

# **Keeping Vessels at the Water's Edge: Progressive Stewardship of Public Trustlands In Massachusetts**

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## **Introduction**

As in coastal states everywhere, in Massachusetts the waterfront infrastructure necessary to support fishing, shipping, passenger transportation, and other maritime industry has been difficult to sustain in the face of intense pressure for development of incompatible (usually nonwater-dependent) uses. But we in the state Office of Coastal Zone Management (CZM) are pushing back, in collaboration with colleagues in the Department of Environmental Protection (DEP). Together these sister agencies work to preserve and enhance vessel-related infrastructure as a primary objective of state control over development on tidelands subject to the public trust doctrine, which in our jurisdiction encompasses both present (“flowed”) and former (“filled”) submerged lands and intertidal areas.

The waterfront at work in Massachusetts is safeguarded through application of the so-called Chapter 91 Regulations, which govern permitting of all projects involving proposed use changes or structural alterations on flowed and filled tidelands. These regulations contain several explicit provisions of both a protective and a promotional nature. Included (among other things) are standards that reserve the waterway and the immediate waterfront for water-dependent uses exclusively; require development of new facilities for water-based public activity; prohibit certain inappropriate projects on prime port lands called Designated Port Areas; prevent involuntary displacement of existing water-dependent uses; invite “competing party” proposals for higher and better maritime activities; and allow use diversifications so maritime businesses can tap opportunities for internal economic subsidy. The author’s presentation at the Working Waterfronts and Waterways 2007 conference will review these major provisions of the regulations and provide examples of application to actual cases.

## **Background**

The Commonwealth's primary tool for protection and promotion of active water-dependent use of its tidelands and other waterways is Massachusetts General Law Chapter 91, the “Public Waterfront Act”, which established what is now the Waterways Regulation Program at DEP. The law was first enacted in 1866, making it the oldest regulatory program of its kind in the nation, but the underlying philosophy goes back another 2000 years to the writings of the Roman Emperor Justinian circa 530 AD. His was the first expression of what has since become widely known as the Public Trust Doctrine: “By natural law itself, these things are the common property of all: air, running water, the sea and with it the shores of the sea.” In time the English courts embraced the doctrine by holding that while the Crown generally had complete powers of

ownership over the realm, any lands lying seaward of the high tide mark were held *in trust* for the common benefit of the public, for commerce, fishing, and other activities in which all citizens were free to engage. This same doctrine was transplanted to America with the British colonists and was first codified in this country in the Massachusetts Colonial Ordinances of 1641-47.

More than three centuries later, the public trust doctrine in Massachusetts was further elaborated in a momentous decision by the state Supreme Judicial Court, in the case of *Boston Waterfront Development Corp. v. Commonwealth* (1979). Here, the court was presented with the question of whether the public trust was terminated in law when tidelands were buried in fact as a result of authorized filling -- as virtually everyone, regulators and property owners alike, had been assuming for the past two centuries. The court's definitive answer was that the public's property rights in formerly submerged tidelands are not so easily extinguished. After an extensive review of prior case law, the court declared that even though the legislative grant in question was 150 years old, it was still impressed with an "implied condition subsequent" that the property continue to be used for a public purpose.

These words ushered in a new era in tidelands regulation, marked soon thereafter by two further milestone events. First was the Legislature's passage in 1983 of amendments to Chapter 91, which extended DEP's licensing jurisdiction to filled areas comprising most urbanized shorefronts in the state, and which gave the agency a mandate to ensure that all tidelands "are used for water-dependent use or otherwise serve a proper public purpose which provides greater benefit than detriment to the rights of the public in said lands." Second was the promulgation in 1990 of sweeping revisions to the existing waterways regulations, designed to strengthen the state's overall ability to provide effective stewardship of both flowed and filled tidelands. A Preamble published with these regulations articulated five basic goals for the enhanced Waterways Regulation Program, of which Goal #1 reads as follows:

*Protect and promote tidelands as a workplace for commercial fishing, shipping, passenger transportation, boat building and repair, marinas and other activities for which proximity to the water is either essential or highly advantageous.*

The Preamble further states that the Chapter 91 Regulations contain several important features to ensure that the immediate waterfront is used primarily for water-dependent purposes. These features are grouped under three basic headings, each described below.

### **Provisions to Prevent Undue Loss of Capacity for Water-Dependent Use**

Prevention should be an important component of any sound environmental management program, and in this case what needs to be prevented is excessive encroachment by private, nonwater-dependent development that diminishes the utility and adaptability of shoreline areas for water-dependent purposes. Accordingly, the Chapter 91 Regulations contain several provisions designed to conserve tideland capacity

to accommodate future water-dependent uses, especially in the immediate vicinity of the water's edge.

One objective is to halt the proliferation of new fill and structures for nonwater-dependent use on flowed tidelands, which reduce space for navigation and other water-based activities in already-crowded harbors. It is also important to give the highest priority to water-dependent industrial development within the 11 state Designated Port Areas (DPAs), which represent the last sites in the Commonwealth still suited for maritime commerce that relies upon deep channels, good landside transportation facilities, and other infrastructure typical of a working port. Lastly, the regulations are intended to reduce overly dense development of housing, offices, and other private uses that often give rise to user conflicts and building configurations that are incompatible with water-related public interests (via wind/shadow impacts, limitations on access by trucks and other commercial vehicles, etc.). These problems can be mitigated to some extent by management and design solutions on a case-by-case basis, but there is also a need to establish clear thresholds on key development parameters to attain an adequate minimum level of prevention of adverse effects.

Among the primary provisions of the Chapter 91 Regulations that address these objectives are the following:

#### Outside of DPAs

- on flowed tidelands, cardinal rule is that no new fill or structures are allowed for nonwater-dependent use (except on a one-for-one replacement basis); existing piers may be redeveloped for nonwater-dependent use but only if the use is also a facility of public accommodation;
- on filled areas, new or expanded buildings for nonwater-dependent use must be set back from water's edge by 25'-100', depending on lot depth, and are subject to density controls (maximum site coverage of 50%; height limits beginning at 55' within first 100' from the shoreline)
- private residences and other facilities of private tenancy are generally excluded not only from piers over water but also from ground-floor interior spaces within 100' of the shoreline, because these areas are where conflicts and incompatibilities tend to be most acute due to space limitations.

#### Within DPAs

- on flowed tidelands, only structures or fill for fishing/shipping, waterborne passenger transportation, and other water-dependent industrial use are allowed; only exception is for public pedestrian access structures, if not feasible to locate on land;
- in filled areas, prohibit uses that are inherently incompatible with maritime operations, like housing, hotels, parks and entertainment complexes, and limit the amount of space that can be devoted to non-port commercial and industrial development to 25% of the pier and land area on the project site (provided a proposed use is determined to be compatible on a case-by-case);
- even if categorically eligible for a license, nonwater-dependent projects may not preempt water-dependent industrial use within the DPA, especially if such a use is

proposed by a “competing party; ” otherwise, reasonable arrangements must be made to “prevent commitments of space or facilities that would significantly discourage present or future water-dependent industrial activity on the project site or elsewhere in the DPA.”

Several of these dimensional and use restrictions, it should be noted, are subject to modification by an approved municipal harbor plan, provided the plan establishes alternative standards that will be of comparable or greater effectiveness in meeting the state tidelands policy objectives in question.

### **Provisions to Protect Against Conflicts with Existing Water-Dependent Use**

A separate section of the Chapter 91 Regulations begins with the general admonition that any project applying for a license “shall preserve the availability and suitability of tidelands... and other waterways that are in use for water-dependent purposes,” and to this end three specific standards must be met. First, the project may not significantly interfere with another littoral or riparian property owner’s right to approach their property from a waterway and vice-versa. In the case of a proposed structure that extends perpendicular to the shore, the DEP generally requires its placement at least 25 feet away from the abutting property lines wherever feasible. Second and more broadly, the regulations stipulate that the project shall not significantly disrupt any water-dependent use in operation, as of the date of license application, at an off-site location within the proximate vicinity of the project site. Projects must include such mitigation and/or compensation measures as DEP deems appropriate if such disruptions cannot be avoided entirely.

The third and most interesting standard of protection is that no proposed project may displace any water-dependent use that has occurred on the site within five years prior to the date of license application, with two exceptions: (a) if the use did not take place on a reasonably continuous basis for a substantial period of time; and (b) if the use has been or will be voluntarily discontinued at the site by the user, for reasons unrelated to the proposed project or as a result of voluntary arrangements with the applicant. Unless the exceptions clearly apply, the project applicant must make arrangements determined to be reasonable by DEP for the water-dependent use to be continued at its existing facility, or at a facility at an alternative location “having physical attributes, including proximity to water, and associated business conditions which equal or surpass those of the original facility,” provided that DEP determines that it is not appropriate for the water-dependent use to continue on the site. Otherwise, only temporary relocation may occur as necessary for project construction.

### **Provisions to Promote Expansion of Water-Dependent Use**

While market forces rather than government actions ultimately determine the future of water-dependent development in Massachusetts, there are several things the

state has done with its tidelands regulatory powers to give the private sector a boost in that regard. The major initiatives in this regard are as follows:

- apply fewer substantive standards, less complicated procedures, and much lower fees to water-dependent projects as compared to nonwater-dependent projects;
- allow water-dependent projects to include a certain amount of “accessory” uses that can add to the overall profitability of the principal business without triggering the higher standards that would otherwise apply to such uses if developed separately; examples of uses that may be determined to be accessory include restaurants and retail facilities primarily serving patrons of the water-dependent use on the site, bait shops, boat sales, and other marine-oriented retail facilities;
- require development of nonwater-dependent commercial and industrial uses in a DPA to “provide water-dependent industrial uses in the DPA with direct economic or operational support, to an extent that adequately compensates for the reduced amount of tidelands on the project site that will be available for water dependent industrial use during the term of the license;”
- require development of any nonwater-dependent project on non-DPA waterfront sites to provide “one or more facilities that generate water-dependent activity, with prime consideration given to facilities that promote active use of the project shoreline, such as boat landing docks and launching ramps, marinas, fishing piers.....and water-based public facilities [such as] ferries, cruise ships, water shuttles, public landings and.....excursion/charter/rental docks, and community sailing centers;
- allow recreational boating facilities to sell long-term leases for up to 50% of marina slips in order to tap equity for improvement in facility infrastructure, but prohibit ownership of such “dockominiums” from being tied to ownership of shoreside condominiums in order to discourage the closing of commercial marinas;
- on former submerged lands containing the highest level of trust-protected public property rights, do not allow nonwater-dependent projects if a determination is made that the project site is necessary to accommodate a public agency that intends to pursue a water-dependent project on such lands, provided the agency meets the eligibility criteria for standing as a “competing party.”

### **Concluding Remark**

With the help of the Public Trust Doctrine, where there’s a will there’s a way for state regulatory authorities to make a difference in the battle to keep vessels at the water’s edge. This is true despite the inexorable pressure to develop our waterfronts for nonwater-dependent uses, and the increasing inability of traditional maritime businesses to compete economically for access to prime sites.