

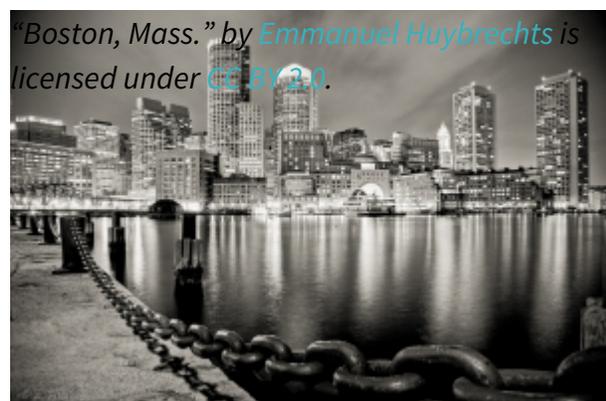


COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

The Blessing and Curse of Waterfront Development in Massachusetts

BY CHRISTOPHER MERCURIO • SEPTEMBER 22, 2015



Massachusetts is home to a beautiful and historically significant coastline—and the Legislature has traditionally preserved that coastline for public use. This is the essence of the “public trust doctrine” that is exemplified in the [Waterways Act](#). Accordingly, any waterfront property that a developer is lucky enough to acquire in Massachusetts usually comes with strings attached. One recent Court of Appeals case demonstrates that these strings are often difficult—or impossible—to cut. In *Navy Yard Four Associates v. DEP*, the developer of the Harborview project on the site of the old Charlestown Navy Yard attempted to lift the parcel’s designation as “Commonwealth tidelands,” only to be denied by both the Department of Environmental Protection (“DEP”) and the courts.

Because the Harborview site fell between the historic high and low watermarks, and was owned by the Boston Redevelopment Authority (“BRA”) when the permitting process began, it met the definition of “Commonwealth tidelands”—as opposed to “private tidelands”—in the Waterways Act. This meant that, the developer—Navy Yard Four Associates (“NYF”)—had to reserve 75% of the ground floor for public use. Unfortunately, it could not find enough tenants for the ground floor. Thus, NYF sought to amend its waterways license to give it more flexibility.

Despite having support from the BRA, NYF’s request was rejected by the DEP and the Court. The Court of Appeals held that a designation of a parcel as Commonwealth tidelands cannot be changed without a specific act of the Legislature, even if the property is now privately owned. The Court further held that the word “Commonwealth” includes political

subdivisions such as the BRA, but that the BRA cannot unilaterally amend the parcel's deed restrictions. Finally, it held that the DEP is owed a certain amount of deference in interpreting the Waterways Act. In other words, NYF is out of luck.

This case is indicative of the strength of the public trust doctrine and the ability of the DEP to preserve coastal property for public use. As *Navy Yard Four Associates* shows, the DEP and the courts are typically not particularly flexible in enforcing this doctrine. Waterfront developers must assume strict enforcement of the Waterways Act in developing design and financial plans for their projects.