

## Public Trust Doctrine – Mass. High Court Finds Municipal Harbor Plan Regulations Involve Unlawful Delegation of DEP Authority

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In [this April 2021 blog post we discussed](#) the [Superior Court's decision](#) in *Armstrong vs. Theoharides*. Since then the Supreme Judicial Court (SJC) took the case on direct appellate review and earlier this week the SJC [issued a decision](#) (pdf) affirming the Superior Court. The SJC found that the longstanding procedure for approving Municipal Harbor Plans – in which the key decisions are made by the Secretary of Energy and Environmental Affairs (the Secretary) – involve an unlawful delegation of the licensing authority that the Legislature gave the state Department of Environmental Protection (DEP) under the state's [Public Waterfront Act, M.G.L. c. 91](#) (Chapter 91).

Municipal Harbor Plans (MHPs) are codified in regulations at 301 CMR 23.00 *et. seq.* (the MHP Regulations) and affect licensing by DEP under Chapter 91 and its implementing regulations at 310 CMR 9.00 *et. seq.* (the Chapter 91 Regulations). In order to obtain a license to construct or modify structures on tidelands, the project proponent must comply with applicable height limits, open space minimums, and other zoning-like requirements in the Chapter 91 Regulations. The MHP planning process allows these rigid requirements to be varied or substituted with regard to a particular waterfront area, taking into account municipal planning objectives for that area, rather than simply applying the requirements to all areas on a uniform basis. Under the MHP Regulations the authority to approve such variations and substitutions is given to the Secretary, and under the Chapter 91 Regulations DEP is required to defer to and accept such variations and substitutions when issuing a Chapter 91 license for that area. The SJC found that this required deference by DEP amounts to the delegation to the Secretary of DEP's licensing authority.

As discussed in our prior post, the *Armstrong* plaintiffs participated in the planning process for the Boston Downtown Waterfront District Municipal Harbor Plan but were unhappy with the substituted (higher) height limits that the Secretary approved. The SJC has now agreed with the plaintiffs (and the Superior Court) that the provisions of the Chapter 91 Regulations that require DEP to accept the decision of the Secretary pursuant to the MHP Regulations go beyond the authority the Legislature gave DEP under Chapter 91.

What happens with Chapter 91 licenses issued under prior approved MHPs? The SJC, in footnote 21 to its decision, notes that Chapter 91 licenses issued under existing MHPs may be protected from challenge given the time limits for such challenges contained in Chapter 91 and the Chapter 91

Regulations.

To remedy the disruption this decision will cause to longstanding processes, the Legislature could amend Chapter 91 to expressly grant to the Secretary the authority to vary or substitute the rigid requirements of the Chapter 91 Regulations. Or it could direct DEP to take into consideration planning processes such as those found in the MHP Regulations when determining whether a project provides a greater public benefit than public detriment for the issuance of a Chapter 91 license.

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