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

REPLY OF THE APPELLANT COMMONWEALTH OF MASSACHUSETTS

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January 20, 2010

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INTRODUCTION

There is nothing "hysterical" about the Commonwealth's description of the implications of the trial court's rulings. Arno Br. at 24 n.12. The 2004 and 2009 orders establish a different set of rules for registered land and stand to upset long-settled expectations governing waterfront development and public trust rights.[1] While Arno characterizes the Commonwealth's arguments as invalidating, "attacking," and "undoing the 1922 Decrees," *id.* at 34-36, the Commonwealth is not in fact contesting Arno's title to the property. MA Br. at 29 n.20. Rather, the Commonwealth seeks to ensure that Arno's proposed project is constructed in a manner that preserves and protects the public interests in his formerly submerged tidelands and flats. Doing so does not disrupt any settled expectations of State property law or the Land Registration Act--to the contrary, public trust rights have existed as an inherent limitation on the use of waterfront property since Colonial times.

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[1] In fact, millennia ago, Roman law declared: "by natural right, these be common to all; the air, running water, and the sea, and hence the shores of the sea." INSTITUTES OF JUSTINIAN, LIBER 2, TRACT 1, SECTION 1, *reprinted in* JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 18 (2d ed. 1847).

ARGUMENT

I. ARNO EFFECTIVELY CONCEDES THAT THE COMMONWEALTH'S APPEAL FROM THE FINAL JUDGMENT WAS TIMELY.

Arno does not challenge the Commonwealth's position that (1) an interdepartmental transfer order does not "sever" a case in the absence of a Mass. R. Civ. P. 21 order, (2) G.L. c. 185, §15 does not authorize full appellate review of an interlocutory order, and (3) interlocutory orders are open to review in an appeal from the judgment that resolves the entire controversy between the parties at the trial court level. *See* Arno Br. at 13-16. Rather, Arno "rests" on the trial court's order (which also overlooks these issues), *id.* at 14, and then offers some color commentary on the Commonwealth's unsurprising decision not to expend resources appealing an order it determined was unappealable. *Id.* at 14-16.[2] Arno's tepid response is telling. Indeed, while the trial court's rationale is premised on the idea that the 2004 and 2005 orders <u>*were not*</u>

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[2] Arno's commentary on the Commonwealth's decision not to appeal from the interlocutory orders demonstrates that the Commonwealth, unlike Arno, has taken a consistent position on this issue throughout the litigation. *See, e.g.*, RA 324, lines 5-6 ("final Judgment in this whole matter"), line 23 ("this is one case"); RA 395, line 13 ("appeal from [] Final Judgment"), line 14 ("one case").

interlocutory, the only case Arno cites concerns appealed orders that were interlocutory. *Id.* at 13 (citing *Colomba v. DWC Assocs., LLC*, 447 Mass. 1005 (2006)).[3]

Instead of trying to rebut the defects the Commonwealth identified in the trial court's 2009 order, *see* MA Br. at 21-28, Arno states only that the trial court relied "principally" on G.L. c. 185, §114, and then criticizes the Commonwealth (in a footnote) for not specifically addressing that section in its brief. Arno Br. at 13 n.6. Neither the trial court nor Arno, however, point to any text in §114 that addresses (1) whether an interdepartmental order severs a case for purposes of appellate review or (2) whether the 2004 order was appealable prior to the resolution of the integrally related issues left open by that order. *See* MA Br. Add.4 at 3-4 (2009 Order); Arno Br. at 13-16. That is because there is none.

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[3] That case concerns the doctrine of present execution, which provides a very narrow exception to the final decision rule, authorizing the appeal of interlocutory orders that are both collateral to the undecided part of the controversy and practically irremediable in an appeal from the final judgment. *Elles v. Zoning Bd. of Appeals of Quincy*, 450 Mass. 671, 673-74 (2008).

Section 114 authorizes the Land Court to "hear and determine the motion [of a registered owner or other person in interest] . . . and [] order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms . . . as it may consider proper." G.L. c. 185, §114. The trial court looked to this section for two reasons. First, it cited §114 to support its position that "rarely is any judgment issued following the original judgment of registration." 2009 Order at 4. That, however, was not the issue. *See* MA Br. at 27.[4] Second, the court relied on §114--the statute giving rise to the land registration issue--to "define 'the case.'" MA Br. at 26. As the Commonwealth explained, defining the case in this way was improper. *Id.*

Most significantly, Arno does not dispute that Mass. R. Civ. P. 21 is the established mechanism for severing portions of a complaint so that each severed

[4] And, in any event, exactly how "rarely" the Land Court enters judgments in §114 cases (S-Petition cases) is unclear. About six months before Judge Piper issued the 2004 order, the Chief Judge of the Land Court entered a "Judgment" under §114, striking a waterways encumbrance from another parcel of registered land. *See* Judgment, *Rauseo v. Commonwealth*, 2004 WL 1431029 (Land Ct. 2004)(Scheier, C.J.) (Addendum A), *aff'd* 65 Mass. App. Ct. 219 (2005).

piece becomes an "independent action[] upon which separate and 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). Since a Rule 21 order was not issued in this case--a case involving one complaint, the same two parties, the same trial court judge, the same underlying facts, and the same integrally related legal issues--the Commonwealth's appeal from the judgment that resolved the entire controversy at the trial court level was both consistent with the rules of appellate practice and procedure, and timely.

II. ARNO'S LAND IS IMPRESSED WITH A PUBLIC TRUST THAT, UNTIL IT IS EXPRESSLY EXTINQUISHED BY THE LEGISLATURE, GIVES THE PUBLIC AN INTEREST IN THE LAND'S DEVELOPMENT.

A. Arno's Attempt to Rely on the Land Registration Act to Extinguish Public Trust Rights Should be Rejected.

In its brief, the Commonwealth argued that public trust rights are not encumbrances that must be set forth in a Certificate of Title to survive registration. MA Br. at 30-32. In an effort to avoid this result--one consistent with the Land Registration Act that Arno trumpets--Arno asserts that the "condition subsequent" described in *Boston Waterfront*

Development Corp. v. Commonwealth, 378 Mass. 629 (1979) is the same as a condition subsequent between two private parties and therefore must be set forth in a Certificate of Title's list of encumbrances to survive registration. Arno Br. at 29-32. Arno's argument, like the trial court's 2004 order, reflects a fundamental misunderstanding of the nature of public trust rights.

Arno's and the trial court's preoccupation with *Boston Waterfront*'s use of the term "condition subsequent" overlooks the decision's central holding, which was stated in unmistakable terms: "[w]e do hold . . . that . . . [the filled tidelands at issue are] subject to that same public trust on which the Commonwealth originally held [them], and that [they] may be used only for a purpose approved by the Legislature as a public use." 378 Mass. at 649. "The essential import of this holding," the Court went on, "is that the land in question . . . is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development." *Id.* The central holding was thus concerned about the *use* of the filled tidelands. While *Boston Waterfront* endorsed the Appeals Court's

description of the public interest as a "condition subsequent" based on an 1890 law review article, the Court's discussion makes clear that this was no ordinary condition subsequent, adding that the public's interest in the waterfront "transcends the ordinary rules of property law." *Id.* at 650. Thus, the Court's use of the term "condition subsequent," now codified in Chapter 91, G.L. c. 91, §1, was just another way of describing the public trust rights "guaranteed by the" Colonial Ordinance, *Boston Waterfront*, 378 Mass. at 634, and therefore arising under the laws of the Commonwealth. MA Br. at 31.

The flaw in the trial court's order is highlighted by its conclusion that the encumbrance exceptions in G.L. c. 185, §46 "do not include conditions subsequent, which in the case of unregistered land, depend on their recording to be enforceable against subsequent purchasers." MA Br. Add.1 at 21 (2004 Order). Thus, in the trial court's view, the condition subsequent described by *Boston Waterfront* must be recorded to remain enforceable whether the land is registered or not. *But see* G.L. c. 91, §1 ("tidelands . . . held by another party by license . . . subject to an . . . *implied* condition

subsequent" (emphasis added)). If this were true, it would mean that unregistered, filled tidelands are no longer subject to public trust rights either, because the Commonwealth is not aware of an instance where it has recorded that type of "condition subsequent" on the title of any unregistered land.[5]

Arno echoes this extraordinary view in his brief, arguing, based on *dictum* in *Manning v. New England Mutual Life Ins.*, 399 Mass. 730, 736 (1987), that "any condition subsequent imposed in or before 1922 has expired" as a result of G.L. c. 184, §28. Arno Br. at 32. This assertion, not made below, is mistaken. As explained above, public trust rights, whether their essence is described by way of the term "condition subsequent" or not, are not encumbrances that must be recorded. *Supra* pp. 6-7. The public trust doctrine embodies the *jus publicum*, which, like the law of nuisance, has acted as an inherent limitation on the title to waterfront property since Colonial times and can only be permanently extinguished by legislation

[5] This is also inconsistent with this Court's ruling in *Trio Algarvio, Inc. v. Comm'r v. Dep't of Envtl. Protection*, which held "that the public trust doctrine would permit the department to assess [] displacement fees" under G.L. c. 91, §21 even if the relevant wharfing statute had not preserved the Commonwealth's right to do so. 440 Mass. 94, 103-04 (2003).

that satisfies the five criteria set forth in *Opinions of the Justices*, 383 Mass. 895, 905 (1981). Given the limitations on the Legislature's ability to permanently relinquish public trust rights in filled tidelands, it simply cannot be that they can be permanently extinguished by a generalized recording statute such as G.L. c. 184, §28. *See Dunfey v. Commonwealth*, 368 Mass. 376, 384 (1975) (holding that G.L. c. 184, §28 does not apply to public trusts).

B. Arno's Preferred Interpretation of the "Waterways Encumbrance" Is Inconsistent with the Original Certificates, Historical Context, and Settled Rules of Construction.

Arno fairs no better in his 15-page exposition of the "plain meaning of the 'Waterways Encumbrance' in the 1922 Decrees." Arno Br. at 34. He begins with the misdirected assertion that his proposed project is above the 1922 mean high water mark. *Id.* at 20. The issue, however, is whether the term "mean high water mark" refers to the historic (or unobstructed) water line or the present mean high water line in 1922. *See* 2004 Order at 23 n.13. Arno's assertion that the Commonwealth waived its ability to challenge the location of the 1922 high water mark thus misses the point. The point is that the trial court itself

interpreted the term "mean high water" as referring to something other than the present high water line in 1922, because that line would have coincided with the edge of the bulkhead--the structure that displaced the tidewater. *Compare* Arno Br. at 21, *with* MA Br. at 33.[6] Ironically, despite his protests, nowhere does Arno actually dispute this common sense fact.

Next, Arno states that the "logical starting point[]" for determining the meaning of "mean high water mark" is the Original Certificates of Title (and Arno's Transfer Certificate) because they are "the definitive instruments." Arno Br. at 24-25. Given his starting point, it is surprising that he fails to

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[6] The trial court recognized the issue, noting that "surveying of the water line at the time [of the registration] would have been further complicated by the apparent presence of a bulkhead." 2004 Order 13 n.6. The trial court thus understood mean high water to refer to a historic (unobstructed) water line; it just failed to take account of the undisputed facts (in the registration system) that the entire parcel was originally in the harbor and then filled. RA 79 (noting lots were below *low* water line and filled), 90 (plan showing water lots), 149 & 151 (same). These facts also refute Arno's assertion that records in the Registration system would not have put him on notice that his land was filled and therefore both impressed with a public trust and subject to Chapter 91. Arno Br. at 35 n.20. Indeed, the fact that Arno applied for a Chapter 91 license indicates that this was his expectation. RA 267 (Arno "proposes to dedicate the entire 3,991 sq.ft of the ground floor as a Facility of Public Accommodation . . ., [and] reserve the remainder of the property as open space . . . .").

note the court's express decision not to determine "the water line." RA 117, 129.[7] Consistent with that decision, the Land Court plans accompanying the Original Certificates do not include language denoting any water line. RA 113 (No. 8255A), 121 (No. 8594A). In fact, while Arno accuses the Commonwealth of ignoring the Land Court's "expertise in reviewing and creating plans," Arno Br. at 23, the Land Court did not denote "high water" on a plan until more than 20 years after the original registrations in 1922. RA 29 (plan dated 1944). Thus, Arno asks this Court to adopt an interpretation of "mean high water mark" based on a reference in a plan issued 20 years later.

In the end, Arno never seriously disputes the fact that the Attorney General (AG) intended to preserve public "property" rights up to the historic high water mark. The AG indicated that he had "no objection to the entry of the decree . . . provided the same is made subject to any and all rights of the public." RA 97, 101. The AG's answers were thus not limited to a particular portion of the parcels; rather, they referred to the "same," that is, the

[7] The Gardner Certificate indicates that the court did not determine the "Harbor line." RA 107.

"decree," which necessarily concerned the parcels in their entirety. The Land Court added the phrase "mean high water mark" when it issued the Certificates. *E.g.*, RA 117. At that time (and today), the AG would have understood that language to refer to the original (historic) water line.[8] Based on this understanding and the fact that the AG would have also understood the public's rights to extend to the historic line, the AG would not have been concerned by the court's inclusion of the reference to "mean high water."

Finally, Arno's attempts to distinguish prior decisions of this Court are also misplaced. First, the established rule of construction that counsels toward preservation of public rights applies with special force here, where the permission to occupy the public's land and interfere with their water-based rights did not come from a "grant" at all, but rather derives originally from the 1882 and 1895 Chapter 91 licenses. MA Br. at 8-13, 36-37; *see also Boston Waterfront*, 378 Mass. at 639 n.4 ("it is the spirit

[8] See, for example, OP. OF ATT'Y GEN. (May 25, 1868), *reprinted in* 1868 SENATE DOC. No. 302, at 2, where the AG framed the inquiry as "whether any of the lands or flats . . . are outside of the original low-water mark, or are outside of one hundred rods from the original high-water mark." *See also* MA Br. at 33-35.

rather than the letter of this 'rule' which is critical"). Second, construing the Waterways Encumbrance to preserve public trust rights based on the guidance provided in *Opinions of the Justices*, 383 Mass. 902-906, does not render G.L. c. 185, §45 "void," or "collide[] with Article 30," Arno Br. at 36-37: (a) the Commonwealth is not asking the Court to invalidate the original decrees; and (b) *Opinions of the Justices*, 383 Mass. at 902-906 and *Moot v. Dep't of Envtl. Protection*, 448 Mass. 340, 347 (2007) make clear that only the Legislature can extinguish public trust rights.[9]

III. ARNO'S PROPOSED PROJECT IS SUBJECT TO CHAPTER 91'S LICENSURE REQUIREMENTS.

Arno begins by reciting the rule that a "statute should be interpreted 'according to the intent of the Legislature ascertained from all of its words construed by the ordinary and approved usage of the language . . . to the end that the purpose of its framers may be effectuated.'" Arno Br. at 39 (citation omitted). It is thus remarkable then that

[9] The Commonwealth did raise this issue below at pages 2 and 6 of its Opposition to Arno's Motion for Summary Judgment, RA 2 (dkt.#22), which is included in a supplemental appendix. *Compare* Arno Br. at 36 n.21.

Arno's interpretation undermines completely Chapter 91's purposes. *See* MA Br. at 45-49 (purposes).

Section 10 of the law, derived originally from St. 1866, c. 149, §2, directs DEP to "protect the interests of the commonwealth in areas described [in that section] in issuing any license" under Chapter 91. G.L. c. 91, §10. Those *areas* include both "harbors and tide waters" and "flats and lands flowed" by harbors and tide waters, and are thus clearly not limited only to "land" in which the Commonwealth or the public hold a "proprietary interest." *Id.* In turn, §14, derived primarily from "An Act to Regulate the Building of Wharves and Other Structures in Tide-Waters," St. 1872, c. 236, §§1-2, authorizes DEP to "license and prescribe the terms for the construction or extension of a wharf . . . or other structure, or for the filling of land or flats . . . in or over tide water below high water mark." *Id.* at §14. Section 18 then makes clear that a licensee cannot change the use of or alter previously licensed fill or structures without obtaining a new license. *Id.* at §18.[10] These

[10] This requirement applies "whether said structure or fill first was licensed prior to or after the effective date of this section." G.L. c. 91, §18. It thus applies expressly to Arno's licensed, filled

provisions constitute the source of Chapter 91's licensing jurisdiction. If the Legislature had intended to make "proprietary interests [] a prerequisite" to Chapter 91 jurisdiction, it would have said so. *See Sullivan v. Sullivan*, 106 Mass. 474, 475 (1871) (court will not construe statute based on "the unexpressed intent of the legislature").

Arno's assertion that Chapter 91 licensing jurisdiction depends on "property rights" relies primarily on the statute's definitions for "private" and "commonwealth" tidelands and the use of those terms in sections 14 and 18 of the statute. Arno Br. at 39-42. What Arno fails to recognize, however, is that the requirement to obtain a license for work below the high water mark existed for 117 years before the terms "tidelands," "private tidelands," or "commonwealth tidelands" were even added to the statute.[11] Those terms and their definitions were added by St. 1983, c. 589, sec. 21 in response to

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tidelands. "Any unauthorized substantial change in use or unauthorized substantial alteration shall render" a previously issued license "void," *id.*, and unlicensed fill below the historic high water mark constitutes a public nuisance. *See id.* at §23.

[11] *See, e.g.*, St. 1866, c. 149, §§4-5; St. 1872, c. 236, §§1-2; St. 1874, c. 347, §1.

Boston Waterfront and *Opinions of the Justices*.[12] The 1983 amendments were intended to ensure the Commonwealth's compliance with the core holdings in those decisions, not to narrow the scope of the statute. It would thus be ironic if amendments intended to more fully promote public trust rights, i.e., the *jus publicum*, were used to eviscerate the statute entirely.

In fact, noticeably absent from the text that Arno focuses on in sections 14 and 18 is any language that expresses an intent to exempt work on "tidelands" from the requirement to obtain a license. *See* Arno Br. at 39-41. That language is absent because those provisions do not exempt work on tidelands from licensing at all, but rather set forth findings that DEP must include when it issues a license depending on whether or not the proposed project is water dependent and will occur on private or commonwealth tidelands. *See, e.g.*, G.L. c. 91, §14; *see also Moot*, 448 Mass. at 343. Mistakenly, Arno also seizes on the inclusion of the term "rights" in Chapter 91 and the regulations to further his argument, equating the term rights with

[12] *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 161 n.9 (1998)("Evidence of contemporaneous legal events . . . is relevant to our inquiry.").

traditional "property rights." Arno Br. at 45. These rights, however, refer to the *jus publicum*, and not to traditional property rights. MA Br. at 39, 45; *see* *Boston Waterfront*, 378 Mass. 649 ("[t]his concept is difficult to describe in language in complete harmony with the language ordinarily applied to privately owned property").

Like the trial court's 2009 order, Arno also dwells on the definitions of the terms "commonwealth" and "private" tidelands in the regulations. Arno Br. at 43. But the regulations, like Chapter 91, define jurisdiction in terms of "geographic areas." 310 C.M.R. §9.03(1).[13] That provision, entitled "Scope of Jurisdiction," requires a person to obtain a license if (1) they intend to perform "one or more activities specified in 310 CMR 9.03(2) and (3) or 310 CMR 9.05," and (2) the activity will occur "in one or more geographic areas specified in 310 CMR 9.04." *Id.* As previously explained, section 9.04 defines the "Geographic Areas Subject to Jurisdiction" to include "all waterways" and "all filled tidelands, except

[13] Similarly, Chapter 91 defines the term "tidelands" in terms of geographic areas--"present and former submerged lands and tidal flats lying below the mean high water mark." G.L. c. 91, §1.

landlocked tidelands." MA Br. at 44. Despite the fact that this section speaks to geographic areas, Arno asks the Court to rewrite the section based on "the specific language used in the definition [of trust lands] in 310 CMR 9.02." Arno Br. at 44 n.27. What he fails to recognize is that the terms "waterways" and "filled tidelands" are already defined by the regulations, and their definitions speak in terms of "geographic areas" too, not property rights. 310 C.M.R. §9.02.[14]

The Commonwealth's interpretation does not render an applicant's "ability to rebut the presumptions of public or Commonwealth proprietary interests meaningless." Arno Br. at 45. Again, "the regulations define [the terms private and commonwealth tidelands] to trigger the applicability of specific sections of the regulations." MA Br. at 44-45. As the regulations are currently written, Arno can avoid the application of regulatory requirements that are defined in terms of private or commonwealth tidelands if DEP determines

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[14] "'Waterway' means any area of water and associated submerged land or tidal flat lying below the high water mark . . . ." 310 C.M.R. §9.02, at 270.1. "'Filled Tidelands' means former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill." §9.02, at 265.

that he has rebutted the presumptions set forth in the definitions for those terms. Thus, the presumptions are not "meaningless."

Finally, Arno argues that the Court should construe the regulations so that they only apply to tidelands in which the Commonwealth or the public hold property rights to avoid a "taking." Arno Br. at 47-48. This extra-textual plea is misplaced. First, it would be inappropriate to consider whether the application of the Waterways Regulations might effect a taking in advance of a final decision applying the regulations to Arno's proposed project. *See Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 414 (1997) (courts have "consistently declined" to consider takings claims without a "final decision regarding the application of the regulations to the property at issue." (citation omitted)). Second, if the Court holds that public trust rights have been permanently extinguished in Arno's land, and then finds that Chapter 91 still applies, there would still in fact be a serious, site specific question about whether a final decision requiring public access "would constitute the [unconstitutional] taking of an easement." *See* Arno Br. at 48. A requirement for

public access to the waterfront as a condition of an approval of a construction project on filled tidelands stands on different footing than the legislation considered in *Opinion of the Justices*, 365 Mass. 681 (1974). Whether such a condition would constitute a taking would likely fall under the test for exactions, which was not applied in that advisory opinion.[15]

CONCLUSION

For the forgoing reasons, and the ones set forth in the Commonwealth's principal brief, 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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January 20, 2010

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[15] *See Dolan v. Tigard*, 512 U.S. 374 (1994); *see also Barry v. Grela*, 372 Mass. 278, 279 (1977) (holding that person may "pass over" private property below the high water mark "for fishing.").