SJC-13210

KATHARINE ARMSTRONG & others[1] vs. SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS & others.[2]

CONSERVATION LAW FOUNDATION & others[3] vs. SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS & another.[4]

Suffolk. March 7, 2022. - July 12, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Trust, Public trust. Department of Environmental Protection. Secretary of the Executive Office of Energy & Environmental Affairs. Harbors. Administrative Law, Regulations, Agency's authority.

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[1] Michael Burkin, Neal Hartman, Matthew Rubins, and Pran Tiku, trustees of the Harbor Towers II Condominium Trust; Robert Gowdy, Lee Kozol, Frank Mairano, Norman Meisner, and Gary Robinson, trustees of the Harbor Towers I Condominium Trust; Julie Mairano; and Marcelle Willock.

[2] Commissioner of Environmental Protection and RHDC 70 East India, LLC.

[3] Bradley M. Campbell, Carol Renee Gregory, Gordon Hall, Priscilla M. Brooks, David Lurie, Karl See, Erica A. Fuller, Kirstie L. Pecci, Lara G. DeRose, Edward T. Goodwin, Carol A. Goodwin, Jamie Goodwin, and Pareesa Charmchi.

[4] Commissioner of Environmental Protection.

Civil actions commenced in the Superior Court Department on July 11, 2018.

The cases were heard by Brian A. Davis, J., on motions for summary judgment, and questions of law were reported by him to the Appeals Court.

The Supreme Judicial Court granted an application for direct appellate review.

C. Dylan Sanders, Special Assistant Attorney General (Lisa C. Goodheart & Alessandra W. Wingerter also present) for Secretary of Energy and Environmental Affairs & another.
Jeffrey J. Pyle (Thomas M. Elcock also present) for Katharine Armstrong & others.
Peter Shelley for Conservation Law Foundation & others.
Richard A. Oetheimer, for RHDC 70 East India, LLC, was present but did not argue.
The following submitted briefs for amici curiae:
Sarah A. Turano-Flores, Mary T. Marshall, Valerie A. Moore, Michael A. Leon, & Matthew H. Snell for NAIOP Massachusetts, Inc.
Seth Jaffe, Aaron Lang, & Cloe Pippin for New England Aquarium.
Ronald W. Ruth, Matthew C. Moschella, & Marcella Alvarez Morgan for Matthew Beaton & others.
Maura Healey, Attorney General, & Seth Schofield, Assistant Attorney General, for Attorney General.
Matthew J. Thomas & Suzanne P. Egan for Massachusetts Municipal Law Association & another.

WENDLANDT, J. Rooted in ancient times, the "public trust doctrine" provides that the government holds tidelands in trust for the benefit of the public for traditional, water-dependent uses such as fishing, fowling, and navigation, as well as for nontraditional, nonwater-dependent uses that serve a proper public purpose. In G. L. c. 91 (Waterways Act), the Legislature has delegated to one agency -- the Department of Environmental

Protection (department) -- the responsibility of making licensing decisions for both water- and nonwater-dependent uses. Consistent with its public trust responsibilities, the department has promulgated regulations, which, inter alia, set certain specifications for buildings within one hundred feet of protected tidelands. The regulations also purport to allow the Secretary of Energy and Environmental Affairs (Secretary or EEA) to override the department's specifications by approving substitute specifications as part of a municipal harbor plan (MHP). While the department may provide a recommendation for the Secretary's consideration during the MHP approval process, its input is not binding on the Secretary. Nonetheless, where a proposed project falls within the area covered by an MHP and meets the substitute specifications approved by the Secretary, the department effectively must license the project as consistent with the requirements of G. L. c. 91 that, inter alia, the proposed project serves a proper public purpose. In these cases, we consider the question whether the department had the authority to delegate this override authority to the Secretary. We conclude that the delegation was ultra vires.[5]

[5] We acknowledge the amicus briefs submitted by the New England Aquarium; RHDC 70 East India, LLC; certain former Secretaries of Energy and Environmental Affairs and Commissioners of Environmental Protection; the Attorney General; NAIOP Massachusetts, Inc.; and the Massachusetts Municipal Law Association and Massachusetts Municipal Association.

1. Background. The present cases concern the Boston Planning and Development Agency's MHP, which was approved by the Secretary in April 2018 and, as relevant here, covers two sites -- the Harbor Garage and the Hook Wharf sites -- located on filled tidelands within one hundred feet of the Boston Harbor high water mark. In providing its recommendation to the Secretary in connection with the MHP review process, the department wrote that it "will adopt as binding guidance in all [l]icense application review any [s]ubstitute [p]rovisions contained in the Secretary's final [d]ecision on the [MHP]."

As approved, the MHP contemplates the construction of structures including dimensional and other specifications that deviated (sometimes substantially) from those set forth in the department's regulations. Specifically, the approved MHP contemplated the construction of a 600 foot tall tower at the Harbor Garage site and a 305 foot tall building at the Hook Wharf site; by contrast, the department's regulations generally impose a fifty-five foot height limit at the water's edge with graduated increases inland. See 310 Code Mass. Regs. § 9.51(3)(e) (2017). The approved MHP also would authorize an additional thirty feet of height allowance for the proposed buildings at both sites "to accommodate the relocation of existing building mechanicals to roof or upper floors" to "increase the planning area's resilience to current and future

hazards." The approved MHP also sets forth standards for the lot coverage of each site, allowances which deviate from the department's standards. See 310 Code Mass. Regs. § 9.51(3)(d) (2017) (requiring "at least one square foot of the project site at ground level" to be "reserved as open space for every square foot of tideland area within the combined footprint of buildings containing nonwater-dependent use on the project site"). Furthermore, the approved MHP allows a minimum setback for buildings from the water's edge at the Hook Wharf site of twelve feet, whereas the comparable waterways regulation defines a minimum setback of twenty-five feet. See 310 Code Mass. Regs. § 9.51(3)(c) (2017).

The Secretary approved the MHP, indicating her finding under the municipal harbor plan regulations, 301 Code Mass. Regs. §§ 23.00 (2017), that the alternative dimensional specifications "ensure that, in general, new or expanded buildings for nonwater-dependent use will be relatively modest in size, in order that wind, shadow, and other conditions of the ground level environment will be conducive to water-dependent activity and public access associated therewith, as appropriate for the harbor in question." 301 Code Mass. Regs. § 23.05(2)(c)(5). In approving the MHP at issue here, the Secretary wrote, "I recognize that while the proposed building height is significantly greater than what would be allowed under

the baseline [w]aterways requirements [set by the department]," the substitute specifications "generally fit[]" within "the setting of the entire [Boston] skyline."

The plaintiffs in these two actions sought, inter alia, a declaratory judgment that the waterways regulations are invalid insofar as they purport to delegate approval authority to the Secretary where the Secretary has approved substitute specifications in connection with an MHP.[6] The Superior Court judge granted partial summary judgment in favor of the plaintiffs, entering a declaration in each case that the challenged delegation by the department was ultra vires. The judge then reported his decision to the Appeals Court, pursuant to Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996);[7] the

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[6] The Conservation Law Foundation (CLF) also argued that the MHP was invalid because it was not promulgated in accordance with the Administrative Procedures Act (APA). The APA claim was dismissed by the Superior Court judge for lack of standing, and the judge also reported his decision dismissing that claim. CLF cross-appealed accordingly. We do not reach the cross appeal in light of our ruling. Cf. Zaniboni v. Massachusetts Trial Court, 465 Mass. 1013, 1014-1015 (2013) (declining to answer question reported under Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 [1996]).

[7] The rule provides, in relevant part:

> "The court, after verdict or after a finding of facts under [Mass. R. Civ. P. 52, as amended, 423 Mass. 1408 (1996)], may report the case for determination by the appeals court. If the trial court is of the opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the

Secretary and the Commissioner of Environmental Protection filed an application for direct appellate review of the report of the two cases, which we allowed.

2. Discussion.[8] a. Standard of review. We turn to consider the department's authority to promulgate regulations effectively binding itself to license a proposed construction project in the tidelands where the Secretary has approved, as part of an MHP, specifications that deviate from the department's own specifications. We do so under familiar standards.

The scope of the department's authority presents a question of statutory interpretation, which we review de novo. See Rosing v. Teachers' Retirement Sys., 458 Mass. 283, 290 (2010). To determine whether an agency acts within its statutory authority in promulgating regulations, we determine "whether the Legislature has spoken with certainty on the topic in question," using the "conventional tools of statutory interpretation," and if "the statute is unambiguous, we give effect to the

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> appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties."

Mass. R. Civ. P. 64, supra.

[8] Although the city of Boston purportedly has disavowed the MHP, it remains in effect. Accordingly, the controversy is not moot, contrary to the Attorney General's suggestion.

Legislature's intent." Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633 (2005). If the Legislature has not spoken to the issue directly, we determine whether the agency's regulations may "be reconciled with the governing legislation" (citation omitted). Id. at 633. Within the scope of its enabling legislation, the department has "a wide range of discretion in establishing the parameters of its authority." Levy v. Board of Registration & Discipline in Med., 378 Mass. 519, 525 (1979). Because the department enjoys broad authority to effectuate the purposes of the legislation, we accord substantial deference to its expertise and experience. See Goldberg, supra; Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867 (1997).

The principle of according weight to an agency's discretion, however, is "'one of deference, not abdication,' and this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable." Moot v. Department of Envtl. Protection, 448 Mass. 340, 346 (2007), S.C., 456 Mass. 309 (2010), quoting Boston Preservation Alliance, Inc. v. Secretary of Envtl. Affairs, 396 Mass. 489, 498 (1986). When an agency acts beyond the scope of authority conferred to it by statute, its actions are invalid and ultra vires. See Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance, 439 Mass. 1, 14

(2003) (agency has "no inherent authority to issue regulations . . . [that] exceed the authority conferred by the statutes by which the agency was created" [citation omitted]); Matter of Elec. Mut. Liab. Ins. Co., Ltd. (No. 1), 426 Mass. 362, 366 (1998) ("An administrative agency has only the powers and duties expressly or impliedly conferred on it by statute"). See also Entergy Nuclear Generation Co. v. Department of Envtl. Protection, 459 Mass. 319, 331 (2011), quoting Morey v. Martha's Vineyard Comm'n, 409 Mass. 813, 818 (1991) (where "scope of agency authority is at issue, we must determine whether the agency is acting within 'the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission'").

b. Public trust doctrine. For centuries, the Commonwealth has recognized the importance of regulating its tidelands[9] under the public trust doctrine, "an age-old concept with ancient roots . . . expressed as the government's obligation to protect the public's interest in . . . the Commonwealth's waterways."

[9] Tidelands are defined as "present and former submerged lands and tidal flats lying below the mean high water mark." G. L. c. 91, § 1. The Waterways Act distinguishes between "Commonwealth tidelands" and "private tidelands." Commonwealth tidelands, at issue here, are defined as "tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose." Id.

Trio Algarvio, Inc. v. Commissioner of the Dep't of Environmental Protection, 440 Mass. 94, 97 (2003), citing Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629, 631-637 (1979) (recounting common-law history of public trust doctrine from its genesis in Roman times to its inclusion in Massachusetts's waterways laws).[10] "[O]nly the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights" in tidelands. Fafard v. Conservation Comm'n of Barnstable, 432 Mass. 194, 199 (2000). "The Legislature has designated [the department] as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91[11] licensing program . . . ." Alliance to Protect Nantucket Sound, Inc. v. Energy

[10] "Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property." Boston Waterfront Dev. Corp., 378 Mass. at 631. They "are held in the public trust." Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 677 (2010). Because the Legislature acts as a fiduciary for the public in regard to tidelands, the Legislature's authority to abandon, release, or extinguish the public interest in such property is tightly regulated; G. L. c. 91 "sets out to 'preserve and protect,' under [the department's] watch, the public's rights in tidelands." Navy Yard Four Assocs., LLC v. Department of Envtl. Protection, 88 Mass. App. Ct. 213, 221 (2015), quoting Moot, 448 Mass. at 347.

[11] In 1866, the Legislature first codified the existing network of laws governing tidelands into the Waterways Act, G. L. c. 91. Goodwin, Massachusetts's Chapter 91: An Effective Model for State Stewardship of Coastal Lands, 5 Ocean & Coastal L.J. 45, 50 (2000).

Facilities Siting Bd., 457 Mass. 663, 678 (2010). See also Navy Yard Four Assocs., LLC v. Department of Envtl. Protection, 88 Mass. App. Ct. 213, 219 (2015) (stressing special designation of department).

Under G. L. c. 91, § 18, the department[12] may only issue a license for "nonwater dependent uses of tidelands" if

> "a written determination by the department is made following a public hearing that said structures or fill shall serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program."

G. L. c. 91, § 18. Consistent with this delegated authority, the department has promulgated regulations governing its licensing decision-making and setting forth certain dimensional specifications for proposed nonwater-dependent projects in tidelands.[13] See 310 Code Mass. Regs. § 9.31 (2017) (general licensing requirements and standards); 310 Code Mass. Regs. §§ 9.51-9.55 (2017) (specific dimensional and use standards)

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[12] The department is housed within the EEA, which the Legislature created in 1974, see St. 1974, c. 806, § 1, inserting G. L. c. 21A, §§ 1, 7-8, to "carry out the state environmental policy," including "develop[ing] policies, plans, and programs" to support State environmental policy, G. L. c. 21A, § 2. The Secretary of the EEA is charged with, inter alia, coordination and oversight of the department, G. L. c. 21A, §§ 3-4.

[13] General Laws c. 91, § 18, provides: "The department may promulgate regulations for implementation for its authority under this chapter."

(collectively, the waterways regulations).[14] The waterways regulations recognize that these "minimum conditions" are "necessary to prevent undue detriments to the capacity of tidelands to accommodate water-dependent use." 310 Code Mass. Regs. § 9.51(3) (2017).

c. The challenged regulations. Critically, for nonwater-dependent uses located in an area subject to an MHP approved by the Secretary,[15] the waterways regulations purport to require the department to substitute the specifications in an approved MHP even if they differ from the specifications provided by the department in the waterways regulations, waiving its own specifications in deference to those approved by the Secretary in an MHP. See 310 Code Mass. Regs. § 9.34(2)(b) (2017) ("the Department shall . . . apply the . . . numerical standards specified in the municipal harbor plan as a substitute for the

[14] These regulations were submitted to legislative committees for approval as required by the authorizing statute. G. L. c. 91, § 18 ("The department shall submit any regulations promulgated under the provisions of this chapter to the joint legislative committee on natural resources and agriculture, to the senate committee on ways and means and to the house committee on ways and means, for their review within sixty days prior to the effective date of said regulations").

[15] Where, in the Secretary's estimation, the MHP is consistent with coastal zone management policies and with the preservation of water-dependent activities as defined in the waterways regulations, the Secretary may approve the MHP. 301 Code Mass. Regs. § 23.05. The MHP regulations, 301 Code Mass. Regs. §§ 23.00, were promulgated pursuant to G. L. c. 21A and were not submitted to the legislative committees for approval.

respective limitations or standards contained in [the waterways regulations]" [emphasis added]).[16] See, e.g., 310 Code Mass. Regs. § 9.51(3)(e) ("the Department shall waive [the department's height specification of fifty-five feet] if the project conforms to a municipal harbor plan which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements" [emphasis added]). As demonstrated by the project in these cases, the substitute standards approved in an MHP can differ significantly from the department's own.[17]

The waterways regulations further provide that the department "shall presume" that compliance with those substitute standards of an approved MHP satisfies the statutory requirement of G. L. c. 91, § 18, that the project serves a "proper public

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[16] With regard to at least seven specifications, the waterways regulations require the department to defer to the Secretary's approval of substitute standards in connection with an approved MHP. See 310 Code Mass. Regs. §§ 9.51(3)(a)-(e), 9.53(2)(b)-(c).

[17] Substitute standards authorized in an approved MHP apparently are not subject to administrative review. See Matter of Wynn MA, LLC, Department of Environmental Protection, Office of Appeals and Dispute Resolution, OADR Docket No. 2016-004, at 6 (Apr. 21, 2016) (declining to review MHP standards because they do not "aris[e] under [the waterways] regulations"); Matter of the Fan Pier Land Co., Department of Environmental Protection, Docket No. 2002-137 (Oct. 29, 2002) (because department must adopt Secretary's substitute standards in MHP, there is "no plausible legal basis" that would "allow reconsideration . . . of the revised overall height limits approved by the Secretary [in the MHP]").

purpose which provides greater benefit than detriment to the rights of the public in said lands." 310 Code Mass. Regs. § 9.31(2)(b). Similarly, "[i]f the project site is within an area covered by a municipal harbor plan, the [d]epartment shall presume" that the statutory requirement that a project be consistent with the coastal zone management program is met (emphasis added). 310 Code Mass. Regs. § 9.54(2) (2017). And where a project conforms to an MHP, the department "shall . . . determine" that it is consistent with the coastal zone management policies. 310 Code Mass. Regs. § 9.34(2)(b)(3).

These presumptions may be rebutted, but only on the narrow grounds that either "the basic requirements" for issuing a license or permit have not been met, or there is "a clear showing . . . made by a municipal, state, regional, or federal agency that requirements beyond those contained in [the waterways regulations] are necessary to prevent overriding detriment to a public interest which said agency is responsible for protecting." 310 Code Mass. Regs. § 9.31(3). Tellingly, the Secretary does not rely on these narrow bases for overcoming the presumptions set forth in the waterways regulations as providing a meaningful review by the department. Accordingly, the challenged waterways regulations essentially provide that if a project meets specifications set forth in an MHP approved by the Secretary, the department is bound to determine that the

project meets the requirements of G. L. c. 91, § 18, that the project serves a proper public purpose, which provides a greater public benefit than public detriment, and that such a determination is consistent with the coastal zone management program's policies. In effect, application of the deference mandated by the challenged regulations[18] results in the delegation to the Secretary of the department's licensing authority over an entire category of projects in tidelands -- namely, those included in an approved MHP.

d. Ultra vires delegation. The department has no authority to delegate to the Secretary its public trust duties to preserve and protect the public's interest in tidelands in this manner. See Moot, 448 Mass. at 353 (striking down regulation exempting landlocked tidelands as "relinquish[ment] by departmental regulation").

Our decision in Moot is instructive. There, we reviewed a provision of the department's waterways regulations that exempted all landlocked tidelands from its licensing procedures.

[18] To summarize, the challenged regulations are the following: 310 Code Mass. Regs. § 9.31(2)(b) (establishing presumption of compliance if substitute standards are met); § 9.34(2) (requiring department to substitute its own standards for those found within approved MHP); §§ 9.51(3), 9.53(2)(b) and (c) (provisions requiring department to waive its own standards for those found in approved MHP); and § 9.54(2) (requiring department to presume coastal zone management standards are met if project is within approved MHP).

Moot, 448 Mass. at 344-345. Based on the public trust principles, we determined that "the department has acted in excess of its authority in exempting all landlocked tidelands from all licensing requirements." Id. at 347. The same reasoning applies here. While the Secretary is correct that the challenged regulations do not literally "exempt" any tidelands from the G. L. c. 91 licensing requirements, the effect of the challenged regulations is analogous. Incorporating decisions made by the Secretary as binding impermissibly delegates the department's public trust duty, excludes wholesale a certain category of project from its purview, and "effectively relinquish[es] all public rights that the Legislature has mandated be preserved through the licensing requirements [of G. L. c. 91, § 18]." Id. at 350. "The department has no authority to forgo its responsibility to preserve and protect the public's rights in tidelands (water dependent or nonwater dependent), whether for administrative convenience, conservation of the department's resources or any other laudable agency reason." Id.

The Secretary principally contends that the department's regulations are a reasonable exercise of its power under G. L. c. 91 by defining two sets of specifications: (i) generic specifications for non-MHP covered areas and (ii) harbor-specific specifications determined by allowing the Secretary (as

the "administrator" of the tidelands, see G. L. c. 91, § 18B [a]) to define specifications in areas covered by MHPs.[19] The Secretary further argues that, because the department can provide a recommendation in connection with the MHP approval process, the regulatory scheme handing those determinations over to the Secretary is reasonable. See 301 Code Mass. Regs. § 23.08(2) (allowing department to "provide a written recommendation to the Secretary concerning the consistency of a proposed MHP with state tidelands policy objectives and associated regulatory principles").

This argument ignores the unique public trust principles at play. The public trust doctrine does not analyze reasonableness; rather, it requires express legislative

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[19] In order to approve an MHP, the Secretary must determine that the MHP is consistent with State coastal zone management policies and State tidelands policy objectives as set forth in the waterways regulations. See 301 Code Mass. Regs. § 23.05(1)-(2). Additionally, the Secretary must make specific findings if the MHP will authorize substitute standards, see § 23.05(2)(c)(1)-(7) (setting forth required findings for each substitute standard). The MHP approval process is administered primarily by the Office of Coastal Zone Management, within the EEA. 301 Code Mass. Regs. § 23.08(1). Notably, the Secretary is not required to gather input from the department; rather, the department may participate in the public hearing or provide input in the form of a "written recommendation . . . concerning the consistency of a proposed MHP with state tidelands policy objectives and associated regulatory principles." 301 Code Mass. Regs. § 23.08(2). Even more, if the department and the Office of Coastal Zone Management disagree on a recommendation regarding the MHP, the Secretary must mediate the conflict and ultimately make the final decision. 301 Code Mass. Regs. § 23.08(2)(b).

delegation, as it addresses a special, unusually valuable form of public property. Moot, 448 Mass. at 347. Here, the Legislature has also expressly chosen the department to make the licensing determinations. Id. See Navy Yard Four Assocs., LLC, 88 Mass. App. Ct. at 218, quoting Alliance to Protect Nantucket Sound, Inc., 457 Mass. at 678 ("[t]he Legislature has designated [the department] as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91 licensing program"). The department's ability to make a nonbinding "recommendation" as part of the MHP process, see 301 Code Mass. Regs. § 23.08(2), does not save the improper delegation underlying the regulatory scheme because it gets the legislative delegation of authority over licensing decisions under public trust principles backwards. To be sure, the department is free to consider -- but should not be bound to adopt -- the Secretary's input when it makes licensing determinations under G. L. c. 91, § 18. Other provisions within the waterways regulations, for example, permissibly require that an approved MHP receive "particular consideration" -- as opposed to establishing a binding determination upon the department -- when the department makes its ultimate licensing decision. See 310 Code Mass. Regs. §§ 9.35, 9.36, 9.52, 9.53. Giving the department a nonbinding role for input to the Secretary on her decision whether to approve substitute specifications in

connection with an approved MHP cannot be squared with the Legislature's express delegation to the department of licensing decisions in the tidelands. The challenged regulations put the Secretary in the exact position that the Legislature delegated to the department; this the department cannot do.

The department, of course, has authority to promulgate regulations for implementing G. L. c. 91, and it need not proceed on a case-by-case basis in making licensing determinations (although, of course, it may). Massachusetts Eye & Ear Infirmary v. Commissioner of the Div. of Med. Assistance, 428 Mass. 805, 817 (1999) (holding agency "may operate on a case-by-case basis to determine [if a threshold inquiry is met] . . . provided there is adequate review of its decision," or it "may promulgate clear rules and deny all [applicants] not in compliance with those rules"). However, the department may not cede to the Secretary the decision whether nonwater-dependent uses of tidelands serve, inter alia, a proper public purpose by binding itself to so find based on the Secretary's decision to approve specifications in connection with an MHP. These obligations are based in public trust principles and, as such, can only be delegated by the Legislature itself. See Moot, 448 Mass. at 353.

The Secretary also maintains that because the department performs the ministerial act of actually issuing the required

license, even when an MHP is approved by the Secretary, the department does not, in fact, delegate its public trust rights but instead maintains its licensing authority under G. L. c. 91, § 18. Such a technicality does not save the regulations. The department has bound itself to defer to the Secretary with respect to the specific determinations that must be made before a license is issued.[20] See 310 Code Mass. Regs. § 9.51(3)(a)-(e); 310 Code Mass. Regs. § 9.53(2)(b)-(c). This "relinquish[ment] by departmental regulation" is impermissible under public trust principles. Moot, 448 Mass. at 353.

The Secretary further argues that the Legislature impliedly approved the department's delegation to the Secretary because the department submitted the waterways regulations to the Legislature for approval according to the mandate in G. L. c. 91, § 18. See note 14, supra. The Secretary also contends that the general statutory authority granted in G. L. c. 21A impliedly delegates to the Secretary the authority needed under public trust principles. See G. L. c. 21A, § 2 (EEA and its "appropriate departments . . . shall carry out the state environmental policy"); G. L. c. 21A, § 3 ("The secretary shall

[20] As discussed supra, while the regulatory presumptions may be overcome on narrow grounds, see 310 Code Mass. Regs. § 9.31(3), the Secretary does not rely on these to argue that the department exercises meaningful review after the Secretary has approved an MHP.

conduct comprehensive planning with respect to the functions of the office and shall coordinate the activities and programs of the departments . . ."); G. L. c. 21A, § 4 (granting Secretary "powers and duties concerning any power or duty assigned to any such department, division or other administrative unit" for "programs jointly agreed to by the secretary"). See also G. L. c. 91, § 18B (a) (designating Secretary as "the administrator of tidelands").

We disagree. The public trust principles require an express delegation of that responsibility by the Legislature; an implied approval will not suffice. Compare Alliance to Protect Nantucket Sound, Inc., 457 Mass. at 678 (holding that "express legislative directive" authorized siting board to assume department's licensing responsibility), with Arno v. Commonwealth, 457 Mass. 434, 451 (2010) (holding neither Land Court nor Attorney General had express legislative authority to relinquish public trust responsibility despite provisions in registration act permitting Land Court to quiet title to parcel on filled tidelands, conclusively "upon and against all persons, including the commonwealth"), Moot, 448 Mass. at 349-350 (holding department had no authority to exempt landlocked tidelands from G. L. c. 91 licensing requirements, because only Legislature can relinquish public trust responsibility), and Fafard, 432 Mass. at 198-199 (holding town had no authority to

promulgate bylaw that purported to grant public trust responsibilities to local commission, because only Legislature could do so). There is no such express legislative directive to the Secretary here; rather, the department has attempted to delegate its own authority, which it cannot do. See Moot, supra.

Indeed, contrary to the Secretary's argument, the Legislature assigned a different role to the Secretary in connection with proposed licensed uses in tidelands. In particular, the Secretary "shall conduct and complete a public benefit review for any proposed project" that is subject to a license under G. L. c. 91, § 18. G. L. c. 91, § 18B (b). The Secretary then "shall provide the determination of public benefit to the department," and the department "shall incorporate the public benefit determination of the secretary in the official record." Id. Importantly, G. L. c. 91, § 18B, specifies that the Secretary's determination "shall not supersede [G. L. c. 91] or any rules or regulations promulgated pursuant thereto and shall not delay the issuance of a license pursuant to this chapter or the completion of a review or any step thereof." Id. See Moot v. Department of Envtl. Protection, 456 Mass. 309, 312 (2010); 301 Code Mass. Regs. § 13.05 (2008) (Secretary's public benefit review determination

"shall not supersede, eliminate, or in any way impair the [d]epartment's exercise of its powers under [G. L. c.] 91").[21]

3. Conclusion. The challenged waterways regulations purporting to require mandatory substitute standards and presumptions are an unlawful delegation of the department's decision-making authority to the Secretary. Thus, we affirm the Superior Court judge's partial grant of summary judgment and entry of declarations in the two underlying cases that these regulations are invalid as an improper delegation of the department's public trust responsibilities. We remand the matters for further proceedings consistent with this opinion.

So ordered.

[21] The Secretary suggests that our conclusion in these cases may upset reliance interest going back thirty years in connection with the department's licensing decisions in connection with other approved MHPs. While these cases do not present occasion to review in any substantive manner licensing pursuant to these historical MHPs, we note that the time to challenge the department's licensing decisions is finite. See G. L. c. 30A, § 14 (1) (action seeking judicial review of agency's final decision must be filed within thirty days of receipt of notice of decision); 310 Code Mass. Regs. § 9.17(2) (administrative challenges to licensing decision must be brought within twenty-one days of department's determination).