

COMMERCIAL REAL ESTATE INSIGHT & NEWS

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Regulation of Massachusetts Municipal Harbor Plans to be Reviewed

BY JOSEPH R. DUQUETTE • AUGUST 18, 2022

In *Armstrong v. Sec'y Energy & Envtl. Affairs*, SJC-13210 (Mass. July 12, 2022), the Supreme Judicial Court (SJC) invalidated the April 2018 Boston Planning and Development Agency's Municipal Harbor Plan for the Harbor Garage and Hook Wharf, holding that the Department of Environmental Protection (DEP)'s municipal harbor plan (MHP) regulations at 301 Code Mass. Regs. §§ 23.00 (2017) unlawfully delegated its authority to review and approve municipal harbor plans to Secretary of Energy and Environmental Affairs (EEA). The MHP regulations purport to require the DEP to adopt "substitute specifications" approved by EEA that deviate from the DEP's own regulatory standards. In its unanimous decision, the Court stated: "the [DEP] has no authority to delegate to the [EEA] its public trust duties to preserve and protect the public's interest in tidelands in this manner."

In rejecting the DEP's argument that the MHP regulations "evidence the cooperative agreement that was reached among DEP, [Massachusetts Office of Coastal Zone Management] and the [EEA] over 30 years ago, in 1990, regarding the allocation of their respective powers and duties, vis-à-vis the regulation of tidelands," the SJC has made it clear that the approval process used by the state for the past 30 years may not work moving forward.

While the Court limited the application of its decision to just the Boston MHP in a footnote, the decision nonetheless creates uncertainty for the nine other communities in Massachusetts that have municipal harbor plans in effect.

The impact of *Armstrong* on projects that have not yet received a Chapter 91 license from the state under previously approved MHPs is unclear. Further, there is concern that future amendments or renewals of Chapter 91 licenses issued under existing MHPs may be open to legal challenge.

This level of uncertainty could impact future developments under existing MHPs unless the regulatory issues identified in the court's decision in *Armstrong* are addressed by amendments to the MHP regulations or to Chapter 91. However, the DEP has not yet announced whether it will propose changes to the MHP regulations. With the legislature having adjourned and Governor Baker rounding out the final months of his tenure, it may take some time before amending

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legislation is presented to the General Court.

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