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'Moot v. DEP': where we are today

By Deborah A. Eliason

On Feb. 12, the Supreme Judicial Court invalidated a regulatory exemption promulgated by the Department of Environmental Protection under G.L.c. 91, the waterways statute, relative to "landlocked tidelands." *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007).

This decision appears to have invalidated the exemption relied upon for the construction of many existing projects on landlocked tidelands and has created enormous uncertainty for new projects proposed to be constructed in landlocked tideland areas.

The case involved a challenge to a DEP decision holding that the construction of a multi-use project was exempt from the licensing requirements of Chapter 91 because it involved a landlocked tideland.

The roughly triangular project site consisted of a 48-acre abandoned rail yard and industrial land located in East Cambridge, bounded by the Monsignor O'Brien Highway, the Gilmore Bridge and the Massachusetts Bay Transportation Authority rail lines and maintenance facility. The site contained approximately 13 acres of filled commonwealth tide-lands originally filled under a Chapter 91 license issued in 1962 to the Boston and Maine Railroad. Under the original license, drainage culverts were constructed beneath the site and the Millers River, which is no longer visible on the site, currently flows through these culverts.

Under the public trust doctrine, the commonwealth holds tidelands in trust for the use of the public for fishing, fowling and navigation. Through Chapter 91, the Legislature expressly mandated that any non-water-dependent use of the tidelands serve a proper public purpose. The obligation to ensure that the public interest and public trust are protected lies with the DEP.

In 1983, Chapter 91 was amended to allow the DEP to license nonwater-dependent uses, only if, after a public hearing, it made a written determination that the structure or fill served a proper public purpose and that said purpose provided a greater public benefit than detriment to the rights of the public in such lands.

In 1990, the DEP promulgated regulations indicating that the areas subject to licensing and permitting by the DEP did not include "landlocked tidelands," which are currently defined as "any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located: (a) within 250 feet of the highwater mark, or (b) within any Designated Port Areas. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark." 310 CMR § 9.02.

In the Moot case, the DEP issued a negative determination of applicability on the basis that the site was located on landlocked tidelands which are exempt from licensing and permitting by the DEP under its regulations.

This decision was appealed and the SJC ultimately held that the regulation relied upon by the DEP was invalid because it was in excess of its legislative authority to exempt all landlocked tidelands from Chapter 91 licensing requirements.

This ruling could have a far reaching impact on existing, proposed and future properties located on landlocked tidelands. The ruling calls into question past developments sited on landlocked tidelands under the now invalid DEP regulation and raises concerns as to what additional approvals are needed for current and future projects.

The SJC stayed the effect of its decision for 180 days, giving the Legislature time to act if it so chooses. The stay was set to expire in September 2007, but the SJC granted a 60-day extension of the stay on Sept. 4.

Shortly after the issuance of the Moot decision, the governor filed legislation in an attempt to preserve the exemption for landlocked tidelands