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## A Legislative Fix for Massachusetts' Chapter 91 Tidelands Program

The Massachusetts Legislature recently enacted House Bill 4324, An Act Relative to the Licensing Requirements for Certain Tidelands ("the Act"). This legislation brings an end to months of uncertainty over the status of so-called landlocked tidelands along the Commonwealth's coast following the controversial decision by the Supreme Judicial Court (SJC) in *Moot v. Massachusetts Department of Environmental Protection*.

Chapter 91 of the Massachusetts General Laws seeks to protect the public's interest in waterways of the Commonwealth, and provides that "tidelands" must only be used for either water-dependent uses or to serve a "proper public purpose." "Tidelands" include both "present and former submerged lands" and "tidal flats lying below the mean high water mark." Any project that entails construction below the existing mean high water mark is subject to Chapter 91 jurisdiction, as are activities on filled former tidelands (the area seaward of the historic mean high water mark). The statute authorizes the Department of Environmental Protection (DEP) to issue regulations and enforce the public's rights under Chapter 91.

DEP promulgated regulations (310 C.M.R. 9.00) (the "Regulations") in 1991 to implement the statutory provisions of Chapter 91, which require projects on present and former tidelands to secure licenses. However, those regulations exempted "Landlocked Tidelands" from the licensing requirements (the "Exemption"). "Landlocked Tidelands" were defined as those filled tidelands landward of the public way nearest to flowed tidelands. Absent the Exemption, any structures or fill on tidelands—including former submerged lands that have been filled—must have a water-dependent use or a public purpose. Since the Regulations were promulgated, developers and DEP have relied on the Exemption for activities in areas designated as Landlocked Tidelands. While not without its flaws, the Exemption provided practical relief from a complex permitting process that otherwise would have applied to large areas adjacent to the Commonwealth's coast and harbors.

More than 15 years later, the Exemption was struck down earlier this year in *Moot v. Massachusetts Department of Environmental Protection*. The case involved the development of a large mixed-use project on 48 acres of land on landlocked tidelands in East Cambridge. The SJC concluded that DEP "exceeded its authority by promulgating a regulation that relinquishes its obligations under [Chapter 91]." The Court determined that DEP could not "forgo its responsibility to preserve and



protect the public's rights in tidelands." The entry of judgment was subsequently stayed several times in order to allow the legislature a chance to respond. Since that time, the legal status of both existing and proposed projects has been in flux, as competing legislative proposals circled on Beacon Hill.

The Act amends Chapter 91 to maintain the Exemption, but at the same time adds certain new hurdles for developers. The Act has a retroactive effect, so existing structures and projects developed pursuant to a landlocked tideland determination made prior to the effective date of the Act will maintain exempted status. Going forward, proposed projects on landlocked tidelands will also be exempt from Chapter 91 licensing requirements. However, the Act charges the Secretary of the Executive Office of Energy and Environmental Affairs (the "Secretary") with conducting a "public benefit review" for proposed projects on landlocked tidelands. A complete public benefit review will be mandatory for projects required to file an Environmental Impact Report (EIR) under the Massachusetts Environmental Policy Act (MEPA), and within the Secretary's discretion for projects requiring only an Environmental Notification Form (ENF).

If the project triggers the public benefit review under MEPA, the project proponent will be required to explain the project's purpose and the effect of the development, the impact on abutters and the surrounding community, and any benefits to the public's rights in the affected tidelands. In addition, the project proponent must identify measures to avoid, minimize or mitigate any adverse impact on such rights as part of MEPA review. Projects in areas determined to have low groundwater levels will also need to include an explanation of the project's impact on groundwater levels and identify measures that will be taken to avoid, minimize or mitigate such impacts.

The Act does authorize the Secretary to establish regulations that may exempt certain development determined to be of *de minimus* impact. The law was designated an emergency law by the legislature and the bill took effect immediately upon passage.

In sum, projects on landlocked tidelands will retain an exemption from Chapter 91 licensing. However, projects on landlocked tidelands triggering MEPA review may now be subject to a public benefit review by the Secretary, in which case project proponents will also need to identify and possibly mitigate the project's impact on rights of the public.



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