

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC No. 10559

JOSEPH V. ARNO
PLAINTIFF/APPELLEE

v.

COMMONWEALTH OF MASSACHUSETTS
DEFENDANT/APPELLANT

APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

BRIEF OF CONSERVATION LAW FOUNDATION
AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Conservation Law Foundation ("CLF") is a nonprofit, member supported organization that works to address public interest and environmental issues which affect the health, well being, happiness and public interest of the communities and people of New England. CLF advocates use of law, economics and science to design and implement strategies that conserve natural resources, protect public health, promote the well-being and happiness of the public in the region and promote and protect the interests of the public in the region. Founded in 1966, CLF has several thousand members in Massachusetts.

From the onset CLF has taken a special interest in the promotion and protection of the public's rights and interests in tidelands. It was instrumental in the cleanup of Boston Harbor and has sought to promote and protect the public's rights in tidelands areas in most of the significant projects in the tidelands and issues affecting tideland laws.

This brief is submitted in response to this Court's solicitation of amicus briefs on September 25, 2009.

STATEMENT OF ISSUE

Did the Land Court Judge, sitting by special assignment as a Superior Court judge, correctly conclude that, with respect to a registered parcel of land consisting of filled tidelands, the Commonwealth lacked jurisdiction to require a license under G.L. c. 91 and regulations promulgated by the Department of Environmental Protection for proposed construction on the property.

STATEMENT OF THE CASE AND FACTS

Conservation Law Foundation relies on the Statement of the Case and Facts contained in the brief of the Defendant, Commonwealth of Massachusetts.

SUMMARY OF ARGUMENT

Since only the Legislature can extinguish the public's right's in tidelands and the Legislature has

not and cannot delegate this extinguishment authority, and this has been the law of the land since the founding of the Colonies and the Colonial Ordinances, the courts below did not have the authority or jurisdiction to extinguish the public's rights and the Department of Environmental Protection's tidelands jurisdiction in tidelands on the premises. The Legislature has not acted to effect such an extinguishment.

ARGUMENT

1. Only the Legislature Can Extinguish the Public's Rights in Tidelands.

Except where properly relinquished or extinguished, all tidelands are subject to the public's rights, in the case of Commonwealth Tidelands involving outright ownership by the Commonwealth or a residual interest that they be used for public purposes and in the case of private tidelands that they are subject to the rights of fishing, fowling and navigation explicitly reserved by the Colonial

Ordinances¹. (see G.L. c. 91, § 2) "The public's interest in the tidelands . . . traditionally involves water-dependent use of the land." Moot v. Dep't of Env'tl. Protection, 448 Mass. 340, 349 (2007). "To the extent that nonwater-dependent use - that is, non-traditional use - is to be made of tidelands, the Legislature has now expressly mandated that any such nonwater-dependent use 'shall serve a proper public purpose' (emphasis added). See G. L. c. 91, § 18, as amended by S. 1983, c. 589, § 26" Moot v. Dep't of Env'tl. Protection, *id.* at 342.

"Only the Commonwealth, or 'an entity to which the Legislature has delegated authority expressly', may act to further public trust rights." Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 197 (2000). Until the mid 19th century, the administration of the public's rights took the form of special acts by the Legislature authorizing filling and erection of piers. Then, in 1866, the Legislature established a permanent Board of Harbor Commissioners

¹The Department's public records show that there are both private and commonwealth tidelands on the premises (See RA 267-268) but that distinction is not essential to the issues involved in this case.

to approve future filling and erection of piers. 1866 Mass. Acts c. 149. This legislation created a rudimentary licensing scheme with many of the components found today in G. L. c. 91. "General Laws c. 91 sets out to 'preserve and protect,' under the department's watch, the public rights in tidelands." Moot v. Dep't of Envtl. Protection, *supra*, at 347.

The public's rights in tidelands "can only be relinquished or extinguished by the Legislature."

Moot v. Dep't of Envtl. Protection, *id.* at 347. "For more than one and one-half centuries, the Legislature has been fully cognizant of its authority to relinquish the public's rights in tidelands by means of appropriate legislation. This authority belongs to the legislature alone." Moot v. Dep't of Envtl. Protection, *id.* at 352-353. "When the Legislature takes such action (relinquishes or extinguishes the public rights in tidelands), it does so explicitly." Moot v. Dep't of Envtl. Protection, *id.* at 348.

Even the authority of the Legislature to relinquish or extinguish the public's rights in the tidelands is not without limitations.

"The authority of the Legislature to abandon, release, or extinguish the public interest in submerged land is not without limits. Where the Commonwealth has proposed the transfer of land from one public use to another, the legislation must be explicit concerning the land involved; it must acknowledge the interests being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer

. . . . Similar principles properly apply to any relinquishment or surrender of a public interest in real estate.

A further and significant limitation on legislative action in the disposition of a public asset is that the action must be for a valid public purpose, and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose

. . . 'the paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit,' . . . whether the 'aspects of private advantage . . . are reasonably incidental to carrying out a public purpose in a way which is within the discretion of the Legislature to choose.' " Opinions of the

Justices, 383 Mass. 895, 905
(1981).²

See also, Legislature's acknowledgement of these requirements for relinquishment or extinguishment in Chapter 168 of the Acts of 2007 § 1.

2. The Legislature Has Not Delegated (and Undoubtedly Cannot Delegate) This Extinguishment Authority.

The Legislature has not delegated to any person, agency, or entity, the authority to relinquish or extinguish the public's trust rights or interests in tidelands. Moot v. Dep't of Env'tl. Protection, supra, and Fafard v. Conservation Comm'n of Barnstable, supra. Moreover, as pointed out above, "Those rights can only be relinquished or extinguished by the Legislature." Moot v. Dep't of Env'tl. Protection, id. at 347. See also, Trio Algarvio, Inc. v. Commissioner of the Dep't. of Env'tl. Protection, 440 Mass. 94, 97 (2003), citing Opinions of the Justices, supra, at

² Justices Liacos and Abrams did not agree with their fellow Justices and in a separate opinion stated that: "(1) the Commonwealth may not convey submerged lands so as absolutely to defeat the public's inalienable trust rights in that property; (2) as to such property, the Legislature may convey such land only for a public purpose, conditioned on its use for the declared purpose, and only after imposing any necessary conditions and making specific findings that such conveyances will not impair the remaining trust rights; and (3) such legislation must meet the requirements of the 'prior public use' doctrine." Opinion of the Justices, supra, at 923.

902-903, and Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 645, 646 (1979). The Legislature cannot delegate the authority to relinquish or extinguish the public rights in tidelands because of the nature of those rights which are of ancient origin and running to all of the public; their extinguishment requires a determination of "proper public purpose" by a deliberate process set forth in the 1981 Opinions of the Justices, supra; and the Commonwealth does not own tidelands outright but as a trustee, acting through the Legislature, with a fiduciary responsibility for the benefit of all the people. The responsibility to determine whether a proper public purpose is served by relinquishment or extinguishment of the public's rights in any specific tidelands area is exclusively in the Legislature.

3. Insofar as the Decisions of the Courts Below Purported to Extinguish the Public's Rights in Tidelands on the Premises, and Thereby the Department's Chapter 91 Jurisdiction, Their Decisions were Void for Lack of Authority and Jurisdiction.

a. The Courts Below Appear to have Assumed They have Authority and Jurisdiction to Extinguish the Public's Rights.

Neither the Land Court in Arno v. Commonwealth of Massachusetts, Registration Case #8594-S-2002-8A nor the Superior Court in Civil Action # 03-29 (being the same judge in each proceeding) addressed the issue of its authority or lack thereof to extinguish the public's rights in the Arno property. The Land Court appeared to view the Commonwealth's claim as being one to a proprietary interest in the property; in other words, the issue was who owns the property, Arno or the Commonwealth? The Land Court stated that "the Commonwealth, . . . asks this Court to adopt the views suggested in the examiner's report filed in the original registration, which questioned the original registrants' title to locus and raised the possibility that the land sought to be registered was created by unauthorized filling of tidelands or flats without permission from the Commonwealth." (RA 231). The Court went on to conclude that "The 1922 decree of this court established a title in Ayers, and extinguished any and all proprietary rights the Commonwealth may have held prior to the entry of the decree, and which were not explicitly recognized in it." (RA 235). The Court, based on this conclusion,

held that registration extinguished the public's rights in the tidelands landward of the 1922 high water mark. In the Court's view the decree determined not only that the Commonwealth had no claim to ownership of the premises of which Arno was the fee owner, but the public's rights in tidelands for which the Commonwealth, acting through the Legislature, was the trustee, were also extinguished.

The Court did not contest that the tidelands prior to 1922 extended over most of the Arno property: "Importantly (particularly in a case where the examination of title conducted for the court tended to show that the primitive, historic high water mark, may have been further landward than most or all of the Ayers parcel)" (RA 240). See also, n.2 in the Land Court's decision. The Court (RA 240) acknowledged that the 1922 Court could have fashioned its decree making it clear that the Waterways Encumbrance referred to the entire parcel "[i]f the Attorney General had sought to have the Court preserve public rights over the entire registration parcel, on

the theory that it all once has been flowed

(RA 240)³

The courts below apparently assumed mistakenly they had this authority. The two opinions contain no analysis of this assumption. They do not address the fact that this Court has made it very clear that only the Legislature can extinguish the public's rights in tidelands. And if the Legislature seeks to do so, it must make a careful analysis based on the five public purpose determinations set forth in the 1981 Opinions of the Justices. Nor do the two opinions point to any explicit delegation by the Legislature of its extinguishment authority. And even if the Legislature could delegate its extinguishment authority, which as we have indicated we do not believe is possible in view of the many specific public purpose considerations which must be determined by the Legislature and the nature of its fiduciary responsibilities, the opinions of the courts below do not indicate how the Legislature might have granted its extinguishment authority with all of the

³ We do not read the courts below to be saying that the Attorney General by his action or inaction can extinguish the public's rights in tidelands.

conditions required by this Court as to its exercise. The Legislature could not, after all, delegate any more authority to extinguish the public's rights in tidelands than it had; in the 1981 Opinions of the Justices this Court indicated the limitations on that extinguishment authority even in the hands of the Legislature.

The Commonwealth contests the conclusion that the public's rights in those portions of the Arno property which were tidelands, some commonwealth tidelands and some private tidelands, were, or could be, extinguished by the Land Court in 1922 or by interpretation and clarification currently. Likewise, it contests the conclusion that, based on that mistaken assumption as to the Land Court's authority and jurisdiction, the Department's Chapter 91 jurisdiction over those tidelands was terminated.

b. The Courts Below Made Public Policy Determinations it is Not their Role to Make.

The Land Court based its extinguishment of the public's rights in tidelands on the avoidance of unfairness to successive private owners of the premises. "To do so (affirm the public's rights in

these tidelands) would reopen a long registered land title relied upon by successive certificate holders who have erected buildings on, and made valuable improvements to, the site. Such a belated and collateral attack on Arno's registered land title cannot be sustained." (RA 243). There are several responses to this concern.⁴

First, it is not at all clear that there has been unfairness to the reasonable expectations of successive private owners of the premises. The certificate of title for the premises stated that the registration is subject to "any and all public rights existing in and over the same below mean high water." (RA 229). The Attorney General appeared on behalf of

⁴ Undoubtedly this Court's holding in Boston Waterfront Dev. Corp. v. Commonwealth, *supra*, and the Legislature's adoption in 1983 of amendments to Chapter 91, disappointed the expectations of developers and other waterfront owners, but avoidance of disappointment of those expectations was not deemed to be a public purpose having priority over the public's rights in tidelands. In that case the Court expressly acknowledged the unique nature of the rules regarding tidelands. It said: "The essential import of this holding is that the land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representation an interest and responsibility in its development. This concept is difficult to describe in language in complete harmony with the language of the law ordinarily applied to privately owned property. We are not dealing with the allocation of property rights between private individuals when we are concerned with a public resource such as Boston Harbor." (at 649).

the Commonwealth and "wrote that 'the parcel described in said petition borders on tidewaters, in which the public has certain rights . . .' but that he had no objection to the entry of the decree prayed for provided the same is made subject to any and all rights of the public." (p. 3). The Land Court in its 2004 decision interpreting and clarifying the certificate, construed the reference to the mean high water mark in the certificate to mean the 1922 mean high water mark at the bulkhead shown on the 1922 plan, rather than the historic mean high water mark referenced currently in the Waterways Regulations. (310 CMR 9.02). But it is not at all clear the 1922 Attorney General so construed it or that such a construction coincides with the reasonable expectations of successive owners.

Second, there was no unfair surprise here. The public's rights in tidelands derive from ancient common law, likely even Roman law (since 1866 preserved and protected by Chapter 91) which came to this country with the first settlers and attached to all tidelands and certain inland waterways. It is well known to members of the bar, the judiciary and

even much of the public. From the earliest date commencing with the Colonial Ordinances, then special acts of the Legislature, and ultimately present-day Chapter 91, it has always been the exclusive province of the Legislature. It is now carefully and explicitly addressed in the statutes, Chapter 91. Obviously Mr. Arno knew of the tidelands issues. (See n.1 above).

Third, the public purpose considerations involved in issues regarding the public's rights in tidelands have come to the fore in recent years because of certain holdings of this Court and the Legislature's response thereto. In the several decades following World War II waterfront development increased dramatically. And this increase was not of the water-dependent character predominating previously and reflected at the outset in the encouragement of fishing and commercial maritime activity which was the public purpose for the Colonial Ordinances. Rather it was for non-water dependent uses such as hotels, residences, office buildings (even court houses). These non-water dependent uses tended to privatize the waterfront and eliminate the public's rights therein.

In response, this Court, in Boston Waterfront Dev. Corp. v. Commonwealth, supra, (also a case in which a developer sought to use the land registration system under G. L. c. 185 to clear title of the public's rights in tidelands) said wait a minute, there are important public rights and public policy considerations which should not be ignored. These tideland areas, which since the beginning were the property of the Colonies and then the Commonwealth, even when conveyed to private persons must serve a proper public purpose, except to the extent otherwise determined by the Legislature within the limits of this Court's 1981 Opinions of the Justices. The purposes intended to be served by the Colonial Ordinances were water-dependent public purposes and the same could be said of the purposes of the rights in the public reserved by the Ordinances. The 1981 Opinions of the Justices of this Court emphasized the importance of public purpose considerations which must govern when dealing with the public's rights in tidelands and that the Legislature was the forum to weigh these considerations and make a judgment thereon. In what circumstances and to what extent to

allow or limit privatizing of tideland areas, particularly for nonwater-dependent purposes, whether in so-called private tidelands or commonwealth tidelands, thereby implementing, diminishing or extinguishing the public rights, is peculiarly a public policy consideration to be made by the Legislature (or in the case of administration but not extinguishment has been properly delegated to the Department under Chapter 91) subject to the limitations set forth in the 1981 Opinions of the Justices. In response to this Court's Boston Waterfront decision and the 1981 Opinions, the Legislature amended Chapter 91 to spell out that public purpose considerations dictate that water-dependent uses are the norm for tideland areas, including former tidelands, and nonwater-dependent uses are subject to special scrutiny and regulation. Subsequent cases have further addressed these important issues.

The Land Court stated in its 2006 decision that the "goal" of the Land Court system is "making registered land titles clear and certain." (RA 233). That is the Land Court's priority. The Legislature

has said in Section 18 of the 1983 Amendments to Chapter 91, in response to the Boston Waterfront case and 1981 Opinions of the Justices, that:

"Any changes in use or structural alteration of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by the department of a new license in accordance with the provisions and procedures established by this chapter (emphasis added).
"No structures or fill for non-water-dependent uses of tidelands may be licensed unless a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts Coastal Zone Management program."

This relatively recent statutory amendment is in some circumstances inconsistent with, even contradictory to, the goal and priority of the Land Court system established much earlier.⁵ It reflects the

⁵ As emphasized by this Court in the Boston Waterfront case the concept established in that case and written into Section 18 "is difficult to describe in language in complete harmony with the

multiplicity of public purposes involved in decisions regarding the public's rights in tidelands, that new licenses are required even though there are prior licenses outstanding and that public input is important in determinations concerning those rights. It reflects the concern for the protection of public interests, to which private benefits are incidental, as expressly set forth in the 1981 Opinions of the Justices. And this heightened concern to ensure advancement of various public purposes in the administrative regulation of tidelands is more important, even critical, in the case of efforts to extinguish the rights of the public. Clearance of title is but one of (and often of lesser priority than) the many priorities to be weighed, balanced and judged in the proposed extinguishment of the public's rights. That is undoubtedly the reasoning behind this Court's conclusion that decisions on extinguishment are to be made only by the Legislature. This Court said very recently in Moot v. Dep't of Envl. Protection, supra, at 351, that making this type of

language of the law ordinarily applied to privately owned property." (at 649) (See n.4 above).

determination with respect to specific properties is not the "role" of courts.

Everyone likes to avoid regulation (except for regulation of their neighbor). The avenue open to Mr. Arno in endeavoring to avoid Chapter 91 regulation is to seek a special act of the Legislature as was done by the plaintiff in Rauseo v. Commonwealth⁶. This is

⁶In Rauseo et al v. Commonwealth, Land Court Registration Case No. 1874-S, 2002-04, upheld on appeal 65 Mass. App. Ct. 219 (2005), further appellate review denied by this Court, the Land Court also purported to extinguish the waterways encumbrance on a landlocked tidelands parcel (Lot C). The Land Court found as facts that the 1907 Original Registration Certificate contained the Waterways Encumbrance (finding of fact #8) (App. A, p. 2 of 6) and upon the 1912 subdivision of the Registration Parcel the Transfer Certificate of Title for the transferred portion (Lot C) of the Registration Parcel also contained the Waterways Encumbrance (finding of fact #12) (App. A, p. 3 of 6). The Waterways Encumbrance referred to "any and all public rights legally existing in and over the same (the Registration Parcel) below mean high water mark." (finding of fact #8) (App. A, p. 2 of 6). As Lot C consisted of former tidal flats less than 100 rods below the historic high water mark, the public rights would be fishing, fowling and navigation rights retained under the Colonial Ordinances. The Land Court stated that the Plaintiff "seeks to strike the Waterways Encumbrance from the Transfer Certificate to reflect changed circumstances arising from the 1912 subdivision of Lot C from the Registration Parcel, alleging that the Waterways Encumbrance does not apply to Lot C." (App. A, p. 5 of 6). The only changed circumstance was the subdivision. In short, the Land Court concluded that the subdivision of Lot C from the original Registration Parcel by private parties had the effect of extinguishing the rights of the public without further legislative action (although apparently those public rights remained on the balance of the Registration Parcel because it had waterfront). And the burden was on the Commonwealth to prove otherwise: "The Commonwealth has failed to proffer any credible evidence disputing that Lot C should not be subject to the Waterways Encumbrance." (App. A, p. 6 of 6). And the Appeal Court's decision (adopting a very narrow definition of the public's reserved right of navigation) is to the same effect: "Here, there is no claim that the filling and use of Lot C has any material impact on the navigability of the Mystic River.

not to say that CLF would support such legislation, we would oppose it particularly in the case of waterfront property. But the Legislature is the proper forum to air the issue.

As there has been no proper extinguishment of the public's rights in the tideland portions of these premises, the Court should overturn so much of the two decisions below as purports to extinguish those rights and the Department's responsibility under Chapter 91 to "preserve and protect" those rights and interests on its watch.

CONCLUSION

The Land Court's decree in 1922, as interpreted and clarified in 2004, and the Superior Court's Summary Judgment in 2009, insofar as they purport to extinguish the public's rights in tidelands on the

Thus, as the plaintiff correctly argues, no rights in the public based on the provisions of the Colonial Ordinances remain." *Supra* at 223. In the Rauseo case (as in this Arno case) the courts assumed the "role" and authority of determining whether the public's rights in tidelands were no longer worth retaining and should be extinguished, an authority the Legislature has not delegated (and cannot delegate) to anyone and has not attempted to delegate even to the department to which it has delegated administration of the rights of the public in commonwealth tidelands and private tidelands. The Plaintiff in that case, Mr. Rauseo, subsequently obtained a Special Act from the Legislature exempting Lot C from Chapter 91 licensing. See St. 2006, c. 123 (Appendix A, p. 7).

Arno property, and the Department's Chapter 91 jurisdiction thereon, are void for lack of authority and jurisdiction¹, and this Court has the authority to so decide. See G. L. c. 211 § 3 and c. 214 § 3 (13). The Registration Decree of the Land Court and the Judgment of the Superior Court should be clarified, corrected and overturned insofar as they purport to extinguish the public's rights in tidelands on the premises and the Department's Chapter 91 jurisdiction thereon.

Respectfully submitted,
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¹It is undoubtedly black letter law that action by a court without subject-matter jurisdiction, in this case without authority to extinguish the public's rights in tidelands, is invalid, void and unenforceable. For examples of invalidity of court actions taken without jurisdiction see Mass. Practice, Equitable Remedies Sections 3.3 and 3.4 and cases cited.