The Boston Waterfront and the Public Trust Doctrine: The Eroding Public Interest in Tidelands

“Well into the twenty-first century, the ancient public trust doctrine that protects critical public rights to the Massachusetts tidal shoreline below the historic high water line remains legally controlling but is persistently challenged by private waterfront developers.”

I. INTRODUCTION

The Boston waterfront is home to a number of hotels, restaurants, and apartment buildings. Although this waterfront property appears to be private land owned by developers, the public still has access to, and an interest in, this shoreline via the public trust doctrine. Nevertheless, the waterfront’s increasing private redevelopment, coupled with an eroding coastline due to climate change, calls into question whether the Commonwealth is adequately preserving the public’s access to the waterfront.

Shorelines across the United States are subject to a form of the public trust doctrine, which allows certain public areas, typically along shorelines, to have public access and governmental protection. Throughout most of the United States, shorelines where public trust


States, the public has access to all tidelands, which are the areas of land along the shore between the high tide and low tide line. Massachusetts, however, is unique in that the public had unencumbered access all the way up to the low tide line until the Colonial Ordinances of 1641-1647 (Colonial Ordinances), which allowed private ownership of the tidelands. Because the Colonial Ordinances permitted private ownership of Massachusetts’s shorelines and tidelands, private developers owned waterfront property in fee simple, despite the public trust doctrine providing for public access to tidelands. The new private ownership interests, however, did also create a restriction that prevented private owners from excluding the public from using the tidelands for navigation, fishing, and fowling. The expansion of private ownership rights created tension between public and private interests, and that tension is reflected in proposed legislative amendments to Chapter 91 of the General Laws of Massachusetts (Waterways Act)—the controlling statute for tidelands.

Since the Colonial Ordinances, Massachusetts has attempted to reconcile the public’s rights regarding tidelands with society’s changing expectations of its ability to use and have access to the waterfront. After the Massachusetts
doctrine applies). Rivers, lakes, and oceans are examples of applicable shorelines for the public trust doctrine. See Bussiere, supra note 3, at 1750-51 (recognizing common areas of tidelands for public access). “[T]he majority of states limit private ownership of land to the high tide line . . . .” Id. at 1750.

6. See Bussiere, supra note 3, at 1750-51 (recognizing common areas of tidelands for public access).”


8. See Bos. Waterfront Dev. Corp., 393 N.E.2d at 360 (stating fee simple ownership of shoreline allowed despite reserved public rights below high tide line); Bussiere, supra note 3, at 1751 (explaining fee simple ownership of shorelines with applicable public trust rights).

9. See LAWS & LIBERTIES, supra note 7, at 124 (declaring reserved public uses for tidelands even if privately owned); Bussiere, supra note 3, at 1755-56 (enumerating exceptions for reserved public uses of fishing, fowling, and navigating in private tidelands); see also Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 83 (1851) (explaining Commonwealth’s power to protect underlying public rights).


As private property owners and municipalities seek to develop land along the water’s edge, the provisions of Chapter 91 provide the basis for the Commonwealth to both review proposals for development and changes to existing waterfront structures, and require the inclusion of conditions that promote public use of and access to the water.
Supreme Judicial Court (SJC) questioned the original public purpose condition in the statute, the Waterways Act Amendments of 1983 (1983 Amendments) codified new standards for licensing tidelands that allow for more than just the originally contended maritime commercial uses. Tidelands owners seek licenses when they wish to alter or start construction on tidelands. The 1983 Amendments help interpret the Boston Waterfront Development Corp. v. Commonwealth decision and modernize the potential use and impact of the public trust doctrine, especially regarding construction on the waterfront. The Waterways Act continues the goal of the public trust aspect of the Colonial Ordinances and establishes that the Massachusetts Department of Environmental Protection (DEP) will protect the public’s interests in the waterfront. The question remains: While the public has these reserved rights, in light of the increasing private, commercial development of the Boston waterfront, is the DEP overlooking them?

Id. The Legislature further defined the tidelands in an attempt to clarify their uses. See ch. 91, § 1 (explaining difference between Commonwealth tidelands and private tidelands). Tidelands are defined as “present and former submerged lands and tidal flats lying below the mean high water mark.” Id. According to the statute, either the state or a private entity, via license or grant, may hold commonwealth tidelands subject to the “public purpose” underlying condition. See id. The public purpose condition requires that the tidelands’ use be for the benefit of the public. See id. Conversely, only private entities hold private tidelands which remain subject to the original conditions of public access for of fishing, fowling, and navigation. See id. For purposes of this Note, “tidelands” will be used as an all-encompassing statutory term. See id. (providing general definition of “tidelands”).

12. See Bos. Waterfront Dev. Corp., 393 N.E.2d at 365 (stating need for license when public purpose differs from maritime commerce); An Act Relative to the Protection of the Massachusetts Coastline, ch. 589, sec. 21, § 1, 1983 Mass. Acts 1056, 1069-70 (codified as amended at MASS. GEN. LAWS ch. 91, § 1 (2019)) (expanding definition of “water-dependent uses” to include recreational uses). The new statutory definition included both recreational uses and water-based recreational uses. See sec. 21, §1, 1983 Mass. Acts at 1069-70; PIKE ET AL., supra note 1, at 13 (indicating shift from maritime activities to nonmaritime activities); see also Op. of the Justs. to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981) (assuring legislature has authority to extinguish all public rights); 310 MASS. CODE REGS. § 9.01 (2020) (indicating authority and purpose for Waterways Act).

13. See Goodwin, supra note 11, at 50 n.23 (stating when licenses required for tidelands development); Bussiere, supra note 3, at 1760 (noting licenses required for shoreline development to preserve public trust).

14. See Bos. Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 366 (Mass. 1979) (stating “private condominiums and pleasure boats” unthinkable for older Legislatures); sec. 21, § 1, 1983 Mass. Acts at 1069-70 (expanding definition of “water-dependent uses” to more than just maritime activities). The court in Boston Waterfront Development Corp. recognized the potential for different profitable uses on the harbor other than commercial shipping. See 393 N.E.2d at 366 (explaining potential reversionary interest for tidelands not contemplated with new harbor uses); PIKE ET AL., supra note 1, at 13 (exploring shift from maritime commerce to modern uses of tidelands).

15. See ch. 91, § 2 (stating DEP protects interests of the Commonwealth); id. § 1 (defining DEP responsible for protection of tidelands and “department” means “DEP” for most statutory provisions); see also LAWS & LIBERTIES, supra note 7, at 124 (enumerating public purpose condition).

16. See PIKE ET AL., supra note 1, at 3-4 (indicating potential shortfalls of DEP protecting public interest in tidelands in trustee role).
Since the Colonial Ordinances, the Legislature has been responsible for protecting the interests of the public and appointing a licensing authority, the DEP.\textsuperscript{17} Political pressures on the DEP sometimes, however, leave the public without the opportunity to participate in the DEP’s licensing process for developing waterfront properties.\textsuperscript{18} The DEP’s discretionary power over waterfront development may hinder the public’s interests in the tidelands, and licensing cases often end up before the courts.\textsuperscript{19} There are also several loopholes within the Waterways Act that allow developers to avoid public participation in the licensing process, thus effectively undermining the public’s ability to assert its interest in the coastline.\textsuperscript{20}

These questions regarding public access to tidelands and the relevant licensing loopholes become more complicated in the context of climate change.\textsuperscript{21} Climate change will inevitably erode the coastline, and land formerly exempt from tideland licensing could become subject to the Waterways Act.\textsuperscript{22} The effect of this changing coastline may impede the public’s access to the coastline because of its potential to affect private licenses, as the DEP must bring landlocked tidelands that were not previously subject to the Waterways Act into compliance.\textsuperscript{23}

The impact of environmental changes on the Boston waterfront has posed several challenges to the public trust concept of balancing the rights of private and public interests in tidelands.\textsuperscript{24} This Note will examine the public trust doctrine’s purpose to preserve public rights in tidelands.\textsuperscript{25} Sections III.A and III.B of this Note will discuss the challenges the DEP faces in issuing licenses and the current licensing issues relating to the Boston waterfront.\textsuperscript{26} Section III.C will address the complex issues relating to climate change, including the problems posed to licensing under the Waterways Act, how climate change may impact the


\textsuperscript{18} See Pike et al., supra note 1, at 32-33 (explaining municipal interests in raising real estate taxes contributes to pressure on DEP). See generally id. at 39-49 (discussing ways private parties have excluded public from licensing process). Loopholes in the licensing process exclude public participation and limit public knowledge about tideland licensing, ultimately disadvantaging the intended beneficiary of the waterfront—the public. See id. at 39.

\textsuperscript{19} See Moot v. Dep’t of Env’t Prot. (Moot II), 923 N.E.2d 81, 82 (Mass. 2010) (noting licensing issue involving DEP and landlocked tidelands). See generally ch. 91, § 18 (explaining issuance process for licensing).

\textsuperscript{20} See Pike et al., supra note 1, at 45-46 (explaining how minor project modifications for tidelands licenses may avoid public participation).

\textsuperscript{21} See Moran et al., supra note 4, at 22 (2019) (explaining potential shift in tidelands from climate change).

\textsuperscript{22} See ch. 91, § 18 (explaining no license requirement for landlocked tidelands).

\textsuperscript{23} See id. (requiring no license for landlocked tidelands); Moran et al., supra note 4, at 23 (explaining climate change impacting tidelands).

\textsuperscript{24} See Moran et al., supra note 4, at 4, 20-21 (explaining DEP’s duty to ensure no flooding occurs on public spaces).

\textsuperscript{25} See id. at 1.

\textsuperscript{26} See infra Sections III.A-B.
tidelands, and in turn, the rights of the public. 27 Ultimately, Part IV of this Note will conclude that in order to preserve the public’s interest in the Commonwealth’s tidelands, the DEP must address the weaknesses in the tidelands licensure process by adding a heightened review process to prepare for climate change and the inevitable erosion of the coastline. 28

II. HISTORY

A. Origin of Public Trust Doctrine and the Colonial Ordinances of 1641-47

The public trust doctrine “states that all rights in tidelands and the water itself are held by the state ‘in trust’ for the benefit of the public.” 29 The public trust doctrine derives from the idea of common property, as seen in ancient Roman law, which established a common right to the sea and seashore. 30 Scholars also loosely trace the beginnings of the public trust doctrine to the Magna Carta and Colonial Ordinances. 31 Amended in 1647, the Colonial Ordinances incorporated English common law into the Massachusetts Bay Colony (Colony)—now the

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27. See infra Section III.C.
28. See infra Part IV.
29. Public Rights Along the Shoreline, supra note 3.
30. See J. Inst. 2:1:1, reprinted in Justinian, Institutes 19 (J.B. Moyle trans., Oxford 1911), https://amesfoundation.law.harvard.edu/digital/CJCiv/JInst.pdf [https://perma.cc/35FS-VKFE] (explaining “air, running water, the sea and consequently the sea-shore” common to everyone). The Institutes of Justinian explained that “no one therefore is forbidden access to the seashore,” providing the foundation for the public trust doctrine and preservation of public coastline access despite private development. See id.; Donna Jalbert Patalano, Note, Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines, 28 B.C. ENV’T AFFS. L. REV. 683, 704 (2001) (reinforcing idea of public trust doctrine stemming from ancient Roman law). The public trust, classified under Roman Law as jus publicum, in conjunction with the property classification res communes, reinforces this property right as “common to all.” See Patalano, supra, at 703-04 (stating seashore considered common property for public use).
31. See Bussiere, supra note 3, at 1754 (indicating Magna Carta protected public rights); Magna Carta cl. 33 (G.R.C. Davis trans., British Museum 1963) (1215), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/Y8RR-AQ2C] (mandating removal of fishing weirs from Thames River). Limitations on fishing in the Magna Carta implicitly intended to preserve public access to natural resources. See Magna Carta, supra, at cl. 33; see also Bussiere, supra note 3, at 1754 (indicating public trust doctrine protected “lands in trust” from private ownership). But see James L. Huffman, Why Liberating the Public Trust Doctrine Is Bad for the Public, 45 ENV’T L. 337, 343 (2015) [hereinafter Huffman, Liberating Public Trust Doctrine] (indicating intent for removal of fishing weirs). “[T]he Roman rule that the coastal area resources were open for common use until occupied or granted by the ruler remained the law of England for several centuries after Magna Carta . . . .” James L. Huffman, Speaking of Inconvenient Truths—A History of the Public Trust Doctrine, 18 DUKE ENV’T L. & POL’Y F. 1, 20 (2007) [hereinafter Huffman, Speaking of Inconvenient Truths]. While the Magna Carta demonstrates traces of the public trust doctrine, it may be “very thin reeds upon which to rest an expansive public trust doctrine.” Id. at 21 (quoting Matthew Hale, A Treatise De Jure Maris et Brachiorum Usuem (1670), reprinted in Stuart A. Moore, A History of the Foreshore and the Law Relating Thereto 389 (1888)); see Laws & Liberties, supra note 7, at 124 (establishing private ownership of tidelands).
Commonwealth of Massachusetts—where the current public trust problem began. 32 Instead of only allowing private ownership of property up to the high tide mark, the Colonial Ordinances created a new interest for property owners in Massachusetts by permitting private ownership of the shoreline up until the low tide mark. 33 Private persons could own the area between the high tide mark and low tide mark—referred to as tidal flats or tidelands—subject to public use for fishing, fowling, and navigating. 34 This type of ownership is atypical, as most other states prohibit private ownership of coastlines beyond the high tide mark. 35 The likely objective of this new grant was to encourage maritime commerce such as wharf-building and increase economic activity in the port areas of the Colony. 36

While the Crown originally meant the Colonial Ordinances to encourage maritime commerce and serve a greater public purpose by conveying private interests, this private ownership has resulted in a lack of public access to tidelands today. 37 Early cases affirmed that while some tidelands are subject to private ownership, the tidelands still have conditions attached to them, and the Legislature may restrict their private use to maintain public access. 38


33. See LAWS & LIBERTIES, supra note 7, at 124 (granting ownership to low tide mark or where “[s]ea doth not ebb above a hundred rods”); Pike et al., supra note 1, at 17 n.54 (explaining grant of private tidelands and classifying tidal areas). The grant is commonly referred to as only to the low water mark or low tide mark, but “the Colonial Ordinances [technically] granted private title to the intertidal flats as far as the more landward of either the mean low tide line or a line drawn 100 rods from the high water line.” See Pike et al., supra note 1, at 17 n.54; see also Public Rights Along the Shoreline, supra note 3 (explaining property owners’ rights of “intertidal flats” extend until low water mark, called “private tidelands”).

34. See LAWS & LIBERTIES, supra note 7, at 124 (stating “it shall be free for any man” for fishing, fowling, and navigation); see also Public Rights Along the Shoreline, supra note 3 (explaining reserved public functions in private tidelands).

35. See Bussiere, supra note 3, at 1756 (enumerating only five states permit private ownership of tidelands).

36. See Kirsten Hoffman, Waterfront Redevelopment as an Urban Revitalization Tool: Boston’s Waterfront Redevelopment Plan, 23 HARV. ENV’T L. REV. 471, 485 (1999) (postulating grant of tideland ownership to encourage private wharf construction). Maritime commerce was the driving factor for granting private tidelands, as affirmed in later statutes. See id. (describing purpose of Legislature’s tideland grants to private parties in 1800s); see also Bussiere, supra note 3, at 1756 (stating conveyance of tidelands for economic growth). Commercial activity was also an important objective to Massachusetts as a Commonwealth as evidenced by the Lewis Wharf statutes, which allowed for the private construction of wharfs on tidelands. See An Act to Authorize the Proprietors of Lewis’ Wharf to Extend the Same, ch. 102, § 1, 1832 Mass. Acts 355, 355-56 (1832) (allowing construction of docks); An Act to Incorporate the Lewis Wharf Company in the City of Boston, ch. 115, § 1, 1834 Mass. Acts 143, 143-44 (1834) (allowing construction of wharf provided they do not interfere with others’ rights); An Act in Addition to “An Act to Incorporate the Lewis Wharf Company in the City of Boston.” ch. 76, 1835 Mass. Acts 385, 385-86 (1835) (conveying power to hold real estate parcels including “land, wharf, and flats”).

37. See supra note 36 and accompanying text (discussing reasons for Colonial Ordinances and granting of tidelands); supra note 4 and accompanying text (questioning public access to tidelands); see also infra Section II.D.1 (explaining DEP license requirements).

38. See Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 79 (1851) (stating Legislature’s power to restrict use of property). The Alger court stated that while the colonial government granted real estate to private
B. Boston Waterfront Development Corp. Decision of 1979

The SJC examined the public trust doctrine in *Boston Waterfront Development Corp.*, and questioned the modern implications of the Lewis Wharf statutes, which allowed for the private construction of wharfs on tidelands. The property owner sought to register a parcel of land under Lewis Wharf. The court held that the defendant property owner did not own land on Lewis Wharf in fee simple absolute and thus could not use the land for all purposes. More importantly, this decision emphasized that tidelands conveyed by the Legislature are subject to the “condition subsequent” that they be used for proper public purposes.

What was disputed by the waterfront property owner was apparent to the court—that another’s rights (the public’s) restricted the property owner’s use of their tidelands, leaving their property encumbered.

After the court in *Boston Waterfront Development Corp.* confirmed that public interests attach to tidelands, the Legislature proposed a bill that would
potentially extinguish the public’s rights to the tidelands. The proposed legislation was not adopted; instead, the Legislature enacted the 1983 Amendments.

C. 1983 Amendments

1. Codification of the Boston Waterfront Development Corp. Decision

The Waterways Act, enacted in 1866, governs tidelands development “by establishing a licensing board to protect the public interest in tidelands.” A significant amendment to the Waterways Act, the 1983 Amendments essentially codified the Boston Waterfront Development Corp. decision—defining private tidelands and expanding the original public purpose of the Colonial Ordinance’s grant to reflect the modern uses of tidelands. The 1983 Amendments also appointed the DEP to act as the licensing authority of the tidelands in the Commonwealth, furthering the interests of the public trust doctrine by ensuring that the public maintains appropriate access to the property. Section 14 and section 18 set forth the allowable water-dependent and nonwater-dependent uses for both private and commonwealth tidelands, demonstrating the departure from the original, limited proper public purpose of promoting maritime commerce found in the Colonial Ordinances. While tidelands are classified in various ways, there

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44. See Op. of the Justs. to the Senate, 424 N.E.2d 1092, 1096 (Mass. 1981) (explaining proposed legislation eliminating vestigial interest of Commonwealth). The SJC, in an advisory opinion, concluded that the Legislature has the power to extinguish the public’s interest in tidelands. See id. at 1099; see also Pike et al., supra note 1, at 10 (stating extinguishing public interest does not violate Constitution). Nonetheless, the court set forth that “in the disposition of a public asset . . . the action must be for a valid public purpose” with only incidental private benefits. Op. of the Justs. to the Senate, 424 N.E.2d at 1100.

45. See Bussiere, supra note 3, at 1764 (explaining while no technical constitutional violation, Legislature did not adopt proposed amendments in 1981).

46. See Goodwin, supra note 11, at 50 (explaining original purpose of Waterways Act).

47. See An Act Relative to the Protection of the Massachusetts Coastline, ch. 589, sec. 21, § 1, 1983 Mass. Acts 1056, 1069-70 (codified as amended at MASS. GEN. LAWS ch. 91, § 1 (2019)) (defining private tidelands with Colonial Ordinances conditions and expanding “water-dependent uses”); see also Pike et al., supra note 1, at 2 (indicating codification of Boston Waterfront Development Corp. decision under 1983 Amendments). The amendments reflect the modernization of the waterfront areas by permitting recreational uses of tidal waters. See sec. 21, § 1, 1983 Mass. Acts at 1070 (including “recreational uses” under water-dependent use definition); Pike et al., supra note 1, at 13-14 (explaining shift away from only maritime commerce purposes).

48. See MASS. GEN. LAWS ch. 91, § 2 (2019) (delegating responsibility of granting licenses to DEP). The Amendments also state that the DEP “shall protect the interests of the commonwealth in areas described herein in issuing any license.” Id; see 310 MASS. CODE REGS. § 9.35 (2020) (stating DEP responsible for protecting rights of public relating to tidelands).

49. Ch. 91, § 14; id. § 18; see id. § 2 (adding protection of public rights by DEP); 310 MASS. CODE REGS. § 9.35(1) (enumerating public access to private tidelands); see also Bussiere, supra note 3, at 1754-55 (describing original purpose of Colonial Ordinances). Additionally, regulations allow for certain private uses that provide a public benefit despite a resulting interference with other water-related public rights. See 310 MASS. CODE REGS. § 9.35(1); see also ch. 91, § 14 (stating DEP may license construction for water-dependent use). For example, the statute states that the DEP may license tidelands for construction of a water-dependent structure so long as it “serve[s] a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands.” Ch. 91, § 14 (explaining public benefit needed for license); id. § 18 (outlining license application procedure). The DEP determines whether a property’s use is water-dependent
are important differences between private tidelands and commonwealth tidelands: Private tidelands are held by private parties but subject to the public’s use for fishing, fowling, and navigation, while commonwealth tidelands are either “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.” The DEP issues licenses to tideland owners subject to provisions in the Waterways Act and provided the license be used for a proper public purpose.

2. Issues Arising After Codification with Private Restrictions

Although the DEP has the ability to promulgate regulations regarding public trust rights under the Waterways Act, this authority has limits. The DEP may issue licenses on all filled tidelands for structures that serve “a greater public benefit than public detriment,” however, in 1994, the DEP created an exception for landlocked tidelands. This 1994 regulation exempted landlocked tidelands from the DEP licensing process and public hearings. In Moot I, the SJC questioned the landlocked tidelands exception, explaining that bypassing the licensure process for filled tidelands inappropriately ignored the public purpose aspect of tidelands licensing. The court concluded that this exemption failed to ensure a necessary proper public purpose for the tidelands, as required by section 18, and further explained that the DEP “does not have the authority to relinquish or

based on statutory definitions, which include use for marinas, boardwalks, aquariums, waterborne passenger transportation facilities, and facilities for water-based recreational activities. See 310 MASS. CODE REGS. § 9.12(2)(a). Restaurants and retail shops are explicitly classified as nonwater-dependent uses. See id. § 9.12(2)(f)(1). Further, the statute recognizes that tidelands may have a nonwater-dependent use provided that a public hearing is held as part of the licensing process. See ch. 91, § 18 (stating purpose must also provide greater public benefit). If a member of the public disagrees with the licensee’s proposed use of the property, they can appeal the license grant. See id.

50. See ch. 91, § 1 (defining private tidelands and commonwealth tidelands).

51. See Bussiere, supra note 3, at 1764 (providing for licensure process with public purpose requirements).

52. See Moot v. Dep’t of Envt’t Prot. (Moot I), 861 N.E.2d 410, 416 (Mass. 2007) (stating Legislature delegated ability to regulate tidelands to DEP); Fafard v. Conservation Comm’n, 733 N.E.2d 66, 68-69 (Mass. 2000) (explaining only Commonwealth’s power to authorize public trust rights, not municipalities’ power).

53. See 310 MASS. CODE REGS. § 9.04(2) (indicating exception for landlocked tidelands); Moot I, 861 N.E.2d at 419 (stating year of regulation promulgation); ch. 91, § 14 (stating public benefit requirement). Landlocked tidelands are filled tidelands separated completely from flowed tidelands. See 310 MASS. CODE REGS. § 9.02 (defining differences between landlocked and flowed tidelands); id. § 9.02 (defining filled tidelands to mean former submerged tidal flats with current presence of fill); id. § 9.04(2) (enumerating exception for landlocked tidelands from licensure process and permitting); Moot I, 861 N.E.2d at 418-19 (explaining DEP licensure process for nonwater-dependent uses of tidelands).

54. See 310 MASS. CODE REGS. § 9.04(2); Moot I, 861 N.E.2d at 419 (stating public hearing not required for landlocked tidelands under regulatory scheme at issue).

55. See Moot I, 861 N.E.2d at 418 (questioning adherence to public purpose requirement). The court stated that “[i]f landlocked tidelands are exempt entirely from the statutory licensing procedures, no opportunity exists for the department to determine, as it must under § 18, whether a proposed use of filled tidelands meets that requirement.” Id. An act by the Legislature is necessary for this exception to be valid. See id.
extinguish the public’s rights in any of the Commonwealth’s tidelands, except on terms expressly authorized by the Legislature.”

Later, the Legislature did in fact amend the statute, carving out an exception for landlocked tidelands. The amended statute superseded Moot I and permits developers to purchase, and develop on, landlocked tidelands without participating in the DEP licensing process. In addition, a new section of the Waterways Act requires the Secretary of the Executive Office of Energy and Environmental Affairs (Secretary) to file an environmental impact report on landlocked tidelands in accordance with the Massachusetts Environmental Policy Act (MEPA).

Private landowners continue to contest the restrictions on their property resulting from the public trust doctrine. In Arno v. Commonwealth, a parcel of property was privately registered in 1922, and the owner, Arno, subsequently obtained a conditional license under the Waterways Act to build on his property. As a landowner, Arno believed he owned his parcel in fee simple absolute, and that the land was free from any public rights conditioning the license because of his private land registration. The SJC disagreed, and once again made clear that only the Legislature has the power to fully extinguish public rights to tidelands, therefore upholding the validity of the DEP’s license.

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56. Id. at 417 (setting forth Commonwealth’s power to extinguish rights of public); see id. at 419 (determining exemption failed to meet § 18 requirements).
57. See An Act Relative to the Licensing Requirements for Certain Tidelands, ch. 168, § 6, 2007 Mass. Acts 671, 673 (2007) (codified as amended at MASS. GEN. LAWS ch. 91, § 18 (2019)) (amending Waterways Act with landlocked tideland exception for license). The law states that “[n]o license shall be required under this chapter for fill on landlocked tidelands, or for uses or structures within landlocked tidelands.” Id.
59. See MASS. GEN. LAWS ch. 30, § 62A (2019) (detailing MEPA statute and environmental impact reports); see also Moot II, 923 N.E.2d at 83 (explaining public benefit analysis requirement for Secretary). The Waterways Act “provides that the Secretary ‘shall conduct and complete a public benefit review for any proposed project’ that is located on landlocked tidelands, and where the proposed project is required to file an environmental impact report pursuant to [MEPA].” Moot II, 923 N.E.2d at 83 (quoting MASS. GEN. LAWS ch. 91, § 18B(b)). Under section 18, a license is no longer necessary for landlocked tidelands, however, the Legislature did not rid these lands of public rights. See id. at 85; see also MASS. GEN. LAWS ch. 91, § 18B(b) (2019) (indicating compulsory review by Secretary for landlocked tidelands). While the Legislature has the power to eliminate the requirement of use for a public purpose, they instead merely changed the MEPA statute and created section 18B, exempting landlocked tidelands from the license requirement but still requiring a public benefit review. See Moot II, 923 N.E.2d at 84.
61. See id. at 7 (listing conditions for encumbered parcel). Arno’s registration mentions “any and all public rights legally existing in and over the same below mean high water mark” as designated rights for the public. Id. This preserved the public trust function as Arno’s land below the high water mark is not entirely private, despite having a license for the nonwater-dependent use of his property. Id.
62. See id. at 8, 16-17 (setting forth Arno’s claims and discussing implications of registration stating “fee simple”).
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conditions.53 Even though nothing in Arno’s title certificate mentioned the rights of the public, public trust rights relating to the tidelands still attached to his property.64

The Massachusetts Appeals Court continued to uphold DEP license conditions in Maslow v. O’Connor.65 After the defendant’s predecessors sought a license to fill a stretch of tidelands, defendants tried to extinguish and prevent their plaintiff-neighbor’s access to the land.66 While a license was granted to the defendant’s predecessors to build a sea wall, it was granted with specific conditions not to impair any preexisting legal rights.67 Because of these specific conditions, the plaintiff had a right to access the remaining tidelands.68

D. Licensure Issuance Obstacles and Public Intervention

I. Modern Licensing Requirements Under Chapter 91

Section 18 of the Waterways Act details the Commonwealth’s present-day statutory scheme for granting licenses for nonwater-dependent uses of tidelands.69 With the exception of landlocked tidelands, license applicants must submit their application to their city’s planning board, and the board may conduct a subsequent public hearing.70 When property requires tideland licensing, applicants must obtain an advisory opinion from their local planning board to ensure the proposed plan achieves a public purpose.71 Then, once the DEP determines

63. See id. at 12 (stating Land Court and Attorney General could not unencumber plaintiff’s parcel). The court further stated that “the public’s rights in Arno’s parcel were not extinguished despite the registration in fee simple of the parcel to Arno’s predecessors in interest.” Id. at 16-17.

64. See Arno, 931 N.E.2d at 19 (stating Arno’s land still subject to public rights for tidelands). The court addressed the rights of the public in property terms as equivalent to a condition subsequent or an easement, but in reality, these terms were used to signify the requirement of ongoing public rights. See id. at 17-18.


66. See id. at 815-16 (explaining property owners’ dispute over right to cross grassy strip abutting defendant’s property).

67. See id. at 817 (stating license granted to build new sea wall and fill tidelands). The court pointed out that the license was issued with express conditions, which must be upheld in accordance with rights granted by the Colonial Ordinances. See id.

68. See id. at 819 (explaining “c. 91 license expressly prevents the impairment of the plaintiff’s rights” of access); infra Section II.D.1 (discussing Chapter 91).

69. See MASS. GEN. LAWS ch. 91, § 18 (2019) (detailing licensing process including application to local planning board, public hearing, and subsequent recommendation). The DEP must find that any uses not in accordance with the enumerated water-dependent uses are nonwater-dependent. See 310 MASS. CODE REGS. § 9.12(4) (2020).

70. See ch. 91, § 18; supra notes 58-59 (discussing evolution of landlocked tidelands licensing requirements). The planning boards must recommend whether the DEP should grant a license, which the DEP will consider in making its license determination. See ch. 91, § 18. While municipalities cannot change licensing requirements, they do have the power to control zoning regulations. See Patalano, supra note 30, at 688 (stating municipalities use police power to zone); see also supra note 17 (explaining state legislatures control licensing requirements, not municipalities).

it serves a proper public purpose, the DEP may grant a license for the tidelands. Under this statute, the DEP regulates the implementation of the licensure process and does so through the Waterways Regulations. In addition to the licensing process, the property is also subject to state and local zoning laws.

While hearings are optional for water-dependent project applications, the DEP requires a public hearing for license applications requesting nonwater-dependent uses. The public hearing process ensures public participation in the licensure process, allowing the DEP to manage and balance the private and public interests when granting licenses. The DEP may also look to Municipal Harbor Plans for additional restrictions in guiding their decisions. For Boston, the Boston Planning and Development Agency (BPDA) works to determine projects’ public purposes in accordance with the Waterways Act. When considering license applications for nonwater-dependent uses, the DEP still acts to protect the water-dependent uses of the tidelands, indicating compliance with the statutory intent. Nevertheless, the DEP may still provide a variance to certain projects that would

further regulate the amount of open space needed, specifically setback regulations, and the building height and floor area ratio. See id. Municipalities may inform the licensing process by suggesting their own requirements, which the Secretary reviews. See id. 72

72. See ch. 91, § 18 (explaining licenses contingent on findings of public purpose and benefit consistent with coastal management policies). The DEP is concerned with finding a detriment to the public’s rights to tidelands that is not outweighed by a greater public benefit. See id.; Hoffman, supra note 36, at 491-92 (indicating requirement for public purpose test).

73. See ch. 91, § 18. 310 MASS. CODE REGS. § 9.01 (stating DEP’s authority under statute to regulate licensure process). This section further states the purpose of DEP’s regulation authority is to carry out the intent of the Legislature and to act to “protect and promote the public’s interest in tidelands.” See 310 MASS. CODE REGS. § 9.01(2)(a).

74. See 310 MASS. CODE REGS. § 9.34(1) (stating compliance with zoning ordinances necessary for private and filled commonwealth tidelands); id. § 9.34(2)(a) (stating project must also conform to municipal harbor plans (Municipal Harbor Plans)); id. § 9.15(1)(b)(2) (explaining license terms).

75. See 310 MASS. CODE REGS. § 9.13(3) (2020) (indicating municipalities’ discretion for hearings on water-dependent use projects); id. § 9.11(2)(b)(2) (explaining full application for nonwater-dependent use license).

76. See 310 MASS. CODE REGS. § 9.13(4)(a) (demonstrating public intervention process and associated appeals). The public may also submit their comments to the DEP with or without a public hearing. See id. § 9.13(4)(b).

77. See Barr & Schultz, supra note 71, § 16.5.4 (indicating Boston Municipal Harbor Plans may modify licensure requirements). “The secretary’s decision specifies the approved substitutions and, in most cases, additional concerns for DEP to follow in approving a Chapter 91 license.” Id.; see Goodwin, supra note 11, at 67 (indicating regulatory flexibility of Waterways Act utilizing Municipal Harbor Plans).

78. See Barr & Schultz, supra note 71, § 16.5.4 (noting BPDA determines whether property meets “public access and related requirements set forth in the zoning”).

79. See MASS. GEN. LAWS ch. 91, § 18 (2019) (indicating purpose to serve public); 310 MASS. CODE REGS. § 9.51 (explaining factors of conflict between nonwater-dependent uses and water-dependent uses). The DEP provides further that “[a] nonwater-dependent use project that includes fill or structures on any tidelands shall not unreasonably diminish the capacity of such lands to accommodate water-dependent use.” 310 MASS. CODE REGS. § 9.51.
not otherwise qualify for a license in circumstances where they cannot meet compliance with these restrictions.80

2. Responsibilities of the Commonwealth and Reversionary Interests

As the DEP has the responsibility to grant these licenses, they also have the responsibility to enforce the conditions of those licenses and to revoke them if necessary.81 License holders must reapply to make subsequent changes to their property because unauthorized modifications may render their licenses void.82 Nevertheless, there are many ways for private license holders to circumvent the licensure process, public intervention, and potential revocation.83 Private property owners may seek to utilize Municipal Harbor Plans—a flexible licensing tool—or request minor project modification to skirt around normal licensing procedures.84

E. Current Environmental Concerns and the Impact of the Public Trust Doctrine

1. Climate Change and Flooding Concerns

Climate change has physically altered the tidelands, as evidenced by the sea level rising nine inches over the twentieth century.85 Climate change has already eroded coastlines in Massachusetts, especially in Cape Cod and Nantucket Island.86 Sea level rise and coastal flooding will inevitably change the high water

80. See 310 Mass. Code Regs. § 9.21 (explaining waiver and variance process). The DEP states that this process is only meant for "rare and unusual circumstance[s]" where there are no reasonable alternatives for the project and the project “minimize[s] interference with the public interests in waterways.” See id.

81. See ch. 91, § 18 (stating DEP’s duty to render licenses void for noncompliance); Pike et al., supra note 1, at 32 (reiterating DEP’s role in protecting public’s interest in tidelands); see also Goodwin, supra note 11, at 56 (stating interest in protecting public trust rights).

82. See ch. 91, § 18 (requiring issuance of new license for changes). The statute also states that “[a]ny unauthorized substantial change in use or unauthorized substantial structural alteration shall render the license void.” Id. The DEP may revoke licenses pursuant to the Waterways Act and MEPA statutes. See 310 Mass. Code Regs. § 9.08 (2020); see also Bos. Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 114 (Mass. 1942) (describing mandatory removal of railroad after failure of condition on license).

83. See generally Pike et al., supra note 1, at 39-50 (explaining strategies license holders use to protect their interests).

84. See infra notes 111-14 and accompanying text (laying out public participation cirumvention from Municipal Harbor Plans and minor project modifications).


and low water lines and transform previously landlocked tidelands to no longer be landlocked—effectively altering the tidelands and the rights associated with them.87

The Commonwealth, via an executive order from Governor Charlie Baker, has introduced climate change resilience plans that will help prepare for and reduce the effects of climate change on the shoreline.88 Measures to preserve the tidelands include the potential modification of DEP regulations to include flooding under “emergency actions,” which would allow the DEP to approve necessary, immediate projects outside the normal licensing procedure.89 To aid in oversight, the Commonwealth’s Office of Coastal Zone Management (CZM) is responsible for monitoring the changing coastlines and harbor areas.90

2. Conservation Efforts in the Public Trust Context

Because Boston’s waterfront is susceptible to the effects of climate change, the Commonwealth and the DEP mandate the upkeep of tidelands and licensed structures to ensure a minimal amount of decay on the coastal areas.91 License holders have a duty to maintain their property by ensuring proper repairs of...

87. See CLIMATE READY BOSTON, supra note 85, at 10, 17 (indicating possible rise of eight inches before 2030 and explaining effect of flooding). Projections indicate that as much as 5% of Boston’s total land area could experience flooding when the sea level reaches high tide. See id. at 21; MORAN ET AL., supra note 4, at 22 (stating tidelands may shift from climate change). “As sea level rises and more lands become submerged or subject to tidal action, property owners’ obligations under the Public Waterfront Act may change as the mean high water mark moves inland as previously landlocked tidelands become no longer landlocked.” MORAN ET AL., supra note 4, at 22.

88. See MASS. EXEC. ORDER NO. 569 (Sept. 16, 2016), https://www.mass.gov/executive-orders/no-569-establishing-an-integrated-climate-change-strategy-for-the-commonwealth [https://perma.cc/AQ2Y-3N7J] (indicating plan to prepare for climate change and extreme weather). Executive Order 569 provides goals and frameworks for the Commonwealth to abide by in order to reduce climate change impact and mitigate damage from sea level rise. See id.; see also CLIMATE READY BOSTON, supra note 85, at 6–7 (detailing Boston’s dynamic approach to combat climate change); Guercio, supra note 86, at 352 (indicating climate change affects Commonwealth and Boston). “Private landowners and state and local governments must plan for—in stead of merely react to—the reasonably anticipated effects of climate change.” Guercio, supra note 86, at 352.

89. See 310 MASS. CODE REGS. § 9.20 (2020) (explaining licensure process for emergency situations). During an emergency, the DEP may grant a license after the proposed action has taken place, meaning the DEP may review licenses after the emergency work is performed. See id. § 9.20(4); CITY OF BOS., COASTAL RESILIENCE SOLUTIONS FOR SOUTH BOSTON: FINAL REPORT 164–66 (2018), https://www.boston.gov/sites/default/files/embed/file/2018-10/climatereadyouthampton_final_report_v11.1s_web.pdf [https://perma.cc/D2VQ-JEHX] (hereinafter COASTAL RESILIENCE REPORT) (listing potential courses of action for Boston to avoid flooding of tidelands).


91. See MASS. GEN. LAWS ch. 91, § 49B (2019) (mandating removal of unsafe structures); 310 MASS. CODE REGS. § 9.22(1) (requiring maintenance of licensed structures on tidelands); MORAN ET AL., supra note 4, at 24–25 (explaining DEP’s duty to ensure removal of dilapidated structures); see also supra notes 85–87 (indicating climate change impact in Boston).
structures on tidelands in order to avoid noncompliance and license revocation.\textsuperscript{92} Should a catastrophic event occur, the DEP allows license holders to bypass the licensing process and rebuild the existing structures on tidelands.\textsuperscript{93} The Waterways Act additionally provides that the Massachusetts Department of Conservation and Recreation (DCR) may make improvements along the coastline to preserve the harbors.\textsuperscript{94}

3. Proposed Federal Legislation for Coastal States

Recognizing the national interest of protecting coastlines, Congress enacted section 302 of the Coastal Zone Management Act “to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone.”\textsuperscript{95} As of 2019, Congress has proposed new legislation that would impact the Coastal Zone Management Act through a series of climate-change-related bills.\textsuperscript{96} Supporters of these bills believe they will help protect against the effects of climate instability in coastal communities including flooding, storms, and rising sea levels.\textsuperscript{97} The Keep America’s Waterfronts Working Act would establish a task force to identify states’ needs related to their waterfronts, award grants to states for the preservation of their waterfronts and climate adaptation mitigation, and allow states to acquire an interest in a working waterfront.\textsuperscript{98} The Coastal State Climate Preparedness Act of 2019 would establish a program to “provide assistance to coastal States to voluntarily develop coastal climate adaptation plans.”\textsuperscript{99} This bill would also provide grants to coastal states combatting climate change for climate change adaptation plans.\textsuperscript{100}
III. ANALYSIS

A. Weaknesses of the Current Tidelands Licensure Process

The Waterways Act serves the public trust doctrine by appointing the DEP to protect the public’s interest in the tidelands and creating a licensure process for private construction projects on tidelands. Historically, there has been a struggle to balance public trust rights with the rights of private landowners. While the Colonial Ordinances granted private property owners rights to private tidelands, the use of this property is limited or restricted because of the attached public rights that remain.

The Legislature intended the Waterways Act to foster protection of the public’s rights in accordance with the public trust doctrine. Public participation is inherent in local zoning matters before zoning boards, but certain property owners may circumvent public hearings in the tidelands licensing process. For example, the Code of Massachusetts Regulations carves out an exception for licenses pertaining to water-dependent uses, making public hearings in these licensing cases discretionary. Moreover, the Municipal Harbor Plans also undercut the public’s interests by creating exemptions in the licensing process for minor project modifications on waterfront property.

The DEP has the responsibility to protect the public’s interests, but by creating these exceptions—seemingly to simplify or ease the licensing process—the DEP


102. See Op. of the Justs. to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981) (emphasizing importance of valid public purpose when Legislature disposes of public assets); see also Bussiere, supra note 3, at 1751 (illustrating contention between private landowners and public). In an advisory opinion to the Senate, the SJC explained that “where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.” Op. of the Justs. to the Senate, 424 N.E.2d at 1100. This tension reflects the balancing game between public benefits and private rights. See Arno v. Commonwealth, 931 N.E.2d 1, 17 (Mass. 2010) (explaining public trust rights encumbered property owner’s privately-held land).

103. See Bos. Waterfront Dev. Corp., 393 N.E.2d at 360 (explaining “strings attached” to grants of private ownership). This “strings attached” theory is why tidelands ownership cannot be considered fee simple absolute. See id. at 363.

104. See ch. 91, § 2 (explaining DEP’s function to preserve public interests in tidelands and ensure proper public purpose).

105. See Patalano, supra note 30, at 699 (commenting on public access to zoning matters essential to zoning development); PIKE ET AL., supra note 1, at 33 (describing common licensing loopholes); see also ch. 91, § 18 (detailing tidelands licensing process). The Waterways Act also enumerates the landlocked tidelands exception to obtaining a license. See ch. 91, § 18.


107. See id. § 9.34(2) (stating DEP reviews project in accordance with Municipal Harbor Plans); Barr & Schultz, supra note 71, § 16.5.4 (explaining municipalities’ substitutions for Waterways Act licenses); see also PIKE ET AL., supra note 1, at 34-35 (arguing Municipal Harbor Plans sometimes lead to fewer public benefits than Waterways Act licensing process).
harms the public’s interests. The goal of the Municipal Harbor Plans is to relax the Waterways Act’s license requirements and impose specifically-tailored conditions on a proposed project in accordance with local harbor conditions. Though these plans can “customize land uses,” they still must survive the public and private benefit weighing. Nevertheless, the conditional licenses granted under the Municipal Harbor Plans undermine the public trust by permitting waterfront property development with a private benefit that outweighs its public benefit. Finally, the DEP and enforcing authorities may overlook the Municipal Harbor Plan exceptions to tidelands licensing, leaving the licensure process entirely circumvented.

Minor project modifications are another way DEP regulations exclude the public from the licensure process. Minor project modifications refer to small structural changes and “changes of use which maintain or enhance public benefits provided by the project.” These types of modifications do not even require

108. See Mass. Gen. Laws ch. 91, § 2 (2019) (explaining DEP’s role to protect public’s interest in tidelands); see also 310 Mass. Code Regs. § 9.01(2) (defining purpose for regulations revolving around Waterways Act). But see Pike et al., supra note 1, at 33 (indicating strategies “reducing the public benefits required by the Waterways Regulations”).

109. See Barr & Schulte, supra note 71, § 16.5.4 (explaining local authorities impose Municipal Harbor Plans to “reflect harbor-specific conditions”). The Secretary still must approve the Municipal Harbor Plans and their substitutes to the Waterways Act. See id. For the South Boston Waterfront District Municipal Harbor Plan, the Secretary imposed location-specific conditions because much of the area was undeveloped. See id. (stating reasoning for approving licenses in undeveloped area with Municipal Harbor Plans).


111. See Pike et al., supra note 1, at 35 (arguing Municipal Harbor Plan standards may lead to fewer public benefits).

The [Municipal Harbor Plan] exemption from the Waterways Regulation standards was intended for use on an area-wide basis by a municipality, so that build-out or redevelopment on a collection of parcels within the planning district could be coordinated and the overall public benefits maintained, albeit in a more customized way. . . . [Nevertheless,] the physical site limitations of a single property can lead the EEA Secretary to compromise the public trust by settling for fewer public benefits through the [Municipal Harbor Plans] spot amendment process than the Waterways Regulations would otherwise have required.

Id. at 34-35.

112. See id. at 35-36 (providing examples of loss of public benefit in tidelands from Municipal Harbor Plans). After the Secretary approved the Municipal Harbor Plans and granted conditional licenses on two different projects, developers did not implement the conditions that would maximize public benefits in accordance with the area, and thus, the private interests outweighed the public benefit of the project. See id. at 35-36. But see Goodwin, supra note 11, at 67-68 (explaining Municipal Harbor Plans alternative requirements to licensing in accordance with local zoning provides flexibility). The DEP ultimately determines if the Municipal Harbor Plan conforms with licensing requirements, however, “[t]he DEP strongly presumes that the municipality’s finding of compliance or noncompliance is correct.” Goodwin, supra note 11, at 68.

113. See Pike et al., supra note 1, at 45-46 (explaining minor project modifications for licenses avoid public hearings).

114. See 310 Mass. Code Regs., § 9.22(3) (2020) (detailing process for minor project modifications). Minor project modifications do not require a new license or amendment as long as the modification does not
developers to obtain a new license; they only require a determination of compliance from the DEP before beginning the alterations.\textsuperscript{115} The DEP’s weakness as a licensing authority also stems from confusion surrounding the tidelands licensure process.\textsuperscript{116} Private landowners may think they own property in fee simple absolute when their property is actually subject to the public’s lasting rights.\textsuperscript{117} This belief is compounded by the fact that some tidelands uses are exempt from licensing requirements and some tidelands are exempt from the licensure process.\textsuperscript{118} Consequently, the Legislature must strike an appropriate balance between private and public rights to enforce appropriate conditions on licenses when aggrieved landowners come into court.\textsuperscript{119}

Further, there are foreseeable issues when it comes to the emergency action exception.\textsuperscript{120} During an emergency, the DEP allows license holders to begin construction on their proposed amendments before the DEP clears their applications.\textsuperscript{121} While there are practical advantages to this exception, the DEP generates more work by not fully evaluating licensed projects in accordance with the Waterways Act because the projects may prove to be out of compliance after property owners have already started construction.\textsuperscript{122} This is especially

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\textsuperscript{115} See id. \textsuperscript{9.22(3)(a)} (indicating one exemption from licensing). The code also allows for minor changes to the project’s use if it maintains a public benefit and developers give written notice to the DEP. See id. \textsuperscript{9.22(3)(b)}.

\textsuperscript{116} See id at \textsuperscript{9.22(3)}. The license holder must submit a plan to the DEP, which then makes a determination of compliance with the original license and in accordance with the Waterways Act. See id. In minor project modifications, there is no process for public participation. See id. (stating only DEP can make objections). Compare id. (stating no need for license for minor project modifications), with id. \textsuperscript{9.13(1)} (detailing public participation process for license applications for water-dependent and nonwater-dependent uses).

\textsuperscript{117} See Arno v. Commonwealth, 931 N.E.2d 1, 8, 18 (Mass. 2010) (explaining Arno believed he owned his land in fee simple absolute).

\textsuperscript{118} See Mass. Gen. Laws ch. 91, \S 18 (2019) (enumerating exception from licensure process for landlocked tidelands); Arno, 931 N.E.2d at 8 (indicating private owner’s belief of fee simple absolute ownership of tidelands). Additionally, the Waterways Act also provides for a mandatory public hearings procedure for nonwater-dependent uses, but does not mandate one for water-dependent uses. See ch. 91, \S 18.

\textsuperscript{119} See Goodwin, supra note 11, at 52 (stating private ownership not absolute in intertidal zones).

\textsuperscript{120} See 310 Mass. Code Regs. \S 9.20 (2020) (indicating license holder’s exceptions to licensing process in course of emergency); Coastal Resilience Report, supra note 89, at 164-66 (stating allowance for expedited emergency action process). “Emergency actions are subject to review by [the DEP], and likely do not consider urgent, anticipated flood risk.” Coastal Resilience Report, supra note 89, at 166.

\textsuperscript{121} See 310 Mass. Code Regs. \S 9.20 (stating DEP’s approval occurs without license). The emergency action process requires a written request to the DEP, and after the emergency approval, the property owner must submit a license application to the DEP within thirty days. See id. Emergency work requires DEP authorization but construction may start without an actual license. See id.

\textsuperscript{122} See 310 Mass. Code Regs. \S 9.20 (declaring DEP may approve modifications to emergency work without license); id. \textsuperscript{9.22(1)(c)} (stating only written notice to DEP required for restoration); Moran et al., supra note 4, at 30 (stating “no safeguard against abuse of this protection”). While planning for emergency actions pertaining to climate change, the DEP may need a more long-term solution for tidelands licenses—not merely an emergency exception. See Moran et al., supra note 4, at 30 (noting emergencies becoming more
problematic if the property owner’s emergency construction does not comply with the structure’s original, permissible purpose.\textsuperscript{123}

B. Proposed Solutions for Preservation of Tidelands

1. Settling Conflicts Between Local Zoning Authorities and the DEP and Evaluating Exceptions

State and local governments must work together to preserve the tidelands and the public’s access to them.\textsuperscript{124} For example, municipalities may create Municipal Harbor Plans to modify requirements for a Waterways Act license.\textsuperscript{125} Because these plans alter the Commonwealth’s requirements, the DEP should direct greater efforts to reconciling conflicts between the two sets of requirements and ensure that property owners fairly utilize the Municipal Harbor Plans in accordance with the statutory intent.\textsuperscript{126}

The Legislature could further preserve the tidelands and the public trust doctrine by restricting licenses for use of waterfront property to the original water-dependent, public-purpose intent.\textsuperscript{127} While a shift in legislation now allows the DEP to license nonwater-dependent—and perhaps more modern—uses on tidelands, this shift poses the complicated question of how to balance public and private interests.\textsuperscript{128} Although some modernization is necessary to adapt to society’s use of the coastline, the Legislature and the DEP should only permit water-dependent uses for licensing in order to more faithfully align with the original intent of the Colonial Ordinances.\textsuperscript{129} Alternatively, licenses for nonwater-dependent uses should have a mandatory renewal process that would be shorter common with climate change). \textit{But see COASTAL RESILIENCE REPORT, supra note 89, at 166} (indicating support for expedited permit process for flood protection licensing).

\textsuperscript{123} \textit{See MORAN ET AL., supra note 4, at 32} (explaining how sea level rise may eliminate public access on parcels of tidelands). As the public loses access to tidelands as a result of rising sea levels, the license the DEP granted would become noncompliant. \textit{See id.}

\textsuperscript{124} \textit{See id. at 9-10} (indicating potential for differences between state and local requirements regarding tidelands).

\textsuperscript{125} \textit{See Barr & Schultz, supra note 71, § 16.5.4} (explaining Municipal Harbor Plans depart from Waterways Act regulations); \textit{see also 310 MASS. CODE REGS. § 9.34(2)} (explaining how Municipal Harbor Plan conforms with Waterways Act and applicable limitations used).

\textsuperscript{126} \textit{See 310 MASS. CODE REGS. § 9.34} (2020) (indicating compliance with Municipal Harbor Plans for tidelands licensing); \textit{see also supra note 112} and accompanying text (highlighting ways public benefits overlooked with Municipal Harbor Plans).

\textsuperscript{127} \textit{See LAWS & LIBERTIES, supra note 7, at 124} (stating original Colonial Ordinances purpose to maintain public benefit of fishing, fowling, and navigation); \textit{see also Bos. Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 366} (Mass. 1979) (noting current modern uses unthinkable for past legislatures).

\textsuperscript{128} \textit{See MASS. GEN. LAWS ch. 91, § 18} (2019) (explaining people may obtain licenses for both water-dependent and nonwater-dependent uses). While the Legislature approved nonwater-dependent uses, water-dependent uses include those that “cannot be located inland.” \textit{See id. §1} (defining water-dependent uses).

\textsuperscript{129} \textit{See Hoffman, supra note 36, at 485} (explaining purpose of grant of private tidelands to promote maritime commerce). These water-dependent uses are in accordance with the original Colonial Ordinances’ purpose of promoting an economically beneficial harbor. \textit{See id.}
than the average length of time for a typical license to ensure the DEP has appropriate oversight.  

2. Proposed Department to Enforce License Conditions and Inspect Current Licenses for Compliance

The DEP has a duty to the public to enforce the principles behind the public trust doctrine by monitoring tideland licenses, and its failure to do so jeopardizes the public’s interest and benefit of tidelands.  

As noted in Boston Waterfront Development Corp., the Commonwealth holds an attached reversionary interest in the state’s tidelands. Creating a new task force would assist the DEP in mitigating both breaches of license conditions and public purpose requirements.

C. Impacts on Massachusetts Tidelands Relating to Climate Change

1. Local Impact of Boston’s Climate Change Plans

The public trust doctrine relating to tidelands preserves the public’s interests while also creating private ownership—a balancing act made ever more challenging with changing coastlines. Municipalities are helping to preserve...
tidelands by combatting rising sea levels and mitigating flooding concerns and coastal erosion.\textsuperscript{137} For example, the City of Boston initiated climate change prevention plans and proposed solutions to the eroding coastlines, including flood walls and raised Harborwalks.\textsuperscript{138} These plans will not only serve to minimize the flooding and sea level rise of the waterfront but also help preserve the public’s interest in tidelands.\textsuperscript{139} If the tidelands change due to environmental pressures, the City furnishes new public property.\textsuperscript{140} Here, the City is planning to take steps to protect the public’s interests, and in turn, aid the DEP by protecting the tidelands from environmental consequences.\textsuperscript{141} Nevertheless, public concern and conservation regarding tidelands and climate change is only one part of this issue; climate change will also affect private license holders.\textsuperscript{142}

Currently, landlocked tidelands do not require any Waterways Act licensing, but rising sea levels—and inevitable changes to the high and low tide lines—may once again subject these tidelands to licensing.\textsuperscript{143} Climate change may impact license holders by negating their property’s public benefit, thus rendering their licenses void.\textsuperscript{144} This may require the DEP to revoke the licenses or allow

\textsuperscript{137} See COASTAL RESILIENCE REPORT, supra note 89, at 49-50 (highlighting Boston’s strategy to promote coastal resilience and combat flooding); see also id. at 18 (explaining heightened risk for loss of tidelands in South Boston).

\textsuperscript{138} See CLIMATE READY BOSTON, supra note 85, at 30-33 (providing overview of climate change plans); COASTAL RESILIENCE REPORT, supra note 89, at 49-50 (demonstrating mitigation of climate-change-related risks); see also SEA LEVEL RISE, supra note 85, at 1 (indicating causal relationship between sea level rise and tidal inundation and erosion).

\textsuperscript{139} See COASTAL RESILIENCE REPORT, supra note 89, at 30 (indicating plans considered for climate change impacts and desire for public space enhancement). The raised Harborwalk and floodwalls would be in compliance with the Waterways Act. See id. at 164-65 (explaining plan will create new habitat and comply with Waterways Act to preserve tidelands).

\textsuperscript{140} See MORAN ET AL., supra note 4, at 32 (indicating DEP’s authority to enforce maintenance of public benefits on licensed property); id. at 22 (explaining shift of high tide lines); see also COASTAL RESILIENCE REPORT, supra note 89, at 30 (indicating desire for public use of waterfronts).

\textsuperscript{141} See Guercio, supra note 86, at 352 (indicating Boston, Commonwealth, and other municipalities affected by climate change). See generally COASTAL RESILIENCE REPORT, supra note 89 (detailing Boston’s research, plans, and initiatives combatting climate change).

\textsuperscript{142} See MORAN ET AL., supra note 4, at 32 (indicating private tidelands licensing may become obsolete because of changing tidelands from environmental pressures). “There are many scenarios under which a licensee may be in non-compliance with the terms and conditions of their license due to climate impacts like sea level rise.” Id.; see MASS. GEN. LAWS ch. 91, § 18 (2019) (recognizing DEP’s duty to render licenses void for non-compliance).

\textsuperscript{143} See MORAN ET AL., supra note 4, at 23-24 (stating shift in tides could cause landlocked tidelands to need licenses); see also COASTAL RESILIENCE REPORT, supra note 89, at 18 (stating rising sea level and coastal flooding causes tidelands to change).

\textsuperscript{144} See MORAN ET AL., supra note 4, at 22, 32 (stating climate change could render licenses void for invalid public purpose). For example, owners of landlocked tidelands may subsequently need to apply for a license from the DEP in accordance with the Waterways Act. See ch. 91, § 18 (indicating no requirement for license on landlocked tidelands).
the current license holders to amend and propose alterations to their property.\textsuperscript{145} Although the DEP is acting as the licensing authority for the Commonwealth to preserve the tidelands for the benefit of the public, conservation efforts have become increasingly necessary to ensure future use and enjoyment of the tidelands.\textsuperscript{146}

2. Potential Impacts with New Federal Legislation

Currently, Congress is considering a handful of climate-change-related bills amending the Coastal Zone Management Act of 1972.\textsuperscript{147} The bills relevant to this Note require working waterfront plans or coastal climate change adaptation strategies in order for the Secretary of Commerce to consider them for grant allocations.\textsuperscript{148} Coastal states may use this grant funding to make improvements and conduct repairs along their waterfronts but must preserve public access, mirroring the statutory intent behind the Waterways Act.\textsuperscript{149} If these bills become law and the Secretary of Commerce approves Massachusetts’s plan, Massachusetts could receive grants to help combat climate change, address the loss of coastal regions, reduce the impact of rising sea levels, and protect existing infrastructure.\textsuperscript{150} Moreover, by protecting the coastline against climate change, these bills would help preserve tidelands as well as the public’s interests in the waterfront.\textsuperscript{151}

145. See Moran et al., supra note 4, at 46 (explaining preserving public benefits of license equally important when combatting climate change).

146. See ch. 91, § 2 (listing responsibilities of DEP); Moran et al., supra note 4, at 32 (arguing DEP’s duty to mitigate damage from climate change).


148. See H.R. 3596 (stating requirements to receive federal funding); H.R. 3541 (giving grants to “coastal States with management programs approved by the Secretary” of Commerce). The working waterfront plan “must provide for preservation and expansion of access to coastal waters to persons engaged in commercial fishing, recreational fishing and boating businesses, aquaculture, boatbuilding, or other water-dependent, coastal-related businesses.” H.R. 3596.

149. See H.R. 3596 (indicating public access requirement). This proposed Act mandates that funding used from this grant must preserve or create public access to the appropriate waterfronts. See id.

150. See id. (indicating approval by Secretary of Commerce required); supra note 148 and accompanying text (explaining distribution of proposed grants); Coastal Resilience Report, supra note 89, at 148 (proposing flood protections in South Boston). In the South Boston neighborhood, building a flood wall and raised Harborwalk has an estimated cost of $210 to $243 million. See Coastal Resilience Report, supra note 89, at 148.

151. See H.R. 3596 (stating use of funds to mitigate climate change and make improvements along waterfronts); see also Guercio, supra note 86, at 352 (indicating municipalities affected by climate change); Moran et al., supra note 4, at 32 (arguing DEP must mitigate damage from climate change); Coastal Resilience Report, supra note 89, at 18 (stating changing tidelands from rising sea level and coastal flooding). Strategies
IV. CONCLUSION

The DEP should address the current weaknesses in their tidelands licensure process, particularly the standards for nonwater-dependent use licenses. Creating a heightened review process for licensing, evaluating exceptions, and improving the compliance monitoring process will aid in balancing the public and private rights to tidelands. Restructuring the licensure process and properly preparing for climate change will help mitigate the loss of the public’s interest in tidelands. The original intent of the Colonial Ordinances was to preserve the public interest and the DEP should maintain that interest by preserving the public’s access to tidelands on the Boston waterfront.

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for coastal planning will include public space enhancements. See COASTAL RESILIENCE REPORT, supra note 89, at 30.