

House, No. 4184

House bill No. 4184, as changed by the committee on Bills in the Third Reading, and as amended and passed to be engrossed by the House. July 26, 2007.



The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT RELATIVE TO THE LICENSING REQUIREMENTS FOR CERTAIN TIDELANDS.

Whereas, The deferred operation of this act would defeat its purpose, which is to authorize a regulatory exemption for certain landlocked tidelands from license requirements and to improve public benefit determinations on tidelands and great ponds, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 28A the following chapter:-

CHAPTER 28B

OFFICE OF TIDELANDS AND GREAT PONDS

Section 1. As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:-

“Applicant”, any person who has filed an environmental notification form with the secretary of the executive office of energy and environmental affairs on any tidelands, landlocked tidelands, or great ponds land.

“Director”, the director of the office of tidelands and great ponds.

“Great ponds”, any pond not actively being used as a source of water supply by any town, water supply, or fire district or public institution, and containing more than 10 acres in its natural state, as calculated based on the surface area of lands lying below the natural high water mark for which the title to land below the natural low water mark is held by the commonwealth in trust for the public good, subject to any rights which the applicant demonstrates have been granted by the commonwealth; provided, however, that any pond larger than 10 acres shall be presumed to be a great pond, unless the applicant presents topographic, historic, or any information demonstrating that the original size of the pond was less than 10 acres, prior to any alteration by damming, or other human activity.

“Landlocked tidelands”, filled tidelands, which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located: (a) within 250 feet of the high water mark of flowed tidelands; or (b) within any designated port area under the Massachusetts coastal zone management program. A public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark of flowed tidelands.

“Office”, the office of tidelands and great ponds.

"Person", a natural person, corporation, association, partnership or other legal entity.

“Public benefit”, shall include, but not be limited to: public access; open space; recreational activities and other uses related to chapter 91 licenses and permits; mitigation or compensation for the use of tidelands; the purpose and effect of development; the impact on the abutters and the surrounding community; leases, easements or transfers; enhancement to the property, benefits of previously secured city or town permits, including but not limited to, community activities on the development; environmental protection and

preservation; housing; commerce; economic development; the public health, safety and general welfare.

“Substantial change in use”, a use for a continuous period of at least 1 year of 10 per cent or more of the surface area of the authorized or licensed premises or structures for a purpose unrelated to the authorized or licensed use or activity.

“Substantial structural alteration”, a change in the dimensions of a principal building or structure which increases by more than 10 per cent the height or ground coverage of the building or structure specified in the authorization or license, or an increase by more than 10 per cent of the surface area of the fill specified in the authorization or license.

“Tidelands”, present and former submerged lands and tidal flats lying between the present or historic high water mark, whichever is farther landward, and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands, as defined in 310 CMR 9.02.

Section 2. (a) There shall be within the executive office of administration and finance, but not subject to the control of said executive office, an office of tidelands and great ponds which shall be under the supervision and control of a director. The director shall be appointed by the governor and shall be a person of skill and experience in the acquisition, disposition or administration of public or private assets having a net value in excess of \$1,000,000. The director shall be the executive and administrative head of the office and shall be responsible for administering and enforcing the provisions of law relative to the office and to each administrative unit thereof. The director shall serve at the pleasure of the governor, shall receive such salary as may be determined by law, and shall devote his full time to the duties of his office. In the case of an absence or vacancy in the office of the director, or in the case of disability as determined by the governor, the governor may designate an acting director to serve as director until the vacancy is filled or the absence or disability ceases. The acting director shall have all the powers and duties of the director and shall have similar qualifications as the director.

(b) The director may appoint such persons as he shall deem necessary to perform the functions of the office, provided that section 9A of chapter 30 and chapter 31 shall not apply to any person holding any such appointment. Every person so appointed to any position in the office shall have experience and skill in the field of such position. So far as

practicable in the judgment of the director, appointments to such positions in the office shall be made by promoting or transferring employees of the commonwealth serving in positions which are classified under chapter 31, and such appointments shall at all times reflect the professional needs of the administrative unit affected. If an employee serving in a position which is classified under said chapter 31 or in which an employee has tenure by reason of said section 9A of said chapter 30 shall be appointed to a position within the office which is not subject to said chapter 31, the employee shall upon termination of his service in such position be restored to the position which he held immediately prior to such appointment; provided, however, that his service in such position shall be determined by the civil service commission in accordance with the standards applied by said commission in administering said chapter 31. Such restoration shall be made without impairment of his civil service status or tenure under said section 9A of said chapter 30 and without loss of seniority, retirement or other rights to which uninterrupted service in such prior position would have entitled him. During the period of such appointment, each person so appointed from a position in the classified civil service shall be eligible to take any competitive promotional examination for which he would otherwise have been eligible.

Section 3. The office of tidelands and great ponds shall have the following duties and responsibilities:-

- (1) identifying, locating, appraising and valuing tidelands, great ponds and natural resources contained within them, including energy resources;
- (2) identifying, inventorying and valuing existing leases and licenses of tidelands, great ponds and resources contained within them;
- (3) designating tidelands and great ponds for permanent preservation and protection;
- (4) developing policies for the sale, lease and licensing of tidelands, great ponds and their resources;
- (5) assessing, collecting, administering, valuing and accounting lease and licensing fees for tidelands and great ponds;
- (6) applying said fees and payments to defer administration expenses of the office and defraying related local expenses; and

(7) reviewing the application and proposal of the developer to determine the public benefit.

In the performance of these duties, the office shall cooperate with other state and federal agencies to coordinate all necessary information to assist in making his public benefit determination.

Section 4. An applicant shall submit to the director a request, together with a fee, for a public benefit determination. The public benefit determination shall follow concurrently the timelines established for a chapter 91 licensing or exemption as set forth in 310 CMR 9.11 (2)4.

The director shall administer a public benefit determination for any new construction or substantial structural alteration or substantial change in use on any tidelands, landlocked tidelands or great ponds land. In such determination, the director shall consider the nature and scope of the public benefit as well as the practical impact on the applicant's development.

Any determination of the director shall not supersede the rules and regulations of the department of environmental protection or any other requirements under chapter 91.

The director shall consider the location, size, use of the development and impact on the surrounding area in relation to the public benefit; provided, however, that the public benefit provided by the applicant shall not be punitive or unduly burdensome on the applicant or his development.

The director shall also establish regulations relative to exempting the development of certain parcels of land that are determined to be of de minimus impact from the public benefit determination.

The department of environmental protection shall incorporate the director's determination of public benefit in the official record.

Section 5. The office shall charge and collect fees as determined annually by the commissioner of administration under the provision of section 3B of chapter 7. The director shall designate one employee to receive all fees collected under this section who shall give bond to the state treasurer in the sum of \$10,000.00.

SECTION 2. Section 61 of chapter 30 of the General Laws as appearing in the 2006 Official Edition, is hereby amended by inserting after the word “grounds”, in line 16, the following words:-- , reduction of groundwater levels, impairment of water quality, increases in flooding or storm water flows,.

SECTION 3. Section 1 of chapter 91 of the General Laws, as so appearing, is hereby amended by inserting after the definition of “Department” the following definition:—

“Landlocked tidelands”, filled tidelands, which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located: (a) within 250 feet of the high water mark of flowed tidelands; or (b) within any designated port area under the Massachusetts coastal zone management program. A public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark of flowed tidelands.

SECTION 4. Section 18 of said chapter 91, as so appearing, is hereby amended by inserting after the fifth paragraph the following 2 paragraphs:-

No license shall be required under this chapter for fill on landlocked tidelands, or for uses or structures within landlocked tidelands. Regulations of and any determinations of applicability issued by the department of environmental protection exempting landlocked tidelands from licensing before the effective date of this act are hereby validated and confirmed as if this act had been in effect when such regulations and determinations of applicability were issued. Any fill, use or structure developed pursuant to such regulations shall not be subject to challenge on the ground that the department of environmental protection lacked the authority to issue such regulations.

The developer of any new use or structure or modification of an existing use or structure within tidelands and landlocked tidelands that is otherwise required to file an environmental notification form pursuant to section 62A of chapter 30 and files an environmental notification form after the effective date of this act, shall comply with the requirements of this paragraph. The environmental notification form, and an environmental impact report required pursuant to section 62B of said chapter 30, if applicable, shall include a discussion of the project’s impact on the public’s right to access, use and enjoy

tidelands as protected by this chapter, and identify measures to avoid, minimize, or mitigate any adverse impact on such rights set forth herein. The environmental notification form and an environmental impact report shall also include a discussion of the project's impact on groundwater levels, if the project is located in an area where low groundwater levels have been identified by a municipality or by a state or federal agency as a threat to building foundations, and identify measures to avoid, minimize, or mitigate any adverse impact on groundwater levels. Any measures identified by the secretary of the executive office of energy and environmental affairs pursuant to this section shall be set forth in a certificate on the environmental notification form or a certificate on the environmental impact report, if applicable. Within 30 days after the issuance of a certificate under this paragraph, the proponent shall file with the department of environmental protection a completed form notifying the department that work will be conducted within landlocked tidelands, and shall attach the Massachusetts Environmental Policy Act certificate to the form. The developer shall comply with all obligations set forth in the certificate pursuant to this section, and the department shall have the authority to enforce such conditions consistent with this chapter.

SECTION 5. Said section 18 of said chapter 91, as so appearing, is hereby further amended by inserting after the word "tidelands", in line 52, the following: words:- , except for landlocked tidelands.

SECTION 6. Said section 18 of said chapter 91, as so appearing, is hereby further amended by inserting after the word "tidelands", in line 53, the following words:- , except for landlocked tidelands.

SECTION 7. Notwithstanding any general or special law to the contrary, the director of the office of tidelands and great ponds, in cooperation with other state and federal agencies, shall prepare a preliminary map of tidelands, landlocked tidelands and great ponds. The department of environmental protection and the department of fish and game and other applicable state agencies shall provide information to the director of the office of

tidelands and great ponds in the preparation of the preliminary map. The preliminary map shall depict, where feasible: (1) the boundaries of properties lying within and abutting tidelands and great ponds and (2) which tidelands are private tidelands and which are Commonwealth tidelands, as defined by 310 CMR 9.02.

The director of the office of tidelands and great ponds shall file a report with the clerks of the senate and house of representatives who shall forward the same to the joint committee on environment, natural resources and agriculture on or before March 3, 2008. The report shall include the preliminary map of tidelands and great ponds and shall detail the necessary resources and timeframe needed to produce a final certified map that shall be filed with all applicable registries of deeds.

SECTION 8. Notwithstanding any general or special law to the contrary, in all determinations of applicability under 310 C.M.R. 9.00 et seq. made by the department after the effective date of this act, a public way that is an elevated public way, bridge or overpass shall not be construed to separate filled tidelands from flowed tidelands.

SECTION 9. Notwithstanding chapter 28B or any other general or special law to the contrary, the director shall administer a public benefit determination for any development on filled tidelands including landlocked tidelands that consists of one million gross square feet or more of buildings or structures and that has been given a certificate by the secretary of environmental affairs but is not fully constructed on the effective date of this act. In determining whether any such development consists of one million gross square feet or more, the entirety of the planned or permitted development and not separate phases or segments thereof shall be considered for this purpose. For this purpose, the development may not be phased or segmented to evade this requirement. The director shall conduct a public hearing for any public benefit determination under this section.

SECTION 10. The first paragraph of section 4 shall apply to all fill, uses and structures existing before, on, or after the effective date of this act

SECTION 11. Any person who has filed an environmental notification form after the effective date of this act shall be deemed an applicant as defined in section 1 of chapter 28B of the General Laws.

House, No.

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REQUIREMENTS FOR CERTAIN
TIDELANDS
