



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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KENNETH L. KIMMELL
Commissioner

In the Matter of
Navy Yard Four Associates, Ltd.

November 22, 2011
Docket No. 2010-062
File No. W09-2851
Charlestown

FINAL DECISION

I adopt the reasoning and the result of the Recommended Final Decision. I find that the land in question is commonwealth tidelands, and the requested license amendment is precluded by the rules governing facilities of public accommodation (FPA).

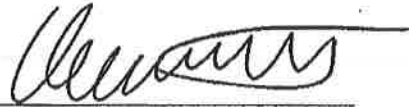
It is apparent that the legal wrangling in this case stems from Navy Yard Four's alleged difficulty in securing a tenant for a ground floor FPA. I assume, without deciding, that Navy Yard has acted diligently and in good faith to find a tenant, but has come up short through no fault of its own.

The paramount purpose of chapter 91 is to activate, preserve and protect public use and enjoyment of tidelands. While the FPA requirements have been highly successful in fulfilling this purpose and enriching our civic culture, it may be that in some instances FPA rules do not work as intended and interior spaces remain vacant. In my view, idle and vacant waterfront space

does not promote the public use and enjoyment of tidelands, and represents a lost opportunity for the public.

It is therefore incumbent upon the Department, who is charged to "preserve and protect the rights in tidelands of the inhabitants of the commonwealth" under chapter 91, to determine whether this problem exists, is widespread, and is attributable to FPA rules. If so, the Department should explore refinements to FPAs and consider alternative means of promoting the public use and enjoyment of the waterfront to address instances in which existing FPA rules do not secure these benefits. I instruct the Department to commence this process, and I welcome the engaged participation of a wide array of stakeholders in this endeavor.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01(14)(e). The motion must be filed with the Case Administrator and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.



Kenneth Kimmell
Commissioner

SERVICE LIST

In The Matter Of:

Navy Yard Four Associates LP

Docket No. 2010-062

File No. W09-2851-N
Boston

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DEPARTMENT

Date: November 21, 2011

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 21, 2011

In the Matter of

Docket No. 2010-062

Navy Yard Four Associates LP

RECOMMENDED FINAL DECISION

Navy Yard Four Associates LP ("Navy Yard Four") appealed the denial of a Chapter 91 ("c. 91") waterways license amendment issued as a written determination by the Massachusetts Department of Environmental Protection ("Department") for its property in Charlestown. M.G.L. c. 91. The Conservation Law Foundation ("CLF") filed a motion to participate, which I granted. Although the issues are far reaching, Navy Yard Four's principal contention is that its building in the Charlestown Navy Yard is located on lawfully filled private tidelands, not Commonwealth tidelands, and therefore is not subject to c. 91 jurisdiction. The Department and CLF argued that the land is Commonwealth tidelands, subject to all applicable regulatory requirements for licensing including ground floor facilities of public accommodation. 310 CMR 9.53(2)(c). For several reasons, I recommend that the Department's Commissioner sustain the denial of a license amendment to Navy Yard Four.

BACKGROUND

Navy Yard Four owns a 2.632 acre parcel of land in the historic Charlestown Navy Yard section of Boston Harbor, an area used by the U.S. Navy from the early 1800s until its transfer to the

Boston Redevelopment Authority ("BRA") in 1978. The U.S. Constitution, the oldest commissioned U.S. naval vessel, is berthed within the Charlestown Navy Yard, and the area is connected to downtown Boston by the Freedom Trail and ferry service. The BRA has redeveloped the area for multiple uses under licenses issued pursuant to c. 91, including marinas, condominiums, offices, and water transportation facilities. As to Navy Yard Four's parcel, the Department issued a written determination pursuant to c. 91 on February 18, 2004 to LDA Acquisition LLC, which leased the land from the BRA, finding that the land was Commonwealth tidelands. The land was conveyed from the BRA to Navy Yard Four in 2005.¹ Neither LDA Acquisition LLC nor the BRA appealed the written determination, and accordingly Navy Yard Four acquired the property subject to the findings in the written determination. The Department issued Chapter 91 License No. 10286 to Navy Yard Four on June 11, 2005. In September 2009, Navy Yard Four filed an application with the Department to amend its license, seeking to revise Special Condition No. 1 to reduce the required amount of Facilities of Public Accommodation from 32,225 square feet to 12,570 square feet, alleging that the licensed area is Private Tidelands instead of Commonwealth Tidelands. On November 9, 2010, the Department denied the amendment. Navy Yard Four filed this appeal, challenging the Department's jurisdiction under c. 91 over its property.

ISSUES FOR ADJUDICATION

Whether the site is located on Commonwealth tidelands, and if on private tidelands, to what extent may the Department require Facilities of Public Accommodation under 310 CMR 9.53(2)(c)?

Whether M.G.L. c. 23G, § 15 relinquished the public's rights in tidelands at the site, so

¹The Secretary of the Executive Office of Environmental Affairs' approval of the Charlestown Navy Yard ("CNY") Master Plan, in the Certificate on the Final Supplemental EIR states, "As the proponent (the BRA) has acknowledged, all activities seaward of the first public way will be subject to chapter 91 licensing. The DEP has classified all tidelands within the CNY as Commonwealth Tidelands because of their ownership" [EOEA # 2383, FEIR Cert issued October 17, 1991].

that no c. 91 license is required?

Whether the requirement for Facilities of Public Accommodation constitutes an inverse condemnation of the ground floor by authorizing entry onto and occupation of private property by a class of persons selected by the Department and by excluding the Petitioner from use of its own property?

Whether the United States acquired fee simple title by prescription against the Commonwealth pursuant to section 12 of Chapter 119 of the Revised Statutes of 1936, thereby extinguishing the public's rights in tidelands at the site?

Assuming that a portion of the site is Commonwealth tidelands, whether the public's interest in the site lapsed in accordance with M.G.L. c. 184, §§ 27-29?

Whether the Department's regulatory definitions of "Commonwealth Tidelands," "Tidelands," and "Private Tidelands" are ultra vires by significantly deviating from the statutory definitions set forth in M.G.L. c. 91, §18?

STANDARD OF REVIEW

310 CMR 1.01(11)(f) allows any party to an administrative appeal to make a motion for summary decision. Summary decision is appropriate where the party seeking summary decision can "demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." 310 CMR 1.01(11)(f). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil suit. Matter of Roland Couillard, Docket No. WET-2008-035, Recommended Final Decision (July 11, 2009), adopted as Final Decision (August 8, 2009). A ruling granting or denying summary decision must be made on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Id. The Petitioner filed a Motion for Summary Decision

and the Department filed a Cross-Motion for Summary Decision and opposition, which was supported by CLF. The schedule allowed for a reply to the Department's cross-motion but the Navy Yard declined the opportunity. Thus, the record consists of the cross-motions for summary decision, the Department's opposition, CLF's memorandum, and the Department's licensing file.

The Petitioner requested adjudication of some issues which are facial challenges to the regulations and, thus, are not amenable to adjudication in this forum but instead must be brought in court. See Matter of Rick Brooks, Docket No. 2005-384, Ruling on Legal Issues; Royce v. Commission of Corrections, 390 Mass. 425 (1983) (promulgated regulations have force of law). I address those issues only briefly here. The parties blended issues in their arguments and in some cases expanded upon the issues; I addressed the arguments presented by the parties. I found no material disputed facts and resolved the issues through summary decision.

PROCEDURAL ISSUE OF LICENSE AMENDMENT

The Department raised related threshold arguments as to Navy Yard Four's filing of an application for a license amendment. The Department argued that the requested amendments were beyond the scope of what is permissible in a license amendment as defined in the regulations and that the issues raised by Navy Yard Four must have been brought at the time of issuance of the license rather than of the time of the denial of the license amendment. Although I conclude that Navy Yard Four's application for an amendment did not meet the limitations imposed by the regulations and the issues on appeal of an amendment would be limited to any amendments as opposed to the license itself, the appeal may not be dismissed on this ground because the Department accepted the application for a license amendment and no party appears to be prejudiced thereby.

The Department's procedures for amendments are specified at 310 CMR 9.24 as follows:

- (1) Upon written request by the licensee accompanied by appropriate plans, the *Department may amend a license and associated written determination to authorize a structural alteration or change in use not defined as substantial in accordance with 310 CMR 9.02, or to delineate a reconfiguration zone within a marina in accordance with 310 CMR 9.39(1)(b), or to renew a term of license in accordance with 310 CMR 9.25(2). A written request may also be made to amend a permit. No license or permit shall be amended unless the project, as modified, complies with the applicable provisions of 310 CMR 9.00 wherever feasible.*
- (2) *The Department shall review the request for amendment and determine whether the proposed changes are so significant as to require a new license or permit application or are appropriate for consideration of an amendment to the existing license or permit.*
- (3) *If the Department determines that the proposed changes are appropriate to allow consideration of an amendment, notice shall be provided in accordance with the requirements of 310 CMR 9.13(1), and to any intervenor on the original license application to the maximum reasonable extent.*

310 CMR 9.24 (emphasis added). The definition of substantial change in use, the most relevant basis upon which Navy Four Yard could request an amendment, is as follows:

Substantial Change in Use means a use for a continuous period of at least one year of 10% or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity, whether express or implied.

310 CMR 9.02.

The Department described the Navy Yard Four's amendment requests as 1) "to change the determination of the type of tidelands since the site ownership has changed from a quasi-public agency to private entity;" 2) "to reduce the requisite amount of facilities of public accommodation from 32,225 square feet (s.f.) to 12,570 s.f., thereby allowing facilities of private tenancy on the ground floor"; and 3) "to allow the FPA space to be relocated from the requisite waterfront location to another location within the ground floor." Of these three requests as to revised jurisdiction, revised use of much of the site, and relocation of uses within the site, none falls within the scope of a license amendment. See Affidavit of Andrea Langhauser. A license amendment is limited to insubstantial structural alterations or change in use, delineation of marina reconfiguration zones, or

license term renewal. The Department, however, upon reviewing the request, did not inform Navy Yard Four that its requests were ineligible for a license amendment and the proper procedure would be an application for a new license. Instead, the Department acted on the amendment application. The amendments were publicly noticed and intervenors to the original proceeding were individually provided notice as required by the regulations. Thus, it is not clear that the rights of any person were prejudiced by the Department's handling of the request for an amendment, as opposed to requiring an application for a new license. The Department's Denial Determination indicates that several parties submitted comments, and none other than CLF pursued status as intervenors or participants.

As to the argument that Navy Yard Four may not raise issues that could have been raised in the initial license proceeding, the Department is correct that an appeal of an amendment is traditionally limited to matters within the scope of the amendment and that other matters may not be raised. See Wetlands Protection Policy #85-4, Amending an Order of Conditions; 314 CMR 2.10 and 310 CMR 2.08. The Department, however, accepted the application for a license amendment and within its determination addressed the requests, which opened this appeal to jurisdictional issues, as well as the requirements for facilities of public accommodation. The Department is also correct that these issues should have been raised when the initial license was issued. However, these issues could be raised again had Navy Yard Four filed a license for a new application, as it presumably would have done if its amendment requests had not been allowed.

Finally, CLF notes that the application for an amendment was filed by Navy Yard Four Associates, LLC while the Petitioner has been identified as Navy Yard Four Associates, LP. CLF asserts that Navy Yard Four Associates, LP is the entity that had owned the site before conveyance to Navy Yard Four Associates, LLC. Thus, CLF challenges standing, on the theory that because Navy Yard Four Associates, LP is not the "applicant who has demonstrated

property rights in the lands in question” or demonstrated standing as a “person aggrieved,” it has no right to pursue an appeal under 310 CMR 9.17(1)(a) and (b). The 2005 deed, however, shows a transfer from BRA to Navy Yard Four Associates, LP. Pet. Motion, Exh. A. Navy Yard Four did not respond to CLF’s claim, which appeared in a footnote. It would appear that a property owner which was not the applicant would be a person aggrieved, and given the record here, I declined to issue an order to show cause related to the demonstration of standing. Accordingly, I address the issues raised in Navy Yard Four’s appeal as they are now before me.

WHETHER THE SITE IS COMMONWEALTH TIDELANDS

There is no dispute that Navy Yard Four’s site is primarily on lawfully filled tidelands between the historic mean high and mean low water marks. Navy Yard Four argued that its land is not “Commonwealth tidelands” subject to licensing because the site is on “tidal flats” and because it is in private ownership. “Tidelands” are defined in c. 91, § 1 as “present and former submerged lands and tidal flats lying below the mean high water mark.” Tidelands are defined in the regulations as “present and former submerged lands and tidal flats lying below the present or historic mean high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands, as defined herein.” 310 CMR 9.02. “Commonwealth tidelands” are defined in c. 91, § 1 as “tidelands held by the commonwealth in trust for the 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.” “Commonwealth tidelands” are defined in 310 CMR 9.02 as “tidelands held by the Commonwealth, or by its political subdivisions or a quasi-public agency or authority, in trust for the benefit of the public; or tidelands held by a private person by license or grant of the Commonwealth, subject to an express or implied condition subsequent that it be used for a public

purpose.” The regulations then establish a presumption that tidelands are Commonwealth tidelands if they are seaward of the historic low water mark or 100 rods seaward of the historic high water mark, unless there is conclusive evidence that the tidelands are unconditionally free of any proprietary state interest. 310 CMR 9.02.

“Private tidelands” are defined in c. 91, § 1 and 310 CMR 9.02 as “tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water.” The regulations then establish a presumption that tidelands are private tidelands if they are landward of the historic low water mark or 100 rods seaward of the historic high water mark. 310 CMR 9.02. Generally, private tidelands include the area between the high and low water mark, where public rights are more limited than on Commonwealth tidelands.

Because the definition of “tidelands” includes “tidal flats” and may be flowed or filled, and “Commonwealth tidelands” must be “held by the Commonwealth,” Commonwealth tidelands may include tidal flats and filled tidelands. Commonwealth tidelands are not defined, as Navy Yard Four argues, as submerged lands seaward of tidal flats. The location of the historic high and low water marks are not necessarily determinative, because public ownership is also a component in determining jurisdiction. Filled tidelands are “former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill.” 310 CMR 9.02. Because the definition of filled tidelands includes tidal flats, or private tidelands, lawfully filled private tidelands are subject to jurisdiction as tidelands.

The regulations distinguish between activities requiring a license, including the continuation of existing structures on lawfully filled tidelands under 310 CMR 9.05(3)(b) which will be subject to licensing at the time of structural alteration or change in use under 310 CMR

9.05(1). It is only the Legislature, not the Department, that may extinguish public rights in tidelands, and then only under strictly limited circumstances. Opinion of the Justices, 383 Mass. 895, 902 (1981). I need not address the portion of the Petitioner's argument to the extent it claims that the Department's regulations are inconsistent with the statute, except to note that the Petitioner's position finds no support in the Department decisions, the Department's regulations, or the most recent failure of the argument in court that filled private tidelands are not subject to c. 91 jurisdiction. Boston Edison v. MWRA, 459 Mass. 724 (2011).²

Navy Yard Four argued that the "presumptive line" is significant to the status of tidelands at the site. To provide guidance to landowners, the Department established "presumptive lines" indicating the boundaries of the historic low water mark. The license plans were prepared in 2003 before the presumptive lines were drawn, and the Department stated in its 2010 Written Determination that the newer research supports a seaward shift of the historic low water line. See Memorandum in Support of Petitioner's Motion for Summary Decision, Exh. B, Parcel 4 - Charlestown Navy Yard Presumptive Shorelines Exhibit Plan in Boston, Massachusetts, dated January 4, 2011, prepared by Gunther Engineering. As a result, the area between the historic high and historic low water line is larger than shown on the 2005 license plans. This change, however, does not affect the jurisdictional status of the site as Commonwealth tidelands.

Navy Four Yard also claims that the regulatory definition of Commonwealth tidelands impermissibly extends beyond the statutory definition to include additional lands once in public ownership, that are now in private hands. I disagree. The site was unquestionably owned by the

² Navy Four Yard cites a Department case in support of its position, Matter of Wharf Nominee Trust, Docket Nos. 2009-052 and 2010-2, Recommended Final Decision (November 3, 2010), Final Decision (January 7, 2011) (adopting the relevant section of Recommended Final Decision). The Recommended Final Decision cites to the Opinion of the Justices as to rights extinguished by lawful filling, but it is clear later in the decision that rights may only be extinguished by the Legislature, not the Department.

federal government, then by the BRA, and the BRA is a political subdivision of the Commonwealth.³ While Navy Yard Four LP is a private entity, the definition of Commonwealth tidelands, in the statute and regulations, is controlling. "Commonwealth tidelands" are defined in c. 91, § 1 to extend beyond tidelands held by the Commonwealth, and specifically include tidelands "*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* (emphasis added)." Navy Yard Four argued that once the transfer occurred and it "held" the land as a private party, the land is private tidelands. However, Navy Yard Four held the tidelands subject to the 2004 Written Determination issued by the Department. The Written Determination not only specifically identified the entire site as Commonwealth tidelands, it specifically approved the project based upon a finding that it be used for a public purpose. See Written Determination, Waterways Application No. W03-0794-N (February 18, 2004), p. 1 and Finding 5 (project serves a proper public purpose). This finding is tantamount to an express "condition subsequent that it be used for a public purpose." Navy Yard Four had clear notice that it had acquired the property subject to this condition. Thus, although a private landowner, Navy Yard Four holds the land by license of the Commonwealth, subject to the continuing requirement that it be used for a public purpose. Id. Accordingly, the site is "Commonwealth tidelands" within the definition at c. 91, § 1 and 310 CMR 9.02.

WHETHER CHAPTER 23G, § 15 EXTINGUISHED PUBLIC RIGHTS

Chapter 23, § 15, enacted as Chapter 556 of the Acts of 1978, conveyed land owned by the United States for use as a naval facility to the BRA. As the Department notes, since that conveyance, development of the Navy Yard has been subject to c. 91 licensing including

³The BRA is a political subdivision of the Commonwealth as demonstrated by its statutory authority at M.G.L. 121B, 4-5 and c. 652 §12. M.G.L. c. 32 §1 includes within the definition of a "political subdivision of the Commonwealth" any city housing authority established pursuant to M.G.L. c.121B, § 5.

waterfront condominiums, affordable housing, MGH research and office space, and the relocation of the Spaulding Rehabilitation Hospital. See c. 91 licenses 1721, 1741, 1585, and 12936. Despite this historical practice, Navy Yard Four argued that M.G.L. c. 23G, § 15 constitutes a full transfer of ownership surrendering public rights by the Commonwealth. Navy Yard Four claimed that the legislation meets the test established in the 1981 Opinion of the Justices to validly extinguish public rights because M.G.L. c. 23G, § 15 explicitly identifies the parcel, waived all interests and rights to restrict uses, recognized the urban redevelopment mission of the BRA, and provides a public purpose even if incidentally benefiting private parties through the public benefits of economic development. Opinion of the Justices, 383 Mass. 895, 905 (1981).

Navy Yard Four's claim that the Commonwealth's interest in the Navy Yard was extinguished by M.G.L. c. 236 § 15 fails for several reasons. First, as noted by CLF and the Department, the text of the statute expresses an intent for the land to remain subject to c.91: "all licenses and authority to place fill, to maintain existing fill, to build and maintain bulkheads, to drive piles, to build, extend, or widen wharves, piers and other structures on piles or on other support structures or to construct other structures *heretofore or hereafter granted* under the applicable provisions of Chapter 91 of the General Laws..." (emphasis added). Not only is this language not a waiver of public trust rights, it appears to be an affirmation of them. Despite this language, Navy Yard Four points to a clause in the Act which waives the Commonwealth's "right or claim of action it might have for the recovery of said land or any interest therein below high water marks or in such fill or appurtenant structures or to restrict the use of the same." Because c. 91 licensing provisions expressly apply to the site, the waiver must refer to possessory rather than fiduciary interest. See Arno v. Commonwealth, 457 Mass. 434, 451

(2010) (distinguishing Commonwealth's role as owner and fiduciary for the public). This reading of the statute gives meaning to all of its sections. To read the statute as Navy Yard Four does would make the express affirmation of Chapter 91 authority meaningless.

Further, the statute does not acknowledge the interest surrendered or the use to which the property will be put. Navy Yard Four's argument that the legislature had created the BRA and understood that the use would change with the transfer from a naval facility to urban redevelopment does not meet the requirements in the 1981 Opinion, which requires explicit, not tacit, statements. See Moot v. DEP, 456 Mass. 309, 314 (2010); Moot v. DEP, 448 Mass. 340, 348-349 (2007) (identifying Acts explicitly relinquishing rights). Finally, interpretation of statutes involving public rights must be resolved in favor of the public. See Boston Waterfront, 378 Mass. 629, 639 (1979) ("Following the long-established principle of statutory construction that in all grants, made by the government to individuals, of right, privileges, and franchises, the words are to be taken most strongly against the grantee . . ."). Therefore, M.G.L. c. 23G, § 15 did not extinguish public trust rights at the site.

FACILITIES OF PUBLIC ACCOMMODATION ON PRIVATE TIDELANDS

Navy Yard Four argued that the Department lacks jurisdiction over lawfully filled private tidelands, and therefore may not impose the requirements established by regulation for facilities of public accommodation. This argument fails because the site is Commonwealth tidelands. In addition, for the reasons stated, the Department has jurisdiction over private tidelands and c. 91, § 18 requires licenses for tidelands generally. The extension of public rights beyond fishing, fowling, and navigation is consistent with the legislative mandate of c. 91, § 18, to ensure that a

public purpose is served through the license. The Department resolved any ambiguity arising from Opinion of the Justices by favoring public rights.⁴

M.G.L. c. 91, § 18 provides:

No structures or fill for *nonwater dependent uses of tidelands* may be licensed unless a written determination by the Department is made following a public hearing that said structures or fill shall serve a proper public purpose and said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management programs.

Emphasis added. The legislature did not, in statutory amendments to c. 91 in 1983 and 1986, act to extinguish rights as to filled private tidelands, but instead gives them equal footing as to licensing. Consistent with the statute, the regulations at 310 CMR 9.51 (3)(b) prohibit facilities of private tenancy on the ground floor of nonwater-dependent structures on any filled tidelands within 100 feet of a project shoreline. See 310 CMR 9.34 (2)(b)(1). A facility of public accommodation ("FPA") is exterior or interior space open to the public, defined as:

a facility at which goods or services are made available directly to the transient public on a regular basis, or at which advantages of use are otherwise on essentially equal terms to the public at large (e.g., patrons of a public restaurant, visitors to an aquarium or museum), rather than restricted to a relatively limited group of specified individuals (e.g. members of a private club, owners of a condominium building).

310 CMR 9.02. FPAs include restaurants, hotels, cultural institutions, entertainment venues, public transportation, and similar facilities that allow or encourage public access to the waterfront. Facilities of private tenancy, in contrast, include offices and housing that exclude public access and tend to "privatize" the waterfront, discouraging the exercise of public trust rights. FPAs are required on the ground floor of buildings on Commonwealth tidelands, and nonwater-dependent facilities of private tenancy are prohibited on pile supported structures over

⁴ "It appears, therefore, that the public interest in flats reclaimed pursuant to lawful authority may be extinguished, and, if deemed appropriate, the Legislature may act to declare that those rights have been extinguished so as to assure the marketability of title to such property." Opinion of the Justices, 383 Mass. 895, 902 (1981).

flowed tidelands or within 100 feet of a project shoreline on filled private tidelands. See 310 CMR 9.53(2)(c) and 310 CMR 9.51(3)(b). The FPA requirement meets the statutory mandate that the project serve a proper public purpose and the purpose must “provide a greater public benefit than public detriment to the rights of the public.” M.G.L. c. 91 § 18. The FPA requirement is also consistent with the Opinion of the Justices that private benefits must not be primary but “merely incidental to the achievement of the public purpose.” Opinion of the Justices, 383 Mass. 905. Navy Yard Four’s parcel is primarily used as a residential condominium, a facility of private tenancy. The requirement for FPAs on the ground floor allows the public to exercise public trust rights on the land.

Navy Yard Four’s argument related to FPAs fails for several reasons. First, the issue should have been raised in an appeal of the license in 2004. Second, claims related to the validity of regulations or constitutional challenges to regulations may not be adjudicated in an administrative proceeding. See Matter of Cross Point Limited Partnership, Docket No. 95-088, Final Decision (1996), Matter of Town of Wareham, Docket No. 98-094, Final Decision (1999). Third, such claims are without merit because the site is Commonwealth tidelands under jurisdiction of c. 91 and subject to the Department’s regulations as Commonwealth tidelands. Navy Yard Four was, or certainly should have been, aware that the c. 91 license governs the property that it acquired in 2005 and the property was subject to public rights as set forth in the license and the regulations. M.G.L. c. 91 § 18 applies to all tidelands, Commonwealth and private tidelands, and a non-water dependent project such as the Petitioner’s must serve a proper public purpose and the purpose must provide a greater public benefit than detriment to the rights of the public. The private benefit must be merely incidental to the achievement of the public

purpose. Opinion of the Justices at 905. For these reasons, the existing FPA requirements should be sustained.

FACILITIES OF PUBLIC ACCOMMODATION AS INVERSE CONDEMNATION

Navy Yard Four's claim that the FPA requirement constitutes an inverse condemnation that deprives it of economic use of the space and interferes with its investment-backed expectations is entirely unfounded. Navy Yard Four's land was subject to public trust rights under the written determination when the land was acquired, and any expectation that its private economic benefit would be paramount was misplaced. As a matter of law, its private benefit must be subordinate, or "merely incidental." Opinion of the Justices, at 905. The upper floors are licensed for use as residential condominiums, a facility of private tenancy and private benefit, and takings law instructs a court to examine the entirety of a parcel, and not a sliver, to assess whether a governmental regulation "goes too far." Finally, the FPA requirement for the ground floor is necessary to realize the public's rights, ensuring that public, not private, benefits are primary. Of course, this question has been answered by the regulations, and a facial challenge must be brought in court.

PRESCRIPTIVE TITLE PURSUANT TO REV. ST. 1836, c. 119, §12

Navy Yard Four argued that any public rights in the site were extinguished by prescription pursuant to Rev. St. 1836, c. 119, §12, which established a time of limitation on real actions by the Commonwealth of twenty years. The statute was repealed in 1867, and made inapplicable to property or interests of the Commonwealth below the high water mark or in great ponds. Chapter 275 of the Acts of 1867. Navy Yard Four claimed that because the Charlestown Navy Yard was walled off, closed to the public, and exclusively used as a naval facility from 1800 to 1978, including the years between the two statutes of 1835 and 1867, the

Commonwealth's interest was extinguished in 1835. Navy Yard Four cited 19th century cases for the proposition that exclusive possession for 20 years was sufficient to establish prescription related to use of a wharf, private rights in great ponds, and adverse possession of walled off and exclusively used Mystic River tidal flats. See Nicholas v. Boston, 98 Mass. 39 (1867); Atty. Gen. v. Revere Copper Co., 152 Mass. 444 (1890); Tufts v. Charlestown, 117 Mass. 401 (1875).

CLF and the Department responded; correctly, that the United States and not Navy Yard Four would be the proper party to bring such a claim. The Department argued, also correctly, that the courts rather than the Department as an administrative agency are the proper arbiters of property rights. See Tindley v. Department of Env. Quality Engineering, 10 Mass. App. Ct. 623, 411 N.E. 2d 187 (1980); M.G.L. c. 185, § 1(k). Additionally, the Charlestown Navy Yard was in public use and publicly supported, contrary to the cases involving private users. Finally, as the Department notes, the test for relinquishment of public rights in the Opinion of the Justices and Boston Waterfront effectively reasserted public trust rights. Opinion of Justices, 383 Mass 395 (1981). Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629 (1979). Accordingly, I conclude that Rev. St. 1836, c. 119, § 12 does not appear to have extinguished public rights at the Navy Yard, but that this claim must be resolved by the courts.

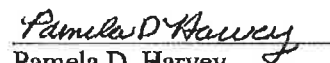
WATER TRANSPORTATION MONETARY CONTRIBUTION

The license required Navy Yard Four to contribute money for five consecutive years to water transportation infrastructure and subsidies to promote water transportation at the site. See License, Special Condition 3. Navy Yard Four conceded that the Department's regulation authorizes compensation to the public for interference with public rights in Commonwealth tidelands. 310 CRM 9.35 (4). Navy Yard Four argued that because the site is lawfully filled private tidelands, compensation is not required and any funds paid should be refunded.

First, Navy Yard Four should have raised this issue in an appeal of the license issued in 2005 that imposed the condition. The five year period for contributions has now lapsed and the issue is moot. Second, Navy Yard Four's argument rests on the assumption the site is filled private tideland rather than Commonwealth tidelands. Because the site is Commonwealth tidelands, the condition is appropriate. Finally, water transportation within the harbor increases access to and from the site, a benefit to residents of the condominium but also a support to FPAs on the ground floor. Although, as Navy Yard Four notes, the MBTA vessels do not dock directly at the site, passengers can easily reach the site from the dock so that Navy Yard Four accrues some benefit from the water transportation service.

CONCLUSION

For the reasons stated, I recommend to the Department's Commissioner that denial of the license amendment requested by Navy Yard Four be sustained.


Pamela D. Harvey
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In The Matter Of:

Navy Yard Four Associates LP

Docket No. 2010-062

File No. W09-2851-N
Boston

Representative

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DEPARTMENT

Date: November 21, 2011