



## **Judge Invalidates DEP Delegation of Authority Over Harbor Tower Development**

Justice Brian Davis of the Massachusetts Superior Court Business Litigation Session dealt a major setback to a developer seeking to build a 600 foot mixed use tower on the current site of the Harbor Garage on Boston Harbor, awarding summary judgment to two plaintiff groups who sued to stop the development. Judge Davis deemed invalid a regulation promulgated by the Massachusetts Department of Environmental Protection (DEP), under which DEP delegated to the Secretary of the Executive Office of Energy and Environmental Affairs (Secretary) the decision whether to approve a structure on tidelands in excess of fifty-five feet. The Court held that the Waterways Act (G.L. c. 91) expressly delegates only to the DEP the obligation to preserve the public trust in tidelands. The Act limits the role of the Secretary to a “public benefit review,” which is advisory in nature. The Waterways Regulations in question (the Municipal Harbor Regulations), however, elevated the role of the Secretary from that of an advisor to having final, binding authority to approve an exemption to the 55-foot tideland structure height limitation. The Court, despite the deferential standard of review of administrative actions, felt “constrained” to agree with Plaintiffs because the Legislature expressly granted only to DEP the authority to make licensing determinations for structures in tidelands. The DEP’s relinquishment of that authority to the Secretary was unlawful, effectively negating the approval on which the proposed project was based. This decision is likely to have a major impact on potential development projects in the Boston harbor area.

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