

August 5, 2010

www.sherin.com**REAL ESTATE LAW****Massachusetts Supreme Judicial Court Decision Supports Public's Rights in the Waterfront**

We are hopeful that many of you will be able to join us on September 15, 2010, for our annual Real Estate Seminar: Big Box Reuse. Those of you who were with us at last year's seminar, at which we discussed Ocean Zoning and Waterfront Developments, may be interested in the Massachusetts Supreme Judicial Court's August 2, 2010, decision in *Arno v. Commonwealth*. Sara Shanahan discussed the lower court's decision in the Arno case, as part of her presentation on Litigating Waterfront Rights. As anticipated by some, the SJC once again demonstrated its commitment to the public trust doctrine.

Arno v. Commonwealth, SJC-10559, 2010 WL 2978092 (August 2, 2010).

On August 2, 2010, in the case of *Arno v. Commonwealth*, the Massachusetts Supreme Judicial Court ("SJC") reaffirmed its commitment to the public trust doctrine and the public's interest in tidelands. The SJC addressed the question of "whether the registration of a parcel of land may extinguish the public's otherwise existing rights therein." The SJC ruled: "We conclude that it cannot."

The Arno case involved a parcel of waterfront property in Nantucket Harbor. Historically, the parcel was a combination of "tidal flats," the area between mean high water mark and mean low water mark, and "submerged lands," land lying seaward of the tidal flats. In the late 1800's, pursuant to state-issued licenses, the property was filled. Since that time, structures were built on the parcel. Today, it houses a waterfront restaurant.

In 1922, the owner of the property filed a petition in Land Court to register the property pursuant to the land Registration Act. In that proceeding, the Attorney General filed an answer on behalf of the Commonwealth, asking that the public rights be preserved below the "mean high water mark." In the present case, the Land Court considered whether the certificate of title issued as a result of the 1922 registration proceeding was sufficient to preserve the public's interest in the parcel below historic mean high water mark - the water line that existed before the property was filled - or if the public rights were limited to the area below the 1922 mean high water mark.

The question was important to Mr. Arno, the property owner, because the existence of public rights in his property (namely, the historic rights afforded the public in tidelands of fishing, fowling, and navigation) would dictate whether he was free to tear down the restaurant and build a new structure on the parcel, or whether any such redevelopment project would fall within the jurisdiction of the Department of Environmental Protection ("DEP") and the Waterways Act, M.G.L. c. 91. In 2002, Mr. Arno originally sought a chapter 91 license from DEP for his development project. DEP conditioned its grant of a license on Mr. Arno maintaining and providing access to a boardwalk that currently runs along Nantucket Harbor. Rather than complying with the proposed license terms, Mr. Arno filed suit in Land Court and argued that his property was exempt from chapter 91 regulation because no public rights were preserved in the 1922 registration process.

In orders from 2004 and 2009, the Land Court judge ruled in Mr. Arno's favor, finding that the registration proceeding had extinguished public rights in the parcel and, therefore, that the parcel was exempt from chapter 91 licensing requirements.

This week, however, the SJC overruled the Land Court's decision and held that neither the Land Court nor the Attorney General has the power to waive the public's rights in tidelands in a registration proceeding. Indeed, as set forth in earlier decisions by the SJC, only the Legislature can give up public rights in tidelands, and only by describing the land involved, acknowledging the rights surrendered, and recognizing the public use to which the land is going to be put as a result of the transfer.

Moreover, the SJC ruled that a reservation of public rights does not need to be included in a registration certificate. Accordingly, in light of the Arno decision, owners and prospective purchasers and developers of registered land that consists of filled tidelands are on notice that their parcels may be subject to DEP regulation and chapter 91 licensing, despite the fact that public rights are not described or specified in the certificate of title.

The Arno decision runs contrary to the position taken by the Real Estate Bar Association and the Abstract Club in their amicus brief. Both had argued that the certainty provided by the land registration process would be disturbed by the imposition of public rights that are not reflected on the certificate of title.

In any event, the SJC's decision in Arno puts landowners and others on notice that registered land that consists in whole or in part of filled tidelands continues to be subject to DEP's jurisdiction under the Waterways Act, chapter 91, and that waterfront developments on such parcels are likely to be subject to licensing conditions designed to promote public access to waterfront areas.

For members of the public, the Arno decision is a modern reminder of the long-standing respect that our judicial system has afforded for the public's rights in the waterfront. As the SJC observed: "Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property. ... Since the Magna Carta, the land below the high water mark has been impressed with public rights designed to protect the free exercise of navigation, fishing, and fowling in tidal waters."

Sara Jane Shanahan is a litigation partner in the Boston law firm Sherin and Lodgen LLP. Her practice focuses on complex business litigation and insurance coverage disputes.

For assistance in this area, we encourage you to contact Sara at 617-646-2054 or sjshanahan@sherin.com.

