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Moot v. Golledge, No. 04-2096, 2005 Mass. Super. LEXIS 220 (Mass. Super. May 4, 2005)

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mained, even though the land was under water. The court rejected this argument, adopting the opinion that title to submerged lands shifts from the riparian owners to the state while the lands are under water, extinguishing any easements on those lands. Because Indiana code provided access to public water for all citizens, there was still a public lakefront easement on these lands while they remained submerged. However, the state's entitlement to the land terminated the original easement over that land. If the water levels receded, title to the land would revert to the riparian owners without the burden of an easement. The court found the original easement still existed over any lands not submerged under water.

The court addressed the language of the easement to determine the rights granted. In interpreting the language, the court found that the grantor provided dominant easement holders a right to use "for recreation purposes." The court then considered the meaning of "recreation purposes." First, the court stated that easement holders could not severely limit the riparian rights of the servient owner. The court noted that if all easement holders placed piers on the easement, the midpoint of each pier would be closer than one foot apart. Therefore, the court found that allowing easement holders to place piers on the easement would severely limit the riparian rights of the servient owner. Next, the court noted that an owner of an easement may not render the easement appreciably less convenient and useful for other co-owners. The court noted that piers physically restrict co-owners from using the beach, a use expressly granted in the easement. Therefore, the court found that piers would render the easement appreciably less convenient and useful for other co-owners. Finally, the court held that placement of piers was not a "recreational purpose."

The court affirmed the trial court's holding that the easement did not grant the right to build piers over riparian waters.

Jonathan P. Long

MASSACHUSETTS

Moot v. Gollodge, No. 04-2096, 2005 Mass. Super. LEXIS 220 (Mass. Super. May 4, 2005) (holding the General Laws of Massachusetts do not require North Point Cambridge Land Company to obtain a license to build on the proposed site because the site was comprised of landlocked tidelands that are not subject to the Waterways Act).

John Moot, with officers, directors, and members of the Association of Cambridge Neighborhoods and Efekta Schools, Inc. (collectively "Moot") filed a Request for Determination of Applicability with the Department of Environmental Protection ("DEP") for a determination of whether North Point Cambridge Land Company ("NPCLC") had to

obtain a waterways license before building a new neighborhood. The intended site of the neighborhood ("Site") was forty-eight acres of land, thirteen of which were filled tidelands. The DEP had previously determined twice that the Site included landlocked tidelands that were not subject to DEP's Waterways Regulation Program. The DEP found for the third time the Site was located on landlocked tidelands and was not within an area subject to jurisdiction or licensing. Moot appealed. At a pretrial conference, the Administrative Law Judge ("ALJ") determined the only relevant issue was whether the Site was a landlocked tideland. Both parties moved for summary judgment and the ALJ granted NPCLC's motion. The DEP's Commissioner, Robert Gollidge, adopted the ALJ's decision and Moot appealed to the Superior Court of Massachusetts.

The DEP promulgated a regulation providing that any construction, addition, improvement, or maintenance not previously authorized required a license from the DEP if the project site covered filled tidelands, except for landlocked tidelands. The court acknowledged the DEP's wide range of discretion and Moot's burden to show the decision was invalid. The legislature delegated the authority to license the tidelands to the DEP, so that inhabitants could only use the tidelands for water-dependent projects or another proper public purpose. Because the legislature instructed the DEP to regulate licensure of tidelands and because water-dependent uses cannot be located inland, the court found the DEP did not exceed its authority when it exempted landlocked tidelands from licensing requirements.

Landlocked tidelands are filled tidelands entirely separated from flowed tidelands by a public way or interconnected public ways before January 1, 1984, except for the portions of filled tidelands located within 250 feet of the high water mark, or within any Designated Port Area. Moot conceded the tidelands were filled, that the Site had not significantly changed since January 1, 1984, that the Site was not within 250 feet of the high water mark, and not within a Designated Port Area. However, Moot argued the Site did not constitute landlocked tidelands because the public way was elevated and open to passage at ground level. Moot claimed since there was no physical separation between the Site and the Charles River Basin, the Site was not landlocked. However, the regulation does not require a physical barrier between filled and flowed tidelands. The regulation required that the public way must completely divide or isolate the filled tidelands from the flowed tidelands. The Site's filled tidelands were adjacent to filled tidelands, and the closest flowed tidelands were 400 feet from the Site. If a person drew a straight line from the flowed tidelands to the filled tidelands on the Site, the line would cross one of the two public ways to get to the filled tidelands. Therefore, the Site satisfied the entirely separated requirement.

Moot also argued that Golledge's citation to *Opinion of the Justices* was inconsistent with the delegation of licensing authority to the DEP. However, the court agreed with the Supreme Judicial Court, stating there was no constitutional barrier to the legislature's right to delegate authority. The legislature could therefore use its authority to surrender public rights in the tidelands, because neither the public nor the Commonwealth had an interest in the tidelands. Finally, Moot argued that NPCLC's predecessor's license to fill in the Site from 1962 had an express provision, stating that no one could build any structures on the fill without authorization from the Department of Public Works or its successors, and the exemption does not apply because of the previous license. However, the procedures for obtaining a license require a new license if the use of the site changes. The DEP issues licenses for specific uses but applicants do not have the ability to use the tidelands in any way they wish. Therefore, NPCLC had to seek a new license for the Site because they were going to change the use of the tideland. Since NPCLC wanted to use landlocked tidelands and requiring NPCLC to obtain a license for the new neighborhood on the Site would not further the DEP's goal to ensure inhabitants use tidelands only for water-dependent purposes, NPCLC was not required to obtain a license.

Accordingly, the court affirmed Golledge's Final Decision.

Tomi L. Hanson

MICHIGAN

Cox v. Musson Sand & Stone, Inc., No. 251936, 2005 Mich. App. LEXIS 856 (Mich. Ct. App. Mar. 31, 2005) (holding failure to show a correlation between mining activity on adjacent property and water loss and quality concerns based on diametrically opposed scientific evidence is insufficient to prove causation).

In 1980, Olivia and Terrence Cox ("Coxes") purchased and built a home on property that included a pond adjacent to the mining operation of Musson Sand & Stone ("Musson"). The Coxes were aware of the mining operation, and they initially had no objection to the activity. However, they became concerned when the pond's water level dropped substantially. Based on an evaluation of the pond, the Coxes concluded the adjacent mining activity caused the drop in the water level and changed the direction of the groundwater on the property. As a result, the Coxes suspended use of the pond for recreation and, although they never received confirmation that the drinking water was unsafe, began using bottled water. Additionally, the Coxes notified local, state, and federal authorities regarding the mining activities, who subsequently found the activities to be in violation of permit conditions; however, the mining continued. The Coxes filed suit to recoup