

**ANALYSIS OF NORTH POINT TIDELANDS DECISION
BY THE SUPREME JUDICIAL COURT**

prepared by Stephen H. Kaiser, PhD

On February 12, 2007 the Massachusetts Supreme Judicial Court issued its decision on the North Point tidelands case, John Moot vs. Department of Environmental Protection. This decision reversed the lower Appeals court, the DEP Adjudicatory Appeals and DEP agency action. The Court determined that DEP "acted in excess of its authority" by exempting certain tidelands from state licensing. The court found that the state legislature had not authorized such an exemption and that the DEP regulation was not supported by legislation. The regulation allowing these exemptions ("landlocking") has now been voided.

The court took a strict view of the role of the Legislature and the regulatory agencies in protecting the public trust doctrine for public lands, but extended the legislative-regulatory concept of consistency to apply to virtually all aspects of government. In essence, the court is saying that the regulatory agencies cannot act in ways that have not been specifically legislated, and this means they cannot make the laws stronger or weaker through specific regulation. Although the court did not specifically say so, the option for agencies to not enforce the laws is still open : inaction does not amount to exceeding the delegated powers.

In terms of regulatory actions, the decision can cut both ways. In the North Point case, the citizen petitioners claimed that DEP had improperly acted to exclude the protection of certain tidelands, and the court agreed. Conceivably there could be cases where state regulations are stronger than were specified in legislation. In such cases, developers might seek to overturn those more stringent regulations. I have heard of no public discussion of this latter instance, but I feel sure that some law firm somewhere has considered this possible interpretation.

It must be emphasized that the SJC did not find fault with either the legislature or the developers. The Court's criticism was directed entirely at DEP and the department's regulatory actions. Some of the issues which are opened up in recent DEP regulation changes are the numerous changes in the fall of 2006 when the departing Romney Administration passed through numerous modifications including new filing thresholds, but also inventing concepts such as "self-permitting" for sewer connections up to 50,000 gallons per day. To my knowledge, the self-permitting rule does not exist in the legislation and could easily be found in violation of the consistency standard stipulated by the SJC. Any "give-away" regulations or actions for public lands or other public interests (where the action is inconsistent with state legislation) would be illegal, according to the general interpretation of the SJC decision.

As another example, the regulations for the preparation of Environmental Impact Reports under MEPA allow for the designation of a Single EIR. However, the Legislation Chapter 30 Section 62 makes no such provision. Thus, the Single EIR regulation must be voided.

MEPA waivers could also be affected by the SJC decision. On January 12, 2007 EOEPA issued ten waiver actions in one day -- allowing four developments to proceed with no mandatory EIR and six to proceed with Phase I construction before the EIR process is completed. Most of the projects were quite large, with one in Westborough proposing 1500 parking spaces. Chapter 30, Section 62 allowed for scoping and exclusion/inclusion of projects by specific regulation, but the law did not allow for wholesale waivers of categorically included projects which require EIRs.

The SJC decision was unanimous and quite concise, but did make clear it was limiting itself to the fundamental issue of legislative-regulatory consistency. The petitioners did not seek such a sweeping conclusion, but they believe the net result is desirable, which is to send the matter back to DEP for permitting through established procedures. The legal situation today and at least for several months into the future is for full DEP permitting to be in effect.

The developer did not seek a DEP license because he claimed that his land was "land-locked" -- using a term unique to DEP regulations and not in the law. A filled site which was formerly flowed tidelands could be considered "landlocked" and thus not subject to DEP licensing if the site is landward of the nearest public way to flowed tidelands. For example, if today's tidelands area, such as the Charles River, had a parallel roadway (such as the Gilmore Bridge) the lands between the river and the road would be tidelands subject to permitting, but the lands on the opposite side of the bridge away from the river would be considered to be "landlocked." North Point site is on the opposite side of the bridge, and the developer sought to claim it was landlocked.

In 2001, the developers of the adjacent Archstone-Smith project filed for a notice of applicability with DEP on the grounds that the bridge was not elevated next to their project : the bridge served as a barrier to separate the Smith project from the flowed tidelands. DEP accepted this argument. The developers of North Point did not seek a determination of applicability from DEP for their own project, even though the bridge was entirely elevated with full pedestrian passage underneath the structure. Petitioners sought a determination of applicability from DEP for North Point, but DEP found that a license was not required because of landlocking.

Petitioners appealed the DEP decision to the Administrative Court of Appeals and also claimed that the bridge had no easement or right-of-way, so that there was no line of separation on the ground. Petitioners also included an affidavit and supporting analysis that the site contained 13 acres of Commonwealth tidelands and that this land was public land not owned by the developers. The North Point developers immediately sought summary judgment from Judge Nee, who decided in favor of North Point. Petitioners appealed to Middlesex Superior Court, where Judge Hines decided in favor of the developers but did recognize that 13 acres of the site were Commonwealth tidelands. Petitioners proceeded to Appeals Court, but the SJC on its own initiative transferred the case to itself on its own motion. Oral arguments were heard on October 3, 2006, and the decision was issued on February 12, 2007.

During the oral arguments and questions from the Justices, the issue of Back Bay and South Boston were raised, in terms of the difficulties of requiring state licenses for building alterations far distant from active tidelands. The court found that the filling of the Back Bay was authorized by legislation in 1852 and of South Boston in 1862 and 1875, including transfer of fee title for land ownership. The SJC

noted that for more than 150 years "the Legislature has been fully cognizant of its authority to relinquish the public rights in tidelands by means of appropriate legislation. This authority belongs to the Legislature alone." At North Point there was no such legislation, so that the public rights to tidelands remain and "cannot be extinguished by department regulation," for any reason.

The SJC noted that historically the Millers River flowed through the site on its way to the Charles River, but in 1962 the large section of open water within the site was filled, requiring the Boston and Maine Railroad to construct underground culverts to provide for the drainage functions previously served by the river. The SJC did not mention that the same permit required the railroad to maintain those culverts (which today are substantially clogged and non-functional) and that the 1962 license required a new license for the construction of any new building on the site.

The SJC recognized that the obligation to "preserve the public trust and to protect the public's interests" in tidelands was delegated by the legislature to DEP. The decision noted the two distinct types of tidelands in Massachusetts law -- where historical mud flats or tidal beaches lying between the high-water line and low-water line may be privately owned and thus are private tidelands, while waters lying seaward of the low tide line are Commonwealth tidelands. Virtually all Commonwealth tidelands are publicly owned, and only by act of the Legislature can fee title for such lands be transferred to private parties and public rights to tidelands extinguished. The SJC decision means that the public interests in all tidelands -- private and Commonwealth -- are fully empowered, except for incidents of explicit action by the Legislature. At North Point, there has been no explicit legislative action to alter or extinguish these public interests.

The North Point decision recognizes the existence of both private tidelands and Commonwealth tidelands, and notes that Commonwealth tidelands (also called submerged lands) are those lands those "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."

It is not clear from the SJC decision what are the explicit types of tidelands and their application to North Point. The first type is filled submerged lands not subject to an existing license (example : illegal filling) ... the second type is filled lands subject to a state license the third is filled lands with fee ownership transferred by action of the legislature -- but with public rights intact and the fourth is filled land for which the Legislature has surrendered all ownership and all public rights. If all rights are extinguished by the Legislature, the lands become "former Commonwealth tidelands" and they no longer have any standing as tidelands. As best as I can determine at North Point, there are some filled tidelands which are illegal, without a license and are of the first type. All remaining tidelands are of the second type : they have state filling licenses, but all 13 acres of Commonwealth tidelands remain under fee ownership by the state. At North Point, the third and fourth types are not applicable because there has been no legislative action.

The plaintiffs argued that DEP had acted improperly in the specific case of the North Point landlocked tidelands, but did not dispute the general landlocking provisions within the regulations. The SJC went further to find landlocking generally inconsistent with legislative authorization. The Court acted to nullify all landlocking,

while also recognizing all past legislative acts to remove tidelands protections. However, the SJC has not given a green light to the Legislature to nullify tidelands protections without reason, because the provisions of Chapter 91 as amended in 1983 still require that activities on filled tidelands must still meet certain conditions. Any change of use on tidelands requires a new license, a public hearing shall be held for non-water-dependent uses and a determination shall be made that the action serves a proper public purpose, with a greater public benefit than detriment "to the rights of the public in said lands," and that the determination is consistent with the policies of the coastal zone management program. Each license shall contain "a statement of the assessment for occupation of commonwealth tidelands," based on payment for prior filling of such lands.

The SJC made brief reference to the Boston Waterfront case of 1979 and to the Opinions of the Justices (1981) but unfortunately did not deal with the special protections for Commonwealth tidelands, even though the SJC recognized such tidelands as part of the North Point site. In the 1981 Opinion, the Justices concluded that "the Legislature has authority to surrender any so-called vestigial or residual public rights in lawfully filled, formerly submerged land." The problem is that the 1962 license makes explicit mention to "existing areas of solid fill ... not previously licensed" which can be reasonably interpreted to mean illegal filling within the Millers River basin. The difficulty for the developers is that they cannot show that all of their filling has been legal, especially any filling of Commonwealth tidelands.

North Point was unable to demonstrate ownership of 2/3 of the 45-acre site, because the "metes and bounds" ownership they were required to submit to the Cambridge Planning Board as part of the PUD submission amounted to nothing more than a listing of book and page numbers in the Registry of Deeds which totaled only 15 acres. DEP could claim that the project would serve a public purpose if the clogged Millers River conduits were cleaned and maintained, but such actions truly involve the enforcement of previous conditions in the 1962 license and are not new demonstrations of a public purpose. DEP might claim that the construction of a new Green Line station within the development would serve a public purpose, but the decision is debatable because of the severe pedestrian hazards imposed by requiring all existing East Cambridge transit riders to cross six-lane O'Brien Highway at grade. Moreover, the transit line is being extended as an elevated structure, a virtual unthinkable urban feature in the modern world. DEP might claim that the central park represents a valid public purpose, but now it appears that the park will be used as a stormwater detention basin designed to serve the development site alone. Currently, there are no active proposals to daylight the Millers River and thus there is no evidence that any water-dependent use is being planned.

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The near-term issues of licensing within the North Point area would appear to include at least six possible projects. Four have received DEP review in some form in the past, while two are new projects which are currently in the design phase. Furthermore, the North Point development project may need to be considered in at least three parts : (a) the current construction site including Buildings S and T, with associated earth clearance and storage as shown in Plan A, (b) the remainder of the site, and (c) the drainage system connecting to the Lechmere Canal.

The Archstone-Smith project on O'Brien Highway is phase one of a multiphase housing project. This project received a landlocked determination in 2001, but now would be subject to licensing since all of the site appears to be on private tidelands. The 22 Water Street site is also on private tidelands and the design is currently undergoing review by the Cambridge Planning Board. The very westernmost tip of the site may be within the corridor of Commonwealth tidelands, but the applicant is not proposing construction in that area. A license would be required.

The MBTA Boston Engine Terminal (commuter rail maintenance building) was the subject of a landlocking determination in June 1989. Although all construction is complete at this time, it appears that a license would still be required to legalize the continued operation of the site.

The relocation of the MBTA Lechmere station is proposed to be funded and built by the North Point developers, using its own and MBTA lands. The construction will occur primarily on historical uplands, with only a very short section along O'Brien Highway on private tidelands. A DEP license would be required.

The 45-acre North Point development site has been segmented into at least two phases. The first phase is the currently delineated construction site for Buildings S and T as well as the adjacent excavated land shown within the fenced area of attached Plan A. This area is located in both Cambridge and Somerville and includes Commonwealth tidelands.

The second part of the North Point site would be the remaining areas of the development site. Both parts include Commonwealth tidelands and would require DEP licensing.

In 2005, North Point submitted a drainage system for wetlands and waterways approvals, as the new culvert passed from O'Brien Highway to the Lechmere Canal. In footnote 25, the SJC concluded that by building a storm drainage system under the site "North Point acknowledges that G.L. c.91 governs the entire project."

In addition to the tidelands-related problems of licensing and legislative compliance, the site has additional legal problems which need resolution. The historic channel of the Millers River (shown in dark blue on the attached plan B) represents the area of Commonwealth tidelands through the site, and in addition the centerline of this channel by state legislation in 1632 represents the municipal boundary line between Cambridge and Somerville. By my best estimation, the Millers River channel became completely silted in by 1840, so that both the channel and the municipal boundary were physically lost. In over 165 years since, maps have been drawn showing attempts to delineate the boundary, and I have found no two maps which are exactly alike. The boundaries range from snakelike curves to segmented straight lines. In certain delineations, Cambridge gains five acres from Somerville, and in other renderings Somerville gets it back. Mapping is wholly inconsistent.

Both the developer and the top officials of the cities of Cambridge and Somerville have known about the boundary problem since at least 2001, yet there has been no solution. The City of Cambridge changed all of their mapping to show a

straight line boundary in 1998, while Somerville has adopted variations of a wavy line boundary. Meanwhile, the North Point developer displays a very wavy boundary which is inconsistent with both Cambridge and Somerville mapping. The truth is that no one knows where the Cambridge-Somerville boundary is at North Point, so neither city could issue a legal building permit for construction within the contested area, because no one knows what is Cambridge or what is Somerville. The developer could have taken action to resolve the matter years ago. If so, both cities could be in a position to issue legal and consistent building permits. However, today the confusion remains unresolved.

Thus, any problems with tidelands licensing are not the sole cause of delay or determinant in the status of the North Point project. Even if the tidelands situation were resolved tomorrow, the boundary problem would remain, sorely in need of remedial legislation.

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The decision of the SJC takes no position on the substance of legislation, except to note that it is the legislature (and not DEP or the Governor) who has the ability to render any significant changes to the tidelands status of land parcels. While I have for years been an advocate for seeking legislation to resolve the city boundary problem, I have been compelled to limit my advocacy for legislation in recognition of the deeply felt distrust of legislators among citizens, lawyers, state employees, and even legislators themselves. These suspicions apply both to Beacon Hill and Congress in Washington. The Sunday Globe of February 18 contains two relevant quotes : from President Bush "And there is distrust in Washington. I am surprised, frankly, at the amount of distrust that exists in this town." Columnist Joan Vennoch also refers to Congress as "that viper's nest of inaction and partisan sniping." Many people I have talked to associated beacon Hill with a back-room culture of highly paid lobbyists who sneak bills though secret channels, without adequate disclosure, without adequate time for public comment, or improperly using conference committees to advance new legislative language. The diminished credibility of our Legislature limits the ability of any legislative action to resolve any and all public matters, including tidelands.

The proper initiative in this case is for the Governor to take the lead, not in terms of legislation, but in terms of process. He needs to provide support to DEP in its restored and somewhat expanded regulatory role. He must seek a public process to let the sunshine in, so that the public can be assured that there will be no favoritism for certain applicants and that those applicants who comply with the law and the regulations will be given proper credit for such compliance. It will be a long and slow process to establish a fair, reasonable and credible legislative process, protected from the perceived stigma of midnight deals.

In terms of building trust, let the Legislature start first by showing what they can do to resolve the Cambridge-Somerville boundary problem. This is an issue which only the Legislature can legally do, but it requires an open, localized process. There are many parties to get together and many public reviews which are necessary. Let the legislature show that they can recover from their rock-bottom public image and demonstrate that they can truly build trust in an open and democratic way.

The task then will be to find legislators who seek a better law-making process, and to build a new coalition to install more democratic procedures while rebuilding the public's trust in the Legislature. It may be many months before we show any progress and many years before we achieve anything like an acceptable working solution. But we must start now, and the SJC decision provides us with the momentum to achieve these goals.







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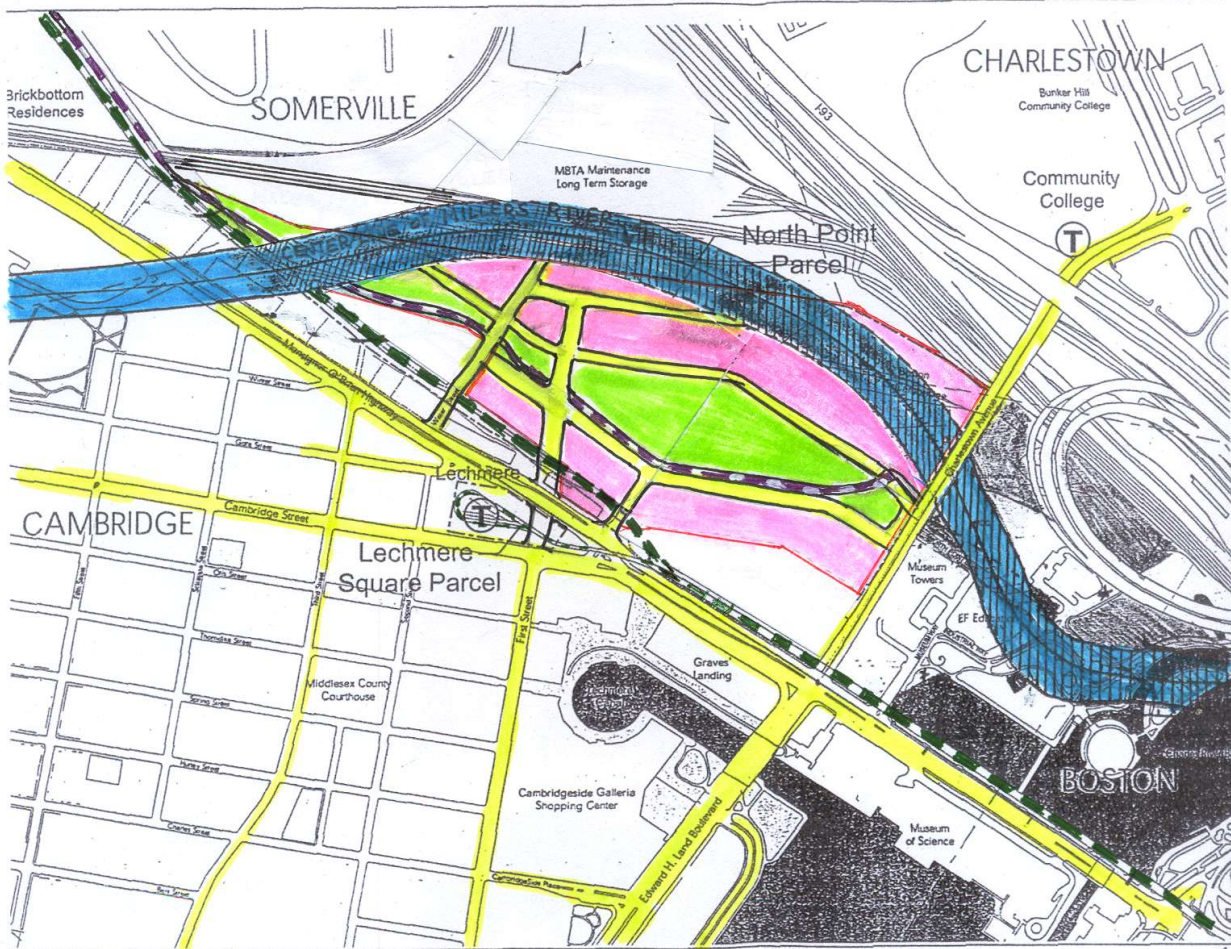


PLAN A Fenceline Around Existing Construction Site at North Point, enclosing area in Cambridge and Somerville with Commonwealth Tidelands

Commonwealth Tidelands at North Point

 Area of Low-Tide Channel for Historic Millers River, based on Hales 1830 mapping

-  Roadways
-  North Point development
-  Parcel Boundary
-  MBTA Green Line
-  Regional Bikepath
-  Central Park at North Point



Prepared by S. Kaiser May 9, 2006

PLAN B Commonwealth Tidelands Corridor at North Point shown in Dark Blue