
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SUFFOLK, SS.

No. 11134

SANJOY MAHAJAN ET AL.,
Plaintiffs-Appellees,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOSTON REDEVELOPMENT
AUTHORITY,
Defendants-Appellants.

DIRECT APPELLATE REVIEW OF A DECISION AND JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

**REPLY BRIEF OF THE APPELLANT
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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Introduction

The Department of Environmental Protection (DEP) submits this reply brief to address Appellees' argument that the license it issued to the Boston Redevelopment Authority (BRA) disposes or changes the use of BRA's land under Article 97 because the license is a mortgageable interest, is recordable, and runs with the land. Appellees' Br. at 38-40. The Court should not consider this argument because Appellees did not make it below. Nor did Judge Fahey rely on such reasoning to reach her conclusions of law. See Memorandum of Decision and Order (Decision) at 7-9. In any event, this new argument does not provide an alternative reason to affirm Judge Fahey's decision.

Second, Appellees wrongly argue that they had no remedy other than invalidation of the license through a writ of mandamus. According to the cases they cite, an action for mandamus relief may lie once BRA enters its lease with the restaurant operator or takes affirmative steps to start the work. Appellees' attempts to justify the issuance of mandamus against DEP here based on the mere issuance of a license fall short. DEP, acting in its regulatory capacity, has no independent obligation to seek Legislative approval before issuing a license. A contrary conclusion makes no practical or procedural sense.

I. The License characteristics relied on by Appellees do not transform the Chapter 91 license into a conveyance of a property right that triggers Article 97's vote requirement.

As DEP argued in its opening brief, only the relinquishment of land or an easement triggers Article 97's vote requirement. DEP Br. at 24-25 (citing Opinion of the Justices to the Senate, 383 Mass. 895, 918-19 (1981) (Opinion I)). This Court in 1981 observed that "the two-thirds vote requirement of paragraph four [of Article 97] applies only to the disposal of lands and easements. We do not treat the omission of lesser property rights from the two-thirds voting requirement as accidental or meaningless where the particular language occurs in two consecutive paragraphs." Opinion I, 383 Mass. at 918.¹

¹ The Sierra Club's contention that "in response to Senate's Question No. 5, the Justices [in Opinion I] addressed only the issue of the bill's retroactivity" is inaccurate. Cf. Br. of Amicus Curiae The Sierra Club in support of Sanjoy Mahajan, et al. (Sierra Club Brief) at 22. Question Five in Opinion I asked whether Article 97 would require a two-thirds vote of the Legislature to enact Senate 1001, a bill proposing to eliminate "vestigial" interests of the Commonwealth in certain tidelands. Id. at 897-98. After making the statement quoted in the text accompanying this footnote, the Opinion I Court stated that although it did not think that the bill disposed of land or an easement, "[i]f any interest which is or might be relinquished pursuant to the proposed act is an easement, a two-thirds vote is required as to the relinquishment of that easement. We therefore answer question five 'Yes' as to the disposition of any land or easement." Id. at 919.

DEP does not relinquish land, an easement, or any other property rights when it grants a Chapter 91 license. See G.L. c. 91, § 15. Indeed, as Appellees concede, DEP has no power to do so. Moot v. Dep't of Env'tl. Prot., 448 Mass. 348, 348-49 (2007). See Appellees' Br. at 44. DEP has no ownership or possessory interests in the land at issue to convey. G.L. c. 91 § 2 (explaining that DEP issues licenses while a different agency sells, leases, and conveys property rights held by the Commonwealth in tidelands); see DEP Br. at 3 (noting same). Finally, as DEP noted in its opening brief, the law does not support Judge Fahey's conclusion that the License is "tantamount to" an easement. DEP Br. at 27 n.5.

Nevertheless, Appellees contend that DEP's issuance of a Chapter 91 license conveys valuable property rights and, as such, disposes of land under Article 97. Appellees' Br. at 39-40. They point to the following characteristics of the License: that it is a mortgageable interest under G.L. c. 91, § 15; that it must be recorded under G.L. c. 91, § 18; and that it runs with the land under 310 Code Mass. Regs. 9.23(1). Appellees do not, however, explain how these features turn the issuance of the License into a disposition of land or grant of an easement.

The Legislature has consistently made clear that Chapter 91 licenses do not convey traditional real

property rights. Until 1986, G.L. c. 91, § 15, read: "The grant of a license [under] this chapter shall not convey a property right, nor authorize any injury to property or invasion of other rights." G.L. c. 91, § 15, Historical and Statutory Notes (appended as Ex. A) (reproducing the pre-1986 version of the statute). In 1986, the Legislature amended the statute by adding the words "Except as provided herein" to that sentence and then adding the following sentence: "A license issued [under] this chapter is hereby made a mortgageable interest lawful for investment by [various entities] authorized to invest in any mortgage or other obligation of a similar nature." See St. 1986, c. 348, § 2 (appended as Ex. B). The statute does not define "mortgageable interest." And nowhere did the Legislature suggest that, by adding this language, it intended to fundamentally change the type of rights granted by a Chapter 91 license. The Legislature instead retained the language establishing that a Chapter 91 license generally does not convey any property rights. This is consistent with the authorities cited in DEP's opening brief explaining that, unlike an easement, a license does not create an estate in land. See DEP Br. at 27 n.5.

The available legislative history reinforces this conclusion. According to the bill that introduced the 1986 amendment, the Legislature added the

"mortgageable interest" language to promote the revitalization of waterfront areas by making it easier for developers to obtain construction financing. That bill recognized tidelands as "a valuable public coastal resource - both for their environmental and economic characteristics." 1986 House Doc. No. 1531 (appended as Ex. C). It also acknowledged "the policy of the General Court that individual irrevocable tidelands licenses are not necessary or appropriate to respond to concerns about financial security and that such concerns should be addressed by amending [G.L. c. 91] or in corresponding regulations." 1986 House Doc. No. 1531, § 3. These statements thus reflect the Legislature's awareness that the revocability of Chapter 91 licenses made financing - and revitalization of waterfront areas - difficult. To solve that problem, the Legislature made Chapter licenses "mortgageable interests."

Further, the provision in Chapter 91 that makes the revocation of the license "a taking of real property" under G.L. c. 91, § 15, reinforces the fact that Chapter 91 licenses do not convey lands or easements. Cf. Appellees' Br. at 40. Chapter 91 limits the compensation for such a "taking" to "valuable structures, filling, enclosures, uses, or other improvements built, made, or continued in compliance with said authorization or license." G.L.

c. 91, § 15. Revocation of a license thus results in compensation only for the improvements and uses made under the license and not for value of the land or any purported easement.

Finally, BRA does not need permission from DEP under Chapter 91 to lease its property. Cf. Appellees' Br. at 38. To the contrary, DEP licenses "activities involving work on or use of fill or structures[.]" 310 Code Mass. Regs. 9.05(1).² Acting within the scope of that authority, DEP issued a Chapter 91 license that "approve[d] the proposed structures and uses describe[d]" in it. Record Appendix (RA) at 51. A lease is not an "activity" that involves work on or the use of fill or structures; instead, it is a contract that creates a lessor-lessee relationship in which the lessor grants the lessee the right to use the lessor's property, real or personal. Black's Law Dictionary 889 (7th ed. 1999). Nothing in Chapter 91, its regulations, or the License here indicates that DEP can or did grant BRA the right to lease its property.

² Chapter 91 requires licenses for "construction, placement, excavation, improvement, maintenance, repair, replacement, reconstruction, demolition, or removal of fill or structures," and structural alterations or changes in use of fill or structures. 310 Code Mass. Regs. 9.05(1). Such activities often require financing. The regulations do not suggest that a party needs to obtain a license for a lease.

The features of the License identified by Appellees in their brief thus do not support the legal conclusion that DEP's issuance of the License by itself changed the use or disposed of BRA's land. And, significantly, the License does not excuse BRA from complying with other laws, including Article 97. Instead, it expressly requires BRA to obtain "any and all other applicable authorizations" prior to commencing any activity or use allowed by the License. See RA 57 (License, Standard Condition 2).

Moreover, in issuing the License, DEP fulfilled its duty to preserve and promote the public's rights in the filled tidelands at issue. G.L. c. 91, § 2 (directing DEP "to preserve and protect the [public's] rights in tidelands . . . by ensuring that tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose"). In 1983, DEP licensed the shade structure for the nonwater-dependent purposes of providing egress and ventilation for the Blue Line subway. RA 39, 74. For nearly 30 years, the shade structure served that purpose. Appellees' use of the structure to enjoy quiet views of the harbor is incidental to that use. In approving the License, DEP concluded that the addition of a restaurant use to the shade structure promoted public use of the site without detrimentally affecting water-based activities on Long Wharf. RA 50-51; 578-582.

Although Appellees lament the loss of "a spacious, quiet public space in which to enjoy" views of the harbor, Appellees' Br. at 5, they never challenged DEP's factual findings that BRA's proposal makes the best possible public use of these lands. RA 582-83.

II. BRA's lease, and not the Chapter 91 license, would trigger the requirement of a legislative vote if Article 97 applies to the land here.

DEP is not indifferent to Article 97's purposes and requirements. Cf. Appellees' Br. at 43 n.18. Indeed, DEP has never suggested that BRA can lease and develop its land without a two-thirds vote of the Legislature if Article 97 applies to the property. The License does not excuse BRA from compliance with all other laws. See RA 57. If Article 97 applies, then BRA - as the public property owner and the project proponent - must obtain approval from the Legislature under Article 97 in addition to getting the License.

Appellees incorrectly contend that the writ of mandamus against DEP was proper here because there is no "effective remedy available to [them]" to ensure compliance with Article 97. Appellees' Br. at 49. To the contrary, they can seek mandamus relief against BRA when the relevant disposition (i.e., a lease) or change in use (i.e., shovels in the ground after all approvals are obtained) occurs. Whether or not the action is ripe at this time is an issue for the BRA but not for DEP.

It simply does not make sense for both DEP and BRA to have to separately seek Article 97 approval for the very same project. Article 97 approval for the Chapter 91 license would not satisfy BRA's Article 97 obligations. On the other hand, it does make sense for project proponents to obtain all necessary regulatory approvals before seeking Article 97 approval. As DEP explained in its opening brief, until the regulatory approvals are issued, a project lacks the definiteness necessary for a meaningful Article 97 vote.

Significantly, the cases cited by Appellees support DEP's position that only the lease, and not the Chapter 91 license, can trigger Article 97's vote requirement. See Robbins v. Dept. of Pub. Works, 355 Mass. 328, 330-32 (1969) (granting mandamus relief to enjoin unauthorized conveyance of land from one agency to another); Gould v. Greylock, 350 Mass. 410, 423-26 (1966) (granting mandamus relief to enforce doctrine of prior public use against leasing authority and invalidating lease and management agreements after determining that lease was not within the scope of the enabling legislation); Toro v. Mayor of Revere, 9 Mass. App. Ct. 871, 871 (1981) (concluding appellants stated a claim for mandamus relief under Article 97 against city after city council conveyed land to its conservation commission). Cf. Appellees' Br. at 46-

48. In all of these cases, mandamus was granted only after a triggering conveyance occurred. Further, mandamus relief was entered only against the public agency with title to the property and not against an agency with regulatory authority over the proposed project. Significantly, none of those courts invalidated a license or permit through mandamus relief.

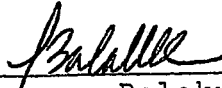
Thus, this Court should reverse the trial court's judgment entering mandamus relief against DEP and invalidating the License. Not only did DEP not have a duty to comply with Article 97 before it issued the License but Appellees also have an effective remedy. They can sue BRA once the triggering disposition or change in use has occurred. Again, while the License certifies that the change in use proposed by BRA complies with Chapter 91, the issuance of the license itself does not change the use or dispose of the land. See DEP Br. at 27-33. Accordingly, this Court should reject Appellees' misdirected attempt to use the License to secure BRA's compliance with Article 97.

Respectfully submitted,

DEPARTMENT OF ENVIRONMENTAL
PROTECTION

By its attorney,

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CERTIFICATION PURSUANT TO MASS. R. APP. 16(k)

I, Annapurna Balakrishna, hereby certify that the foregoing brief complies with all the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.



Annapurna Balakrishna
Assistant Attorney General

ADDENDUM

G.L. c. 91, § 15 Exhibit A
St. 1986, c. 348, § 2 Exhibit B
1986 House Doc. No. 1531 Exhibit C

Exhibit A

C

Effective:[See Text Amendments]

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

▣ Title XIV. Public Ways and Works (Ch. 81-92B)

▣ Chapter 91. Waterways (Refs & Annos)

→→ § 15. Revocation and expiration of authority or license; exception; mortgageable interest

Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work in, over and under the Connecticut River or the non-tidal part of the Merrimack River or in, over or under the waters of any great pond or at any outlet thereof below high water mark, or upon ground over which the tide ebbs and flows, or to fill up or to enclose the same, whether such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not. Said authority or license shall be revocable at the discretion of the general court, or by the department for noncompliance with the terms and conditions set forth therein. The license shall expire as to all work authorized or licensed not completed within five years from the date of such authorization or license or such other period of time specified therein; provided, however, that for good cause shown the department may extend, without public hearing or notice, the construction period of the authorization or license for one or more one-year periods. Revocation by the general court of licenses issued after January first, nineteen hundred and eighty-four shall be treated as a taking of real property requiring payment of just compensation in accordance with the provisions of chapter seventy-nine for valuable structures, fillings, enclosures, uses or other improvements built, made or continued in compliance with said authorization or license. Except as provided herein, the grant of a license pursuant to this chapter shall not convey a property right, nor authorize any injury to property or invasion of rights of others. A license issued pursuant to this chapter is hereby made a mortgageable interest lawful for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee, or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature.

CREDIT(S)

Amended by St.1983, c. 589, § 25; St.1986, c. 348, § 2.

HISTORICAL AND STATUTORY NOTES

St.1869, c. 432, § 1.

St.1874, c. 284, § 1.

P.S.1882, c. 19, § 12.

St.1885, c. 344, § 3.

St.1888, c. 318, § 5.

R.L.1902, c. 96, § 21.

St.1914, c. 717, § 3.

St.1917, c. 178, § 1.

St.1917, c. 240, § 1.

St.1927, c. 39, § 1.

St.1983, c. 589, § 25, an emergency act, approved Dec. 17, 1983, rewrote the section, which prior thereto read:

“Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work in, over and under the Connecticut river or the non-tidal part of the Merrimack river or in, over or under the waters of any great pond or at any outlet thereof below high water mark, or upon ground over which the tide ebbs and flows, or to fill up or to enclose the same, whether such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not: such authority or license shall be revocable at the discretion of the general court and shall expire in five years from its date, except as to valuable structures, fillings or enclosures actually and in good faith built or made under the authority or license during the term thereof; but if compensation has been paid to the commonwealth under section twenty-two or under any similar provision of law, the rights and privileges for which it has been paid shall not so terminate or be revoked unless provision is made for repayment of such compensation.”

St.1986, c. 348, § 2, approved July 23, 1986, rewrote the section, which prior thereto read:

“Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work in, over and under the Connecticut river or the non-tidal part of the Merrimack river or in, over or under the waters of any great pond or at any outlet thereof below high water mark, or upon ground over which the tide ebbs and flows, or to fill up or to enclose the same, wheth-

er such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not. Said authority or license shall be revocable at the discretion of the general court or for noncompliance with the terms and conditions set forth therein. The license shall expire unless all work authorized or licensed is completed within five years from the date of such authorization or license; provided however, that revocation by the general court for authorization of licenses issued after January first, nineteen hundred and eighty-four for any reasons other than noncompliance or expiration requires compensation in accordance with the provisions of chapter seventy-nine for valuable structures, fillings or enclosures actually and in good faith built or made under said authorization or license during the term thereof. The grant of a license pursuant to this chapter shall not convey a property right, nor authorize any injury to property or invasion of other rights."


LAW REVIEW AND JOURNAL COMMENTARIES

Tidelands laws and regulations. John A. Pike and Herbert W. Vaughan, 77 Mass.L.Rev. 98 (1992).

Waterfront development and public trust doctrine. William L. Lahey (1985) 70 Mass.L.Rev. 55.

LIBRARY REFERENCES

Water Law  2696.

Wharves  7.

Westlaw Topic Nos. 405, 408.

C.J.S. Navigable Waters §§ 123, 135 to 137.

C.J.S. Wharves §§ 10 to 11.

RESEARCH REFERENCES

Treatises and Practice Aids

28 Mass. Prac. Series § 8.39, Types--Tidelands.

28 Mass. Prac. Series § 26.6, Tidewaters--Docks and Wharves.

NOTES OF DECISIONS

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1. In general

Power to revoke license to place fill on tideland resides with legislature. Attorney General v. Baldwin (1972) 279 N.E.2d 710, 361 Mass. 199. Water Law  2696

Revocation of defendants' license to place fill on tideland rendered moot that part of final decree which enjoined defendants from placing any further fill in area until terms of license were complied with. Attorney General v. Baldwin (1972) 279 N.E.2d 710, 361 Mass. 199. Appeal And Error 843(2)

2. Void license

Where license to extend wharf to a point below high water mark and accompanying plan were not recorded within one year after effective date of the license as required by statute, the license became "void" in the strict sense, and thereafter such structure erected over tidewater was maintained on lands of the commonwealth without legal right, so that owners thereof could not recover against city for damage done to structure during the construction of a seawall under statute authorizing City of Haverhill to enter into flood control project with the United States. Tilton v. City of Haverhill (1942) 42 N.E.2d 588, 311 Mass. 572. Eminent Domain 284; Wharves 7

3. Delegation of authority

The commonwealth has the power to require the granting of licenses for the construction of interstate lines under its waters, and may delegate the power to supervise such construction. 8 Op.Atty.Gen.1927, p. 216.

4. Legislative grant

Act of Massachusetts Legislature authorizing condemnee's predecessor in title to extend the wharves and landing places over tidewaters of harbor to a specified distance, with right and privilege of using and occupying flats within or adjoining such wharves and structures, was a "legislative grant" and not merely a revocable "license", notwithstanding that no words of inheritance appeared. U.S. v. Five Acres of Land in Suffolk County, Mass., D.C.Mass.1944, 56 F.Supp. 628, affirmed 149 F.2d 927, certiorari denied 66 S.Ct. 54, 326 U.S. 741, 90 L.Ed. 443. Water Law 1249

5. Valuable structures

Statute providing that every authority or license for erections in, over, or under tidewaters, granted after 1868, should be subject to conditions that license should be revocable, and should expire in five years from its date, except as to valuable structures, actually and in good faith built or made under the authority or license, does not prevent revocation of a license because valuable structures have been erected. Commissioner of Public Works v. Cities Service Oil Co. (1941) 32 N.E.2d 277, 308 Mass. 349. Water Law 2600

M.G.L.A. 91 § 15, MA ST 91 § 15

Current through Chapter 192, except for Chapter 165, of the 2012 2nd Annual Session

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END OF DOCUMENT

Exhibit B

ACTS, 1986. - Chaps. 347, 348.

commonwealth that the guidelines required under section one of this act have been promulgated, and approved, whichever date first occurs.

Approved July 23, 1986.

Chapter 347. AN ACT RELATIVE TO THE TEMPORARY CUSTODY OF PAROLEES AND ISSUANCE OF THE WARRANT FOR SUCH TEMPORARY CUSTODY.

Be it enacted, etc., as follows:

Section 149A of chapter 127 of the General Laws, as appearing in the 1984 Official Edition, is hereby amended by inserting after the second sentence the following two sentences:- The parole board shall have the right to withdraw said warrant for temporary custody and such withdrawal shall not affect the validity of any subsequent warrants issued. Upon the withdrawal of said warrant, the time from the issuance of the warrant until the withdrawal shall be considered as part of the original sentence:

Approved July 23, 1986.

Chapter 348. AN ACT RELATIVE TO THE COASTAL PROTECTION OF THE COMMONWEALTH.

Be it enacted, etc., as follows:

SECTION 1. Section 1 of chapter 91 of the General Laws, as appearing in the 1984 Official Edition, is hereby amended by inserting after the definition of "Private tidelands" the following two definitions:-

"Substantial change in use", a use for a continuous period of at least one year of ten per cent 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.

"Substantial structural alteration", a change in the dimensions of a principal building or structure which increases by more than ten per cent the height or ground coverage of the building or structure specified in the authorization or license, or an increase by more than ten per cent of the surface area of the fill specified in the authorization or license.

SECTION 2. Said chapter 91 is hereby further amended by striking out section 15, as so appearing, and inserting in place thereof the following section:-

Section 15. Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work in, over and under the Connecticut River or the nontidal part of the Merrimack River or in, over or under the waters of any great pond or at any outlet thereof below high water

mark, or upon ground over which the tide ebbs and flows, or to fill up or to enclose the same, whether such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not. Said authority or license shall be revocable at the discretion of the general court, or by the department for noncompliance with the terms and conditions set forth therein. The license shall expire as to all work authorized or licensed not completed within five years from the date of such authorization or license or such other period of time specified therein; provided, however, that for good cause shown the department may extend, without public hearing or notice, the construction period of the authorization or license for one or more one-year periods. Revocation by the general court of licenses issued after January first, nineteen hundred and eighty-four shall be treated as a taking of real property requiring payment of just compensation in accordance with the provisions of chapter seventy-nine for valuable structures, fillings, enclosures, uses or other improvements built, made or continued in compliance with said authorization or license. Except as provided herein, the grant of a license pursuant to this chapter shall not convey a property right, nor authorize any injury to property or invasion of rights of others. A license issued pursuant to this chapter is hereby made a mortgageable interest lawful for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee, or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature.

SECTION 3. Section 18 of said chapter 91, as so appearing, is hereby amended by striking out the first paragraph and inserting in place thereof the following three paragraphs:-

Upon or prior to applying for a license pursuant to this section, the applicant shall submit to the planning board of the city or town where the work is to be performed, except in case of a proposed bridge, dam or similar structure across a river, cove, or inlet, the application containing the proposed use, the location, dimensions and limits and mode of work to be performed.

Said planning board may conduct a public hearing within thirty days of receipt of license application. Within fifteen days of conducting said public hearing or within forty-five days of receipt of license application, the planning board shall submit a written recommendation to the department. Said recommendation shall state whether said planning board believes the development would serve a proper public purpose and would not be detrimental of the public's rights in these tidal lands. The department shall take into consideration the recommendation of the local planning board in making its decision whether to grant a license.

Every license granted under this chapter shall be signed by the department, shall state the conditions on which it is granted, including, but not limited to the specific use to which the licensed structure or fill

ACTS, 1986. - Chap. 348.

is restricted, and shall specify by metes, bounds and otherwise the location, dimensions, and limits and mode of performing the work authorized thereby. Any changes in use or structural alteration of a licensed structure or fill, whether said structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by the department of a new license in accordance with the provisions and procedures established in this chapter. Any unauthorized substantial change in use or unauthorized substantial structural alteration shall render the license void. Licenses granted by the department pursuant to this chapter shall be revocable by the department for noncompliance with the conditions set forth therein. The department shall not revoke any license until it has given written notice of the alleged noncompliance to the licensee and those persons who have filed a written request for such notice with the department and afforded them a reasonable opportunity to correct said noncompliance. The department may promulgate regulations for implementation for its authority under this chapter.

The department shall submit any regulations promulgated under the provisions of this chapter to the joint legislative committee on natural resources and agriculture, to the senate committee on ways and means and to the house committee on ways and means, for their review within sixty days prior to the effective date of said regulations.

SECTION 4. The last paragraph of section 18 of said chapter 91, as so appearing, is hereby amended by inserting after the word "tidelands", in lines 56 and 57, the word:- if.

SECTION 5. Section 22 of said chapter 91, as so appearing, is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:- The department shall by regulation provide for a method for determination of such compensation which may in the department's discretion be based on either a schedule of rates per square yard of commonwealth tidelands occupied or on an appraisal of the fair market value of the rights granted by the commonwealth, and which may in the department's discretion be assessed either as a lump sum payable in full prior to issuance of the license or as a series of annual payments which shall be required as a condition of the license.

SECTION 6. Section 2 of chapter 183A of the General Laws, as amended by section 3 of chapter 788 of the acts of 1985, is hereby further amended by adding the following sentence:- For purposes of this section, the holder of a license granted by the department of environmental quality engineering under the provisions of chapter ninety-one for development of commonwealth tidelands shall be deemed the owner of the land, and the licensee shall be deemed the holder of a sufficient interest in real estate to be submitted to and governed by the provisions of this chapter.

Approved July 23, 1986.

Exhibit C

HOUSE No. 1531

By Mr. Hynes of Marshfield, petition of Frank M. Hynes and Carol Amick relative to the coastal protection of the Commonwealth. Natural Resources and Agriculture.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Eighty-Six.

ACT RELATIVE TO THE COASTAL PROTECTION OF THE COMMONWEALTH.

Enacted by the Senate and House of Representatives in General Assembly, and by the authority of the same, as follows:

Whereas, The tidal flats and submerged lands in the Commonwealth of Massachusetts are an essential link between the uplands and sea;

Whereas, The tidal flats and submerged lands in the Commonwealth of Massachusetts are a valuable public coastal resource — both for their environmental and economic characteristics;

Whereas, These areas are commonly referred to as tidelands;

THE GENERAL COURT DOES HEREBY RESOLVE THAT PUBLIC RIGHTS IN TIDELANDS SHALL BE ACKNOWLEDGED IN THE FOLLOWING MANNER:

Massachusetts General Laws, Chapter 91, sets forth the appropriate and preferred method to authorize the use of tidelands;

The General Court has delegated to the DEQE and MCZM the case by case evaluation of proposed structures, fill and other uses in tidelands due to the specific expertise of these agencies;

It is the policy of the General Court that individual revocable tidelands licenses are not necessary or appropriate to respond to concerns about financial security and that such concerns shall be addressed by amending Chapter 91 or in corresponding regulations;

The General Court will from time to time, entertain policy

24 amendments to refine the provisions of Chapter 91 as warranted
25 to facilitate a clear understanding of the intent of that Chapter
26 as amended in Chapter 589 of the Acts of 1983.

1 SECTION 1. Section 1 of chapter 91 of the General Law
2 most recently amended by Chapter 589 of the Acts of 1983
3 hereby further amended by adding the following definitions:
4 "Substantial change in use", a use for a continuous period
5 at least one year of ten percent or more of the surface area of
6 authorized or licensed premises or structures for a purpose
7 unrelated to the authorized or licensed use or activity.
8 "Substantial structural alteration", a change in the dimensions
9 of a principal building or structure which increases by more than
10 ten percent the height or ground coverage of the building or
11 structure specified in the authorization or license, or an increase
12 by more than ten percent of the surface area of the fill specified
13 in the authorization or license.

1 SECTION 2. Said Chapter 91 is hereby further amended
2 striking out Section 15, as most recently amended by Section
3 of Chapter 589 of the Acts of 1983, and inserting in place thereof
4 the following new section:
5 Section 15. Every authority or license granted since eight
6 hundred and sixty-eight or hereafter granted in the commonwealth
7 wealth to any person to build a structure or do other work
8 over and under the Connecticut River of the nontidal part of
9 Merrimack River or in, over or under the waters of any great pond
10 or at any outlet thereof below high water mark, or upon ground
11 over which the tide ebbs and flows, or to fill up or to enclose
12 same, whether such ground is above or below low water mark
13 or within or beyond one hundred rods from high water mark
14 whether private property or property of the commonwealth shall
15 be subject to the following conditions, whether expressed in the
16 act, resolve or license granting the same or not. Said authority
17 or license shall be revocable at the discretion of the general court
18 or by the department for non-compliance with the terms and
19 conditions set forth therein. The license shall expire as to all work
20 authorized or licensed not completed within five years from the date

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date of such authorization or license or such other period of time specified therein; provided, however, that for good cause shown the department may extend, without public hearing or notice, the construction period of the authorization or license for one or more one-year periods. Revocation by the general court of licenses issued after January first, nineteen hundred and eighty-four shall be treated as a taking of real property requiring payment of just compensation in accordance with the provisions of chapter twenty-nine for valuable structures, fillings, enclosures, uses or other improvements built, made or continued in compliance with said authorization or license. Except as provided above, the grant of a license pursuant to this chapter shall not convey a property right, nor authorize any injury to property or invasion of rights to others. A license issued pursuant to this chapter is hereby made a mortgageable interest lawful for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature.

SECTION 3. Section 18 of said Chapter 91, as most recently amended by Section 26 of Chapter 589 of the Acts of 1983, is hereby further amended by striking out the first paragraph, and inserting in place thereof the following new paragraph:

Section 18. Every license granted under this chapter shall be granted by the department, shall state the conditions on which it is granted, including, but not limited to the specific use to which the licensed structure or fill is restricted, and shall specify by metes, bounds and otherwise the location, dimensions, and limits and mode of performing the work authorized thereby. Any changes in use or structural alteration of a licensed structure or fill, whether the structure or fill first was licensed prior to or after the effective date of this section, shall require the issuance by the department of a new license in accordance with the provisions and procedures established in this chapter. Any unauthorized substantial change in use or unauthorized substantial structural alteration shall render the license void. Licenses granted by the department

18 pursuant to this chapter shall be revocable by the department
 19 noncompliance with the conditions set forth therein. The
 20 department shall not revoke any license until it has given written
 21 notice of the alleged noncompliance to the licensee and the
 22 persons who have filed a written request for such notice with the
 23 department and afforded them a reasonable opportunity to
 24 correct said noncompliance. The department may promulgate
 25 regulations for implementation for its authority under this
 26 chapter.

1 SECTION 4. The seventh paragraph of said Section 18 of
 2 Chapter 91 is hereby amended by inserting after the word
 3 "lands", in line 5, the word: — if.

1 SECTION 5. Section 22 of said chapter 91, as most recently
 2 amended by section 27 of chapter 589 of the acts of 1983, is hereby
 3 further amended by striking out the second sentence, and inserting
 4 in place thereof the following new sentence: — The department
 5 shall by regulation provide for a method for determination of such
 6 compensation which may, in the department's discretion, be based
 7 on either a schedule of rates per square yard of commonwealth
 8 tidelands occupied or on an appraisal of the fair market value of the
 9 rights granted by the commonwealth, and which may in the
 10 department's discretion be assessed either as a lump sum payable
 11 full prior to issuance of the license or as a series of annual payments
 12 which shall be required as a condition of the license.

1 SECTION 6. Section 2 of chapter 183A of the General Laws
 2 hereby amended by adding at the end thereof the following sen-
 3 tence: — For purposes of this section, the holder of a license granted
 4 by the department of environmental quality engineering under the
 5 provisions of chapter ninety-one for development of commonwealth
 6 wealth tidelands shall be deemed the sole owner of the land, and the
 7 licensee shall be deemed the holder of a sufficient interest in the
 8 estate to be submitted to and governed by the provisions of this
 9 chapter.

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