supervision of all harbors and tidewaters." §2. Three years later, the Legislature made it clear that all future licenses to fill below the high water mark were revocable. St. 1869, c. 432. In 1872, the legislature transferred its licensing authority to the board. St. 1872, c. 236.

Today, Chapter 91--the modern codification of the 1866 Act--is designed to regulate water and nonwater dependent development on tidelands and to protect the public's water based rights. *See Moot v. Dep't of Envtl. Protection*, 448 Mass. 340, 342 (2007). In 1983, the Legislature defined the term "tidelands" to make it clear that Chapter 91 applies to all filled and

unfilled areas lying below the historic high water mark. *See* St. 1983, c. 589, §21 (codified at G.L. c. 91, §1); 310 C.M.R. §9.02. The statute now requires new licenses for "[a]ny changes in use or structural alteration of a licensed structure or fill," §18, and requires DEP to determine that any nonwater dependent uses "will serve a proper public purpose." §18.

II. THE FILLED TIDELANDS AT ISSUE

It is undisputed that Arno's parcel includes filled tidelands, a large portion of which are former submerged lands or Commonwealth tidelands, i.e., lands below the historic low water line. Add.8. The following describes the history of the parcel.

A. History of Licensed-Filling That Created Arno's Filled Tidelands.

Prior to 1882, the current location of Arno's parcel lay within the confines of Nantucket Harbor. RA 179, 219. According to two title reports from 1921, the Proprietors of Nantucket believed that they held title to land above and below the low water mark. RA 149. Acting on this belief, they divided up the harbor into water lots in the late 1700s, and allotted them to private persons. RA 78, 149; *see also* RA 90, 151 (depicting water lots). The lots extended "below

[the] mean low water mark." RA 78. Arno's parcel was once one or more of these water lots.

The area of Nantucket Harbor that now makes up the majority of Arno's parcel was filled pursuant to two licenses.[3] On November 28, 1882, the Board of Harbor and Land Commissioners issued a license that authorized the Nantucket Railroad Company "to construct a solid roadway between the Old North and Steamboat Wharves in Nantucket Harbor" as depicted on the plan that accompanied the application. RA 175, 179. The license noted that the fill was "subject to the provisions of the nineteenth chapter of the Public Statutes, and of all laws which are or may be in force applicable thereto." RA 175.[4] The licensee was also required to construct a 6 foot wide "sluiceway" in the middle of the roadway to allow tidewaters to flow into the inner harbor basin created by the new railway bulkhead. RA 176.

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[3] A third Chapter 91 license was issued in 1928. RA 59. That license authorized Arno's predecessor to construct "a timber bulkhead and fill solid in Nantucket Harbor" seaward of the "present high water line." RA 59. This bulkhead is now the location of a boardwalk. Add.8; RA 186, 267.

[4] Chapter 19 of the Public Statutes of 1882 was the first codification of Chapter 91. Add.5.

The second license was issued on October 24, 1895. RA 209. This license authorized Delmont Weeks to "fill solid in tide water of a basin connected with Nantucket Harbor," that is, the inner basin created by the bulkhead authorized by the 1882 license. RA 209. Like the earlier license, it noted that the fill was "subject to the provisions of the nineteenth chapter of the Public Statutes, and of all laws which are or may be in force applicable thereto." RA 209. The accompanying plans depict a high water line circumscribing the inner basin and landward of the railway bulkhead constructed under the 1882 license. RA 215, 219. A dashed line on the plan depicts the low water mark as it had come to be located after the 1882 railway bulkhead altered the water flow. RA 219.

As portrayed on the plan created and certified by Arno's surveyor, Arno's parcel consists of the tidelands filled under the 1862 and 1895 licenses. Add.8. The plan also indicates that Arno's parcel and his proposed building lie seaward of the 1895 high water line and on former submerged lands. *Id.* In accordance with the terms of the 1882 and 1895 licenses, the filled parcel remains subject to "all

laws . . . which may be" enacted to regulate and control the use of the filled tidelands. RA 175, 209.

B. The 1922 Registrations for the Parcels Reflected in Arno's Transfer Certificate.

Arno's parcel derives from two 1922 Certificates of registration. RA 107(Cert. 1093 (Gardner Regist.)), 117 (Cert. 1101 (Ayers Regist.)), 129 (Arno Transfer Cert.). The parcel consists of the two contiguous lots shown as Lot G and Lot 1 on Land Court Plans 8594-C and 8594-D. RA 139 (8594-C), 141 (8594-D).

In the Spring of 1921, Gardner filed a petition to register title to the land that later became Lot 1 (Regist. No. 8255). The plan that accompanied the petition depicts a bulkhead running parallel to, and inland of, the harbor line. RA 165. The petition was reviewed by an examiner, who concluded that Gardner "has not good title." RA 147. This conclusion appears to have been based on the fact that the land lay below the historic low water mark. RA 149-50. The report did not mention the 1862 and 1895 licenses.

On or before December 21, 1921, Ayers filed a petition to register title to the land that later became Lot G (Regist. No. 8594). The plan that accompanied the petition depicts a bulkhead running

along the harbor and then landward of a mark that appears to refer to mean high water. RA 69.[5] The petition was reviewed by an examiner, who concluded that Ayers "has not good title." RA 76. As in the Gardner case, this conclusion appears to have been based on the fact that the land consisted of former submerged lands (land below the historic low water mark), and that the State had never granted the land to Ayers. RA 78. The Report makes no mention of the 1882 or 1895 fill licenses.

The Attorney General filed an answer on behalf of the Commonwealth in No. 8255 on September 12, 1921, RA 101, and in No. 8594 on March 3, 1922. RA 97. In case No. 8255, he stated that "the parcel . . . borders on tidewater in which the public has certain rights," but that he had "no objection to the entry of the decree . . . provided the same [i.e., the parcel,] is made subject to any and all rights of the public." RA 101. The Attorney General made the same statement in case No. 8594, except that he also noted that "the plan filed with said petition shows a bulkhead on the

[5] It is not clear when the reference to "mean high water" was written on the plan since it does not appear on other copies of this plan with the same date. *Compare* RA 69, *with* RA 37.

property which is located between high and low water." RA 97.[6] He added that he had no objection to entry of the decree, "provided that" it did not include a "right to maintain" the bulkhead. RA 97.

The Land Court issued Original Certificates of Title in both cases. RA 107 (No. 8255), RA 117 (No. 8594). Both Certificates included a caveat, or "Waterways Encumbrance," reserving any public rights over the registered parcels. RA 108, 117. These Waterways Encumbrances are reflected in Arno's Transfer Certificate, which states that Arno's "land is registered under [Chapter 185], subject, however, to . . . any and all public rights legally existing in and over the same below mean high water mark." RA 130. The Transfer Certificate also states that the court did not determine "the water lines." RA 129.

C. Arno's Application for a Chapter 91 License to Construct a New Building on Filled Tidelands.

Arno proposes to "construct and maintain an addition and reconfigure an existing structure into a

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[6] This statement is significant in that the actual high water mark in 1922 would have coincided with the seaward edge of the bulkhead. The Attorney General's reference to the high water mark thus referred to something other than the "present high water mark" as it existed in 1922.

mixed-use development" on filled tidelands. RA 267. As proposed, the project would expand the existing footprint, and include two "commercial retail uses on the ground floor and two (2) private residential uses . . . on the second floor." *Id.* Arno applied for a license for the project under Chapter 91. RA 186.

On June 4, 2002, after analyzing the application, and applying the regulations, DEP approved the project with conditions. RA 269. Those conditions included a requirement that Arno "allow public pedestrian access along the . . . existing . . . harborfront boardwalk," and that he "maintain a point of access walkway" so that the public could access the boardwalk. RA 271.

III. THE LITIGATION

Arno challenged DEP's decision in two forums. First, on June 25, 2002, he requested an adjudicatory hearing to challenge the licensing determination. RA 187. Second, just over a month later, Arno filed a *single count complaint against the Commonwealth in the* Land Court. RA 15. The latter is at issue here.

Arno's complaint was brought under G.L. c. 185, §§1(a½), 115[7] and G.L. c. 231A, §1, and sought a

[7] The judge later construed the complaint as being brought under Ch. 185, §114 as well. Add. 1 at 7 n.4.

judgment declaring that: "(i) he is the exclusive owner in fee simple of the Property above present mean high water mark," (ii) the "Property above the 1922 mean high water mark, is . . . not subject to either an express or implied condition subsequent that it be used for a public purpose . . .," and (iii) G.L. c. 91 does not apply to the proposed project if neither the Commonwealth nor the public hold any property rights in the land. RA 18.

A. Judge Piper's 2004 Land Court Order Granting Partial Summary Judgment to Arno.

A central issue in the trial court was whether the reference to "mean high water" in the Certificate referred to the "historic (unobstructed)" or "present" line at the time of the 1922 registrations. Judge Piper decided it was the latter, and on December 29, 2004, he denied the Commonwealth's motion for judgment on the pleadings and granted partial summary judgment to Arno. Add.1 at 1. Judge Piper ruled that Arno holds title to the parcel "free of proprietary ownership right of the Commonwealth or the public in the portion of the registration parcel which lies landward of the Nantucket Harbor water line, as it existed in 1922." *Id.* at 23. However, Judge Piper

declined to "decide whether . . . [DEP] may subject Arno's proposed [] project to . . . G.L. c. 91," *id.* at 23-25, and then added that he would "take no action now on the balance of the complaint." *Id.* at 25.[8]

B. Judge Piper's 2009 Superior Court Order Granting Summary Judgment to Arno on the Remainder of His Complaint.

On January 12, 2009, Judge Piper, sitting by assignment as a justice of the Superior Court for the reasons discussed below, granted summary judgment to Arno on the "balance" of his complaint. Add.2 at 10. In the order, he ruled that Arno's project was not subject to Chapter 91. *Id.* at 3. This holding turned on the 2004 ruling that neither Commonwealth nor the public hold property rights in Arno's land. *E.g., id.* at 7. Absent any proprietary ownership rights, the trial court reasoned, "the Commonwealth has no authority to regulate locus under Chapter 91." *Id.*

Judge Piper entered a final Judgment on January 12, 2009, which incorporated the holding of the 2004 order. Add.3. The Judgment declares that Chapter 91 does not apply to Arno's proposed project "given that neither the Commonwealth nor the public hold any

[8] On March 5, 2005, Judge Piper entered a second order, which directed the Assistant Recorder to amend Arno's Transfer Certificate. RA 251, 279 (as amended).

proprietary ownership right in and to the land where Arno intends to develop . . . [his] project." *Id.* at 2. Entry of the Judgment fully resolved the remaining issue raised by Arno's original and only complaint. The Commonwealth appealed from the Judgment. RA 431.

C. Judge Piper's Order Striking the Commonwealth's Appeal of the 2004 Order.

Arno moved to strike the Commonwealth's appeal as it related to the 2004 and 2005 orders. RA 433. The Commonwealth opposed that motion, arguing that those orders were interlocutory because they failed to resolve the entire controversy between the parties. Judge Piper disagreed, and issued an order striking the Commonwealth's appeal as it applied to the earlier orders. Add.4 at 1, 5. The Commonwealth timely appealed from that order. RA 445.

Judge Piper's order was premised on a 2003 order of the Chief Justice for Administration and Management (CJAM), which transferred the Chapter 91 issue to the Superior Court and assigned Judge Piper to sit as a justice of that department to resolve it. RA 223. Judge Piper had requested the order to resolve a concern about whether the Land Court had jurisdiction to decide the ultimate question raised by Arno's

complaint--whether Arno needed a Chapter 91 license for his proposed project. RA 221.

The issue of finality and related appellate rights did not arise until a July 28, 2005 status conference. Prior to that date both parties believed that the 2004 and 2005 orders were "interlocutory" and "unappealable."[9] It was not until Arno's counsel stated, "there's no final Judgment," that this issue came to the forefront. RA 321. What ensued was an extended colloquy about an issue the court itself acknowledged as confusing. RA 348, line 3.[10] The hearing concluded with Judge Piper stating that the Commonwealth's only remedy was to ask a Single Justice to allow a late appeal. RA 347-48. Unwilling to take a position before a Single Justice with which it did not agree, RA 385, lines 12-15; 395, lines 7-20, the Commonwealth instead filed a motion to report the

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[9] RA 306 & n.1; *see also* RA 306 (Arno stating that, "[t]he Land Court Order deferred action on the balance of the complaint until the adjudicatory appeal concluded, thus precluding a final judgment that can be appealed."); RA 323, line 19 (former counsel for the Commonwealth).

[10] During the hearing, Judge Piper also acknowledged that "there's some, not only confusion in this case, but there has been some different approaches to it taken in this Court recently and in past years about the appealability of these kinds of S case Orders." RA 329, lines 5-8.

order to the Appeals Court. RA 356. The motion was denied at a September 2005 hearing. RA 405, 409. That hearing also included a colloquy regarding the issue, during which the court remarked that it had been "the source of th[e] conundrum." RA 395, lines 21-24.[11]

SUMMARY OF THE ARGUMENT

1. Without an order under Mass. R. Civ. P. 21 to sever the case, the interdepartmental order that transferred part of the case (along with the judge) to the Superior Court did not create two separate cases for purposes of appellate review. A contrary holding would undermine the purposes of the interdepartmental transfer authority and conflict with well established rules of appellate practice and procedure. Except in narrow circumstances, the rules prohibit full appellate review of an order that does not resolve the entire controversy between the parties. While G.L. c. 185, §15 may have authorized interlocutory review of the 2004 order, interlocutory review is permissive, and earlier orders that affect the outcome of a case are always open to review from the final judgment that ends the case. Accordingly, the Commonwealth appealed

[11] In a separate exchange, Judge Piper stated that "[t]hey're two separate cases; they have never been consolidated." RA 379, lines 23-24.

from the judgment that was decisive of the case and that appeal was timely as to the earlier orders that were integral to that judgment (pp. 21-28).

2. The trial court's construction of the meaning of the Waterways Encumbrance's reference to "mean high water" (something close to but not quite the 1922 water line) and the holding that followed (all public trust rights were extinguished by the registration proceedings) suffers from a basic misunderstanding of public trust rights. The public's rights--the *jus publicum*--arise under the laws of the Commonwealth and are therefore excepted by §46 of the Land Registration Act. G.L. c. 185 (pp.28-32). Even if the State and public *property* rights are not excepted by §46, the underlying record and historical context demonstrate that "mean high water mark" must refer to the historic water line. This interpretation is the more consonant with history, and is required by the rule that public grants to private parties should be construed in favor of the public and the fact that only the legislature can permanently relinquish public trust rights in tidelands (pp. 32-39).

3. Even if the Court determines that registration of the land in 1922 extinguished the State's and the

public's property rights, Arno's proposed project on filled tidelands is still subject to Chapter 91's licensure requirements. Chapter 91 does not define its jurisdiction in terms of property rights. Rather, it defines its jurisdiction in terms of "tidelands," and that term is defined to extend to all tidelands lying below the historic high water mark. *See* G.L. c. 91, §1. It constitutes an assertion of the *jus publicum*, designed to protect the waterfront from uncontrolled development and to promote the public's water-based rights. The statute's licensing scheme effectuates these purposes by ensuring that the government can secure public benefits in return for licensing private interference with the public's rights (pp. 39-50).

ARGUMENT

I. THE 2004 ORDER IS OPEN TO REVIEW IN AN APPEAL FROM THE FINAL JUDGMENT THAT FULLY AND FINALLY RESOLVED ARNO'S ONE COUNT COMPLAINT.

Since its inception this case has involved only one single-count complaint, the relief it requested, and the Commonwealth's answer to it. RA 15, 41. It has involved the same two parties, the same underlying facts, the same integrally related legal issues, and the same trial court judge. Indeed, the case was managed by the Land Court on a single docket up until

at least April 15, 2009. RA 11-14.[12] In these circumstances, settled rules of appellate practice and procedure normally preclude full appellate review before the entry of a final judgment that ends the entire controversy between the parties. Because the trial court's decision to strike the Commonwealth's appeal from the judgment that ended the case undermines the policy behind interdepartmental transfers and the policy against piecemeal appeals, it should be reversed.

A. An Interdepartmental Transfer Order Does Not, By Itself, Create Two Separate Cases for Purposes of Appellate Review.

The interdepartmental transfer statute and relevant case law are silent on whether the transfer of part of a case (along with the judge) to another department of the trial court creates two cases for purposes of appellate review. *See* G.L. c. 211B, §9(xxi).[13] In light of the policy underlying that

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[12] At some point after that date, the Land Court created a new docket for papers related only to the part of the case assigned a Superior Court docket number. *Compare* RA 1-5, *with* 7-10.

[13] The Standing Order on "Requests for Interdepartmental Judicial Assignments," adopted in 1996 and amended in 2005, also does not address the issue, but does reinforce the point that these orders are intended to "reduc[e] delay and duplication in actions pending in the Trial Court." *Id.*

authority and an available rule of civil procedure to effectuate such a result, it should not.

The statutory authorization for interdepartmental transfers and assignments was enacted as part of the Court Reorganization Act of 1978. St. 1978, c. 478, sec. 110, §9. That Act was intended "to promote the orderly and effective administration of the judicial system of the commonwealth." *Id.* sec.1. In this regard, the Legislature empowered the CJAM to assign justices of one department to another to "promote the speedy dispatch of judicial business." *Id.* sec. 110, §9 (codified at G.L. c. 211B, §9(xxi)). The Act thus provides "a statutory alternative to dismissing actions on jurisdictional grounds" where another department of the trial court would have jurisdiction to resolve the case. *ROPT Ltd. v. Katin*, 431 Mass. 601, 607-08 (2000)(collecting cases). It is designed "to conserve judicial resources." *Worcester v. Sigel*, 37 Mass. App. Ct. 764, 766-67 (1994).

The trial court's order effectuates neither of these purposes, necessitating multiple appeals from a single controversy. Here, for example, the Commonwealth's adoption of the trial court's position could have resulted in two separate appeals--a result

that is contrary to Massachusetts' "bedrock policy against premature appeals." *Long* v. *Wickett*, 50 Mass. App. Ct. 380, 387 (2000). This policy holds that "absent special authorization,"[14] . . . interlocutory rulings or decisions cannot be presented piecemeal . . . for appellate review. They may be presented only as part of the ultimate appellate review available on completion of proceedings in the trial court." *Kargman* v. *Superior Court*, 371 Mass. 324, 329 (1976)(citation omitted); *see also Cappadona* v. *440 Function Rm., Inc.*, 372 Mass. 167, 169 (1977)("entire case."). The 2004 order *did not* dispose of the entire case between Arno and the Commonwealth--it was only a grant of partial summary judgment, RA 225, 249, and "no appeal can be taken *from* a trial court's partial judgment." *Long*, 50 Mass. App. Ct. at 384 n.5.

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[14] The reference to special authorization refers to interlocutory appeals: (1) authorized by a single justice of an appellate court, (2) excepted under the doctrine of present execution, or (3) allowed under G.L. c. 231, §118 ¶2 to challenge an order granting, modifying, or denying a preliminary injunction. *Mancuso v. Mancuso*, 10 Mass. App. Ct. 395, 401 n.6 (1980). While it was unavailable here because Arno's complaint does not set forth "multiple claims," a proper Mass. R. Civ. P. 54(b) certification also authorizes full appellate review of a judgment that resolves less than all claims in a complaint. *Long*, 50 Mass. App. Ct. at 386.

The confusion reflected in the transcripts could have been avoided had the CJAM or the trial court entered an order under Mass. R. Civ. P. 21 to sever the case. *E.g.*, RA 329, 348, 391-395. It is established that "claims properly severed under Rule 21 take on lives of their own and become independent actions upon which separate appealable judgments may enter." *Roddy & McNulty Ins. v. A.A. Proctor & Co.*, 16 Mass. App. Ct. 525, 529 (1983), *rev. denied*, 390 Mass. 1103 (1983).[15] While severance under Rule 21 would have been improper in this case because it would not have promoted, *inter alia*, judicial economy, reliance on it would have at least put the parties on notice that the transferred issue was intended to take on a life of its own, however imprudent that may have been.

B. Section 15 of G.L. c. 185 Does Not Alter the Final Decision Requirement Where the Chapter 185 Order Does Not Resolve the Entire Controversy Between the Parties.

The trial court judge also relied on section 15 of the Land Registration Act, which provides that a party aggrieved "may" appeal "[q]uestions of law arising in the land court on any decision, judgment, or decree . . . to the appeals court or, subject to

[15] The same is true under the federal rule. *See* 21 R. FREER, MOORE'S FEDERAL PRACTICE §21.06[1] (3d ed. 2007).

[G.L. c. 211A, §10), to the supreme judicial court." G.L. c. 185, §15.[16] This provision, however, does not alter the settled rule that a party may not seek full appellate review of an order that "does not conclude the plaintiff's action at the trial level." *Breault v. Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 30 (1987); *Rollins Envtl. Servs. v. Superior Ct.*, 368 Mass. 174, 177 (1975) (holding order was interlocutory since it was not "decisive of the case").

The trial court seems to have compartmentalized the case based on the statute giving rise to the issue, effectively relying on the relevant statute to define "the case." *See* RA 336 lines 16-17; Add.4 at 2. But parties frequently file complaints asserting claims and theories under more than one law, and the final resolution of an issue under one statute does not make it immediately appealable. *See Krupp v. Gulf Oil Corp.*, 29 Mass. App. Ct. 116, 120-21 (1990) (entry of judgment on tort claim, but not Ch. 93A claim,

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[16] This statutory list does not include "orders." Moreover, the Legislature's use of the word "may" in relation to appeals instead of the word "shall" sets this case apart from *Senior Hous. Props. Trust v. Healthsouth Corp.*, where this Court held that §15's requirements for requesting a jury trial are mandatory ("shall") and that the party in that case waived its right to a jury by failing to comply with those requirements. 447 Mass. 259, 266-67, 271-72 (2006).

would not trigger right to appellate review). The Commonwealth did not seek the entry of "multiple judgments," Add.4 at 3; rather, it sought entry of a final judgment that resolved the entire controversy presented by Arno's complaint.

Section 15 also does not alter the well-settled rule that a right to appeal from an interlocutory decision is permissive. *Commonwealth v. Roxbury Charter High Pub. Sch.*, 69 Mass. App. Ct. 49, 52 n.10 (2007); *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 613 (1980)(same).[17] Here, the 2004 order was directly related to the ultimate issue that it left open, that is, whether Arno needed a Chapter 91 license. This was the reason Arno filed his complaint, and given the theory pleaded he could not have prevailed on this ultimate issue without prevailing on the predicate title issue first. In

[17] Even if §15 could be read to have authorized the Commonwealth to seek review of the earlier orders on an interlocutory basis, there is no reason to suppose that the statute limits appellate rights to an interlocutory appeal. *See, e.g., Borman v. Borman*, 378 Mass. 775, 779 (1979)(refusing to hear appeal of an interlocutory order authorized by a statute similar to Ch. 185, §15 "until final judgment has entered"); *Mancuso*, 10 Mass. App. Ct. at 401-02 (appeal "should lie dormant"). The fact that G.L. c. 231, §118 was amended in 1987 to authorize single justice review of interlocutory orders of the Land Court reinforces this conclusion. St. 1987, c. 208 secs. 1 & 2.

other words, it was "inextricably intertwined with the ultimate issue[]." *R.J.A. v. K.A.V.*, 34 Mass. App. Ct. 369, 375 (1993). And, an appellate court can consider an earlier order "on appeal from the final decree so far as it affects the merits of the case and the ultimate rights of the parties." *Corey v. Tuttle*, 249 Mass 135, 138 (1924); *see* Mass. R. App. P. 3(a). Thus, the 2004 and 2005 orders are open to review here.[18]

II. THE TRIAL COURT ERRED IN HOLDING THAT THE REGISTRATION OF ARNO'S FILLED TIDELANDS EXTINGUISHED ALL PUBLIC TRUST RIGHTS IN THOSE FORMER SUBMERGED AND FLOWED LANDS.

Arno's Transfer Certificate is subject to a Waterways Encumbrance, which provides that the parcel was registered "subject . . . to any and all public rights legally existing in and over the same below mean high water mark." RA 130. The rights referred to in the Encumbrance, as later explained in *Boston Waterfront*, concern, *inter alia*, "the condition subsequent that [the] property be used for" a public purpose. 378 Mass. at 649. The fact that the land in question concerns tidelands--"a special form of

[18] *See also* 16A CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE & PROCEDURE §3949.4, at 100 (2008) ("appeal from a final judgment supports review of all earlier interlocutory orders, at least if the earlier orders are part of the progression that led to the judgment").

property of unusual value," *id.* at 631--"gives the public's representatives an [enduring] interest and responsibility in [their] development." *Id.* at 649-50.

The question framed by the trial court was whether this reservation concerned the "historic" or "present" water line at the time the land was registered in 1922. The Certificate refers only to "mean high water mark." RA 130. It is a question of great significance, because the Commonwealth believes that this or very similar language appears in many (if not all) certificates for registered tidelands.[19] The court construed the language as referring to something close to (but not quite) the present high water mark, as of 1922--a construction that appears to have been predominated by a concern about defeating the purposes of the Land Registration Act. *See* Add.1 at 18-20.[20] Adopting the trial court's analysis will likely have serious adverse consequences, because it effectively extinguishes all public trust rights in all registered

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[19] *E.g.*, *Rauseo v. Commonwealth*, 65 Mass. App. Ct. 219, 221 (2005) (1907 registration certificate reserving rights "below mean high water mark"); *Burke v. Commonwealth*, 283 Mass. 63, 66 (1933) ("below mean high water mark").

[20] That concern was misplaced. To the extent it was unclear, the Commonwealth states here that it does not dispute Arno's title to the parcel.

tidelands that were filled at the time they were registered. This dramatic result is unsupported by both the law and the facts.

A. Public Trust Rights Are Not Encumbrances That Must be Set Forth in the Certificate of Title.

The trial court's analysis reflects a fundamental misunderstanding of the nature of the public's rights in tidelands, filled or unfilled. In both the 2004 and the 2009 orders, the trial court equated the *jus privatum*, or title to the soil, with the *jus publicum*, or the public's interests in the development and use of the waterfront, and found, in effect, that the relinquishment of the *jus privatum* effected a relinquishment of the *jus publicum* as well. *See* Add.2 at 9. These two interests are "distinct," *supra* p.5, and a grant of the *jus privatum* does not relinquish the government's power to protect the public's rights in the waterfront. *Id.* Even where title is held by a private person, it remains "subject to all such restraints and limitations of absolute dominion over it . . . for the security and benefit . . . of the public." *Alger*, 7 Cush. at 70.

The sovereign right to regulate and control the use of the waterfront to protect public interests

arises under the laws of the Commonwealth. Originally just a common law right, derived from the laws of England, the colonial government acted to manifest these rights through the Colonial Ordinance. *Commw. v. Vincent*, 108 Mass. 441, 446 (1871) ("This ancient ordinance . . . is the foundation of our law upon this subject."). By virtue of Article 6 of Chapter 6 of the Constitution of the Commonwealth, the rules and rights established under the Colonial Ordinance remain "in full force," except as "altered . . . by the legislature." MASS. CONST. Pt. 2, c. 6, art. 6. As explained in Part III, the Legislature continues to exercise its police power authority to regulate use and development of tidelands through Chapter 91.

The existence of the *jus publicum* and its assertion through Chapter 91 refutes the trial court's analysis. Section 46 of the Land Registration Act, G.L. c. 185, excludes from the list of encumbrances that must be set forth in a certificate of title to have effect, all "claims or rights arising under the . . . the statutes of th[e] commonwealth." G.L. c. 185, §46. As explained above, the public's rights in tidelands arise under the laws of the Commonwealth and they are thus exempt from the list of encumbrances

that must be set forth in a certificate. These were the fundamental underpinnings of this Court's seminal decision in *Boston Waterfront*, underpinnings which were overlooked entirely by the trial court's conflation of the *jus privatum* with the *jus publicum*.[21]

B. Even If It Were Necessary to List Public *Property* Rights on the Certificate, the Waterways Encumbrance Preserves Them.

1. The Trial Court's Interpretation of the Waterways Encumbrance Ignored Its Plain Language, As it Would Have Been Understood in 1922.

The Attorney General's 1922 answer stated that "he ha[d] no objection to the entry of the *decree* prayed for provided *the same* is made subject to any and all rights of the public." RA 97 (emphasis added). He thus made it clear that the reservation was intended to apply to "the decree," which necessarily concerned the entire parcel. *Id.* That the Attorney General referred to something other than the mean high water mark as it existed in 1922 is made plain by the

[21] The Court's holding in *Boston Waterfront* was codified as part of the 1983 amendments to Chapter 91. Those amendments make clear that "Commonwealth tidelands" are "held by the commonwealth in trust for the benefit of the public *or* held by another party *by license* or grant of the commonwealth subject to an express or *implied* condition subsequent that it be used for a public purpose." St. 1983, c. 589, sec. 21 (codified at G.L. c. 91, §1)(emphasis added).

fact that his only reference to water lines was to "a bulkhead on the property which is located between high and low water." RA 97. This reference to high water could not have referred to the actual or present high water line as it existed in 1922, because the 1922 high water mark would have coincided with the seaward edge of the bulkhead. RA 69. Thus, the Attorney General must have been referring to a former, i.e., historical (or unobstructed) water line; no other construction makes sense. To contend with this inconvenient fact, the court relied on a fiction, finding that the water line was not the historic line or the present line, but the potential high water line in the absence of the bulkhead, Add.1 at 18--a finding that conflicts with the certificate's admonition that it did not determine any "water line." RA 117, 129.

The parties would have understood the reference to mean high water as referring to the historic high water mark, because pre-fill lines define public and private rights. That this is the case can hardly be questioned given the examiner's detailed description of the history of filling that created the parcel. RA 78-79; *see also* RA 149-50. Historical documents also reflect this common understanding. For example, in

describing the survey of water lines in Boston Harbor, the Commissioners described the need to determine "the original line of high-water mark" as "[o]ne of the most essential matters," because that line would "ultimately" define "the rights of riparian proprietors . . . under the colonial law of 1641." 1847 SENATE DOC. No. 25, at 3. This understanding is also reflected in judicial decisions. For example, in *Rauseo*--a case concerning registered land with the same encumbrance--the parties and the Court proceeded on the basis that the encumbrance extended to the historic high water mark, without question. 65 Mass. App. Ct. at 220.[22] And, in *McCarthy v. Oak Bluffs*, the Court emphasized the point, referring to the need to determine the historic low water mark, because, "*as a matter of law, this line would represent the division between private and . . . public, ownership rights.*" 419 Mass. 227, 234 (1994)(emphasis in original).[23]

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[22] The question in *Rauseo* was whether the Mystic River wharfing acts--all enacted prior to 1866--extinguished public property and water-based rights in flats (private tidelands). 65 Mass. App. Ct. at 219-20. While the Commonwealth continues to disagree with this holding, it notes that *Rauseo* did not decide the effect of acts or licenses on public rights in flats issued after 1866, St. 1866, c. 149, or 1868. St. 1869, c. 432.

[23] *See also Boston Waterfront*, 378 Mass. 630 n.1

This understanding would also have been informed by settled rules regarding the movement of littoral boundaries. Littoral owners only receive title to gradual and imperceptible accretions caused by natural processes or the union of natural and artificial processes. *Lorusso v. Acapesket Improvement Ass'n*, 408 Mass. 772, 780 (1990). They do not take title to land that they have made themselves. *Id.* (citing *Michaelson v. Silver Beach Improvement Ass'n*, 342 Mass. 251, 254 (1961)).[24] The U.S. Supreme Court found that the latter rule was so well understood in 1834 that it would have been unnecessary for an agreement between the States to have addressed it. *New York v. New Jersey*, 523 U.S. 767, 783 (1998). Similarly, while the parties may have understood Arno's predecessors to have acquired title to the filled lands because the fill was authorized by the 1882 and 1895 licenses and then registered,[25] they would not have understood that authorization to have altered the historic water lines

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(proceeding on basis of historic water lines); *Wheeler v. Stone*, 1 Cush. 313, 323(1848) (Shaw, C.J.) (describing need to ascertain "ancient lines of high and low water" to determine rights in flats).

[24] *See also Bergh v. Hines*, 44 Mass. App. Ct. 590, 592 (1998) ("[A]ccretion by 'steam shovel' is not a recognized method of changing littoral boundaries.").

[25] *But see Trio Algarvio*, 440 Mass. at 106 (revocable licenses only authorize occupation).

for purposes of defining public property rights. *See Commercial Wharf Co. v. Winsor*, 146 Mass. 559, 563 (1888) (authorization to construct beyond low water line does not extend that line).[26]

2. The Trial Court Failed to Construe the Waterways Encumbrance in Favor of Preserving Public Rights as Required By Established Rules of Construction.

The trial court's interpretation also ignored the familiar rule that grants "by [a] public authority to private individuals, must be strictly construed in favor of the public against the licensee." *Tilton v. Haverhill*, 311 Mass. 572, 579 (1942). This rule "applies *a fortiori* to a case where such a grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also of a portion of that public domain, which the government held in a fiduciary relation, for general and public use." *Roxbury*, 9 Gray at 492. Such is the case here where Arno asks this Court to construe language involving public rights in a certificate concerning land previously held by the Commonwealth.

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[26] The contrary rule would allow a littoral owner to benefit doubly--first by the artificial filling of public land and then by any natural accretion upon it.

The principle of these cases is that ambiguities that concern the division of public and private property rights should be resolved in favor of the public. Preservation of these rights does not, as the trial court seemed to think, render Arno's registered land any less certain or ascertainable. Add.1 at 11. To the contrary, the Waterways Encumbrance appears on the face of Arno's transfer certificate. RA 130. It was this language that likely led Arno to ascertain the original water lines, Add.8, and then to apply for a Chapter 91 license. RA 267.[27] The private rights (right to title) and the public rights can coexist without derogating the purposes of the Land Registration Act.

3. The Proper Construction of the Waterways Encumbrance Is Consistent with the Rule that Only the Legislature Can Effect a Permanent Relinquishment of All Public Trust Rights.

To the extent any doubt remains, that doubt should be resolved in favor of preserving the public's interest in the former submerged lands and flats at

[27] To the extent these rights had to be set forth on Certificate and this Court finds that they were not, these facts bring Arno squarely within the exception in *Doyle v. Commonwealth*, 444 Mass. 686, 693 (2005). The "facts described in his [transfer] certificate of title" apparently "prompt[ed]" him to investigate further," *id.*, which led him to discover that his land lies seaward of the historic high water line. Add.8

issue, since only the legislature has authority to permanently relinquish public trust rights in tidelands, filled or not. *Moot*, 448 Mass. at 347. To permanently relinquish *all* public trust rights in filled tidelands, the legislation must satisfy 5 criteria, including that the act be for "a valid public purpose." *Opinions of the Justices*, 383 Mass. 895, 905 (1981). The fact that there is no such legislation here makes it all the more necessary to construe the Waterways Encumbrance in favor of preserving public property rights.[28]

This conclusion is also supported by the fact that Arno's predecessors did not utilize the available statutory mechanism for determining the division of flats between littoral property owners. That law authorized Arno's predecessors to "request the court to" make a "determination of the lines and boundaries

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[28] The trial court did not address this issue directly, implying that it was not an issue since any rights had been extinguished by the lawful filling of the "flats." Add.1 at 17-18. That analysis, however, ignores the existence of the former submerged lands at the site. RA 219; Add.8. Moreover, while this rule has been often repeated, *e.g.*, *Trio Algarvio*, 440 Mass. at 97, the Legislature's decision to prohibit all construction below the high water mark in 1866 raises a serious (and still unaddressed) question about its vitality. St. 1866, c. 149, §§4-5; *see also Trio Algarvio*, 440 Mass. at 100 n.7 (appearing to extend extinguishment rule to all tidelands).

of their ownership" of "flats" "concurrently with the registration proceedings." St. 1906, c.50, §§1, 3; St. 1864, c. 306; G.L. c. 240, §§19-26.[29] Despite the fact that Arno's predecessors did not proceed concurrently under this law, the trial court implied that a case proceeding solely under the Land Registration Act can have the same effect. Add.1 at 8. If that were true, however, it would have been unnecessary to require "a petitioner for registration" to ask "the court to proceed under" G.L. c. 240, §§19-26.

III. CHAPTER 91 ASSERTS JURISDICTION OVER ALL "TIDELANDS" BELOW THE HISTORIC HIGH WATER MARK.

In the trial court, Arno argued that DEP's ability to "regulate under Chapter 91 . . . arise[s] exclusively from the public's proprietary interest in waterfront land, and without property rights, the Commonwealth lacks statutory authority to require a license for" his project. Add.2 at 4. The trial court agreed, holding that the test for jurisdiction is whether the State or the public hold property rights in the tidelands at issue. *Id.* at 7. That test turns

[29] Significantly, the statute also states that such a proceeding may not "affect any rights or title of the Commonwealth, to any flats or lands, unless the Commonwealth consents to become a party to the proceedings." St. 1864, c. 306, §4 (G.L. c. 240, §26).

Chapter 91 on its head, ignoring both its plain meaning and purposes. Chapter 91 is an assertion of the *jus publicum*, that is, the public's interests in the waterfront. Those public interests do not depend on "property rights" for their existence.

A. Chapter 91 Is Not Limited to Tidelands In Which the Commonwealth or the Public Hold Property Rights.

In construing the scope of Chapter 91, the court looked first to DEP's definitions for "commonwealth" and "private" tidelands to inform the scope of the term "tidelands," as defined by the statute. Add.2 at 5-6. This was backwards. Settled rules of statutory construction require courts "to begin with the plain language of the statute." *Commonwealth v. Boston Edison*, 444 Mass. 324, 336 (2005). Chapter 91 defines the term "tidelands" broadly to mean "present and *former* submerged lands and tidal flats lying below the mean high water mark." St. 1983, c.589, §21 (codified at G.L. c. 91, §1) (emphasis added). The court thus erred in concluding (in a parenthetical) that Chapter 91 "defin[es] tidelands without regard to [the] historic water mark." Add.2 at 6.

The Legislature's use of the word "former" makes clear that historic water lines matter, because former

submerged lands and tidal flats, i.e., filled tidelands, will always lie landward of the present water lines after they are filled. G.L. c. 91, §1. The trial court's interpretation would thus render the Legislature's use of the word "former" without meaning, in conflict with the rule that courts must construe statutes "so that no part will be inoperative or superfluous." *Wolfe v. Gormally*, 440 Mass. 699, 704 (2004)(citation omitted)).[30]

DEP's regulations reflect the plain meaning of the statute. DEP has defined the term "tidelands" to mean "present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is further landward." 310 C.M.R. §9.02, at 270. The regulations then make clear that "[t]idelands include both flowed and filled

[30] The fact that jurisdiction extends to the historic high water mark is hardly novel. Federal jurisdiction under the Rivers and Harbors Act of 1899, 33 U.S.C. §403, and the Submerged Lands Act of 1953, 29 U.S.C. §§1301-1315, also extends to the historic high water mark. *U.S. v. Millner*, 583 F.3d 1174, 1191 (9th Cir. 2009) (RHA applies to "all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state." (citation omitted)); *California v. U.S.*, 457 U.S. 273, 286 (1982) (Submerged Lands Act applies to "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters.")(citation omitted)).

tidelands." *Id.*[31] DEP's interpretation is thus entirely consistent with the terms of the statute and it is entitled to "substantial deference." *Gateley's Case*, 415 Mass. 397, 399 (1993). There was simply no need to "temper[]" the scope of the regulations. Add.2 at 6. Indeed, doing so conflicts with *Moot*, since *Moot* is premised on the understanding that Chapter 91 and the regulations extend to all filled tidelands. *See Moot*, 448 Mass. at 343, 349 (that tidelands were filled and landlocked "does not . . . negate the applicability of § 18.").[32]

Based on its narrow view of the statute, the trial court went on to undermine the scope of the statute further, finding that the "proper" jurisdictional test is "whether [the tidelands are] private or commonwealth tidelands." Add.2 at 7. This test was apparently based on the court's view that "Chapter 91 excludes tidelands that fit neither definition," *id.* at 8, and that the regulations "exempt[] . . . tidelands which are not subject to

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[31] "Filled tidelands" are defined as "former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill." 310 C.M.R. §9.02, at 265.

[32] The only exception is for "landlocked tidelands." St. 2007, c. 168; *see* SJC-10482 (under advisement).

some proprietary interest in the state or the public." *Id.* at 6. There is nothing, however, in either the statute or the regulations to support this conclusion. As explained above, the term "tidelands" is defined broadly, without any reference to "commonwealth" or "private" tidelands. G.L. c. 91, §1. Thus, there is simply no textual support for narrowing the scope of the Act based on the subordinate definitions.

In fact, Chapter 91 defines three categories of tidelands, not to narrow the statute, but to delineate the application of specific statutory provisions. Section 18 thus states that "[n]o structures or fill for nonwater dependent uses of *tidelands* may be licensed *unless*" DEP makes certain findings. G.L. c. 91, §18(emphasis added). Later in §18, the legislature required an applicant for a license on "private tidelands" to obtain "a certification by the clerk of the affected cities or towns" regarding compliance with local laws. *Id.* The same section--§18--also refers to "commonwealth tidelands," stating that licenses must include "a statement of the assessment for occupation of commonwealth tidelands" if work will occur on that type of tideland. *Id.* The Legislature was clearly cognizant of the meaning of these terms,

and its choice to use the broader term "tidelands" in some instances and not in others must be given effect.

The trial court made the same mistake in finding that DEP's regulations limit the agency's jurisdiction to tidelands in which the Commonwealth or the public holds some property right. Add.2 at 6. While the agency has defined commonwealth and private tidelands in terms of property rights, it did not define those terms to limit its own jurisdiction. 310 C.M.R. §9.02, at 263, 268. In fact, section 9.04 defines the "Geographic Areas Subject to Jurisdiction" to include "all waterways" and "all filled tidelands, except landlocked tidelands." §9.04(1)-(2).[33] The section does not use the term private or commonwealth at all.[34] Like the statute, the regulations define those terms to trigger the applicability of specific sections of

[33] The fact that DEP decided to begin the section with a reference to "trust lands," which it has defined in property terms, 310 C.M.R. §9.02, at 270, does not limit the section's scope. Indeed, DEP introduced the term trust lands with the words "generally considered." §9.04. In doing so, DEP made it clear that not all of the geographic areas subject to jurisdiction would be trust lands, as defined by the regulations.

[34] This is carried over into the substantive licensing sections. For example, section 9.51 refers to "[a] nonwater-dependent use project that includes fill or structures on any tidelands." 310 C.M.R. §9.51; *see also id.* §9.52 ("any tidelands").

the regulations. For example, section 9.53 concerns "Activation of Commonwealth Tidelands for Public Use." §9.53. While the trial court stated that it had construed the regulatory scheme "as a whole," Add.2 at 6, its analysis never really left the definition section. *Id.* at 5-6. If it had, the court would have found that the regulations are not constrained by the existence of State or public property rights.

B. Chapter 91 Is An Exercise of the Government's Authority to Protect Public Interests in Tidelands and Tidewaters.

The trial court's singular focus on property rights reflects a fundamental misunderstanding of the statutory scheme--its analysis conflates the *jus privatum*, property rights, with the *jus publicum*, the public interests in the seashore, and fails to recognize the significance reflected in the use of licenses. The *jus publicum* concerns common, public rights, not property rights. *See* ANGELL, *supra*, at 80; MASS. CONST. amend. Art. 97. And the licensing scheme is the vehicle through which the Legislature has sought to exact continued protection of public interests in return for the benefits that private parties receive from interfering with the public's superior interests.

Chapter 91 has never been restricted to the protection of property rights. Rather, Chapter 91 and its licensing scheme have always been animated by a desire to protect public interests from uncontrolled development of the waterfront. Indeed, when the Legislature broke with "past practice" in 1866, *Trio Algarvio*, 440 Mass. at 93-94,[35] and prohibited all construction below the high water mark without a license, it made an administrative board responsible for "the general care and supervision of all harbors and tidewaters, and of all the flats and lands flowed therein." St. 1866, c. 149, §1. Modern day Chapter 91 is designed to further the same public interests. G.L. c. 91, §10 ("protect the interests of the commonwealth" in "harbors and tide waters").[36]

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[35] *See Henry v. Newburyport*, 149 Mass. 582, 586 (1889) ("statute materially diminishes the rights of owners of flats").

[36] While the reference to "department" in the first sentence of G.L. c. 91, §10 refers to the Department of Conservation and Recreation (DCR), *id.* §1 (defining "department"), the last sentence makes clear that DEP is supposed to further §10's purposes through its licensing authority. *Id.* On the other hand, section 2 gives *DCR* specific "[d]uties . . . [r]elative to Commonwealth [l]ands." G.L. c.91, §10 (title). Originally derived from St. 1859, c. 223, section 2, in contrast to §10, relates primarily to land held by the Commonwealth and its management. G.L. c. 91, §2. While the last paragraph directs DEP to "protect the interests of the Commonwealth" through its licensing

Early cases establish that Chapter 91 is designed to protect the public's interests in the waterfront--the *jus publicum*. As early as 1889, for example, the Court concluded that Chapter 91 was "passed for a public purpose, the preservation and security of the coasts and harbors, and for the benefit of navigation." *Henry*, 149 Mass. at 587. It was settled long ago that laws of this nature constitute an exercise of the police power--the Legislature's "power . . . to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties." *Alger*, 7 Cush. at 95.[37]

Chapter 91's licensing scheme is the regulatory mechanism the Legislature chose to condition and restrain private interference with public interests so

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authority, it is DCR that that has primary responsibility for the Commonwealth's property. *Id.*

[37] *See Newburyport Redev. Auth. v. Commonwealth*, 9 Mass. App. Ct. 206, 242 (1980) (Act that regulates use of tidelands "represented an exercise of the . . . police power"); *see also Goodridge v. Dep't of Public Health*, 440 Mass. 309, 321-22 (2003) (police power laws are those "necessary to secure the . . . general welfare of the community"). DEP's regulations further reflect the fact that Chapter 91 is an exercise of the police power, as the agency has interpreted its purposes to include protection of public "health, safety, and general welfare as it may be affected by any project in tidelands." 310 C.M.R. §9.01(2)(c).

that public interests may be preserved. I OPS. OF THE ATT'Y GEN. 412, 418 (1899)(statute intended "to regulate the filling upon flats by riparian proprietors [so] that the rights of the public . . . may be preserved."). Through Chapter 91 licenses, DEP can preserve or "accommodate[]" the public's interests by, *inter alia*, "exact[ing] conditions as to the manner of building." *See Commonwealth v. Charlestown*, 1 Pick. 180, 189 (1822). Thus, Chapter 91 is "concerned with the *use* of [] property," *Gloucester Landing Assocs. v. Gloucester Redev. Auth.*, 60 Mass. App. Ct. 403, 411 (2004) (emphasis in original), and ensuring that the public receives something in return for the private interference with their public rights and interests in the waterfront.

Modern day Chapter 91 ensures that DEP has a continuing role in regulating the use of tidelands, filled or not, so that the government can continue to promote and preserve the public's interest in the waterfront. In particular, the 1983 "Act Relative to the Protection of the Massachusetts Coastline"[38]

[38] "The title is in a legal sense part of the act, and resort may be had to it as an aid in the interpretation of the act." *Comm'r of Corps. & Taxation v. Chilton Club*, 318 Mass. 285, 292 (1945).

codified a requirement that persons proposing to alter any previously licensed structure or fill must obtain a new license. St. 1983, c. 589, §26 (codified at G.L. c. 91, §18). The agency also has the authority to revoke licenses if the licensee fails to comply with the terms of its license. G.L. c. 91, §§15, 18. This authority applies whether the license concerns "private property or property of the Commonwealth." §15. By granting licenses to authorize what would otherwise be a public nuisance *per se*, the State clearly does not "divest itself of the right to regulate the use of the granted premises in the interest of the public." *New York*, 68 N.Y. at 79.[39] Chapter 91 thus embodies a continuing assertion of the *jus publicum*, clearly not tied to any State or public property right (the *jus privatum*).

Arno should not be surprised that Chapter 91 applies to his project. Both of the licenses that authorized the filling of what are now his filled tidelands noted that the land would be "subject to the provisions of [Pub. Stat. c. 19], and of all laws which are or may be in force applicable thereto." RA

[39] The fact that Chapter 91 licenses have been revocable since 1868 reinforces the point. St. 1869, c. 432, §1.

175; RA 209. While inclusion of this proviso was not necessary to secure future jurisdiction, the language makes it clear that continuing regulatory oversight inheres in the title to the land itself, registered or not. *See Boston Waterfront*, 378 Mass. at 649 (land not "subject to development at the sole whim of the owner."). By personally benefiting from the land made possible by Chapter 91, Arno cannot now complain about having to comply with its requirements.

CONCLUSION

For the foregoing reasons, the Court should reverse: (1) the 2004 and 2005 orders, (2) the 2009 order and judgment, and (3) the 2009 order striking part of the Commonwealth's notice of appeal.

Respectfully submitted,

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