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MASSACHUSETTS'S CHAPTER 91: AN EFFECTIVE MODEL FOR STATE STEWARDSHIP OF COASTAL LANDS

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I. INTRODUCTION

The South Boston waterfront area has been described as the “last frontier” of developable property along the highly coveted Boston waterfront.¹ As with most urban development projects, there are many stakeholders with different and often competing interests in the South Boston waterfront area, including landowners, developers, architects, historical associations, neighborhood groups, local planning boards, and state environmental agencies. Through the operation of Chapter 91, the Massachusetts Public Waterfront Act, the Commonwealth has mandated that another interest, the public’s interest in tidelands, will not only be considered, but accommodated.

Massachusetts has taken a farsighted and comprehensive approach to ensure that the shores of its sea remain the common property of its citizens. Through Chapter 91 and its attendant permitting scheme, Massachusetts has asserted its sovereign obligation to protect the public’s interests in the shores of the sea by regulating the development of tidelands in the Commonwealth. As private property owners and municipalities seek to develop land along the water’s edge, the provisions of Chapter 91 provide the basis for the Commonwealth to both review proposals for development and changes to

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1. See generally *Water’s Edge*, BOSTON GLOBE, Oct. 25, 1998, special supplement. Boston’s Mayor Thomas Menino renamed the area the South Boston waterfront in June of 1999, some say as a political concession to South Boston residents, to settle the dispute among stakeholders as to its name. Some stakeholders, including the head of the Boston Redevelopment Authority, wanted to call the area the “Seaport district,” which is the name the area has been called since the major development projects were first proposed. See generally Anthony Flint, *In Waterfront Name, Control Issues Flip-flop Sparks Fears on S. Boston Influence*, BOSTON GLOBE, June 15, 1999 at B1. Because the name of the Seaport area was only recently changed, many references in this comment refer to the project as the Seaport District, rather than the South Boston waterfront.

existing waterfront structures, and require the inclusion of conditions that promote public use of and access to the water.

The Rowes Wharf complex, built in the mid-1980s, on Boston's Atlantic Avenue is one of the more obvious examples of Chapter 91's success in promoting public access without sacrificing commercial profit. In addition to the archway that provides visual access to the water from the street, Rowes Wharf features pedestrian walkways and plazas, public restrooms, a marina, temporary boat dockage, ferry terminals, a watershuttle to Logan Airport, and a public observatory in the rotunda.² Although opponents of Rowes Wharf questioned whether the public would feel comfortable walking along the million dollar condominiums, anyone who has wandered through the grand archway on a sunny New England day knows that this early fear has proven unwarranted.³ It is questionable whether the developers would have provided these significant public benefits without the existence of Chapter 91.

Chapter 91 went largely unchanged from its adoption in 1866 until the Supreme Judicial Court issued its landmark decision *Boston Waterfront Development Corporation v. Commonwealth*, in which the court held that even formerly submerged land that had been filled and built upon remained impressed with a public trust.⁴ In 1983, the legislature responded to the decision by amending Chapter 91 to ensure that tidelands are either developed for a water-dependent use, or otherwise serve a proper public benefit. Developers strongly objected to the new regulations, largely due to the height and space restrictions that they mandated. Developers noted that the height of Rowes Wharf would have caused the project to fall out of compliance with Chapter 91 under the new regulations.⁵ Because there was considerable controversy over the amendments, the Department of Environmental Protection did not issue its clarifying regulations until seven years later in 1990.

The controversy over the regulations did not end once they were promulgated by the DEP. Two prominent Boston real estate attorneys, in a 1992 law review article, challenged the validity of the 1990 regulations on

2. See generally COASTAL ZONE MANAGEMENT/EOEA, COASTAL BRIEF NO. 9, 21-23 (1994).

3. See generally John King, *Developing the Waterfront Question: Should City and Rural Shore Property Be Treated Differently?* BOSTON GLOBE, Sept. 26, 1989, at 25 (asking how many people feel comfortable walking next to some rich person's condo).

4. *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 633 (1977).

5. See King, *supra* note 3.

several fronts.⁶ These critics of the 1990 regulations contended that the regulations were overbroad in their jurisdictional scope, inflexible, and created impermissible zoning-like restrictions. The critics also posed an interesting statute of limitations issue, noted but not fully addressed by the *Boston Waterfront* court, that could potentially undercut the Commonwealth's ability to regulate tidelands that it had previously conveyed to another party.

Because there has not been any litigation arising from the application of the 1990 regulations to a development project, many questions surrounding the regulations have gone unanswered by the courts. Given its far-reaching scope and size, however, the South Boston waterfront project may present an occasion for the courts to address some of the questions left unanswered by the *Boston Waterfront* decision and the regulatory scheme so dependent upon it.

This Comment first discusses the history of tideland ownership in Massachusetts and the history of the public trust doctrine in the Commonwealth, which provide the legal foundation for Chapter 91. The major provisions of Chapter 91 and the controversial regulations promulgated in 1990 by the Division of Waterways of the Department of Environmental Protection are then discussed. This Comment concludes that the agency did not exceed its delegated authority in enacting the 1990 regulations that give administrative effect to the provisions of Chapter 91. Finally, to highlight the role the statute continues to play in the creation of living and working waterfront communities, this Comment examines the South Boston Seaport project as a specific example of the way in which Chapter 91 is administered at the agency level.

II. LEGAL FOUNDATION FOR CHAPTER 91

Chapter 91's statutory scheme is based upon the public trust doctrine as it has been articulated by the United States Supreme Court and subsequent Massachusetts state court decisions. This section describes the history of the public trust doctrine in Massachusetts and how it has shaped Chapter 91 into its current form. Although the public trust doctrine has been widely accepted as a valid legal doctrine, it does stand on somewhat shaky ground because it lacks roots in either constitutional or English common law.

6. See John A. Pike & Herbert W. Vaughan, *Massachusetts Tidelands Laws and Regulations*, 78 MASS. L. REV. 98 (1992).

A. History of Tideland Ownership in Massachusetts

Tideland ownership in Massachusetts originated with a compromise between the common law principle that the English king could not convey the portion of a parcel of land subject to a *jus publicum*⁷, and the colonists' recognition of the importance of maritime commerce for the growth of the colony.⁸ The colonists brought to the Commonwealth the public trust doctrine, based upon natural law and codified by the Romans, that the air, running water, the sea and the shores of the sea are common property to all.⁹

The colonists, however, also had to find a way to promote maritime commerce if the Commonwealth was going to succeed. To balance the Commonwealth's interests in protecting public trust rights and promoting maritime commerce, the colonists enacted the Colonial Ordinances of 1641–1647; the ordinances granted property owners title to the low water mark, subject to the public's traditional rights of fishing, fowling and navigation, while the Commonwealth retained title to the tidelands below the low water mark.¹⁰

As a result of the Colonial Ordinances, Massachusetts became one of the few coastal states that extend the upland owner's title to the low water

7. By the law of all civilized Europe, before the feudal system obtained in England, there was no such thing as property in tide waters. Tide waters were *res omnium*, that is, they were for the common use, like air and light. . . . In England, the fiction of a fee in the Crown, and the control of the trust in Parliament, we understand to have been a mode, suited to the times and genius of the feudal law, for insuring to the State the control over tidewaters. The Commonwealth succeeds to this right of control.

Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. at 633 (quoting 1850 SEN. DOC. NO. 119, at 2). As with the people of all states after the American Revolution, the people of the Commonwealth acquired the "absolute right to all . . . navigable waters and the soils under them for their own common use." *Martin v. Waddell*, 41 U.S. 367, 410 (1842).

8. See *Commonwealth v. Roxbury*, 75 Mass. 451 (1857).

9. See *J. Inst.* 2.1.1.

10. The ordinance stated in part:

Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bayes, Coves and Rivers, so far as the Sea ebbs and flowes, within precincts of the towne where they dwell, unless the freemen of the same Town or the General Court have otherwise appropriated them. . . . [I]n all Creeks, Coves and other places, about and upon Saltwater, where the Sea ebbs and flowes, the proprietor of the land adjoining, shall have propriety to the low-water mark, where the Sea both not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder passage of boats or other vessels, in or through any Sea, Creeks or Coves, to other mens houses or lands.

The Book of the General Lawes and Liberties at 50, cited in *Opinion of the Justices*, 365 Mass. 681, 685 (1974).

mark.¹¹ Most coastal states instead hold title to lands below the high water mark, and thereby limit the upland owner's title to the high water mark.¹² Courts have interpreted the purpose behind the Commonwealth's extension of upland title to the low water mark in the Colonial Ordinances as evidence of the Commonwealth's intent to induce the erection of wharves for the benefit of commerce.¹³ The colonists reasoned that if upland owners were granted title to the land up to the low water mark, subject to the public's rights of fishing, fowling, and navigation, the owners would be induced to erect wharves and other aids to navigation that would in turn foster maritime commerce.¹⁴ Therefore, although private upland ownership in Massachusetts has included tidelands landward of the low water mark since the Colonial Ordinances were enacted, this extension of ownership from the high water mark to the low water mark originated from the Commonwealth's intent to confer a public benefit upon its citizens, not from an intent to confer a benefit upon private owners.

B. State's Role as Guardian of Public Trust Rights

The public's rights of fishing, fowling and navigation, to which private ownership of tidelands is subject, would be meaningless without sovereign protection of these rights through enforcement. The United States Supreme Court held in *Shively v. Bowlby*, that each state has the authority to define the scope of its own public trust.¹⁵ It was in this recognition of the state's role as guardian of the public's interest in submerged lands that moved the Supreme Court, in its landmark decision *Illinois Central R.R. v. Illinois*, to hold that a state can only grant parcels of submerged land to private parties when there is a corresponding significant public purpose served by the grant.¹⁶ Moreover, a legislative grant necessarily became revocable once the

11. See generally JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 13 (2nd ed. 1994).

12. See *id.*

13. See, e.g., *Storer v. Freeman*, 6 Mass. 435, 438 (1810); *Commonwealth v. Roxbury*, 75 Mass. 451, 515 (1857); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 360 (Mass. 1979).

14. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. at 630.

15. See *Shively v. Bowlby*, 152 U.S. 1 (1894). The Supreme Court stated: "[B]ut leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States." *Id.* at 58.

16. See *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452 (1892). The Court concluded that an Illinois Act which granted a private corporation rights in submerged land in Lake Michigan could be repealed because abdication by the state of its general control over its navigable waters was not consistent with the trust devolved upon it to preserve such waters for the public's use. See *id.* at 453. In a 1997 law review article, James Rasband has

public purpose ceased to exist.¹⁷ As the Supreme Court stated: “The State can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”¹⁸ Therefore, although individual states have the authority to define the scope of their public trust doctrines, they do not have the authority to relinquish their obligations over these unique parcels of land unless there is a significant corresponding public purpose served by the relinquishment.

Massachusetts has taken seriously its sovereign duty, mandated by the United States Supreme Court, to protect the public trust rights of its citizens. The Massachusetts legislature recognized the necessity to regulate harbor development as early as 1835.¹⁹ In 1851, the legislature’s power to regulate the upland owner’s rights in tidelands was upheld by the Supreme Judicial Court in *Commonwealth v. Alger*.²⁰ The court held the “legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties.”²¹ Having received affirmation of its authority from the Supreme Judicial Court, the legislature took an additional step to protect the public’s interests in tidelands by establishing a licensing board to protect the public interest in tidelands, establish harbor lines, and prescribe plans for all tideland construction.²² This act governing tidelands development was eventually codified into its current form in 1866 as Massachusetts General Law chapter 91.²³

challenged the validity of linking the equal footing doctrine of *Shively v. Bowlby* with the public trust doctrine in *Illinois Central*. Rasband suggests that the two cases are irreconcilable because the *Shively* court focused on the state’s intent to convey whereas *Illinois Central* focused on the state’s power to convey. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 18–21 (1997). Rasband, however, also notes that only a handful of state courts have refused to follow *Illinois Central*. See *id.* at 21.

17. See *Illinois Central Railroad v. Illinois*, 146 U.S. at 452.

18. *Id.* at 453.

19. See generally ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA’S COASTS* 168 (1994).

20. *Commonwealth v. Alger*, 61 Mass. at 53.

21. *Id.* at 95.

22. See 1866 Mass. Acts c.149.

23. ARCHER, *supra* note 19, at 169. In general, a Chapter 91 license is required if there has been an alteration in tidelands, great ponds, and certain rivers and streams. Types of structures requiring authorization include piers, wharves, floats, retaining walls, revetments, pilings, bridges, dams and waterfront buildings. Some structural changes and changes in use

C. *The Legacy of Boston Waterfront Development Corp.
v. Commonwealth*

Neither the courts nor the legislature of the Commonwealth made any further attempt to define the scope of the public trust doctrine in Massachusetts until the Supreme Judicial Court rendered a highly controversial decision in 1979.²⁴ In *Boston Waterfront Development Corp. v. Commonwealth*, the court engaged in a lengthy review of the history of the public trust doctrine in Massachusetts and held that even formerly submerged land that had been filled and built upon remained impressed with a public trust.²⁵ Although the Lewis Wharf statutes at issue in *Boston Waterfront* purported to grant fee simple title, the statutes also provided that "nothing herein contained shall be understood as authorizing said corporation in any way to interfere with the legal rights of any person or persons whomsoever."²⁶ Based upon this conditional language in the granting legislation, the court determined that the private owners of formerly submerged land held title to "its property in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted."²⁷ Although the decision has been characterized as sending shock waves through the real estate bar,²⁸ the reaction to the decision is somewhat surprising because the court did not announce a new legal principle, but instead relied upon a common law principle, based upon Roman law, that had been in existence

of previously licensed structures may also require a new Chapter 91 license. See MASS. GEN. LAWS ch. 91 (1996). Since its adoption in 1866, more than 17,000 licenses have been granted under Chapter 91. See David B. Struhs, *Protecting the Public's Rights to Our Waterfronts* Commissioner's Column — May 1997, (visited Jan. 21, 1999, last updated June 26, 1997) <<http://www.state.ma.us/dep>>.

24. See ARCHER, *supra* note 19, at 169.

25. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629 (1977). The plaintiff sought to register title to tidelands, obtained by legislative grant and subsequently filled and improved upon, in fee simple absolute without any limitation or condition upon its use. The court rejected the claim. See *id.* at 630.

26. *Id.* at 637 (citing 1834 Act. St. 1835, c. 76). The Supreme Judicial Court was not concerned with the absence of statutory language indicating what should become of the land granted to the private corporation to further the purpose of maritime commerce should that commerce cease to exist because:

At that time, it was probably inconceivable to the men who sat in the Legislature . . . that the harbor would ever cease to be much used for commercial shipping, or that a wharf might be more profitable as a foundation for private condominiums and pleasure boats than as a facility serving public needs of commerce and trade.

Id. at 648.

27. *Id.*

28. See, e.g., Pike & Vaughan, *supra* note 6, at 98.

for centuries in the Commonwealth. The court, in effect, only reminded the Commonwealth, that with regards to property in the intertidal zone, private ownership is never presumed absolute.

In an advisory opinion,²⁹ the Supreme Judicial Court clarified the *Boston Waterfront* decision by acknowledging the possibility that the Commonwealth could extinguish public trust rights in tidal flats, once filled, if certain conditions existed.³⁰ To meet the test, the legislation must explicitly define the land involved, explicitly acknowledge the public interest surrendered, and recognize the new use to which the land is to be put; there must also be a valid public purpose behind the grant that extinguishes the public trust rights.³¹ Although the court did not attempt to describe the type of legislation that might meet this standard, the court's language, especially its use of "explicitly" as a modifier, suggests that a private party that seeks to register title to filled tidal flats must meet a relatively high burden of proof before that party will convince a court that the Commonwealth relinquished its public trust obligations.³²

As critics of Chapter 91 have pointed out, one question the *Boston Waterfront* decision left unanswered is whether the statute of limitations found in General Laws (G.L.) chapter 184 section 23 and chapter 260 section 31A³³ bars the Commonwealth from pursuing a right of action against

29. Advisory opinions are not binding for *stare decisis* purposes, but instead are issued to address specific questions posed to the Court by the legislature. See Opinion of the Justices to the Senate, 373 Mass. 883, 366 N.E.2d 733 (Mass. 1977).

30. See Opinion of the Justices to the Senate, 383 Mass. 895, 905, 424 N.E.2d 1092 (1981).

31. See *id.* The public purpose requirements also reflect the *Appleby v. City of New York*, 271 U.S. 364 (1926), decision in which the United States Supreme Court held that a state could convey fee title to submerged lands only if its legislature concluded that such a conveyance was in the public's interest. See *id.*

32. Although the Massachusetts Supreme Judicial Court has not since interpreted a statute that purports to relinquish the public trust, the California Supreme Court has noted that such statutes "are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation." *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369, *cert. denied*, 449 U.S. 840 (1980). In a decision that relied heavily upon *Boston Waterfront*, the Vermont Supreme Court boldly noted that restaurants, hotels, and shopping malls are not examples of appropriate public uses encompassed by the contemporary public trust doctrine. See *State of Vermont v. Central Vt. Railway, Inc.*, 571 A.2d 1128, 1136 (Vt. 1989).

33. Section 31A reads in pertinent part:

No proceeding based upon any right of entry for condition broken or possibility of reverter, to which a fee simple or fee simple determinable in land is subject, created before the second day of January, nineteen hundred and fifty-five shall be maintained in any court after the first day of January, nineteen hundred and sixty-four, unless on

a party for breach of the condition subsequent at issue in the case.³⁴ This issue potentially poses a problem for the Commonwealth if developers challenge its jurisdiction on the basis of the loose language articulated by the *Boston Waterfront* court on this point. Because the Court found that the parties did not adequately raise the issue, it noted that its remarks were only “suggestive of the outlines of the issue, and not determinative of the result.”³⁵ The *Boston Waterfront* court began its outline of the issue with the thirty-year rule for the existence of conditions on land imposed by G.L. chapter 184 section 23.³⁶ Having found that that the conveyance at issue in the case met both exceptions to the rule,³⁷ the Court then outlined the issue in terms of chapter 260 section 31A.³⁸ When section 31A was originally enacted in 1956 to limit the viability of conditions created before 1955, the statute applied “to all such rights whether or not the owner thereof is a corporation or a charity or a government or governmental subdivision. . . .”³⁹ This language appeared to include the Commonwealth in its application. In 1968, however, the legislature amended section 31A to read: “This section shall apply to all such rights whether or not the owner thereof is a corporation or a charity or a government or governmental subdivision, other than the commonwealth. . . .”⁴⁰ In 1974, the general court deemed it necessary to enact further clarifying legislation to fix with certainty the inapplicability of the statute to commonwealth grants and conveyances.⁴¹ Because the Boston Waterfront Development Corporation originally filed its petition for registration between 1956 and 1968 (before the statute was amended to specifically exempt the Commonwealth from its application), the issue, as noted by the court, was whether, and if so how, the after-the-fact expression of legislative intent affected the rights of the parties.⁴²

or before the first day of January nineteen hundred and sixty-four, (a) the condition has been broken or the reverter has occurred, and a person . . . having the right of entry or reverter shall have taken possession of the land . . . or (b) a person . . . having the right of entry, or who would have it if the condition were broken . . . shall . . . have filed . . . a writing . . . describing the land and the nature of the right. . . .

MASS. GEN. LAWS ch. 260, § 31A (1996).

34. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. at 651.

35. *Id.*

36. See *id.* at 652.

37. The conveyance existed on July 16, 1887 and it was contained in a grant of the commonwealth. See *id.*

38. See *id.*

39. *Id.*

40. *Id.* (citing St. 1968, c. 496).

41. See St. 1974, c. 527, §1.

42. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. at 653.

Although the *Boston Waterfront* Court narrowly outlined the issue in terms of the Commonwealth's right of action against a party who filed for registration during the time period when the applicability of section 31A to the Commonwealth was at least questionable, the Supreme Judicial Court in a later case applied the *Boston Waterfront* analysis in a much broader context.⁴³ In *Manning v. New England Mutual Life Insurance Co.*, the court held that the plaintiffs were barred from obtaining enforcement of certain building restrictions, which appeared in conveyances of land by the Commonwealth, because of the failure to re-record them as required by G.L. chapter 184, section 28.⁴⁴ The land restriction at issue in *Manning* was a setback restriction in a conveyance by the Commonwealth to conform to a comprehensive land use plan.⁴⁵ The court rejected the plaintiff's argument that section 28 did not apply to restrictions in conveyances by the Commonwealth.⁴⁶ The emergency act in 1974 to clarify the application of section 31A to the Commonwealth also included a statement of the non-applicability of section 28 to Commonwealth conveyances.⁴⁷ Unlike section 1 of Massachusetts Statutes 1974, chapter 527, which dealt with section 31A, section 3 dealing with section 28 was deleted in 1975. The *Manning* Court concluded that the deletion of that language, contrary to the plaintiff's contention, operated to bring conveyances by the Commonwealth back within the scope of section 28.⁴⁸

The *Manning* Court did not consider the *Boston Waterfront* decision until the very end of its decision, where it made a sweeping statement without any subsequent analysis to indicate its reasoning.⁴⁹ The Supreme Judicial Court, in response to an argument put forth by the plaintiff that the

43. See *Manning v. New England Mutual Life Ins. Co.*, 399 Mass. at 736. The plaintiff, who owned abutting property to the defendant, objected to the defendant's building set back distance of ten feet when the Commonwealth restrictions required a twenty-five feet set back and unsuccessfully sought judicial enforcement of the restriction which the Commonwealth had failed to re-record in compliance with G.L. c.184, § 28. See *id.*

44. See *id.* at 731. Section 28 reads in pertinent part:

No restriction imposed before January first, nineteen hundred and sixty-two shall be enforceable after the expiration of fifty years from its imposition unless a notice of restriction is recorded before the expiration of such fifty years or before January first, nineteen hundred and sixty-four, whichever is later, and in the case of such recording, twenty years have not expired after the recording of any notice of restriction without the recording of a further notice of restriction.

MASS GEN. LAWS ch. 184, § 28 (1996).

45. See *Manning v. New England Mutual Life Ins. Co.*, 399 Mass. at 731.

46. See *id.* at 733.

47. St. 1974, c.527, § 3.

48. See *Manning v. New England Mutual Life Ins. Co.*, 399 Mass. at 733.

49. See *id.* at 735-736.

restrictions constituted a public trust and should therefore not be subject to section 28, stated: "We conclude that, even if the Commonwealth had a continuing interest of this (public trust) nature, it was extinguished by the bar imposed by G.L. c.184, § 28. Cf. *Boston Waterfront Dev. Corp. v. Commonwealth*."⁵⁰ The court implied in its statement and corresponding citation that the *Boston Waterfront* decision supports the conclusion that the Commonwealth's public trust interests would be extinguished if not recorded within the statutory period mandated by section 28. However, *Boston Waterfront* fails to support such a conclusion for many reasons. The most apparent flaw is that the *Boston Waterfront* court explicitly stated that it was only suggesting an outline and not issuing a determination on the statute of limitations issue. Moreover, the *Boston Waterfront* court did not even contemplate section 28. Instead, it narrowly focused on the application of section 31A to the Commonwealth's right of action between the years of 1956 and 1968.⁵¹

Another flaw with the *Manning* court's conclusion is that it seems to equate the setback restriction then before it with the condition subsequent at issue in *Boston Waterfront*. There are, however, significant differences between these two restrictions. The Commonwealth did not impose the land restriction at issue in *Manning* pursuant to its role as guardian of the public trust. Instead, the Commonwealth imposed the set back restrictions on landlocked property in the Back Bay of Boston to conform to an 1850's comprehensive land use plan in which the Commonwealth filled certain tidal flats for residential use.⁵² When the Commonwealth conveyed the parcels, it did not subject the conveyance to any public trust restrictions, but instead sold the lots for dwellings subject only to land use restrictions.⁵³ Although the restrictions at issue in *Manning* and *Boston Waterfront* were both imposed in conveyances by the Commonwealth, their similarities end there. Therefore, because the *Manning* court had already determined that the setback restrictions on the landlocked parcel were not in the nature of a public trust, it had no reason to reach the issue of the effect of section 28 on the Commonwealth's public trust interests. Moreover, the Commonwealth's public trust interests are arguably more akin to the interests created by a public charitable trust than to the land use interests the court found subject to the mandates of section 28. The Supreme Judicial Court has held that the recording requirements imposed by section 28 are not applicable to land held

50. *Id.* at 736.

51. *See Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 653 (1977).

52. *See Manning v. New England Mutual Life Ins. Co.*, 399 Mass. at 731.

53. *See id.*

by public charitable trust in perpetuity.⁵⁴ Like the obligation impressed by the public charitable trust upon a town to guarantee the public's interest in a park, as found in *Dunphy*, the public trust doctrine impresses a similar sovereign obligation upon the Commonwealth to protect the public's interest in their public trust rights. Perhaps the court should have at least undertaken an analysis of the inapplicability of section 28 to public charitable trusts before it concluded that section applied to public trust interests.

Given the narrow scope of the *Boston Waterfront* court's treatment of the statute of limitations issue, and the distinction between the restriction at issue in *Manning*, the Supreme Judicial Court overreached when it summarily concluded, without meaningful analysis, that section 28 would extinguish the Commonwealth's continuing public trust interests.⁵⁵ Finally, section 28 was enacted to prevent enforcement of obsolete, uncertain or unenforceable restrictions.⁵⁶ As the remaining sections of this Comment will demonstrate, Chapter 91 makes evident that the restrictions placed on formerly submerged, filled tidelands at the water's edge are neither obsolete, uncertain nor unenforceable.

Although the courts in *Manning* and *Opinion of the Justices* have attempted to limit the holding of *Boston Waterfront*, the decision has not been overruled. The Massachusetts courts continue to uphold the legitimacy of the public trust doctrine in protecting the public's rights to fishing, fowling and navigation. In fact, as recently as 1998, the Supreme Judicial Court noted "the paramount attendant legal circumstance: namely that like all privately owned tidal areas in Massachusetts, the locus lying between the mean high and low water marks is and always has been subject to the Public Trust Doctrine."⁵⁷

54. See *Dunphy v. Commonwealth*, 368 Mass. 376 (1975).

55. At the very least, a reasoned analysis of the issue would necessarily include reconciling the limited circumstances in which the court, in *Opinion of the Justices*, found the Commonwealth could extinguish its public trust rights with section 28, which does not purport by its express terms to surrender a public interest. See *Opinion of the Justices to the Senate*, 383 Mass. 895, 905 (1981).

56. See generally *Labounty v. Vickers*, 352 Mass. 337 (1967).

57. *Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 689 N.E.2d 500, 505 (1998) (holding that although the owner of flats is without power, in absence of legislative authorization, to use them in such manner as would hinder or obstruct public navigation rights, the public has no right of perpendicular access across private upland property for the purpose of gaining access to the water or flats in order to exercise public trust rights).

III. CHAPTER 91 — THE STATUTORY SCHEME

A. *Overview of Statutory Provisions*

As mentioned above, the Massachusetts legislature first regulated waterfront development in 1835, through the establishment of a tidelands licensing board, and did not make substantive changes to that statutory scheme until the *Boston Waterfront* case was decided.⁵⁸ It is important to note, however, that a commission, established in 1850 to study the effects of filling tidal flats concluded that when an individual demand for land conflicts with the public demand for water, the public demand should prevail.⁵⁹ This basic presumption, which further evidences the Commonwealth's early commitment to the public trust doctrine, is the basis upon which the regulatory scheme is built.

Taking its cue from the *Boston Waterfront* decision, the legislature revised Chapter 91 in 1983 to make it conform it to the public trust principles affirmed by the Supreme Judicial Court.⁶⁰ In response to the court's recognition that the mere filling of formerly submerged tidelands did not remove the public's rights to those parcels, the legislature amended Chapter 91 to promote the public's rights in filled as well as submerged tidelands. The amendments recognize the different interests the public has in different portions of tidelands. The legislature changed the licensing scheme to give priority to water-dependent uses over non-water-dependent uses⁶¹ and the inclusion of formerly filled flats within Chapter 91 jurisdiction.⁶² This section discusses these changes in the context of their relation to the public trust doctrine in Massachusetts.

1. Changes in Definition of "Tidelands"

The definition of tidelands is critical because the Commonwealth only has licensing jurisdiction over those coastal areas included within the definition of tidelands. Tidelands are defined in Chapter 91 as present and former submerged lands and tidal flats lying below the mean high water

58. See ARCHER, *supra* note 19, at 169 (describing the only significant developments as pertaining to the designation of the appropriate agency for administration of the licensing laws).

59. See *id.* at 168 (citing Report of the Commissioners in Relation to the Flats in Boston Harbor, SEN. DOC. NO. 3, at 12, 15, 16, 18 (1850)).

60. See *id.* at 173.

61. See MASS. GEN. LAWS ch. 91 § 14 (1996).

62. 1983 Mass. Acts. c. 589 § 21.

mark.⁶³ The phrase “former submerged lands” is included within the tidelands definition as a direct result of the Supreme Judicial Court’s holding in *Boston Waterfront* that formerly submerged land⁶⁴ remains subject to the condition subsequent that it be used for a public purpose. Because the Commonwealth can convey ownership in submerged land lying below the low water mark only when a significant public purpose is served by the conveyance, the public has a heightened interest in formerly submerged land that remains adjacent to the water. Thus, it follows that the legislature would amend its definition of tidelands to include formerly submerged land.

Tidal flats are defined as the area between the mean high water mark and the mean low water mark.⁶⁵ Although the public’s interest in tidal flats is limited to fishing, fowling and navigation, the public has a reserved easement in tidal flats as a matter of law.⁶⁶ Because the public retains public trust rights to tidal flats, the legislature was justified to include tidal flats within the definition of tidelands so as to exercise the Commonwealth’s sovereign obligation.

The legislature further defined tidelands by classifying them as either commonwealth or private. Under Chapter 91, commonwealth tidelands are subject to different licensing requirements than are private tidelands. Commonwealth tidelands are defined as “tidelands held by the commonwealth in trust for 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.”⁶⁷ This definition, which includes tidelands to which another party holds title, directly reflects *Boston Waterfront’s* decision that the public purpose requirement is presumed to attach to legislative grants of tidelands. Because commonwealth tidelands include tidelands that are either held by the state or held by another party subject to the condition that the parcel be used for a public purpose, there is a heightened public interest in this classification of tidelands; these tidelands should then be regulated differently from tidelands in which the public does not possess such an interest.

Private tidelands are defined as “tidelands held by a private party subject to an easement of the public for purposes of navigation and free fishing and

63. See MASS. GEN. LAWS ch. 91 § 1 (1996).

64. In an advisory opinion, the Supreme Judicial Court noted that the submerged land referred to in the *Boston Waterfront* decision was land lying below the historic mean low water mark. See Opinion of the Justices to the Senate, 383 Mass. 895, 901 (1981).

65. See *id.* at 902.

66. See *Commonwealth v. Alger*, 61 Mass. 80 (1851).

67. *Id.*

fowling and of passing freely over and through the water.”⁶⁸ Because private tidelands are not subject to a condition subsequent that they be used for a public purpose, the Commonwealth’s authority to regulate them is limited to the protection of traditional public trust rights; it does not extend to imposing a public purpose requirement on the use of the land.

2. Prioritization of Water-Dependent Uses⁶⁹

Chapter 91, in addition to the distinction between commonwealth and private tidelands, distinguishes between water-dependent and non-water-dependent uses in its regulatory scheme. The Commonwealth has the authority to license:

the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in or over tide water below the high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership.⁷⁰

The 1983 amendments to section 14 of Chapter 91 added language that makes clear the primacy of water-dependent uses over non-water-dependent uses of tidelands. The amended section 14 provides, in part: “Except as provided in section eighteen, no structures or fill may be licensed on private tidelands or commonwealth tidelands unless such structures . . . are necessary to accommodate a water-dependent use.”⁷¹ The amendment further qualifies the Commonwealth’s ability to issue licenses on commonwealth tidelands to only those structures or fill which provide a greater public benefit than public detriment to the public’s rights in those lands.⁷² However, there is no corresponding public purpose requirement for a water-

68. *Id.*

69. Water-dependent uses are defined as:

those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: marinas, recreational uses, navigational and commercial fishing and boating facilities, water-based recreational uses, navigation aids, basins, and channels, industrial uses dependent upon waterborne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site.

MASS. GEN. LAWS ch. 91 § 1 (1996).

70. *Id.* § 14.

71. *Id.*

72. *See id.*

dependent use on private tidelands because, by definition, private tidelands are not held subject to the requirement that they be used for a public purpose.

Despite section 14's requirement that uses be water-dependent, section 18 does provide a mechanism for granting a license for a non-water-dependent use. The Commonwealth may grant a license for a non-water-dependent use of private tidelands upon "written determination that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment. . . ."⁷³

Given the nature of the public trust doctrine and that it developed around the public's rights to water, it would be difficult to argue that the primacy of water-dependent uses was a new concept when the legislature added to the statute in 1983. Instead, the amendments pertaining to the priority of water-dependent uses can be interpreted as a clear and unambiguous recognition that the public trust doctrine is the legal foundation upon which Chapter 91 is built.

B. *The 1990 Regulations*

In 1990, the Department of Environmental Protection⁷⁴ promulgated an extensive regulatory scheme to implement its statutory obligations.⁷⁵ The general purposes of the regulations are to:

- (a) protect and promote the public's interests in tidelands . . . in accordance with the public trust doctrine, as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts; (b) preserve and protect the rights in tidelands of the inhabitants of the Commonwealth by ensuring that the tidelands are utilized for water-dependent uses or otherwise serve a proper public purpose; (c) protect the public health, safety and general welfare as it may be affected by any project in tidelands . . . (d) support public and private efforts to revitalize unproductive property along urban waterfronts, in a manner that promotes public use and enjoyment of the water; and (e) foster the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic,

73. *Id.* § 18.

74. St. 1990 c.177, § 150 substituted the Department of Environmental Protection for the Department of Quality Engineering in the definition of "Department."

75. MASS. REGS. CODE tit. 310, § 9.01-9.55 (1996).

historic, and esthetic qualities of their environment under Article XCVII of the Massachusetts Constitution.⁷⁶

This section addresses some concerns that critics have voiced about the 1990 amendments.

1. Geographical Jurisdiction

The controversy over the 1990 Regulations is primarily based upon regulatory interpretations of some key terms defined in Chapter 91.⁷⁷ The DEP enacted regulations that authorize it to presume that tidelands are commonwealth tidelands if they lie "seaward of the historic low water mark or of a line running 1650 feet seaward of the historic high water mark, whichever is further landward."⁷⁸ This presumption may only be overcome when the DEP issues a written determination based upon either a final judicial decree concerning the tidelands in question, or some other conclusive legal documentation that tidelands are unconditionally free of any proprietary interest by the Commonwealth.⁷⁹

These regulations are controversial because they presume that all tidelands within certain geographical boundaries are Commonwealth tidelands and therefore subject to an express or implied condition subsequent that they be used for a public purpose. Given, however, that it is the geographical location of tidelands that subject it to the public trust doctrine, the agency charged with the administration of Chapter 91 would reasonably start with a geographic classification. Moreover, title to land seaward of the low water mark is either owned by the Commonwealth, in trust for the public, or owned by another party subject to the condition that the land be used for a public purpose.

Although an advisory opinion is often cited⁸⁰ for the proposition that the Commonwealth can extinguish the public's interests in submerged land, the opinion also provides a list of very limited circumstances under which the Commonwealth can do so. Meanwhile, legislative authority to extinguish the public's interest in submerged lands is dependent on the legislature's creation of explicit legislation that concerns the land involved.⁸¹ Such legislation must acknowledge the interest being surrendered and recognize

76. *Id.* § 901(2).

77. *See, e.g., Pike & Vaughan, supra* note 6.

78. MASS. REGS. CODE tit. 310, § 9.02 (1996).

79. *See id.*

80. *See, e.g., Pike & Vaughan, supra* note 6, at 98.

81. *See* Opinion of the Justices to the Senate, 383 Mass. 895, 905 (1981).

the public use to which the land is to be put as a result of the transfer.⁸² The court further limits the legislature's authority to extinguish the public's interest in submerged land by requiring both that the action be for a valid public purpose, and that any benefit to a private party must not be primary but incidental.⁸³ According to the court, "[t]he 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."⁸⁴ Given the stringent criteria described above, it was then reasonable for the DEP to find that tidelands meeting the geographical criterion of lying beyond the low water mark are presumed to be commonwealth tidelands, absent a contrary determination by a judicial body.

2. Overbreadth

The Supreme Judicial Court has found it permissible for the legislature to delegate its power and responsibility to regulate tidelands subject to the public trust to an administrative agency.⁸⁵ The Department of Environmental Protection, in conjunction with the Executive Office of Environmental Affairs, is the agency delegated by the legislature to establish procedures, criteria and standards for uniform and coordinated administration of the provisions of Chapter 91.⁸⁶ Critics argue that the DEP has exceeded this delegated authority by enacting regulations that are overbroad.⁸⁷

Critics base their contention on the fact that a parcel of land can be brought under Chapter 91's regulatory jurisdiction as Commonwealth tidelands under the 1990 regulations, but not according to the Chapter 91 definition of Commonwealth tidelands.⁸⁸ This contention, however, is based on the assumption that a grant of former submerged lands by a duly authorized warranty deed from the Commonwealth, without an express reservation or implied condition subsequent that it be used for a public purpose, would be excluded from the statutory definition of Commonwealth tidelands. This may not necessarily be the case. The courts have not had

82. *See id.*

83. *See id.*

84. *See id.* (quoting Opinion of the Justices to the House of Representatives, 368 Mass. 880, 885 (1975)).

85. *See* Opinion of the Justices to the Senate, 383 Mass. at 919-920.

86. *See* MASS. GEN. LAWS ch. 21A §2 (1994). *See also*, MASS. REGS. CODE tit.310, § 9.01(1) (1996).

87. *See e.g.* Pike & Vaughan, *supra* note 6, at 108.

88. *See id.*

occasion to rule on whether the existence of a warranty deed or consideration⁸⁹ alters the result in *Boston Waterfront*. Moreover, given the public purpose requirements necessary for a state to give away the public's interest in submerged land, it is difficult to conclude that a court would determine that the existence of a warranty deed removes any implied condition subsequent that the land be used for a public purpose. The warranty deed, in order to extinguish the public's rights in submerged land, would presumably have to meet the same requirements to which a legislative grant is subject. Because no court has held to the contrary, there would be no reason for a court to find that a warranty deed, without an express acknowledgment of the interest being given up and the public benefit conferred by the transfer from the Commonwealth to the private party, negates the implied condition subsequent. Given the uncertainty whether submerged land transferred by warranty deed, rather than legislative grant, contains an implied condition subsequent that the land be used for a public purpose, the tidelands conveyed in this manner could fall under the statutory as well as the regulatory definition of Commonwealth tidelands.

3. Zoning-Like Restrictions

A third criticism of the 1990 regulations is that the DEP overstepped its authority through its enactment of zoning-like restrictions on the development of tidelands in the Commonwealth.⁹⁰ Critics argue that the restrictions set forth in the regulations are akin to zoning restrictions and because the power to enact zoning restrictions has been reserved to local governments, the legislature lacks authority to enforce these regulations.⁹¹ This argument, however, is based on the assumption that because the Zoning Act enables local governments to enact zoning restrictions,⁹² the Commonwealth itself lacks the power to do so. Regardless of local government's authority to enact zoning regulations, the Commonwealth retains the power to enact zoning regulations by virtue of its police power.

89. Although the Massachusetts Court of Appeals made reference to its lack of consideration in *Boston Waterfront Development Corporation v. Commonwealth*, 6 Mass. App. Ct. 214, 374 N.E. 2d 598, 606 (1978), the Supreme Judicial Court left out any reference to the relevance of consideration in its opinion. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629 (1979). In another case the Massachusetts Appeals Court held that current owners of tidelands hold the property subject to the same limitations under which the Commonwealth held them, and some consideration was paid in that case. See *Newburyport Redev. Auth. v. Commonwealth*, 9 Mass. App. Ct. 206, 238 (1980).

90. See *Pike & Vaughan*, *supra* note 6, at 109.

91. See *id.* at 110.

92. MASS. GEN. LAWS ch. 40A (1996).

The Forty-ninth Article of Amendment to the Massachusetts Constitution in relevant part states:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. The general court shall have the power to enact legislation necessary or expedient to protect such rights.⁹³

There is also common law support for the Commonwealth's authority to regulate tidelands. The Commonwealth's interest in the shore "transcends the ordinary rules of property law."⁹⁴ In *Commonwealth v. Alger*, the court found that "the legislature has power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by suitable penalties."⁹⁵

A zoning enactment is presumed constitutional and will be sustained upon showing of a rational connection between the regulation and a legitimate state interest.⁹⁶ The regulations that distinguish the standards to preserve water-related public rights⁹⁷ from the standards to protect water-dependent uses,⁹⁸ and the standards for non-water-dependent use projects are zoning-like in their nature and effect.⁹⁹ There is, however, a strong connection between the regulations and the legitimate state interests the regulations seek to protect. The distinction between the standards for water-related rights and water-dependent uses comply with the different public interests associated with each category. The standards for water-dependent

93. MASS. CONST. amend. art. 49.

94. *See Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. at 650.

95. *Commonwealth v. Alger*, 61 Mass. 53, 95 (1851). *See also* Bd. of Appeals of Hanover v. Housing Appeals Comm. in Dep't of Community Affairs, 294 N.E.2d 393 (Mass. 1970) (finding legislature's zoning power may be used where interests of public require such action and where the means employed are reasonably necessary for the accomplishment of that purpose).

96. *See Sturges v. Chilmark*, 402 N.E.2d 1346, 1353 (Mass. 1980).

97. MASS. REGS. CODE. tit. 310, § 9.35.

98. *See id.* § 9.36.

99. *See id.* §§ 9.51, 9.52.

uses are the least stringent because the DEP presumes the proper public purpose requirement is met if the project is a water-dependent use project.¹⁰⁰

Standards to preserve water-related rights include provisions to ensure a project will not “significantly interfere” with public rights of navigation, free passage over and through the water, access to town landings, and on-foot passage for purposes of fishing, fowling, and navigation.¹⁰¹ It is important to note that the regulations modify the word interfere with “significantly.” The DEP’s final determination, *In Matter of: Sari Lipkin*, interpreted the regulations as contemplating “that some disruption or interference with navigation will be tolerated, so long as it is not significant.”¹⁰² Moreover, the regulations also provide for mitigation through the mandate of public benefits should some interference with water-related public rights prove unavoidable.¹⁰³ The prohibition of significant, as opposed to de minimus, interference and the existence of mitigation provide flexibility in the administration of the regulations.

The most stringent standards are used in determinations regarding non-water-dependent use projects because such projects presumably diminish public access to water rights. In order to compensate the public for the diminishment of their rights to the water, the regulations require substantial measures to meet the public purpose test. The regulations specify that the project site shall include both exterior open spaces for active or passive recreation and pedestrian amenities.¹⁰⁴ The regulations also require non-water-dependent use projects to devote interior space to facilities of public accommodation.¹⁰⁵ Perhaps the most “zoning-like” regulations are the numerical standards for set back distances, coverage ratios, height limits, and minimum widths for public walkways along the water.¹⁰⁶

Other mitigating factors to the somewhat stringent standards are the extensive public notice and participation requirements mandated by the regulations.¹⁰⁷ Upon receipt of a permit application, the DEP is required to

100. *See id.* § 9.31(2)(a).

101. *See id.* § 9.35(2), (3).

102. *In the Matter of: Sari Lipkin*, No. 92-043, 1995 WL 805814 (Mass. Dep’t Envtl. Protection, Dec. 22, 1995). The DEP also found that safe navigation is not specifically identified as a standard. *See id.*

103. *See* MASS. REGS. CODE. tit. 310, § 9.35(1).

104. *See id.* § 9.53(2)(b).

105. *See id.* § 9.53(2)(c). Examples of public accommodation include the public restrooms found in several structures, such as Battery Wharf, Burroughs Wharf, the Pilot House, and Rows Wharf, along Boston’s waterfront. *See generally Water Closets on the Waterfront*, BOSTON GLOBE, May 4, 1998.

106. *See* MASS. REGS. CODE. tit. 310, § 9.51.

107. *See id.* § 9.13.

send notice of the application to the municipal official, the planning board, the conservation commission, and the harbor master in the city or town where the proposed project is to be located.¹⁰⁸ The DEP is also required to give notice to all landowners of the proposed project site and abutters thereto,¹⁰⁹ and to the New England Division of the U.S. Army Corps of Engineers.¹¹⁰ If the proposed project falls under other specific provisions, the notice must be issued to an even greater number of parties.¹¹¹ In addition, the regulations place a duty on the license applicant to furnish notice at his or her own expense.¹¹² The applicant is required to publish notice in at least one newspaper with circulation in the area affected by the project,¹¹³ and if a public hearing is to be held, the applicant is also required to post notice visible to the public in one or more prominent locations on the site.¹¹⁴

Given the more stringent standards that apply to non-water-dependent projects, the public hearing requirement is contingent upon determination of the project as a non-water-dependent use. For non-water-dependent use projects, the DEP "shall" hold a public hearing in the city or town in which the project is located.¹¹⁵ The absence of discretion with regards to non-water-dependent projects is consistent with the agency's recognition that these projects, which do not necessarily have to be located at the water's edge, might prevent the public from exercising their public trust rights. For water-dependent use projects however, the DEP is afforded discretion in determining whether or not to hold a public hearing.¹¹⁶ Individuals, though, are provided the opportunity to request that the DEP exercise its discretion in

108. *See id.* § 9.13(1)(a)1. Notice consists of the name and address of the applicant, a description of the location of the project, a description of the project, public hearing information if applicable, the date until which public comments will be accepted, the address where the application may be viewed, and a statement that a municipality, ten citizen group or any aggrieved person that has submitted written comments may also petition to intervene to become a party before the close of the public comment period and that failure to submit such a petition will result in the waiver of any right to an adjudicatory hearing. *See id.* § 9.13(1)(c).

109. MASS. REGS. CODE tit. 310, § 9.13(1)(a)(6) (1996).

110. *See id.* § 9.13(1)(a)7. Depending upon the type of project, the DEP may also be required to provide notice to the harbor master, Coastal Zone Management, Department of Environmental Management, Department of Fish and Wildlife and to Environmental Law Enforcement. *See id.* § 9.13(1)(a).

111. *See, e.g., id.* § 9.13(1)(a)2-5.

112. *See id.* § 9.13(1)(b).

113. *See id.* § 9.13(1)(b)1.

114. *See id.* § 9.13(1)(b)2.

115. *See id.* § 9.13(3)(a).

116. *See id.* § 9.13(3)(b).

favor of a public hearing; the request must be made in writing within the public comment period, and include a statement of reasons.¹¹⁷

In addition to the procedural safeguards of notice, comment, and hearing, the 1990 regulations provide a mechanism for municipal planning boards to interject their recommendations on a particular license application.¹¹⁸ The regulations allow a municipality to hold its own public hearing on a license application and submit a written recommendation to the DEP. The written recommendation must state whether and why the planning board believes the project would not be detrimental to the public rights in the tidelands and serves a proper public purpose, except in the case of water-dependent use projects entirely on private tidelands.¹¹⁹ If the municipality submits a written recommendation within the time period established by the regulations, the DEP "shall" take into consideration the recommendation in making its decision whether to grant a license.¹²⁰

4. Evidence of Regulatory Flexibility: The Municipal Harbor Plan Provisions

Perhaps most telling of the flexibility inherent in the Chapter 91 regulations is the alternate mechanism they provide for non-water-dependent use projects to meet the public benefit requirements necessary to obtain approval from the DEP. The municipal harbor plan¹²¹ provisions provide a flexible mechanism for non-water-dependent use projects to comply with Chapter 91. A project must first comply with applicable zoning ordinances of the municipality,¹²² compliance is determined upon written certification issued by a municipal official.¹²³ In addition, a project must comply with the Coastal Zone Management Plan, where applicable, and relevant state environmental regulations to ensure that the regulations are but one component of a well-managed, integrated coastal zone development plan.

117. *See id.* § 9.13(3)(c). If a public hearing is held, any person may submit written comments to the DEP on the license or permit application within ten days of the close of the public hearing or within any additional public comment period granted by the DEP. *See id.* § 9.13(4)(a). If no public hearing is held, the comment period runs for thirty days after the license application or fifteen days after the notification date for a permit application. *See id.* § 9.13(4)(b).

118. *See id.* § 9.13(5).

119. *See id.* § 9.13(5)(b).

120. *See id.*

121. A municipality develops a harbor plan in accordance with the provisions in MASS. REGS. CODE tit. 301, § 23.03-.07.

122. *See id.* § 9.34(1).

123. *See id.*

A project's conformance with a municipal harbor plan is determined by the DEP in consultation with the planning board or other agency responsible for plan implementation.¹²⁴ The DEP strongly presumes that the municipality's finding of compliance or noncompliance is correct. However, no such presumption exists when the project requires a variance from the substantive provisions of the plan, unless such a deviation is unrelated or only de minimus related to the purposes of Chapter 91.¹²⁵ If the DEP determines that the project does comply with the Municipal Harbor Plan, the use limitations or numerical standards specified in the Municipal Harbor Plan may be substituted for the limitations and standards found in Chapter 91: 9.51(3)(a) on-site replacement requirement for pile-supported structures; 9.51(3)(c) set back distances; 9.51(3)(d) coverage ratios, open space requirement; 9.51(3)(e) height limits; 9.52(1)(b)1 minimum width of public walkways along water; 9.53(2)(b) open space for public passive recreation; 9.53(2)(c) devotion of indoor space to facilities of public accommodation.¹²⁶

The municipal harbor plan provisions provide an alternate means for projects to comply with Chapter 91 through satisfaction of the numerical standards of the harbor plan. To ensure that municipalities do not develop plans that sacrifice the public's interests in tidelands, however, safeguards are included in the development of the municipal harbor plan. In order for the Executive Office of Environmental Affairs to approve a municipality's proposed harbor plan, the municipality must first demonstrate that the substitute provisions set forth in the plan will promote, with comparable or greater effectiveness, the state tidelands policy objectives stated in the corresponding provisions of 310 Code of Massachusetts Regulations 9.00.¹²⁷ In addition, should the substitute provisions contain alternative use limitations or numerical standards less restrictive than those found in the waterways regulations, the plan must include requirements for the mitigation of any potential adverse effects on water-related public interests.¹²⁸ Therefore, even though the regulations require stringent standards, particularly on non-water-dependent projects, the regulations do provide for an alternate means by which a project can comply with Chapter 91.

124. *See id.* § 9.34(2)(1).

125. *See id.* § 9.34(2)(2).

126. *See id.* § 9.34(2)(b).

127. *See id.* § 23.05(d).

128. *See id.*

IV. CHAPTER 91'S SUCCESS IN PROMOTING WORKING AND LIVING WATERFRONTS

Although the Massachusetts courts have not had occasion to rule upon the validity of the 1990 regulations, as of the writing of this Comment, the fact that developers who seek Chapter 91 licenses appeal no further than the agency level may indicate that developers are convinced that the courts would likely uphold the regulations. The Fan Pier parcel in South Boston illustrates how Chapter 91 has encouraged developers, state environmental agencies, municipal land use boards and interested citizens to take a "stop and think" approach to development along the water's edge.

In 1997, the Boston Properties Group proposed a development plan for an 800 room hotel at a height of 225 feet on the Fan Pier site in South Boston.¹²⁹ In addition to violating the nineteenth century seaside maxim "nothing higher than a whale by the water,"¹³⁰ the building height would have exceeded the restrictions imposed by the 1990 regulations by fifty to sixty feet.¹³¹ The developer primarily asserted that completion of a new environmental impact report, as required under the Massachusetts Environmental Policy Act, was unnecessary.¹³² The developer also initially argued that the land parcel was not subject to Chapter 91 jurisdiction because it was transferred from the Commonwealth to a private party by a warranty deed and for considerable consideration.¹³³ The DEP, however, rejected the developer's contention and determined that the project was indeed subject to Chapter 91 jurisdiction.¹³⁴ The developer did not appeal this determination.¹³⁵ Meanwhile, instead of issuing a decision regarding the need to

129. See Anthony Flint, *Waterfront Plan Headed for Snags City Proposal Conflicts with State Law*, BOSTON GLOBE, Dec. 9, 1997, at A1.

130. Jane Holtz Kay, *Vision for a Livable Waterfront*, BOSTON GLOBE, Mar. 16, 1998, at A17.

131. See Anthony Flint, *Official Working to Refuel Pier Plan Patience, Flexibility Key, BRA Head Says*, BOSTON GLOBE, Dec. 10, 1997, at B1.

132. See *id.* The developers argued that the impact report prepared for a prior proposal sufficed because the project had not changed significantly enough to warrant the preparation of a new impact statement. See *id.*

133. See Richard Kindleberger, *Fan Pier Developers Contend Project is Exempt From State Tideland Regulations Developers: Fan Pier Free From Tideland Rules*, BOSTON GLOBE, Dec. 18, 1997, at A31.

134. See Karleen Kozaczka, *Fan Pier's 1986 Review Defended But Critics Say Environmental Impact Needs Reevaluation*, BOSTON GLOBE, Jan. 30, 1998, at B3.

135. Perhaps if the developers had not been so compliant and had decided to appeal the determination that the Commonwealth had jurisdiction to regulate the land under Chapter 91, the court would have been presented with another opportunity to send shockwaves through the conveyancing bar.

complete a new impact statement, the Secretary of the Executive Office of Environmental Affairs asked the developer to put the project on hold until a harbor plan was created for South Boston.¹³⁶ The developer voluntarily agreed to the Secretary's request.¹³⁷ Although there are always environmental and citizen concerns when any major development project is undertaken, Chapter 91 requires developers to address public use and access issues before the ground is broken. Prior to the Secretary's determination that the Fan Pier project fell within the jurisdiction of Chapter 91, the developer's plan called for tall buildings that would have created offensive wind and shadow conditions and closed off visual access to the water. If the plan met local zoning requirements, the project may have been built as proposed; the citizens of the Commonwealth would then have lost a valuable resource to commercial interests. Such a tragedy did not transpire, however, and the events that did occur once the developers voluntarily put their project on hold are indicative of Chapter 91's success at fostering a collaborative, "stop and think" approach to development at the water's edge.

In May of 1998, the Boston Globe and The Massachusetts Institute of Technology (MIT) convened a Boston Harbor Conference,¹³⁸ which included a televised town meeting held at Faneuil Hall. The purpose of the conference was to establish options for the harbor's future, given "the conflicting constituencies, political intrigue, overlapping jurisdictions, and high stakes involved in developing Boston's 'new frontier' in the South Boston Seaport District."¹³⁹ One of the findings of the Conference was that "[p]arks and open space also determine the quality of life in the public realm."¹⁴⁰ However, the Boston Redevelopment Authority (BRA) apparently did not give much consideration to this finding, as evidenced by the interim Seaport plan it released in November of 1998. The interim plan allowed office towers to dominate the waterfront and was consequently sent back to the drawing board by a host of critics.¹⁴¹ The "Seaport Public Realm Plan" was

136. See Jennifer Babson, *Fan Pier Complex on Hold*, BOSTON GLOBE, Mar. 3, 1998, at D1.

137. See *id.*

138. See generally, *Harbor Conference: A New Role for Media*, BOSTON GLOBE, June 12, 1998, at A27. The participants at this Conference included the head of the Boston Redevelopment Authority, representatives from Massport; the secretary of the Executive Office of Environmental Affairs; citizens of South Boston; the head of the Boston Harbor Association; and numerous architects. See Anthony Flint, *The Hot Spot*, BOSTON GLOBE, Oct. 25, 1998, special supplement at 9.

139. Babson, *supra* note 136.

140. Timothy Leland & Thomas Piper, *Plotting the Course*, BOSTON GLOBE, Oct. 25, 1998, special supplement at 4.

141. Flint, *supra* note 131, at 8.

then delivered to Boston's City Hall on March 1, 1999.¹⁴² The plan includes low-level buildings, parks, and civic destinations in addition to housing, hotels, office buildings, and restaurants.¹⁴³ Although the plan is not a "master" plan and does not contain zoning regulations, the plan does create the foundation for significant public access and accommodation. Specifically, the plan calls for the developers of Fan Pier to create a waterside park and public destination point on the portion of the land closest to the water.¹⁴⁴ Perhaps as a mitigation measure for the allowance of some higher buildings in the central portions of Fan Pier, the plan requires landowners, whose parcels are situated further from the water, to contribute to a central fund to create public amenities.¹⁴⁵ The Seaport document is a collaborative product that represents the varied interests of several parties, but it remains to be seen whether the individual plans of Fan Pier developers will comply with the framework of the Seaport plan.¹⁴⁶

Critics of Chapter 91 may point to delays in the Fan Pier project as evidence of the inefficiency of the regulations for the promotion of waterfront development. The delays, however, are warranted if they result in a waterfront district that everyone can live with and enjoy. Although the original plan proposed by the developer of Fan Pier included some open space, the concern was that the footprint and shadows created by the extreme height of the building would render the open space uninviting. Boston already lacks sufficient hotel space and the demand is expected to increase further once the convention center opens in South Boston. The "stop and think" approach effectuated by Chapter 91 is therefore particularly important during this time of rapid growth and development, replete with corresponding political pressure to rush projects. Although some will argue that the hotel and office complex proposal was acceptable given that it provided greater public use than its current use as a parking lot,¹⁴⁷ the fact remains that

142. See Anthony Flint, *Planners Focus on Seaport Details*, BOSTON GLOBE, Mar. 1, 1999, at B5.

143. See *id.*

144. See *id.*

145. See *id.*

146. As of the writing of this comment, the Fan Pier developers have released their most recent proposal, including a public realm plan to the public, but have not yet filed with the Boston Redevelopment Authority or state environmental agencies. See Anthony Flint, *Fan Pier Plans Fan Out New Proposal Mixes Public Access, Housing, Business*, BOSTON GLOBE, Mar. 10, 1999, at B1. Initial reaction, as measured by the press accounts, indicates that the lack of sufficient residential units, the lack of a "signature" open space, and the number of cars the complex would accommodate are the major points of contention among stakeholders. See *id.*

147. See e.g., Flint, *supra* note 131. "Everyone needs to relax a little bit, and remember

the public has a real interest in this land and the potential for a thriving waterfront community exists until the land is developed without regard for the unique and irreplaceable significance of the property. The delays caused by Chapter 91 were beneficial: they caused government agencies, developers, urban planners, architects, environmental groups, and citizens to collaborate and create a harbor plan that ensures that the public's interest will not succumb to another mass of steel and glass.

V. CONCLUSION

This Comment has demonstrated that the Commonwealth of Massachusetts takes seriously its sovereign obligation to protect its citizens' interests in tidelands. This sovereign obligation has its roots in a body of law that pre-exists the Commonwealth itself. The Commonwealth gave statutory effect to its sovereign obligation in its adoption of the Chapter 91 tidelands licensing statute, which enjoyed a somewhat uncontroversial history until the landmark *Boston Waterfront* decision was handed down.

Although the validity of the 1990 regulations, which were enacted in part as a response to *Boston Waterfront*, has been subject to attack on several grounds by commentators, no court has yet had the opportunity to respond to these attacks. Chapter 91's record of engendering voluntary compliance and the lack of court appeals for Chapter 91 determinations may, however, be indicative of the validity of the 1990 regulations. The 1990 regulations will remain intact unless the court is presented with the opportunity, and decides to take the opportunity, to severely limit the holding of *Boston Waterfront*.

As the South Boston waterfront project makes evident, Chapter 91 and its attendant regulations have successfully preserved the public's interests in the shores of the sea. The South Boston waterfront story highlights both the strength and the flexibility of the regulations. In absence of the regulations, the public's interests in the waterfront property would likely have been sacrificed to the developer's plan for skyscrapers that would not have even provided sight, much less access, to the water. On the other hand, without the municipal harbor plan provisions of the regulations, the site may have continued as a parking lot with no progress made towards the creation of a vibrant waterfront community. The regulations accordingly strike the delicate balance between the prevention of careless development and the prevention of any development whatsoever. If the final master plan is

that what's out there today is a giant parking lot, with no access to the water's edge" (quoting Thomas O'Brien, Head of Boston Redevelopment Authority).

successful in both its design and implementation, other coastal states will have one more testimony to the marked effectiveness of Chapter 91 as a model for state stewardship of coastal lands.

