COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Nantucket County

SJC-10559

JOSEPH V. ARNO,

Plaintiff-Appellee,

v.

COMMONWEALTH OF MASSACHUSETTS,

Defendant-Appellant.

On Appeal from Decisions of the Land Court
and the Superior Court in Nantucket County

BRIEF FOR PLAINTIFF-APPELLEE JOSEPH V. ARNO

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2. If the Commonwealth's appeal of the "S-Petition" proceeding is not untimely, whether final Decrees of Registration entered in 1922 limit to areas seaward of the 1922 mean high water mark any Commonwealth and public rights in Joseph V. Arno's registered land.

3. Whether G.L. c. 91 ("c. 91") authorizes the Department of Environmental Protection ("DEP") to require a license for land in which neither the Commonwealth nor the public holds a property interest.

STATEMENT OF THE CASE[1]

Joseph V. Arno ("Arno") owns registered land located between Easy Street and Nantucket Harbor shown as Parcel G on Plan 8594C and Parcel 1 on Plan 8594D (the "Property"). (A. 29, 31) He owns these contiguous parcels by virtue of Transfer Certificate of Title No. 8693, dated May 1, 1979, issued under G.L. c. 185, §1, *et seq.* (the "Registration Act") (A. 129) Because Arno's Land Court proceeding was a

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[1] References to the Record Appendix are indicated by the abbreviation "A." followed by page number(s).

subsequent proceeding with respect to land registered in 1922, most of the relevant facts are in the procedural history.

The Original Registration Proceedings

Arno's land was the subject of two registration proceedings filed no later than 1921 (the "Original Registrations"). The Land Court Examiner's report in Case No. 8594, which makes up most of Arno's Property, ends on February 1, 1922. The Land Court Examiner's report in Case No. 8255 ends on July 30, 1921. Both reports concluded that the petitioners (Ayers and his abutter, Gardner) had "not a good title as alleged" and suggested that the Commonwealth held title to most or all of the land. (A.76, 78-79, 147, 149-150)

After completion of the Examiners' reports, the Attorney General filed appearances and answers "for and on behalf of the Commonwealth of Massachusetts" in the Original Registrations. In its Answer to Case No. 8594, the Commonwealth noted "[t]hat the plan filed with said petition shows a bulkhead on the property which is located between high and low water…." (A. 97) This reference was in response to the designation of a "Mean High Water" mark landward of the bulkhead shown on the 1921 petitioner's plan filed in that

case. (A. 69) The "Mean High Water" is the only water mark shown on that plan. The petitioner's plan does not show a historic high water mark.[2]

Despite the Examiners' reports, the Commonwealth did **not** oppose registration of title in Ayers or Gardner. The Commonwealth also did not assert that the petitioners' title to the land was subject to a condition subsequent. Rather, the Commonwealth's Answers provided that the Property "borders on tidewaters, in which the public has certain rights," and stated "no objection to the entry of the decree prayed for provided the same is made subject to any and all rights of the public." (A 97, 101)

In 1922, the Land Court entered decrees in the Original Registrations (the "1922 Decrees"). The 1922 Decrees vested fee simple title of the Property in Arno's predecessors, and ordered issuance of the Original Certificates of Title (the "Original Certificates"). (A. 107, 117) The Original Certificates contain metes and bounds descriptions and

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[2] The Commonwealth's Answer in Case No. 8594 also reflects that the Examiner's report did not disclose any licenses to fill, averring "that no license has at any time been duly issued for the construction or maintenance of the said bulkhead…." (A. 97)

refer to plans that are to be filed with them (the "Registration Plans").

Plan No. 8594A (A. 37), filed with the Original Certificate in Case No. 8594, shows both the bulkhead and a water line in the same locations as the "Mean High Water" mark on the petitioner's plan in Registration Case No. 8954 (A. 69). Plan No. 8594A also shows that water line continuing onto the abutting Gardner land. That same water line and bulkhead are also shown on Plan No. 8594B (A. 39), and a line labeled "High Water 1922" is shown on Parcel A on Plan 8594C. (A. 29)[3] Plan 8255A depicts the same water line on the Gardner and Ayer land. (A. 113)

The Original Certificates do not contain any encumbrances on the Property or rights in favor of the Commonwealth or the public above the mean high water mark. Nor do they refer to the historic mean high or mean low water marks. Rather, each of the Original Certificates provides that the petitioner's title is "subject, however, to any of the encumbrances mentioned in Section forty-six of said Chapter [185]

[3] These registration plans were prepared by the Land Court Engineering Department (now known as the Land Court Survey Division). Later plans were prepared as the registered land was subdivided.

which may be subsisting, **and subject also** … to any and all public rights existing in and over the same **below mean high water mark**…." (A. 108, 117, emphasis added) The language relating to "public rights" is referred to by the Commonwealth as the "Waterways Encumbrance."

The Arno Proceedings Below

Arno's title derives from the Original Registrations. His Transfer Certificate of Title No. 8693 has the same encumbrance language quoted above, including the "Waterways Encumbrance." (A. 129-130)

In response to Arno's application for a c. 91 license to re-construct an existing building on the Property above the 1922 high water line shown on the Registration Plans, DEP issued a Written Determination that required public access to the proposed building based on purported public ownership and easement rights. (A. 267-276)

Arno then filed a complaint in Land Court on August 9, 2002. His complaint sought to clarify that he owns the Property located landward of the 1922 mean high water mark free of any Commonwealth or public proprietary rights, and that, as a result, no c. 91 license was required for his proposed re-construction. (A. 15) The complaint was styled and docketed as a

"subsequent to registration" petition, or "S-petition," in Registration Case No. 8594. (A. 15, 221) See G.L. c. 185, §115. The S-petition case is referred to herein as the "Land Court proceeding."

On December 22, 2002, the Commonwealth moved for judgment on the pleadings. Arno filed a cross-motion for summary judgment.

On August 12, 2003, the Chief Justice of Administration and Management (i) transferred to the Nantucket Superior Court the prayer for a declaration that the Commonwealth lacks authority to require a c. 91 license for work on registered land in which neither the Commonwealth nor the public has a proprietary right, and (ii) appointed Judge Piper a justice of the Superior Court to resolve that issue. (A. 223) The Nantucket Superior Court case was assigned civil action number 03-00029 (the "Superior Court case").

On December 29, 2004, the Land Court issued an order granting Arno partial summary judgment and ordering an amendment to Arno's Transfer Certificate of Title to reflect that neither the Commonwealth nor the public has proprietary rights landward of the mean high water mark that existed in 1922, when the Land

Court issued decrees in the Original Registration. (the "2004 Order", Comm. Add. 1 at p. 26) The 2004 Order also ruled that Arno's proposed building project lies entirely landward of the 1922 mean high water mark. (Id. p. 23-24) The Order did not fix a more exact location of the 1922 mean high water mark than that shown on the Registration Plans. Instead, it noted that the parties did not dispute this location, and gave the parties 30 days within which to request a more precise location. (Id.)

Neither party did so and, on March 4, 2005, the Land Court issued an order that Arno's Transfer Certificate of Title be amended to reflect the 2004 Order ("the 2005 Order"). (A. 251). Pursuant to that Order, on March 14, 2005, the Nantucket Registry District of the Land Court issued Arno the amended Transfer Certificate of Title. (A. 279-280)

The 2004 Order did not decide the issue transferred to the Nantucket Superior Court. The Court declined to act on this question because there was pending an adjudicatory appeal by Arno of DEP's

determination prescribing the conditions for a c. 91 license. (A. 267-276)[4]

On July 28, 2005, the Court held a status conference and made clear to the parties its view that, (i) under §114 of the Registration Act, the Land Court proceeding had been fully and finally resolved by its orders, (ii) the time for an appeal thereof by right had passed, and (iii) the time for the Land Court to grant leave for a late appeal also had passed. (A. 322-323, 329-330, line 2; 345, lines 4-10) The Court set a deadline of August 10, 2005, for the Commonwealth to decide whether to seek leave to file a late appeal of the 2004 Order. (A. 3, 347-348)[5]

On October 3, 2005, the Court issued an order denying the Commonwealth's motion to report questions of law to the Appeals Court and stay proceedings. The

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[4] That adjudicatory proceeding had been stayed pending the Land Court's determination of the Commonwealth's proprietary rights in the Property. Arno's attempts to lift the stay following the 2004 Order were opposed successfully by DEP, which stated that the Commonwealth intended to appeal that Order. (A. 295, 300, 313) When no appeal was filed, Arno renewed his motion for summary judgment on the remaining claims.

[5] The Commonwealth did not advise the Court by August 10th whether it intended to seek leave to file a late appeal of the 2004 Order. It later moved to report to the Appeals Court the issues resolved thereby. (A. 3)

Court again stated that the S-petition proceeding concluded with the 2004 Order and its subsequent implementing order, the 2005 Order, and that, accordingly, these orders were not interlocutory or reportable. (A. 409)

On January 12, 2009, the Court decided the Superior Court Case, declaring that the Commonwealth lacks jurisdiction under c. 91 and the waterways regulations (310 CMR 9.00 *et seq.*) to require a license to build on Arno's land above the 1922 mean high water mark (the "Superior Court Decision"). Comm. Add. 2.

On March 13, 2009, the Commonwealth filed a notice of appeal purporting to appeal from both the 2004 Order and from the Superior Court Decision. (A. 431). The Land Court issued an order striking as late the Commonwealth's notice of appeal with respect to the 2004 Order. Comm. Add. 4.

STATEMENT OF FACTS

There follows the remaining relevant facts in the record that are not covered above.

As shown in the Examiners' reports, most if not all of the Property is located below the historic mean high water mark and the historic low water mark.

Comm. Add. 1 p. 16. (See also A. 78-79,149-150, 219) Before 1922, the Property was filled and a bulkhead constructed, raising the Property above the previous mean high and mean low water marks. (A. 219)

No licenses before 1928 are noted as encumbrances on the Original Certificates of Title or on Arno's Transfer Certificate of Title. (A. 109, 118, 131)

After the Original Registrations, but no later than 1928, a second bulkhead was constructed pursuant to a c. 91 license. This bulkhead was built seaward of the then existing bulkhead and seaward of the mean high water mark that existed in 1922; it now defines the seaward edge of the Property. (A. 55; 59-64)

Arno purchased the Property and received Transfer Certificate of Title No. 8693, dated May 1, 1979. (A. 129) The **1928** c. 91 license is the first encumbrance shown on the memorandum of encumbrances that is part of Arno's Transfer Certificate of Title. (A. 131)

Arno sought and received two special permits, local Historic District Commission approval, and approvals from the Nantucket Conservation Commission in order to raze the existing building and construct a new one in essentially the same location. (A. 17, ¶8)

The Land Court found that the undisputed location of this work was above the 1922 mean high water mark shown on the Registration Plans. Comm. Add. 1, pp. 12-13, 22-23 and n. 13. (See also A. 51-52, 55)

In 2002, the Commonwealth, acting through DEP, issued a determination requiring a c. 91 license for Arno's proposed work above the 1922 mean high water mark. (A. 267) That proposed license requires public access both in the new building and over the Property landward of the 1922 mean high water mark. (A. 271)

SUMMARY OF ARGUMENT

1. The Commonwealth's appeal of the 2004 Order was filed late. Under §114 of the Registration Act, the Land Court amends certificates of title in S-petition proceedings exclusively through orders that are final and appealable when issued. The Commonwealth declined the Court's repeated invitations to seek leave to appeal the 2004 Order within one year of its issuance, instead waiting four years after the Land Court proceeding concluded to file a notice of appeal. (pp. 13-16).

2. If the Commonwealth's appeal of the 2004 Order is not untimely, the Commonwealth is still precluded by *res judicata* from challenging the 1922

Decrees. Section 45 of the Registration Act expressly makes those decrees binding on the Commonwealth and on the land. Section 46 requires that original and amended certificates of title list all easements and encumbrances that burden the land. As made clear in Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629 (1979), and other cases, this requirement pertains to any public or Commonwealth easement or other proprietary interest. In light of the record in the Original Registrations and the 1922 mean high water mark shown on the Registration Plans, the "Waterways Encumbrance" must be construed here to preserve public trust proprietary interests only seaward of that mark. (pp. 16-38).

3. Because the Commonwealth and the public hold no proprietary interest in Arno's land above the 1922 mean high water mark, under c. 91 the DEP does not have jurisdiction to require a license mandating, among other things, a public easement over Arno's property. Chapter 91 and its implementing regulations only assert licensing jurisdiction over "Commonwealth tidelands" and "Private tidelands," both of which are defined terms. The regulations expressly authorize landowners in Arno's position to rebut the presumption

that tidelands fall within either category through a judicial decree showing that neither the Commonwealth nor the public has any proprietary right in the land at issue. (pp. 38-48).

ARGUMENT

The Commonwealth paints the issue on appeal as broadly concerning impingements on public trust rights. However, this appeal is really about less heady, though still significant questions: the preclusive effect of final registration decrees, and the interpretation of statutory language and regulations promulgated thereunder.

I. THE COMMONWEALTH'S APPEAL OF THE 2004 ORDER WAS FILED LATE.

The Land Court struck the Commonwealth's notice of appeal principally in reliance on the language of §114 of the Registration Act (authorizing amendments to certificates of title exclusively "by order of the court").[6] Comm. Add. 4. Cf. Colomba v. DWC Assoc., LLC., 447 Mass. 1005 (2006) (appeal period begins to run when there is an appealable order under the doctrine of present execution). With the exception of

[6] The Commonwealth's Brief does not address the effect of §114 on the timeliness of its appeal.

the following comments regarding the Commonwealth's position on appeal, Arno rests on the Land Court's thorough explanation of its reasoning in that Order.

Both parties initially understood the 2004 Order to be interlocutory. However, this impression was challenged by the Court during later hearings, where it invited an appeal of the 2004 Order. (A. 322-323, 379-380) As described in its October 2005 denial of the Commonwealth's motion to report questions of law and to stay the case:

> In colloquy with counsel [at previous hearings], this court had several times invited the Commonwealth's appeal, so that the issues of law decided by the court in the 'subsequent to registration' proceeding might be reviewed in the Appeals Court.

(A. 414, footnote omitted). The Commonwealth had let pass a Court imposed deadline to seek leave to file such an appeal. However, the October 2005 Order again states, "[o]nly a justice of the Appeals Court may now allow the Commonwealth's appeal to proceed…." (A. 414)

Nevertheless, the Commonwealth "deliberately declin[ed] to appeal," instead waiting until March 2009—over four years after the 2005 Order—to file its

notice of appeal in the Land Court proceeding. Comm. Add. 4 at p. 3. Accordingly, the Land Court observed that its decision to strike the Commonwealth's appeal of the Land Court Orders as late "should come as no surprise to the Commonwealth, which was repeatedly put on notice ... that the final orders resolving the S-case registered land title action were appealable when issued." Id.

In light of the foregoing chronology, the Commonwealth's plea of "confusion" falls flat. Similarly, the Commonwealth's current position that it disfavors multiple appeals of these matters is contradicted by its own Motion to Report Questions of Law and to Stay the Remainder of the Proceedings. (A. 353) In that motion, the Commonwealth sought to stay the Superior Court case pending a report of the 2004 Order to the Appeals Court, claiming that "[p]rinciples of judicial economy will be served if the question [in the Land Court proceeding] is resolved [by appellate review] before the Court addresses the issue of DEP's jurisdiction." (A. 356) If that motion had been granted and the 2004 Order affirmed by an appellate court, the Commonwealth undoubtedly also would have sought appellate review of

a later Superior Court decision against it (as it has done here).

II. EVEN IF THE 2004 ORDER AND THE 2005 ORDER ARE REVIEWABLE, THE LAND COURT DETERMINED CORRECTLY THAT THE COMMONWEALTH AND THE PUBLIC HAVE NO PROPRIETARY RIGHT, TITLE OR INTEREST IN THE PROPERTY ABOVE THE 1922 MEAN HIGH WATER MARK.

A. The Registration Act.

Although the Land Court decision rests squarely on the fact that the Property is registered land, remarkably the Commonwealth cites only one section of the Registration Act only one time in its argument regarding the issues resolved in the Land Court proceeding. Because the case revolves around the legal effect of registering the Property, Arno will begin by discussing these topics.

Section 45 of the Registration Act addresses the *res judicata* effect of judgments in registration proceedings. It provides in no uncertain terms that that a judgment of registration "shall be conclusive upon and against all persons, **including the commonwealth,** whether mentioned by name in the complaint, notice or citation[.]" (Emphasis added). Section 45 further provides that the "judgment shall not be opened … [by persons under disability] nor by any proceeding at law or in equity for reversing

judgments or decrees." Finally, §45 makes clear that a registration judgment is *in rem*, as it "shall bind the land…." See also G.L. c. 185, §54 (original and certified copies of certificates of title "shall be conclusive as to all matters contained therein, except as otherwise noted in this chapter.").

Section 46 of the Registration Act provides that, subject only to specified exceptions, a bona fide purchaser of registered land "shall hold the same free from all encumbrances except those noted on the certificate…."[7]

The Registration Act also grants the Land Court exclusive jurisdiction over the state of title to registered land. See G.L. c. 185, §1(a½). Although the Land Court may amend a certificate of title, the Registration Act

> shall not authorize the court to open the original judgment of registration, and nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith

without his written consent. G.L. c. 185, §114.

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[7] See also G.L. c. 185, §47 (requiring that judgment of registration set forth all easements and other encumbrances on the land).

This Court has confirmed that these statutes mean what they say:

> "[T]he underlying purpose of title registration is to protect the transferee of a registered title." ... To that end, G.L. c. 185, § 45, provides that a decree of registration "shall be conclusive upon and against all persons ... [and] shall not be opened ... by any proceeding at law or in equity for reversing judgments or decrees." Similarly, G.L. c. 185, § 46, provides that "every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate." Original and transfer certificates of title are "conclusive as to all matters contained therein," except as otherwise provided in the statute. G.L. c. 185, § 54.

Doyle v. Commonwealth, 444 Mass. 686, 690 (2005), quoting Wild v. Constantini, 415 Mass. 663, 668 (1993) and Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 260 (1961) (citation omitted).

Citing §45, the Appeals Court has emphasized that a registration judgment "is binding on the parties, their privies and the land." Gifford v. Otis, 70 Mass. App. Ct. 211, 215 (2007) (footnote omitted) review den. 450 Mass. 1104 (2007). Gifford also held that the *res judicata* effect of a registration

judgment is broad: "the judgment of registration … *operates to preclude claims not addressed in the Land* Court proceeding." Id. at 217.[8]

Finally,

> [i]t is well established that … subsequent purchasers of registered land for value and in good faith "take free of all encumbrances except for those noted on the certificate." … [W]ith respect to easements, the general rule is that "[i]n order to affect registered land as the servient estate, an easement must appear on the certificate of title."

Commonwealth Elec. Co. v. MacCardell, 450 Mass. 48, 50-51 (2007) quoting G.L. c. 185, §114 and Tetrault v. Bruscoe, 398 Mass. 454, 461 (1986) (citation omitted).[9] See also Calci v. Reitano, 66 Mass. App. Ct. 245, 247 (2006) ("G.L. c. 185, §47 … expressly provides that, when land is registered, the judgment of registration (and subsequent certificate) 'shall set forth … all

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[8] Gifford explains at length the process of registering land.

[9] The two exceptions to the general rule are actual knowledge of a prior unrecorded interest and other instruments **in the registration system** that a reasonable purchaser would be prompted to discover by his own certificate of title. Id. at 51. DEP's records regarding licenses that are not noted on certificates of title are not such instruments.

particular … easements … to which the land or owner's estate is subject.'").

B. It Was Undisputed Below that Arno's Proposed Construction is above the 1922 Mean High Water Mark.

As plainly stated in the 2004 Order:

> While the parties differ about which high water mark is referred to in the decree [1922 or historic], they do not appear to disagree significantly about the location of the mean high water mark as it existed at the time of registration. It is depicted in part on the court's Plan No. 8594-C [at A. 29], and is also drawn on the plan, dated May 13, 2003, which is attached to the Richard K. Earle affidavit [at A. 51-55]. This plan and affidavit also show, **without contradiction in the record**, that Arno's proposed building project would in its entirety lie landward of both the 1922 high water mark and the property's water line which was (at least approximately) employed in the decree and ensuing certificates of title and plans issued by the court.

Comm. Add. 1 at p. 23 n. 13 (underline in original, emphasis added). See also Id. at 24 ("the exact location of the 1922 mean high water mark does not appear to be in controversy"). The 2004 Order relies on these undisputed facts, repeatedly referencing "the Nantucket Harbor water line as it existed in 1922,"

the "1922 Nantucket Harbor water line," "the mean high water mark as it existed at the time of the 1922 registrations" and the like. Comm. Add. 1 at pp. 23-24.

The 2004 Order expressly offered the parties the opportunity to file a motion to "establish a more precise location of the" 1922 mean high water mark. Comm. Add. 1 p. 23 n. 13. See also Id. p. 24. However, the Commonwealth waived this chance, never asserting that the mark was located anywhere except in the location shown on the Registration Plans.

Despite its silence below on the location of the 1922 mean high water mark, on appeal the Commonwealth now challenges the location of the 1922 mean high water mark, for the first time asserting that "the 1922 high water mark would have coincided with the seaward edge of the bulkhead." Comm. Brief p. 13 n. 6. See also Id. at p. 33 (same). The Commonwealth attempts to bolster its new position on the location of the 1922 mean high water mark by speculating that minor differences between the petitioner's plan and the Registration Plans could indicate that the "mean high water" mark was added at some later date. Comm. Brief, p. 12 n. 5. This conjecture, also offered for

the first time on appeal, evidences confusion between the petitioner's plan, on the one hand, and the Original Registration Plan and later Registration Plans in Case No. 8594, on the other. As noted in the Original Certificates, the latter were prepared by the Land Court's Engineering Department and reflect a process by which the petitioners' plans are "modified and approved by the Court" before issuance of the Original Certificates. (A. 107, 117)[10]

A claim not raised below (including on behalf of the government) is waived and may not be made on appeal for the first time. See, e.g., Biogen Idec MA, Inc. v. Treasurer and Receiver General, 454 Mass. 174, 189 n. 25 (2009); Newell v. Dep. of Mental Retardation, 446 Mass. 286, 298 n. 27 (2006), and

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[10] Courts rely on the expertise of the Land Court's Engineering Department. See, e.g., Doyle, 444 Mass. at 689 (noting that petitioner was required to file a plan with the Land Court Engineering Department); Burwick v. Mass. Highway Dept., 57 Mass. App. Ct. 302, 303 n. 4 (2003) ("because of the number and complexity of existing plans, we have commissioned the sketch from the engineering department of the Land Court as an aid to our decision."); Perez v. Bd. of Appeals of Norwood, 54 Mass. App. Ct. 139, 140 n. 4 (2002) (same). That Land Court Department was created by statute. See G.L. c. 185, §117 ("The court may make sectional plans showing registered lands, and in so doing may employ competent draftsmen and assistants.").

cases cited therein. In any event, as explained below, the Commonwealth's new challenge to the location of the 1922 mean high water mark must fail. The Commonwealth simply ignores the Land Court's expertise in reviewing and creating plans, papering over the water mark shown on the Registration Plans (in one case designated as "High Water 1922"). The Commonwealth would have the Land Court delineating meaningless, dated water marks on Registration Plans.[11]

C. The 1922 Decrees and Arno's Transfer Certificate of Title Establish Conclusively that Neither the Commonwealth Nor the Public Holds Any Proprietary Interest Above the 1922 Mean High Water Mark.

Arno's claim is a narrow one, as is the Land Court's ruling: that the certificates of title as written, the Registration Plans as drawn, and the record, including the Commonwealth's Answer, make clear that the "Waterways Encumbrance" in **Arno's** Transfer Certificate of Title does not apply to any part of his land above the 1922 mean high water mark.[12]

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[11] Consistent with its position that this water mark should be ignored, the plan that the Commonwealth attaches at the end of its Brief does **not** include that mark.

[12] In an apparent effort to obtain a decision based on grounds other than the Registration Act and traditional principles of *res judicata*, the

The 2004 Order is not an edict covering any "Waterways Encumbrances" recorded on any certificate of title issued since the Registration Act was enacted. Rather, it is fact-based. Arno does not seek a ruling that the effect of the "Waterways Encumbrance" language is always limited to land below the mean high water mark at the registration date.[13]

The logical starting points for the analysis of the parties' rights in the Property are the Original Certificates of Title. They are the definitive

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Commonwealth states that it "**believes** that this or very similar language [to the "Waterways Encumbrance"] appears in many (if not all) certificates for registered tidelands," and issues an hysterical alarm that this case threatens a "dramatic result" of "extinguish[ing] all public trust rights in all registered land." Comm. Brief pp. 29 30 (emphasis added; footnote omitted). The Commonwealth ignores the fact that public trust rights have been explicitly preserved in specified portions of Arno's registered land.

[13] It may be that the record in other registration cases reflects that public rights exist based on the location of a historic water mark. For example, in Boston Waterfront, the parties understood, and this Court stated expressly, that "[t]he low water mark **referred to here** is that which was determined in 1846 by one George R. Baldwin, who was appointed by this court for that purpose." 378 Mass. 629 at 630 n. 1 (emphasis added). See also McCarthy v. Town of Oak Bluffs, 419 Mass. 227, 230-31 (1994) (historic 1903 low water mark referenced in engineer's filing with Land Court). Thus, references to different water marks may lead to a different conclusion in other registration proceedings.

instruments (along with Arno's Transfer Certificate of Title) setting forth the parties' rights in the Property as defined by the 1992 Decrees. The Original Certificate of Title in Case No. 8594 contains a metes and bounds description. (A. 117) Two of the boundaries are described by exact measurements to one one-hundredths of a foot. The parcel's easterly and southwesterly boundaries are described as, "measuring on the **upland**, about" 98.5 feet and 56 feet, respectively (emphasis added). The southeasterly boundary of the parcel is called as "Nantucket Harbor."[14] The 2004 Order explains the difficulties faced in setting the precise (within one one-hundredths of a foot) location of the 1922 mean high water line. Comm. Add. 1 at pp. 12-14.

It has long been understood in the Commonwealth that "'Upland' is the area above the high water mark." Houghton v. Johnson, 71 Mass. App. Ct. 825, 829 (2008) quoting Storer v. Freeman, 6 Mass. 435, 439 (1810). Consistent with this understanding, Registration Plan Nos. 8594A and 8255A show a high water mark at the

[14] The Original Certificate of Title in Case No. 8255 uses identical language, and reflects the same upland boundary with Ayers of 56 feet. (A. 106)

distances stated in the Original Certificates of Title, as does Registration Plan No. 8594B. (A. 121, 113, 125) This same mark is designated "High Water 1922" on Plan 8594C, and similarly identified on the Petitioner's Plan in Case No 8594. (A. 139, 69) The Registration Plans in Case No. 8594 also show the then existing bulkhead seaward of that high water mark (Plan No. 8594C shows the post-1928 bulkhead).

The 1922 mean high water mark is the only water mark shown on the Registration Plans. Indeed, it is the only water mark shown in the file in either registration proceeding. Neither of the historic low or high water marks appears in the registration system.[15] The "Waterways Encumbrance" in the certificates of title to Arno and his predecessors specifically concerns public proprietary rights "below mean high water mark." Given these facts, that mark can only be the mean high water mark at the time the

[15] The only plan in the record of the instant case showing historic water marks is the plan prepared in connection with the 1895 license to fill at A. 217 and 219. However, as the Commonwealth's brief acknowledges on pages 11-12, this license is not mentioned in the relevant Examiners' reports. There is no evidence of a reference to this plan (or to the license to which it pertains) in the registration system.

land was registered as referenced in the Original Certificates of Title and shown on the Registration Plans.[16]

The record in the Original Registrations reinforces this conclusion. As explained in the 2004 Order, the Commonwealth did not claim in the Original Registrations that the Property was below historic high or low water marks. Rather, the Commonwealth's Answers allege that the land "borders on tidewaters." The Commonwealth's Answer in Case No. 8594 also acknowledges "[t]hat the plan filed with said petition shows a bulkhead on the property which is located between high and low water…." The Commonwealth did not (i) object to registration because title to all of the Property was below the low water mark, or (ii) assert that all of the Property was subject to a condition subsequent. Rather, it asked that the registration be made subject to any and all rights of the public. (A. 97, 101) In other words, the Commonwealth requested what it calls the "Waterways Encumbrance."

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[16] A contrary reading would have the ambiguous result of registered title subject to public rights in an unknown area of the land.

The 1922 Decrees, which the Commonwealth did not appeal, are "not subject to collateral attack." McCarthy, 419 Mass. at 237. Thus, the Commonwealth is barred by *res judicata* principles from now arguing that the Commonwealth and the public have proprietary rights in the Property other than those recognized below the 1922 mean high water mark by the "Waterways Encumbrance." See also G.L. c. 185, §46 (the original registrant and subsequent bona fide purchasers of registered land "shall hold the same free from all encumbrances except those noted on the certificate").

D. Section 46 of the Registration Act Does Not Preserve any Commonwealth or Public Proprietary Interest Throughout the Property.

The Commonwealth expressly concedes (indeed emphasizes) that "it does not dispute Arno's title to the parcel." Comm. Brief p. 29 n. 20. See also Id. p. 36 (Property is "land **previously held** by the Commonwealth" (emphasis added)).[17]

[17] In making this concession, the Commonwealth concurs with the holding of the 2004 Order that, despite most or all of the Property lying below the historic low water mark, "[i]f the conclusion of the court in the original registration case was that the Commonwealth, rather than the petitioner, held the fee to the registration parcel, the court could not and would not have entered a decree that Ayers [the

Instead, the Commonwealth suggests that Arno's Transfer Certificate of Title preserves non-fee simple real estate interests of the Commonwealth and the public throughout the Property, and not only seaward of the 1922 mean high water mark. On page 28 of its brief the Commonwealth posits that its real estate interest in the Property is a possibility of reverter, and that Arno holds title to all of the Property subject to a condition subsequent.

Recognizing the difficulties that it faces in extending the "Waterways Encumbrance" in this case over the entire Property, and relying on what it terms the "seminal decision in Boston Waterfront," the Commonwealth first argues that G.L. c. 185, §46, does not require that its proprietary rights be set forth in Arno's Transfer Certificate of Title. Comm. Brief p. 32. However, the Commonwealth fails to understand

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original registrant] was the fee simple owner." Comm. Add. 1 p. 12. See also G.L. c. 185, §55 ("Every certificate of title shall set forth the names of all the persons whose estates make up the estate **in fee simple** in the whole land." (emphasis added)); G.L. c. 185, §26 (only one who owns the land "in fee simple" may file a complaint for registration of title); Institution for Sav. v. Roxbury Home for Aged Women, 244 Mass. 583, 587 (1923) ("as the petitioner did not have the entire title … the title could not be registered.").

the impact of that case on whatever proprietary rights it or the public once may have held in Arno's land.

As explained in the 2004 Order:

> The first statutory category of encumbrances [in §46] are those "[l]iens, claims or rights arising or existing under the … statutes of this commonwealth which are not by law required to appear of record in the registry of deeds in order to be valid against subsequent purchasers or encumbrances of record." This statutory encumbrance exception does not include conditions subsequent, which, in the case of unregistered land, depend on their recording to be enforceable against subsequent purchasers….
>
> [Had the appellate courts determined that the wharfing statutes involved in Boston Waterfront] created a condition subsequent of the sort which was included in the §46 list of encumbrances, they would have said so. … [T]here would have been no need for the Supreme Judicial Court to order the imposition of the condition upon the registered title to the Boston Waterfront petitioner…. If such a condition did not require notation to burden the land registered in that case [by the Land Court], the Land Court's decree [which did not note a condition subsequent] would have been affirmed as originally entered.

Comm. Add. 1, pp. 21-22 (footnote omitted).[18]

Furthermore, as the 2004 Order also explains:

> The Boston Waterfront case … stands on a significantly different footing than the case at bar. The Supreme Judicial Court in Boston Waterfront had before it, for review on appeal, the registration decree which, based on the Land Court's ruling that the petitioner has obtained fee simple title, the Land Court had *entered without notation or exception for the condition subsequent*….

Comm. Add. 1, p. 20. This Court rejected that ruling. It could do so because Boston Waterfront was a timely appeal from a registration decree. There was no question of *res judicata* or collateral estoppel.

In contrast, over eighty years ago "the petition in the instant case went to decree with the involvement of the Commonwealth as a party, and without … any stated condition, subsequent or otherwise, upon the title," and "sequential certificates of title have been issued by the court to the petitioner and subsequent fee owners." Comm. Add.

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[18] Compare Faneuil Investors Group, Ltd. Partnership v. Bd. of Selectmen of Denis, 75 Mass. App. Ct. 260, 262-263 (2009), further appellate review requested (deed containing condition subsequent "explicitly" noted as a restriction on certificate of title).

1, p. 20. The question of whether or where there is a conditional fee (or an easement in favor of the public to fish, fowl and navigate) was resolved by the 1922 Decrees and is *res judicata*. In short, Boston Waterfront supports the 2004 Order.

The Commonwealth's argument must be rejected for three other reasons. First, Boston Waterfront emphasizes that the wharfing statutes granted the land at issue on the condition that it be put to a specific use that only could be changed to a new use "consistent with that [original] public purpose." 378 Mass. 629 at 647-648, 654. But here, there is no grant specifying a condition that can be breached. Second, any condition subsequent imposed in or before 1922 has expired. See Manning v. New England Mutual Life Ins. Co., 399 Mass. 730, 736 (1987) (citing G.L. c. 184, §28).

Finally, the Commonwealth's current position that the certificates of title to the Property need not show proprietary rights contradicts its own position in the Original Registrations. In its Answers to those cases, the Commonwealth expressed "no objection to the entry of the **decree** prayed for **provided the same is made subject to any and all rights of the**

public." (A. 97, 101, emphasis added) The 1922 Decrees reflected this proviso, preserving public rights below the 1922 mean high water mark by imposing the "Waterways Encumbrance." The Commonwealth's current position would render that "Waterways Encumbrance" meaningless surplusage. Indeed, having successfully taken the position that the decree needed a "Waterways Encumbrance" to protect the public's proprietary rights, the Commonwealth is judicially estopped from now taking a contrary position in a supplemental proceeding in the same case.[19]

E. The Commonwealth's Arguments that the "Waterways Encumbrance" Applies to Arno's Upland Also Must Fail.

Having addressed §46, the Commonwealth goes on to argue that the "Waterways Encumbrance" should be construed to preserve public proprietary rights

[19] As the 2004 Order observes, non-proprietary "rights of the public or of the government which are not encumbrances on the title need not have been listed on the certificate of title at all …." Comm. Add. 1 at p. 18. See also Id. at p. 24, n. 14; Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 428 (1995) ("It is well established that building or zoning laws are not encumbrances or defects affecting title to property."). To the extent that the Commonwealth claims that the *jus publicum* gives it regulatory, police power rights independent of its title interest, those claims are the subject of the Superior Court Decision, not the 2004 Order.

throughout the Property. In doing so, it studiously ignores any references to the facts of the Original Registrations, and Arno's good faith reliance thereon. Instead, it makes a plea that the Court should use certain public policy considerations to distort the plain meaning of the "Waterways Encumbrance" in the 1922 Decrees.

The Commonwealth first suggests that its usual fee ownership of land below the low water mark is important here. However, as conceded by the Commonwealth, Arno holds fee simple title to the registered Property, all or most of which was below the historic low water mark. The "Waterways Encumbrance" cannot be understood to provide for Commonwealth ownership of the land registered to Arno's predecessors, thereby undoing the 1922 Decrees.

The Commonwealth next cites a rule for construing governmental grants of fee and licenses. This rule is inapplicable here because the 1922 Decrees are not grants; they are adjudications of title. In any event, the principal case on which the Commonwealth relies, Tilton v. Haverhill, 311 Mass. 572 (1942), is most often cited for its holding that a statute's intent should be "ascertained from all its terms and

parts and the subject matter to which it relates, and should be construed as to make it an effectual piece of legislation in harmony with common sense and sound reason." Id. at 577-578 (citation omitted). If that standard pertained to judgments as well as to legislation or licenses, the 2004 Order would be a model of how to apply it.[20]

In the guise of a final argument regarding interpretation of the "Waterways Encumbrance," the Commonwealth levies an attack on Arno's Transfer Certificate of Title and on the authority of the Land Court to enter the 1922 Decrees. Thus, the Commonwealth asserts that, "only the Legislature has authority to permanently relinquish public trust

[20] As the 2004 Order states in footnote 11, there is no evidence that Arno is not a good faith, for value certificate holder (and the Commonwealth made no such argument below). Nevertheless, footnote 27 of the Commonwealth's Brief suggests that Arno somehow had notice from within the Registration records that the public retained rights above the 1922 mean high water mark. In any case, that claim is not credible in light of Arno's fee simple title in his Transfer Certificate of Title, the clear meaning of the "Waterways Encumbrance" based on the Commonwealth's Answer and plans in the Registration files, and the absence of any references to any pre-1928 licenses in those files.

rights in tidelands…."[21] Comm. Brief p. 38. This statement is a direct challenge to the jurisdiction of the Land Court - and this Court - to bind the Commonwealth in matters concerning its rights in land.[22] It ignores the unambiguous and absolute legislative grant of Land Court jurisdiction in G.L. c. 185, §45, which provides that a judgment of registration "shall be conclusive upon and against all persons, **including the commonwealth,** whether mentioned by name in the complaint, notice or citation[.]" (emphasis added). When, as here, the Commonwealth has actually participated in registration proceedings that have gone to final decrees, a claim that said decrees are not valid (or should be read in a manner contradictory to the intent expressed in its Answer) is especially attenuated. Indeed, this argument

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[21] The Commonwealth did not take this position in the Original Registrations or below. Arno notes that, to the extent, if any, a public purpose is required to justify a decree determining Commonwealth rights in tidelands, a public purpose is the basis for the Registration Act: "to provide a method for making titles to land certain and indefeasible." McCarthy, 419 Mass. at 237 (quoting Lasell College v. Leonard, 32 Mass. App. Ct. 383, 387 (1992).

[22] The Conservation Law Foundation ("CLF") makes this attack more directly in its amicus brief.

amounts to nothing less than a request that the Court hold the relevant portion of §45 void.

Given the statutory grant of authority to the Land Court to bind it, the Commonwealth's challenge to the Land Court's authority collides with Article 30 of the Commonwealth's Declaration Rights, which protects the separation of powers.

Citing only cases decided after the date of Arno's Transfer Certificate of Title, the CLF acknowledges that its argument is based on legal issues that "have come to the fore in recent years because of certain holdings of this Court and the Legislature's response thereto." CLF Brief p. 15. The Court should reject CLF's invitation to effect a judicial taking of Arno's fee simple interest by holding that new law has voided Arno's registered title.

The Commonwealth's claim that it is not bound by the 1922 Decrees because Arno's predecessors did not also institute a proceeding (under what is now G.L. c. 240, §§19-26) for determining the division of flats between littoral property owners also falls short. The Commonwealth cannot be bound in such proceedings unless it consents to becoming a party. G.L. c. 240,

§26. The fact that, as discussed in the following section, the law is different in registration proceedings reinforces that the Legislature fully intended that the Commonwealth be bound by Land Court decrees. Further, the optional, non-exclusive procedure is aimed principally at providing a mechanism for owners of adjacent beaches, which often do not have good landmarks, to determine their boundaries.

For all of the foregoing reasons, the Land Court's determination that the rights of the public and the Commonwealth are limited to areas of the Property below the 1922 mean high water mark was correct. The 2004 Order should be affirmed.

III. NO CHAPTER 91 LICENSE IS REQUIRED FOR WORK ABOVE THE 1922 MEAN HIGH WATER MARK.

As stated in the Superior Court Decision, "[t]he issue here is not what the Commonwealth could have done, but, rather, what the Commonwealth did." Comm. Add. 2 p. 8. Thus, despite its focus on the *jus publicum*, the question on appeal is not what rights the Commonwealth may have under that doctrine. Rather, it is the narrower one of whether the specific licensing provisions in c. 91 (and the regulations

promulgated thereunder) give the DEP jurisdiction to require a license for work on that part of Arno's land in which the Commonwealth and the public hold no proprietary rights. Applying basic principles of statutory and regulatory construction, the court below concluded correctly that they do not.

A statute should be interpreted "'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language . . . to the end that the purpose of its framers may be effectuated.'" Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). However, the Commonwealth touches only lightly on the relevant language of c. 91, and fails entirely to mention §14. That section provides in relevant part:

> Except as provided in section eighteen, no structures or fill may be licensed **on private tidelands or commonwealth tidelands** unless such structures or fill are necessary to accommodate a water dependent use; provided that for commonwealth tidelands said structures or fill shall also serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to

> **the rights of the public in said lands.** (emphasis added)

The emphasized phrases, which includes defined terms, makes clear that c. 91 only requires licenses for **lands in** which the Commonwealth or the public hold real estate rights.[23] Thus, G.L. c. 91, §1, defines "tidelands" generally as "present and former submerged lands and tidal flats lying below the mean high water mark." Having made clear what "tidelands" are and where they are located, that section further distinguishes the two types of tidelands that it regulates. The first type, "commonwealth tidelands," are defined as:

> tidelands **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. (emphasis added)

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[23] This language reflects the property-rights basis for all of c. 91 expressed in §2, which refers to "lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth … [and] title of the commonwealth thereto." The Court has applied this language in §2 to DEP. Moot v. Dept. of Envt'l Protection, 448 Mass. 340, 342-343 (2007). DEP's authority is guided and defined by this, and other language in §2 ("water-dependent uses," "proper public purpose" and "rights" of the public) that reappears in the sections of c. 91 that apply to DEP, and also in its own waterways regulations.

The second type, "private tidelands," are:

> tidelands held by a private party **subject to an easement of the public** for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. (emphasis added)

These defined terms refer exclusively to land in which the Commonwealth holds property rights. These definitions also mirror opinions of this Court, which describe the public's interest in tidelands as proprietary. See, e.g., Moot, 448 Mass. at 342-343 ("Commonwealth holds tidelands in trust"); Boston Waterfront (condition subsequent); Wellfleet v. Glaze, 403 Mass. 79, 82 (1988) (reserved "public easement" over flats); Home for Aged Women, 202 Mass. 422, 436 (1909) ("paramount power of the Legislature over the Commonwealth's lands under tide water").

The property rights-based nature of the licensing provisions of c. 91 carries over to §18, the other licensing provision referenced in §14.[24] Where there is no reason to distinguish between property rights,

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[24] As acknowledged in 310 CMR 9.01(1), §18 also is the source of DEP's authorized to promulgate the Waterways Regulations. DEP has "no inherent authority to issue regulations." Mass. Hospital Ass'n., Inc. v. Dep. of Med. Security, 412 Mass. 340, 342 (1992) (citation omitted).

that section does not always do so, but instead refers generally to "tidelands." Although the Commonwealth tries to leverage this language into a broader assertion of jurisdiction over, not two, but "three categories of tidelands,"[25] it remains clear in §18 that proprietary interests are a prerequisite when granting waterways licenses. Significantly, §18 provides:

> No structures or fill for nonwater dependent uses of tidelands … may be licensed unless a written determination by the department is made … that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than detriment to the **rights of the public in said lands** …. (emphasis added)

Therefore, §18 relates only to land **in** which the public holds "rights," i.e., commonwealth and private tidelands. Consistent with this construction, sections 14 and 18 provide no guidance for granting licenses for construction on tidelands in which the public has no rights.[26]

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[25] Cf. Moot, 448 Mass. at 343 (c. 91 "distinguishes between" the two categories of defined tidelands).

[26] Section 18 further provides, "No license shall be granted for private tidelands unless the application

The c. 91 implementing regulations provide no help to the Commonwealth's position. To begin with, the Introduction to the regulations adopts Arno's position. It states, "There are two basic types of tidelands:" Private Tidelands and Commonwealth Tidelands. Comm. Add. 7 at p. 2. Although differing somewhat from those in c. 91, the regulatory definitions of "Private Tidelands" and "Commonwealth Tidelands" in 310 CMR 9.02 also support Arno. The former are "subject to an **easement** of the public" to fish, fowl and navigate. 310 CMR 9.02. The presumption that tidelands in certain locations are within this definition can be rebutted by "a final judicial decree that such tidelands are not subject to said easement of the public." Id. The definition of "Commonwealth Tidelands" provides that they are "held by the Commonwealth … in trust for the benefit of the public," or privately "subject to an express or implied condition subsequent…." See also definition of "trust lands" as "present and former waterways in

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therefore contains a certification by the clerk of the affected cities or towns that the work … is not in violation of local zoning ordinances or bylaws." It is unreasonable to read §18 as exempting from this zoning certification tidelands that are neither commonwealth nor private.

which the fee simple, any easement, or other proprietary interest is held by the Commonwealth in trust for the benefit of the public."[27]

The regulatory presumption that certain tidelands are Commonwealth Tidelands is overcome by "a written determination based upon a final judicial decree … or other conclusive legal documentation establishing that, notwithstanding the Boston Waterfront decision…, such tidelands are unconditionally free of any proprietary interest in the Commonwealth." 310 CMR 9.02.

In trying to extend the reach of the waterways regulations, the Commonwealth overlooks the import of

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[27] The Commonwealth agrees in footnote 33 that this language speaks "in property terms." The later statement in this definition that "all geographic areas … in 310 CMR 9.14, are **generally** considered to be trust land" is an intentional acknowledgement by DEP that some of these geographic areas (such as Arno's upland) are not subject to any public or Commonwealth proprietary rights, and therefore are not subject to c. 91 and its regulations. (emphasis added). The areas described "generally" in 310 CMR 9.04, must give way to the specific language used in the definition in 310 CMR 9.02. See, e.g., TBI, Inc. v. Bd. of Health of North Andover, 431 Mass. 9, 18 (2000) ("'general statutory language must yield to that which is more specific.'" (citations omitted)). See also Webster's Ninth New Collegiate Dictionary (Merriam-Webster 1987) ("generally" means "usually"). The term "trust lands" would be a misnomer if it applied to land in which the Commonwealth held no interest directly or in trust for the public.

these definitions. Simply put, the 2004 Order removes the Property above the 1922 mean high water mark from these definitions. Moreover, that DEP provided a mechanism for a landowner to show that his or her property is neither Commonwealth nor Private Tidelands is at odds with a claim of DEP licensing authority over a third category of tidelands. To so interpret the waterways regulations would render the ability to rebut the presumptions of public or Commonwealth proprietary interests meaningless.[28]

Most importantly, the specific provisions that DEP would apply to Arno's license demonstrate that none is required. Section 9.35(3)(b) of the waterways regulations requires that the project "not significantly interfere with public rights to walk or otherwise pass freely" over private or Commonwealth tidelands for various purposes including "fishing, fowling, navigation." However, under the 2004 Order there are **no** such "public rights" in the location of

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[28] The above regulatory language reflects the express purpose of the Waterways Regulations, which is "to carry out its statutory obligations and the responsibility of the Commonwealth for effective stewardship of trust lands…." 310 CMR 9.01(2). As noted above, such "trust lands" are subject to proprietary rights of the Commonwealth or the public.

Arno's building, and that location is not Private or Commonwealth Tidelands. Compare Section 9.53 (pertaining only to Commonwealth Tidelands and "**proprietary rights** of the Commonwealth therein"); Section 9.52 (requiring "public access in the exercise of **public rights** in such lands" and a pedestrian access network "available to the public for use in connection with fishing, fowling, navigation, and any other purposes consistent with the extent of **public rights** at the project site."); Section 9.31(2) (project must serve "a proper public purpose which provides greater benefit than detriment to **the rights of the public in** said lands.") (emphasis added).[29]

To the extent that any provisions of the waterways regulations purport to expand DEP jurisdiction beyond those lands in which the Commonwealth or the public has rights, such an expansion is not authorized by c. 91. However, the Court can and should construe any such provisions

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[29] 310 CMR 9.31(2) begins, "No license or permit shall be issued … for any project on tidelands … except for water-dependent use projects located entirely on private tidelands, unless said project serves a proper public purpose…." Under the Commonwealth's theory, water-dependent projects on the third category of tidelands would not benefit from the exception. This makes no sense.

consistently with the governing statute to apply only to activities on private or Commonwealth tidelands. See Fafard v. Conservation Comm. of Barnstable, 432 Mass. 194, 204 (2000).

A final reason to construe the relevant sections of the waterways regulations as not applying to Arno's upland is that they otherwise would effectuate a taking of an easement over Arno's fee in favor of the public. For example, 310 CMR 9.35(3) and 9.52(1)(b) emphatically require public, on foot access. See also "Standard Waterways Conditions" issued by DEP to Arno at A. 273, requiring public access to proposed building and also across the upland.[30] There is no

[30] Condition 4 in the proposed license requires Arno to "construct and maintain a point access walkway for public use from Easy Street" to the boardwalk on the Property. Conditions 6 and 7 mandate that most of the structure's ground floor be a "Facility of Public Accommodation," with public restrooms. (A. 271) The written determination also provides that the structure is authorized on (i) Private Tidelands, and requires Arno to allow public use thereof "[i]n accordance with the public easement that exists by law on private tidelands," and (ii) Commonwealth Tidelands, which "are held in trust by the Commonwealth for the benefit of the public" and over which the public has a "right to use and to pass freely, for any lawful purpose," and that, except as permitted therein, "[n]o restriction on the exercise of these public rights shall be imposed...." (A. 273) There is no provision in the DEP document for tidelands free of any proprietary public interests.

question that this pedestrian access requirement would constitute the taking of an easement. Opinion of the Justices, 365 Mass. 681, 688-689 (1974). The waterways regulations make no provision for takings. Indeed, the rebuttable presumptions in the definitions may reflect, in part, DEP's intent to avoid the risk of a taking.

In sum, both c. 91 and its implementing regulations reflect that they are not exercises of some independent police power of the Commonwealth to regulate privately owned land in which neither it nor the public holds any rights. Rather, the source of authority for c. 91 is the proprietary right of the Commonwealth or the public. Chapter 91 and the regulations adopted thereunder do not apply to land in which there is no such proprietary right.

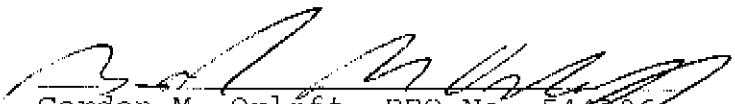
CONCLUSION

For all of the foregoing reasons, Arno respectfully submits that this Court should affirm the decisions below.

Respectfully submitted,

JOSEPH V. ARNO,

By his attorneys,



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