COASTAL CONFUSION

Ruling Creates Uncertainty About Future Waterfront Development

Regulators Face ‘Profound Challenges’ Updating Laws to Reflect Decision

By R.J. Lyman | Special to Banker & Tradesman | Jul 24, 2022 | Reprints | Print

A state Supreme Judicial Court ruling could make it harder for owners of waterfront properties to make improvements and refinance or re-lease them amid uncertainty about enforcement of Massachusetts’ Chapter 91 land use rules.

A unanimous state Supreme Judicial Court concluded in *Armstrong vs. Secretary of Energy and Environmental Affairs* that state decisions about waterfront commercial development must be made by the Department of Environmental Protection, rather than the secretary of Energy and Environmental Affairs.

This seemingly technocratic requirement exposes profound challenges for those charged with administration of Massachusetts General Laws Chapter 91 and their counterparts at the Boston Planning & Development Agency in revisiting old decisions and reforming current regulations. These challenges in turn present risk and opportunity for property owners and community members.

To refresh, Chapter 91 is the mid-19th century statutory codification of the public trust doctrine, first set forth in our Colonial Ordinances of 1641-47 and rooted in ancient English and Roman legal traditions. The public trust doctrine protects the public's right to use present and former tidelands for traditional activities like fishing, fowling, navigation and other proper public purposes.

Under the statute, the legislature or its delegatee can license non-water dependent use of present or former tidelands, but only if its public benefits outweigh its detriments. The present regulatory scheme was fashioned after the SJC ruled in a 1979 case that even land deeded for private use remained subject to this condition subsequent.

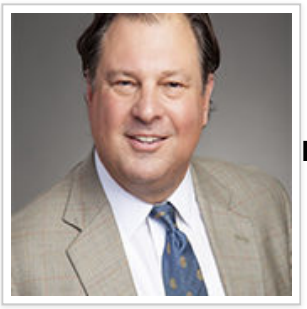
To implement this system, the Department of Environmental Protection – the legislature's delegatee – promulgated elaborate regulations in 1990 after a decade's labor. The core of the scheme (at least the part that's proven controversial) is a set of dimensional standards for non-water dependent uses on former tidelands now filled. Because filled tidelands surround much of Boston's Inner Harbor, the regulations' dimensional standards were principally informed by Boston zoning, which reflected the then-existing industrial uses along the waterfront.

Will Refinances, Leases Be Impossible?

To allow for commercial development beyond these standards, and to reflect the conventional primacy of local government in land-use decision-making, the regulations created a mechanism for relief: the Municipal Harbor Plan. There are lots of intricate details, but the bottom line is straightforward. The MHP process gave the power to set limits to the environmental secretary, rather than DEP; because the public trust doctrine's responsibilities can be delegated only by the legislature (which it did, to DEP alone), the SJC struck down the MHP mechanism.

The decision creates the biggest immediate impact on those seeking to build under the downtown Boston MHP that was at issue. But, as a footnote toward the end of the opinion revealed, the decision's impact covers the waterfront, so to speak. Seeking not to upset three decades' reliance on the existing scheme, the SJC pointed out that the appeal periods for the vast majority of MHPs elsewhere (as well as the Chapter 91 licenses issued under them) had long since expired.

This may not prove sufficient to enable refinancing, leasing, improvement or other activities on the commercial buildings that now line the waterfront, authorized well beyond the regulatory baseline standards and dependent upon MHPs now invalidated.



Regulations Ripe for Revision

DEP may have a fix for this, in the form of a comprehensive recitation of all the MHP substitute standards, appended to the existing regulations after appropriate rulemaking. This is an excellent start, although all will be wise to ensure these appended standards both authorize enough and do not enable too much. It will be a tough drafting challenge and a delicate balancing act for the regulators and require careful analysis and forceful advocacy from property owners.

But even beyond this essential first fix, the existing regulatory scheme appears ripe for revision. Most importantly, irrespective of the recent decision, the program appears aimed at public purposes deviant from present priorities.

As the climate changes and the seas rise, what was good for wharfing out may not be so good at shoring up. A comprehensive regulatory reform may prove not only necessary but also useful, moving from old industrial zoning standards to a modern approach to resiliency and inclusivity, as yet another adaptation of the ancient public trust to a modern challenge.

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