PROPERTY LAW

Tidelands, submerged lands and public rights:

Arno v. Commonwealth and *Alliance v. Energy Facilties Siting Board*

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CHARACTERIZATION OF CASES/HOLDINGS

In a unanimous, populist decision that navigates closer to immortality the public's rights in current and former tidelands, *Joseph V. Arno v. Commonwealth,*[1] required the Massachusetts Supreme Judicial Court to consider the interplay between the commonwealth's system of land registration[2] and the public's longstanding rights in geographic areas known as tidelands.

The salient question of first impression was whether registration of a parcel of land may extinguish the public's "trust rights" in "tidelands."[3] The SJC concluded registration cannot extinguish these rights, because neither the Land Court nor the attorney general has been legislatively authorized to do so.[4]

This note reviews *Arno,* as amplified by an immediately subsequent and more pragmatic decision by a divided SJC, *Alliance v. Energy Facilities Siting Board,*[5] which concluded the Legislature could allow one state agency to "stand in the shoes" of another, usual agency in reviewing tidelands-related license applications, without meeting the *Arno*-affirmed criteria for the permanent disposition of public trust rights.[6]

KEY UNDERLYING DEFINITIONS OF TERMS

Before recounting the recent cases, it is helpful to pause to define the terms used frequently.

First, the land below the high water mark "since the Magna Carta" has been impressed with "public rights designed to protect the free exercise of navigation, fishing and fowling" and collectively known as "public trust rights."[7] These rights are currently held in trust for the people by the Massachusetts Legislature which, in usual circumstances, statutorily delegates issuance of licenses for uses and structures on or in tidelands to the Massachusetts Department of Environmental Protection ("DEP"), pursuant to Mass. Gen. Laws Chapter 91.[8]

Second, "tidal flats" refer to "the area between mean high water and mean low water (or 100 rods from mean high water, if lesser)[9]; Third, "submerged lands" refers to "land lying seaward of flats."[10] Together, tidal flats and submerged lands are referred to as "tidelands."[11] Finally, "filled tidelands," while not defined in the *Arno* case, are discussed therein (and comprise much of the City of Boston, for example).[12]

COMMON PROCEDURES OR PROCESSES FOR CHAPTER 91 LICENSING IN RELATION TO THESE CASES

In practice, legal proceedings on the subject of public trust rights tend to concern filled tidelands, because few landowners or developers dispute the continuing public trust rights to access currently flowing tidelands. During proceedings to license structures or uses on tidelands, the state tends to focus on protecting water dependent uses' capacity to use waterfront sites and, of late, the general public's recreational access for strolling along the waterfront.

In general, the public is entitled to "fish, fowl and navigate" along currently flowing tidelands between the high and low water marks. While a subject of great controversy and misunderstanding among beachgoers, simply strolling or beach bathing is not legally within the general public's rights on privately owned, currently flowing tidelands in Massachusetts.

Regarding filled tidelands, the state defines structured public walkways, such as "harborwalks" along the water's edge, as "water dependent uses" and generally requires them to be built right at the water's edge at a developer's expense, whereas restaurant seating areas for dining near the water are defined as "non-water dependent uses," and generally are required to be set back substantially from the water's edge. Future litigants on this subject will find ample reference material in both the *Alliance* majority and dissenting opinions.

ALLIANCE'S MAJORITY AND MINORITY DISTINCTIONS OF *ARNO'S* HOLDINGS

Less than a month after releasing the *Arno* decision requiring express delegation of authority to do away with public trust rights, a divided SJC decided the *Alliance* case with the Chief Justice Margaret H. Marshall authoring the dissenting opinion and Justice Margo Botsford the majority. Marshall vociferously differed with the majority on the adequacy of the legislative delegation of authority to decide tidelands matters, which she distinguished from other delegations by referencing, among other things, the fiduciary nature of the Legislature's responsibilities in tidelands matters.[13]

Arno's fundamental holding overturns the lower court's holding and concludes that not even the Land Court or the attorney general can "divest the public's rights" in tidelands, absent an adequate delegation of authority to do so from the Legislature. The case also reaffirms that any successful legislative delegation of authority to extinguish public trust rights would be required to comply with the prerequisites articulated in *Opinions of the Justices*.[14] The *Arno* decision did not elect to emphasize any particular prerequisite, other than to include the unusually assertive observation that an adequate delegation of authority for permanent extinguishment of public trust rights "may not be possible."[15]

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Arno also holds that public trust rights do not need to be included in Land Court registration certificates to remain extant, and that the Legislature is acting as a *fiduciary* for the public, not as an owner, in exercising its authority. In practice, this means the frequent prior use of "reservation of waterfront rights" need not be included in the registration certificate to be nevertheless effective, because the rights already exist and the Land Court has no authority to take them away.

If *Arno* navigated the existence of public trust rights closer to immortality, the majority opinion in the *Alliance* case built intervening breakwaters, with ostensible channel markers for proceeding safely onward. By making it easier for the Legislature to provide for other authorities to make delegated decisions regarding public trust rights, however, it is syllogistic that it will be easier to dilute these rights or prioritize their actualization differently than prior state authorities have.

Reading both cases together, one concludes it is indeed not possible to extinguish public trust rights, once they have been found to have ever existed, without an express legislative delegation of authority to do so. *Arno* alone would make that express delegation very difficult to accomplish. But read with the *Alliance* majority, indirect expressions of intent to delegate authority would seem to suffice, particularly where the issue is which commonwealth entity has delegated authority to act with respect to public trust rights as opposed to anyone (other than the Legislature) having authority to extinguish them entirely. And, as noted in both the *Alliance* majority and dissent, the influence of current, politically favored movements, such as development of renewable energy resources, can realign perceptions of what matters in actualizing public trust rights.

The delegation of authority issues addressed in *Alliance* were decided in the context of the politically charged subject of transmitting energy through state waters from what is slated to be the nation's largest in-water wind energy facility in federal waters in Nantucket Sound, a contextual fact both the majority and the dissent acknowledged as influential in all relevant proceedings.[16]

The *Alliance* majority and dissent also both agreed that express delegation of authority to make decisions regarding tidelands was necessary, but disagreed as to whether the required delegation criteria had indeed been met by the specific legislation, which makes no mention of public trust rights.[17]

In practice, the two types of delegated authority fuse when it comes to a particular project or geographic location. Put colloquially, once "the decider," whomever that may be, has made a final decision about what is and is not an adequate actualization of the public's trust rights in tidelands, that's it for many generations to come. Most current Chapter 91 tidelands licenses bear extremely long terms.

And, as with many matters, who decides often determines what is decided. Once a commonwealth license to use or build on tidelands has issued in final form by any state agency, be it the usual Department of Environmental Protection or the unusual Energy Facilities Siting Board, the public's trust rights are treated as adequately actualized and are not available for debate or reconsideration again until termination or extinguishment of the license, usually many lifetimes hence.

Also, as a matter of human nature, once the licensed project has been built, subsequent generations acclimate to the changed environment and find it nonsensical, if not aberrant, to suggest extant public trust rights merit substantial current attention.[18]

POSSIBLE FUTURE LITIGATION

There are a few other jurisprudential gems embedded in the extremely carefully written, useful and pro-public-trust-rights *Arno* decision by the Hon. Robert J. Cordy.[19] For example:

- The *Arno* decision recognizes that licenses to fill tidelands are generally revocable, and subject to a condition subsequent that they be used for a "proper public purpose." The exact scope of the public purpose "likely encompasses at least the conditions found in the licenses issued when the land was filled."[20]
- This statement, hovering between *dicta* and a mandate, poses substantial challenges for both property owners and the Commonwealth, where very few filled tidelands are still being used for exactly the same purposes as when they were first filled. Practitioners providing legal opinions on tidelands compliance matters may want to make note of the revocability of a license to fill, while observing that, to date, the Commonwealth has rarely revoked an otherwise extant fill license solely for a change in the use of the property. It is not yet known how *Arno* will impact the ➤ 23

1) 457 Mass. 434 (2010).
2) Mass. Gen. Laws ch. 185, §§ 26-56 (West 2010)
3) *Arno*, 457 Mass. at 436.
4) *Id.*
5) 457 Mass. 663 (2010),
6) *Id.*
7) *Arno*, 457 Mass. at 450.
8) Mass. Gen. Laws ch. 91 §§ 1 et. seq. (West 2009)
9) *Id.*
10) *Id.*
11) *Id.*
12) Joseph V. Arno v. Commonwealth¸ 457 Mass. 434 (2010).
13) Alliance v. Energy Facilities Siting Board, 457 Mass. 663 (2010),
14) 383 Mass. 895, 902-906 (1981).
15) *Arno*, 457 Mass. at 453.
16) *Alliance*, 457 Mass. 670 (2010).
17) Mass. Gen. Laws ch. 164, §§ 69-69S (West 2009).
18) S*ee, e.g.*, Moot v. Dept. of Environmental Protection, 448 Mass. 340 (2010); and the subsequent legislative proceedings.
19) This author served as Gov. William F. Weld's asst. secretary and general counsel for the then-Executive Office of Environmental Affairs at the time the Hon. Robert J. Cordy served as his chief legal counsel for the commonwealth.
20) *Arno*, 457 at 456.

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Commonwealth's practices in this regard. Once such a site comes to the Commonwealth's attention, a new license for ongoing uses and structures (or proposed new ones) is usually required, at which time one is expected to demonstrate a continuing "public purpose" for the fill, as well as provision for modern-era public access. The recent articulation of "public purposes" made by the Secretary of Energy & the Environment and published at 301 Mass. Code Regs. 13.04 is informative, in starting one's analysis of adequate public purposes for previously filled tidelands on which the use has changed since the license or legislative grant to fill, subject to condition subsequent, became effective. These new regulations correspond to the statutory changes made in response to a prior judicial decision and should be read in conjunction with the usual Chapter 91 "Proper Public Purpose" requirements detailed at 310 CMR 9.31.

- *Arno* observed that certain aspects of the public's longstanding trust rights may remain in effect, even though they are not referenced statutorily in Chapter 91 and may never have been re-codified since finding "official expression in the Body of Libertyes or early colonial statutes."[21] The implication is that it is possible for an assertion of public trust rights to be made which is not codified in statute and for that assertion to nevertheless meet with success in the courts, if sufficiently supported by historic evidence. Or, in the inverse, that it is possible for DEP to include in regulations public trust rights which are not referenced in the authorizing statute but are derived from the preceding historic legal authorities.

PRACTICE IMPLICATIONS OF *ALLIANCE* AND *ARNO*

As a practice note, the particular *Arno* matter is remanded for Land Court to reconsider exactly which geographic areas of the subject parcels on Nantucket Harbor were or are tidelands and therefore continue to host extant public trust rights (primarily a factual inquiry into historic tidal records). Locating historic tide lines is itself an arcane expertise.

In general, counsel to any current waterfront parcel owner would be prudent to arrange to have reexamined Land Court registration decisions before assuming a pre-existing registration decision remains valid with respect to an absence of public trust rights (and the consequential absence of need to secure a Chapter 91 license from the commonwealth for structures or uses on the property).

Thus, contrary to the usual practice with respect to property which has passed through Land Court, prior Land Court registration cases involving current or former tidelands are now suspect, with respect to extant public trust rights. In such a specialized area of law, it is not difficult to imagine the misreading of *Arno* (intentional or accidental) resulting in even factual findings concerning the delineation and location of tidelands being newly challenged or "spooking" potential lenders. A careful reading of *Arno* should result in all prior factual findings by Land Court remaining unchanged and unchallengeable, such as a prior factual delineation of the specific location of the historic high water, from which one defined the existence at any time of public trust rights.[22]

Post-*Arno* and *Alliance*, it remains entirely possible to methodically provide a respectable, reliable, useful legal opinion on the trust rights associated with any property. What are truly at risk, however, and truly susceptible to challenge, are prior registration cases in which public rights were said to be extinguished by virtue of the registration proceedings, having once existed. The distinction practitioners should focus on is whether the relevant Land Court action was deciding a factual matter as to where tidelands were and were not, or a "policy" matter as to whether public trust rights should or should not be extinguished (as opposed to never having existed geographically).

Factual research as to the current and historic extent of tidal influence on any particular parcel is usually well worth the investment, unless one's client anticipates complying with current state Chapter 91 licensing requirements using the state's current presumptive jurisdictional delineation. In practice, the vast majority of waterfront owners simply use the state's presumptive jurisdictional line for tidelands, which is available by inquiry to the DEP.

After ascertaining the state's presumed jurisdictional line, most developers seek to meet the usual licensing requirements of 310 CMR. 9.00 *et seq.* in order to proceed to develop without commonwealth opposition and delay. Some experts report that most relevant registered land parcels already contain a waterways encumbrance anyway, so the "practice problem" of public trust rights re-emerging from old Land Court decisions should be limited to rare circumstances.[23]

Neither *Arno* nor the *Alliance* matter had reason to address the looming issue of sea level rise, anticipated in due course but as yet unquantified in dimension, in relation to public trust rights (nor do they address the constant and current issue of changing tide lines and their resulting changes to otherwise privately owned property). *Arno* makes it explicit that "because actual high and low water marks can change over time, the starting point for determining the public's rights in tidelands (filled or unfilled) must be the historic, or "primitive" high and low water marks."[24]

It is also remarkable that the term "primitive" appears in the cited *Opinions of the Justices*, *supra* at 900-901, and not in the DEP regulations. The current statute legislatively defining public trust rights (Mass. Gen Laws Chapter 91) states that the public has rights in all tidelands, not just past tidelands at a fixed point in time.

Thus, if over the decades, sea level in Massachusetts indeed rises, the location of public trust rights should rise with it. The current Chapter 91 regulations reflect this intention by the manner in which "tidelands" are defined. (310 CMR 9.02.) Future litigants may well seek to argue that once land has been registered, it should not be possible for geographic changes in the extent of tidal influence to newly encumber registered property with new public trust rights, but such arguments face strong winds in a leaky vessel. Such litigants will have to address the fundamental principle of *Arno* that "public trust rights do not need to be included in registration certificates" to exist.[25]

And, in addition to the statutory and regulatory references in Chapter 91, many would also note an extensive line of cases maintaining that as littoral boundaries move inward, away from the sea, public trust rights move with them.[26] It is worth recalling that it is not title itself which is at risk in such matters, but rather new obligations to the public, much like when stormwater changes create wetlands on one's property and, as a result, alter development rights.

In the end, *Arno* made clear that "title in tidelands is in a special category, different from ordinary fee simple title to upland property [and] the registration of title in tidelands does not lead to the conclusion that [the property owner] owns the soil at issue in unconditional fee simple title … . Rather, title in tidelands remains subject to public rights (unless properly extinguished)."[27]

A future case will likely address yet again whether an attempt at extinguishment of public rights in tidelands has properly satisfied the court's articulation of necessary legislative criteria. Stakeholders in that case, whenever it comes to pass, will cite the majority and the dissent in the *Alliance* matter, with both containing ample channels to divergent results. Like the tide and tidelands, the jurisprudence does not disappear, it evolves or continues in changed form. ■

21) *Arno*, 457 Mass. at 454 n. 22.

22) *Arno*, 457 Mass. at 437.

23) *See, e.g.* Brief of Defendant-Appellant at 29, Arno v. Commonwealth, 457 Mass. 434, (SJC-10559) Seth Schofield for Attorney General Martha Coakley).

24) *See* Opinion of the Justices, 383 Mass. 895, 900-901, 424 N.E.2d 1092 (1981); *Arno*, 457 Mass. at 436-437.

25) *Arno*, 457 Mass. at 11.

26) *See, e.g.* Lorusso v. Acapesket Imp. Ass'n, Inc., 408 Mass. 772 (1990); Lorusso v. Acapesket Imp. Ass'n, Inc., 1989 WL 1183738 (Mass. Land Ct. 1989).

27) *Arno*, 457 Mass. at 455.

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proportionally. This approach abandons "the all-or-nothing effect of the traditional contributory negligence rule," instead providing for some recovery if the jury finds the defendants even marginally negligent, *Raymond v. Jenard*, 390 A. 2d 358, 361 (R.I. 1978).

As a threshold issue, then, a jury must find both the plaintiff and defendant negligent before apportioning negligence between them, *Calise v. Hidden Valley Condo. Ass'n*, 773 A. 2d 834, 837 (R.I. 2001). Defendants become joint and severally liable for whatever amount the jury apportions to them collectively, G.L. § 10-6-2 (2009). They may seek contribution from other tortfeasors based on their relative degrees of fault, but not from settling tortfeasors, G.L. § 10-6-3, 8 (2009).

VERMONT

Vermont's comparative negligence statute divides damage awards severally among named defendants in proportion to their causal fault, 12 V.S.A. § 1036 (2009). Plaintiffs cannot recover if their negligence exceeds the negligence of all the defendants. If a plaintiff's negligence is less than 50 percent, the courts will diminish the total damages by his or her proportional fault. Vermont only permits juries to apportion damages between named defendants, *Levine v. Wyeth*, 944 A. 2d 179, 196 (Vt. 2006).

Joint and several liability principles apply to all other tortfeasors. The courts do reduce damage awards by the amount paid to the plaintiff pursuant to settlement agreements, but defendants cannot seek contribution from joint tortfeasors.

How the New England states apportion damages varies widely. An awareness of these differences can impact a case at all its stages, and accordingly, counsel should keep the differences in mind in selecting a jurisdiction for suit, and for evaluating the value of their case.

Whether in settlement negotiations or trial strategy, what state law applies may matter a great deal. ■

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FBI BACKGROUND CHECK

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The fee for the record is $18 and must be paid by money order or cashier's check made payable to the Treasury of the United States, or by the use of a credit card payment form found at www.fbi.gov/about-us/cjis/background-checks/credit-card-payment-form.

The client also must fill out and sign an applicant information form found at www.fbi.gov/about-us/cjis/background-checks/ and click on Applicant Information Form (pdf).

These three items are mailed to:
FBI CJIS Division-Record Request
1000 Custer Hollow Road
Clarksburg, WV 26306

The FBI suggests leaving 12 weeks for a response. It is possible the response will be "no record," which is always good news. Remember, the failure to disclose a record may be considered fraud, and it is not unknown for an individual to be arrested at a U.S. Citizenship and Immigration Services (USCIS) interview, always an embarrassing moment. You can prevent these unpleasant consequences by this simple and inexpensive process. ■