COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SUPREME JUDICIAL COURT

SJC-10559

JOSEPH V. ARNO,
Plaintiff/Appellee

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant/Appellant

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

BRIEF OF THE REAL ESTATE BAR FOR MASSACHUSETTS and THE ABSTRACT CLUB

AMICI CURIAE

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The Amici Curiae submitting this brief ("Amici") are The Real Estate Bar Association for Massachusetts, Inc. ("REBA", formerly known as the Massachusetts Conveyancers Association) and the Abstract Club. REBA is the largest specialty bar in the Commonwealth. It is a non-profit corporation that has been in existence for over 100 years and has more than 2,500 members who practice in cities and towns throughout the Commonwealth. The Abstract Club is a voluntary association of experienced lawyers who practice in the area of real estate law. It has been in existence for over 100 years and is limited by its bylaws to 100 members. REBA and The Abstract Club both work toward the improvement of real estate law and practice through educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms.

The Amicus Committee is a joint committee of the two organizations comprised of real estate lawyers with many years experience. The Amicus Committee, from time to time, files amicus briefs on important questions of law. All Committee members serve without compensation.

The membership of REBA and The Abstract Club are keenly interested in preserving the certainty and reliability of titles to land adjudicated in the Massachusetts Land Court pursuant to the Land Registration Act, G.L. c. 185. The decision of the Land Court that is the subject of this appeal represents a straightforward application of the practice and principles represented by the land registration system in Massachusetts. Members of the Amici represent a wide variety of real estate stakeholders, including property owners and developers, buyers and sellers, mortgagors and mortgagees, landlords and tenants, title examiners and insurers, as well as representatives of municipal bodies, boards and land use permitting authorities.

The Amici submit that, as evidenced by this Court's decision to grant Direct Appellate Review, whether the Land Court properly held that title to uplands previously adjudicated by the court under the provisions of the Land Registration Act is held by the fee owner free of all interests and encumbrances not specifically set forth on the decree or certificate of title is an issue of considerable importance. Although acutely aware of the importance of the public

trust doctrine in protecting public rights to fishing and navigation in flowed lands, the Amici believe that imposing the regulatory burden of these public rights on previously registered uplands, where no property interest in the public or Commonwealth exists, is unsupported as a matter of law and common sense.

Title examiners, lenders, purchasers and municipal and state boards have relied for over a century on the defined limits of ownership and private rights as set forth on certificates of title issued after a Land Court adjudication and have made decisions to buy, lend or build based upon the statutory safeguard that the property was free from encumbrances not shown on the certificate. If the certainty of registered land titles can be undercut by historic public rights terminated prior to the registration proceeding, a permanent cloud on title will replace that certainty and the very purpose of the land registration system will be compromised. Title examiners will be required to search back title, historic special acts, recorded and unrecorded licenses, atlases and other obscure sources to assess the implications of records potentially at odds with the Land Court certificate and plans.

The Amici take no position on the procedural aspects of this appeal and assume for purposes of this submission that the case is properly before the Court. The Amici note, however, that orders clarifying, modifying and otherwise relating to an original Land Court decree have generally been issued as "orders" in subsequent proceedings bearing the docket number of the original registration petition pursuant to G.L. c. 185, §114 and would ask this Court to respect the finality of orders issued in these previous Land Court adjudications regardless of the Court's determination here.[1]

STATEMENT OF ISSUES

1. Whether the Land Court judge correctly decided that land above the high water mark registered to Joseph V. Arno's predecessor in title is held by

[1] The Court might avoid future procedural confusion of the type evident in this case by judicially discouraging, by court rule or otherwise, the need for interdepartmental transfers in cases where the Land Court has clear jurisdiction over a principal claim in the case to which the claim involving questionable jurisdiction clearly relates. See Ritter v. Bergmann, 72 Mass. App. Ct. 296, 301-301 (2008) quoting Thayer v. Shorey, 287 Mass. 76, 80 (1934)("Courts of the Commonwealth constitute a single system for the administration of justice," where court has jurisdiction controversy shall be "completely and finally disposed of").

Arno free and clear of any property rights in the public or in the Commonwealth.

2. Whether the Land Court judge, sitting by designation in the Superior Court, correctly held that the Commonwealth's right to regulate tidelands pursuant to Chapter 91 must be based on an interest in property reserved to the public in the Colonial Ordinances and that no such property interest exists in land adjudicated in private ownership above the high water mark.

STATEMENT OF FACTS

The Amici adopt the Statement of Facts as stated in both the Statement of Facts and the Statement of the Case in the brief of Plaintiff/Appellee Joseph V. Arno ("Arno"). Of particular significance to the Amici's position is the fact that neither the Filed Plan nor the Judgment Plan in the Ayers registration case in 1921 indicate any high water mark other than the mean high water mark as it existed as of the date of the Filed Plan, i.e. November 22, 1921.[2] At that

[2] The "Filed Plan" is defined in the Land Court 2006 Manual of Instructions for the Survey of Land and Preparation of Plans (hereafter "2006 Land Court Survey Instructions") at 44 as "[t]he plan, prepared by a Surveyor, submitted at the time a complaint or request for a division approval is filed in the Land

time, a bulkhead had been constructed that extended seaward of the high water line by more than 20 feet at its east end and less than 10 feet at its west end. The bulkhead is shown on the Filed Plan as extending into the waters of Nantucket harbor. The data from the Filed Plan was essentially incorporated wholesale into the Judgment Plan in the Ayers case. No plan filed in the case or issued by the court in accordance with its judgment suggests that a high water line other than that shown on the 1922 Filed Plan was intended.[3]

Court. Also called surveyor's plan, linen plan, petition's plan or complaint Plan." The plan included at App. at 67 will be referred to throughout this brief as the "Filed Plan." "Judgment Plan" is defined in the 2006 Land Court Survey Instructions as "the plan issued by the Court at the time a judgment issues in a registration case and is recorded in the Land Court section at the Registry of Deeds. This plan is also known as the "A" plan or a Decree Plan." This plan included at App. at 37 will be referred to throughout this brief as the "Judgment Plan."

[3] The Filed plan is required by G.L. c. 185, §33. The Judgment Plan accompanies the final decree or judgment and represents the "description of the land as finally determined by the Court." G.L. c. 185, §47. Once the decree or judgment has issued in the case the court forwards the case to the survey division of the court to have a plan drawn in accordance with the judgment. As noted in the 2006 Land Court Survey Instructions, "the boundaries of the registered parcel of land are definitively located on the ground as shown on the Judgment Plan." 2006 Land Court Survey Instructions, Section 1.5.

SUMMARY OF ARGUMENT

The Amici urge that the 1922 decree of registration pursuant to G.L. c. 185 adjudicated the location of the high water line for purposes of defining the location of the public rights under the Colonial Ordinance, which rights are limited to fishing, fowling and navigation in land between the high and low water lines. A land registration proceeding is an *in rem* adjudication as to the land at issue that results in a judgment binding the land and conclusive on all persons pursuant to G.L. c. 185, §45. pp. 8-10.

The mean high water mark shown on the Filed Plan and incorporated onto the Judgment Plan is the high water mark described in the Waterways Encumbrance because it was the only monument presented to the court at the time the case was adjudicated. The public trust rights seaward of that high water line are preserved. pp. 10-14.

The public's interest in maintaining the certainty of titles previously adjudicated through the land registration system requires that the judgment of the Land Court be affirmed and that the Commonwealth's attempt to introduce "new evidence" in an *in rem*

proceeding conclusively determined 89 years ago be rejected. pp. 14-17.

Under G.L. c. 91, the Commonwealth's authority to regulate tidelands must be based on a property interest in those tidelands. The lower court's decision preserves the public trust rights below the high water mark by means of a specific Waterways Encumbrance as set forth on the certificate. The land adjudicated as upland pursuant to that certificate is not subject to regulation for the reason that the court has adjudicated that there are no tidelands to regulate. pp. 18-25.

Once land has been adjudicated as upland pursuant to G.L. c. 185, there are no property interests or public rights that attach and such land is not subject to regulation pursuant to Chapter 91. The lower court decision does nothing more than recognize the 1922 judgment of registration as fixing the extent of uplands and private rights and does not negate public trust rights which are explicitly preserved on the certificate by the Waterways Encumbrance. pp. 25-28.

ARGUMENT

A. THE COMMONWEALTH MISAPPREHENDS BOTH THE NATURE OF THE PUBLIC RIGHTS IN FILLED TIDELANDS AND THE EFFECT OF THE LAND COURT REGISTRATION PROCESS

1. Under the Colonial Ordinance of 1641-47 the Rights of the Public Are Limited to Fishing, Fowling and Navigation

The Commonwealth's extensive discussion of *jus privatum* and *jus publicum* obfuscates unnecessarily the plain and practical fact that the public's interest in tidelands is limited to the rights to fish, fowl and navigate between the high and low water marks. Barry v. Grela, 372 Mass. 278, 279-80 (1977); Commonwealth v. Alger, 61 Mass. (7 Cush) 53, 79 (1851); Rauseo v. Commonwealth, 65 Mass. App. Ct. 219, 226 (2005) *further appellate review denied*, 446 Mass. 1106 (2006).[4] Once the high water mark and the corresponding extent of upland has been judicially determined pursuant to G.L. c. 185, neither the

[4] Assuming the accuracy of the Commonwealth's contention that prior to 1882, the current location of Arno's parcel lay within the confines of Nantucket harbor and that the filling was done pursuant to the licenses referenced in the Commonwealth's brief and in accordance with St. 1866, c. 149, §4, once the filling done pursuant to the 1895 license was complete there was no longer a recognized public right in the Arno locus. The 1922 judgment confirmed that to be the case and notably neither of the licenses nor their terms are set forth on the certificate.

adjudication nor the location of the registration parcel can be undone or subjected to an easement not disclosed on the face of the certificate. G.L. c. 185, §§ 45-47; 114. The suggestion that subsequent amendments to Chapter 91 and decisions of this court could retroactively undo a valid court judgment from 1922 establishing the extent of private ownership is a disturbing prospect unwarranted by either precedent or common sense.

2. The Commonwealth's Argument Misapprehends the Purpose and Effect of the *In Rem* Land Registration Process

Adopted in 1898, 1898 Mass. Acts c. 562, the Land Registration Act was designed to settle judicially title to a defined, surveyed parcel of land through an *in rem* judicial proceeding. The purpose of the Land Registration Act was "to provide a means by which title to land may be made certain and indefeasible." Deacy v. Berberian, 344 Mass. 321, 328 (1962), citing McMullen v. Porch, 286 Mass. 383, 388 (1934). The *in rem* nature of the Land Court registration process conclusively determines title to the land in "proceedings adverse to all the world" and binding on all the world rather than merely affecting parties to the proceeding or litigation in question. G.L. c.

185, §45; Tyler v. Court of Registration, 175 Mass. 71, 78 (1900). Accordingly, although the 1922 Land Court registration decree in question[5] here is a final adjudication of the location and limits of a parcel of land in private ownership binding as to all the world, it is an adjudication only with respect to the land so adjudicated and affects only the title to that parcel.

B. THE MEAN HIGH WATER MARK REFERENCED IN THE WATERWAYS ENCUMBRANCE ON THE CERTIFICATE REFERS TO THE MEAN HIGH WATER MARK AS ESTABLISHED IN 1922 AS SHOWN ON THE FILED PLAN.

The argument that the language making the Arno title subject to "public rights legally existing in and over the same below mean high water mark" ("the Waterways Encumbrance") in the April 7, 1922 original certificate issued to John K. Ayers refers to anything other than the "mean high water" line as shown on the Filed Plan, App. at 67, is baseless and without merit. The only reference to any high water mark in any of the filings in Land Court Case No. 8594 is the mean high water mark shown on the Filed Plan dated November

[5] Although the authors recognize that two original registration cases are at issue (Case No. 8255, Frank W. Gardner and Case No. 8594, John K. Ayers), because a relatively small portion of the Arno land derives from Case No. 8255 and that case involves comparable facts and the same surveyor, this brief will confine its discussion and references to the Ayers' judgment (Case No. 8594).

22, 1921 and prepared by William S. Swift. The stamps on that plan indicate that it was filed in December of 1921 and "approved" by the court in March of 1922. It was based on this approval that the Judgment Plan was issued. App. at 37. Although under current Land Court practice, the Judgment Plan would not identify the surveyor for the Filed Plan and would be drawn by the court, the Judgment Plan in Case No. 8594 was consistent with practice at the time.[6] The plan was reviewed, checked and approved by C.B. Humphrey, the surveyor for the court and drawn pursuant to the order and direction of the court. See 2006 Land Court Survey Instructions at 3, Section 1.5.

The 2006 Land Court Survey Instructions contain the following directive concerning the preparation of plans abutting tidal waters, which is not significantly different from the requirements or practice in 1922:

> The mean high water mark of all tidal waters and the low water mark of any lake, pond, or river and the middle line and side lines of any stream or

[6] Although the Judgment Plan would not have been issued by the court until sometime in 1922 at approximately the same time of the issuance of the decree of registration on April 7, 1922, the plan is dated November 22, 1921 and indicates that William S. Swift was the surveyor.

> brook are the only water lines ordinarily required. *Where title instruments indicate other water lines are determinative or where a contest with respect to the location of any water line is anticipated, additional data concerning the water levels or courses may be required...*The location of the low water mark or the 100-rod line is necessary when lines over flats or foreshore are to be determined.

2006 Land Court Survey Instructions, section 2.1.3.2.2 (emphasis added). As the Ayers petition did not request determination of the boundaries of flats and did not involve a "contest with respect to the location of any water line," additional data and "physical record features that limit and lie within or adjacent to the flats" as required by the 2006 Land Court Survey Instructions would not have been required. See id., section 2.1.3.2.4.

The mean high water mark shown on the Filed Plan was incorporated into the Judgment Plan in precisely the same manner and location as shown on the Filed Plan although it is not labeled as such. Compare App. at 37 with App. at 67. Given that the Filed Plan is part of the case record, however, and clearly indicates the only high water mark that was part of

the record of the case,[7] it is indisputable that it is this high water mark, as it existed in 1921, that is referenced in the Waterways Encumbrance on the certificate. The Waterways Encumbrance clearly and unequivocally preserves the public rights "legally existing" in and over the parcel below mean high water mark as shown on the Filed Plan and preserves the only rights the public had under the Colonial Ordinance, *i.e.*, the rights to fishing, fowling and navigation.[8]

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[7] The Commonwealth's suggestion that the "historic high water mark" was intended must be rejected given the complete lack of reference to the historic high water mark in the file of the registration case. As with any matter in litigation, the court can only adjudicate what is before it and the Land Court entered its decree based on the facts in its record. The fact that other cases refer to other water marks, high and low, is simply not relevant to these proceedings. E.g., Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 630 n. 1 (1979)(low water mark determined in 1846 relevant in court's determination); McCarthy v. Town of Oak Bluffs, 419 Mass. 227, 230-31 (1994)(historic 1903 low water mark referenced).

[8] The Waterways Encumbrance was included in response to the request of the Commonwealth, which approved the form of decree as issued. The question is not whether the rights conferred by the Colonial Ordinance needed to be stated on the face of the decree but rather the *location* of the tidal lands subject to those rights. Neither the Arno decree nor the general statutes or common law the Commonwealth provide for rights of the public or others landward of the mean high water mark as identified on the Filed Plan and shown on the Judgment Plan.

The Commonwealth's assertion that the Attorney General's 1922 request for the insertion of language preserving the public's rights referred to something other than the high water mark as it existed in 1922 because that high water mark coincided with the seaward edge of the bulkhead, Commonwealth's Brief at 13 and n.6, is simply inaccurate. An examination of both the Filed and Judgment Plans shows the bulkhead as extending substantially beyond the mean high water mark and accordingly the decree preserves the public's rights in that portion of the bulkhead extending seaward of that high water mark. The Attorney General, moreover, would have had no reason to argue, suggest or otherwise urge that the public had rights landward of the mean high water mark as shown in 1922 for the simple reason that the public had no such rights as those rights were extinguished once the land was filled pursuant to a valid license.

C. THE PUBLIC'S INTEREST IN MAINTAINING THE CERTAINTY OF TITLES PREVIOUSLY ADJUDICATED THROUGH THE LAND REGISTRATION SYSTEM REQUIRES THAT THE DECISION OF THE LAND COURT BE AFFIRMED.

The Land Court decree of 1922 registered title in Arno's predecessor subject only to rights of the public below the mean high water mark. Pursuant to

G.L. c. 185, §46, an owner of registered land "shall hold the same free of all encumbrances except those noted on the certificate." The 1922 certificate at issue here adjudicated title in Arno's predecessor free and clear of any rights landward of the mean high water mark and conclusively fixed the location of that mark.[9] That judgment of registration is conclusive on all persons including the Commonwealth and is the result of an *in rem* proceeding. G.L. c. 185, §45. The Land Court's 2004 order determining in the Land Court proceeding that the 1922 decree meant what it said and that the mean high water mark referenced on the face of the decree referred to the only high water mark in the record of the case was nothing more than a clarification and restatement of the 1922 decree and, as all parties concede, a predicate to the question of whether the Commonwealth has regulatory jurisdiction (as opposed to a proprietary interest) in the land subject to that decree.

[9] None of the statutory exceptions set forth in G.L. c. 185, §46 are applicable here. The only rights "arising or existing under...statutes of this Commonwealth" arguably relevant are rights under the Colonial Ordinance which affect only land below the mean high water mark.

The suggestion by the Commonwealth that other high water marks, including the historic high water mark, found nowhere in the record of the land registration case at issue, should be considered now by the court in a subsequent proceeding in the same registration case clarifying (to the extent such clarification was even necessary) the court's clear and unequivocal 1922 decree is unprecedented and would invite the presentation of "new evidence" in all previously adjudicated Land Court registration cases. If such a process were to be endorsed by this Court it would call into question the certainty of all registered land titles throughout the Commonwealth.[10] The Commonwealth's argument is nothing more than an attempt to reopen evidence in a fully adjudicated proceeding that was concluded 89 years ago.

Nor is the Commonwealth's misguided effort necessary to preserve the public rights or public

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[10] Title examiners, conveyancers and others who have relied on the finality of those certificates for over one hundred years would be required to examine and determine whether the high water mark shown on a plan reflected the "historic" high water mark and whether rights in public not set forth on the certificate would exist as a result. The resulting lack of defined limits of private and public rights is totally inconsistent with the purpose of the registration system.

interest in tidal flats. As noted *supra*, at the time this land was registered, the public had no rights above the then existing mean high water mark. That this case may have been argued differently today by the Attorney General in light of the 1983 amendments to Chapter 91 and this Court's 1978 decision in Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629 (1979)[11] should not change the result or require readjudication of a previously settled land registration case. The original registration case is an *in rem* proceeding affecting the land described in the certificate and shown on the Judgment Plan beyond the boundaries of the land adjudicated. The supplemental petition that was the subject of the 2004 Land Court Order is likewise *in rem* and related solely to the clarification of what was encompassed by the original registration decree. Accordingly, this court should affirm the Land Court's determination that neither the Commonwealth nor members of the public have any proprietary interest in land shown on Arno's certificate above the mean high water mark as it existed in 1922 and as it was shown on the Filed Plan.

[11] Boston Waterfront was a direct appeal by the Commonwealth from a judgment of registration and was accordingly consistent with G.L. c. 185, §45.

The question whether a proprietary interest is necessary in order for the Commonwealth to assert regulatory jurisdiction under Chapter 91 is addressed below.

D. THE DEPARTMENT OF ENVIRONMENTAL PROTECTION LACKS AUTHORITY TO REGULATE LAND IN WHICH THE COMMONWEALTH HAS NO PROPERTY INTEREST UNDER THE PROVISIONS OF CHAPTER 91.

1. Under Chapter 91 the Authority to Regulate Tidelands Must Be Based on the Commonwealth's Property Interest in Those Tidelands

The Superior Court judgment (entered by the Land Court judge pursuant to an interdepartmental transfer) that no license pursuant to the provisions of G.L. c. 91 was required for the building that Arno planned to construct should be upheld. Both the provisions of Chapter 91 and the regulations promulgated by the Department of Environmental Protection ("DEP") at 310 C.M.R. 9.01 ("Chapter 91 Regulations") regulate the licensing of structures and fill in the waters of the Commonwealth and on great ponds. The Chapter 91 regulatory scheme explicitly requires that only lands in which the Commonwealth has a property interest is subject to regulation. Although this regulatory scheme differentiates between the types of interests held by the Commonwealth in such land in determining

the extent of the regulatory reach on such land, the necessary predicate to imposition of any regulation is that the Commonwealth have some property interest.

The provisions of both Chapter 91 and the Chapter 91 Regulations seek to protect the rights of the public in land along the shoreline. In Boston Waterfront, 378 Mass. at 654, an appeal from a judgment of registration pursuant to G. L. c. 185, the Court found that title to certain filled land was held in fee simple but subject to a condition subsequent that the land be used for the public purposes expressed in the so-called "Lewis Wharf" statutes that permitted the original filling of such area. The land in question had been located below the historic low water mark prior to said filling. Id. at 630. Filled land located between the historic high and low water marks was also adjudicated, but the judgment of registration to that portion of the parcel without condition was consented to by the Commonwealth and not appealed. Id.

In response to issues raised by Boston Waterfront, the Legislature enacted the present regulatory scheme embodied in Chapter 91. See Fafard v. Conservation Commission of Barnstable, 432 Mass.

194, 197 (2000). Although licensing of coastal structures first began in 1866, see discussion of the history of licensing in Trio Algarvio v. Commissioner of the Department of Environmental Protection, 440 Mass. 94, 97-100 (2003), it was not until 1983 that the Legislature amended Chapter 91 to provide explicit regulatory authority for the licensing of previously filled tidelands to protect public trust rights of the type at issue in Boston Waterfront and delegated the authority for promulgating regulations pertaining to such licensing to DEP.[12] St. 1983, c. 589, An Act Relative to the Protection of the Massachusetts Coastline ("the Act"). This Court has recognized that the Legislature could delegate to DEP the right to regulate tidelands to protect the public trust rights in tidelands. See, Fafard, 432 Mass. at 199; cf. Moot v. Department of Environmental Protection, 448 Mass.

[12] Under G.L. c. 91, §14, a license may be granted by DEP for certain construction and filling below the high tide line. In licensing of fill or structures on private or Commonwealth tidelands, DEP must find that such structures or fill "are necessary to accommodate a water dependent use" and for Commonwealth tidelands only, that such structures or fill "shall also serve a public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands." Id; 310 C.M.R. 9.53.

340, 353 (2007)[13] (exemption from licensing for landlocked tidelands contained in the Chapter 91 Regulations beyond the authority of DEP to promulgate without legislative authorization). Thus, after Boston Waterfront, the protection for public trust rights was codified by the Act in Chapter 91 and regulatory oversight of such public trust rights was delegated to DEP. See "Expanding Public Access by Codifying the Public Trust Doctrine: the Massachusetts Experience," 42 Me. L. Rev. 65 (1990).

The Act also inserted the definitions of Commonwealth tidelands and private tidelands. "Commonwealth tidelands" are defined in section 1 as "tidelands held 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." G.L. c. 91, §1 (emphasis added). "Private tidelands" are defined as "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." G.L. c. 91, §1 (emphasis added).

[13] Currently awaiting further decision by this Court.

Both "condition subsequent" and "easement" are property ownership terms that describe property interests. Thus, the statutory definitions set forth in G.L. c. 91, §1 require that the Commonwealth have a property interest in the subject property before licensing under G.L. c. 91, §14 is required. If the Commonwealth does not possess a property interest, whether an easement or otherwise, there is no authority to regulate under Chapter 91.

2. Because the Commonwealth Has No Property Interest in the Arno Upland, DEP has No Authority to Regulate Under Chapter 91.

The Commonwealth's argument that the lower court's focus on property rights undermines the scope of Chapter 91 is misplaced because if the public has no property right in the upland portion of Arno's land, there are no interests of the public to protect in that portion of the land. In this case, Arno sought a determination by way of a petition pursuant to G.L. c. 185, §115 as to the extent of the public's interest in his property because DEP asserted Chapter 91 regulatory jurisdiction over his entire property. The Land Court found that the Commonwealth held no rights in the upland portion of Arno's land and that

the structure sought to be constructed by Arno was located on the upland portion of the land.

Based on that determination, the Court concluded that because the licensing provisions of Chapter 91 and the Chapter 91 Regulations apply only if public property rights exist in the portion of the property sought to be regulated, DEP lacked regulatory authority over Arno's upland. The definitions of Commonwealth tidelands and private tidelands contained in the Chapter 91 Regulations recognize that a judicial decree may defeat the presumption that the public holds rights in either type of tidelands, 310 C.M.R. 9.02, and explicitly support this result.

Courts throughout the years have ruled on petitions brought by private owners to clarify the extent of ownership of land and flats along the shore, including where the rights of the public begin and end in such areas. Adjudication in the Land Court pursuant to G.L. c. 185 provides a statutory vehicle for conclusively determining these rights because the fundamental issue involved in cases affecting public trust rights is the issue of title. Resolution of who holds title and the monuments on the ground establishing the limits of such title, whether title

is encumbered by public easement rights (private or public), and the location of such easement rights are matters uniquely within the expertise and jurisdiction of the Land Court. See, e.g., Rauseo, 65 Mass. App. Ct. at 225.

The issue of title to tidelands originates with the Colonial Ordinance of 1647 which granted title to the low water mark to upland owners subject to the rights of navigation, "until built upon or inclosed." Commonwealth v. Alger, 61 Mass. (7 Cush) 53, 79 (1851). This grant was necessary to encourage the construction of private wharfs to the low water mark, Michaelson v. Silver Beach Improvement Association, 342 Mass. 251, 257 (1961), and was made subject to the public rights to fish and navigate.

Those public rights have been construed by the courts as limited and as not including more general rights of passage. Barry v. Grela, 372 Mass. 278, 279-280 (1977)(public right to walk across private property between the high and low water marks only to exercise the right to fish from a public jetty); Butler v. Attorney General, 195 Mass. 79, 83-84 (1907)(land registered in fee simple, subject to an easement in the public between the high and low water

marks for fishing, fowling and navigation, but not for bathing purposes); Opinion of the Justices, 365 Mass. 681, 690 (1974)(legislation that would allow unfettered public access to the area between the high and low water marks "would effectively appropriate property of individuals to a public use"); Michaelson, 342 Mass. at 261 (public has no rights to maintain a beach on property accreted after construction of a breakwater; accreted area below mean high water was owned by the upland owner subject to public easement for fishing, fowling and navigation); Rauseo, 65 Mass. App. Ct. at 226 (property subdivided no longer connected to the shoreline not subject to any retained public trust rights).

3. The Lower Court's Decision Preserves the Public Trust Rights Below the High Water Mark

The Commonwealth's argument that the effect of the Land Court decision is the extinguishment of public trust rights in the Arno parcel ignores the Court's explicit finding that Arno's title is subject to public trust rights seaward of the 1922 high water mark. The Land Court's decision did not extinguish public rights but rather fixed the location of these rights. Consistent with this finding, Arno's

predecessor in title obtained a license (License No. 870) in 1928 to construct a bulkhead seaward of the high water mark App. at 59[14]. The Chapter 91 regulatory scheme applies to the areas where there are public property rights - which for Arno's property are located seaward of the 1922 high water mark.

Tidelands regulated and licensed by DEP pursuant to Chapter 91 and the Chapter 91 Regulations are either Commonwealth tidelands or private tidelands. While the Chapter 91 Regulations may contain broader licensing language,[15] the scope of the Chapter 91 regulatory scheme is centered on whether (and what portion of) a parcel is either Commonwealth or private tidelands. Restrictions on size, location, uses, and the benefits to be provided by a project as required by the Chapter 91 Regulations are predicated on the classification and location of tidelands on the parcel. Once land has been conclusively adjudicated as upland pursuant to G.L. c. 185, there are no public

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[14] The license issued by the Department of Public Works (issuer of Chapter 91 licenses at that time) indicates that the area to be filled would be classified as private tidelands because no approval was received from the Governor and Council as required by G.L. c. 91, §14.

[15] See "Massachusetts Tidelands Laws and Regulation," September 1992 Mass. L. Rev. 98 (1992).

property interests or rights that attach and the classification of tidelands as Commonwealth or private is irrelevant. Accordingly, because the land in question has been conclusively determined to be upland and not "tidelands," there is no public property interest and nothing to regulate or license under Chapter 91 or the Chapter 91 Regulations.

The fact that the extent of uplands and private rights was fixed by the Land Court does not negate public trust rights but rather locates on the ground the geographic extent of such rights and serves to focus regulatory attention and authority on tidelands. The location of tidelands subject to public trust rights does not derogate from these rights - it rather delineates for both the landowner and the Commonwealth the extent to which the Chapter 91 regulatory scheme will affect the ownership of such land.

As the Attorney General noted, Chapter 91 is the regulatory scheme chosen to preserve and protect the public's rights in tidelands. Commonwealth Brief at 47. But what the Attorney General fails to recognize is that first and foremost the public must have a property interest to protect. Identifying, defining and fixing conclusively the area in which the public

has such rights through the Land Court registration process is of paramount importance and is a subject concerning which the legislature granted exclusive jurisdiction to the Land Court pursuant to G.L. c. 185. Where the Commonwealth and the public hold no title or property interest, the provisions of Chapter 91 or the Chapter 91 Regulations cannot apply. The decision of the Land Court should be affirmed.

CONCLUSION

For the reasons stated above, the Amici respectfully urge this court to reject the Commonwealth's invitation to relitigate the extent of private lands adjudicated in a 1922 decree of registration and affirm the order and judgment of the Land Court below.

Respectfully Submitted,

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