

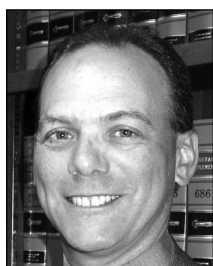
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State Appeals Court Decision Restricts Commission Authority

By Howard P. Speicher and Judith Ashton



The Massachusetts Appeals Court recently applied the brakes to a local conservation commission's attempt to regulate land development activity near a wetlands resource area. After two decades during which local conservation commissions have increasingly exercised expansive authority to regulate wetlands, the Appeals Court has articulated clear limits on that authority, striking down an attempt by the Andover Conservation Commission to act on the basis of a policy that had neither been adopted as a valid written regulation nor applied uniformly to all permit applicants.

Fieldstone Meadows Development Corp., a developer of custom single-family residences, filed an application with the Andover Conservation Commission to perform work as part of a five-lot residential subdivision development project on land within 100 feet of a protected wetlands resource area. The drainage system Fieldstone proposed included a detention basin – a depression with a

loamed and grass-seeded bottom that would detain storm water runoff so that it could be released at a controlled rate. The basin was to be constructed and installed within 25 feet of a wetland area. The conservation commission denied Fieldstone's application. The commission based its denial on an unwritten policy it had established requiring a "no build" zone within 25 feet of any wetland boundary unless the applicant could establish that the adjacent wetland would not be damaged in any way by the applicant's work in this so-called "buffer" zone. While the commission applied its policy to Fieldstone, the record indicates that it did not adopt the policy as a formal regulation so that it would have had to be applied uniformly to all applicants.



The Appeals Court struck down the commission's determination, ruling that in exercising wetlands regulatory authority, local conservation commissions must act pursuant to lawfully adopted regulations and that those regulations must be enforced uniformly with respect to all applicants. Moreover, even a regulation requiring a 25-foot "no build" buffer zone would be unlawful under the Andover bylaw (which did not prohibit work in the buffer zone) unless substantial evidence established that work in that zone would adversely affect the wetland resource area.

The Context

The controversy exemplified by the Fieldstone case has been brewing for more than 20 years. That controversy concerns what parameters apply to local conservation commissions when regulating activities in wetland resource areas and in the buffer zones adjacent to such areas.

Until 1979, conservation commissions in Massachusetts generally acted as local administrators of the state Wetlands Protection Act. That law requires developers to obtain a permit, called an "order of condi-

tions," before performing construction work affecting wetlands. Application for the permit, called a "notice of intent," is made to the local conservation commission, which determines after a public hearing whether the work may proceed and, if so, under what conditions. The applicant, if unhappy with the decision of the local board, may appeal to the state Department of Environmental Protection (DEP) and ask for a "superseding" order of conditions. Under the statutory scheme, DEP looks at the application anew, giving no deference to the local commission's decision.

In response to the state law paradigm giving local commissions limited power, several communities adopted their own wetlands protection bylaws. They sought to implement stricter requirements on development activities altering wetlands. Additionally, under the state law, activities within 100 feet of a wetland are subject to conservation commission review only if such activities would alter the wetland area itself. In response, local communities sought to provide more stringent restrictions on work in the buffer zones, just outside the wetlands.

By implementing their own wetlands bylaws, local boards could also make developers' appeals more difficult. While DEP gives no deference to local commissions' decisions made under the state law, appeals from local commissions' determinations made under local bylaws are treated differently. These determinations go directly to the Superior Court, bypassing the DEP, and in ruling on such appeals, the Court generally must defer to lawful local decisions that are supported by substantial evidence.

In 1979, the Massachusetts Supreme Judicial Court decided that these stricter local bylaws are valid as long as they are not inconsistent with the state law. Since then, nearly half of Massachusetts municipalities have enacted local wetlands protection bylaws and the courts have, until recently,

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generally upheld them.

This trend has nowhere been more apparent than in court decisions permitting stricter local regulation of activity in buffer zones than is allowed under the state law. In an earlier case involving a North Andover bylaw that prohibited work of any kind within 25 feet of a wetland and prohibited structures within 50 feet, the Supreme Judicial Court upheld the bylaw because the local commission established that the local rule was supported by substantial evidence that the wetland resource area would be adversely affected.

Municipalities have taken a number of different approaches in regulating activity in buffer zones. Those that have adopted specific bylaws or regulations to limit such activity have often simply established presumptions that work in the buffer zone would negatively affect bordering wetlands. Some of these bylaws and regulations impose "no build" requirements, prohibiting construction, while others are stricter, requiring that vegetation in the buffer zone not be disturbed. Other bylaws have sought to protect the buffer zone itself, without regard to any possible effect that work in the buffer zone would have on the adjacent wetland area. Another approach has been to distinguish among buffer zones based on their topography. Some bylaws allow discretionary hardship variances and

waivers if a developer agrees to mitigate the environmental impact of its work in the buffer zone. Some local commissions have sought to regulate activity in the buffer zone without adopting formal regulations, either based on an established policy or ruling on a case-by-case basis.

This expansive jurisdiction by local conservation commissions has led to many circumstances in which a developer's project has been allowed by a local commission acting in its capacity as a state agency but prohibited by the same commission acting as a local board. Even when the decisions are identical, developers have been required to devote more time, money and effort to the wetlands regulatory process than was previously the case.

The Pendulum Swings

Recently, the Massachusetts appellate courts and courts in other states as well have applied the brakes to this trend. For example, in a recent case in which the Reading Conservation Commission had approved a project wearing its "state hat" and had then denied it wearing its "local hat," the Appeals Court allowed the project to go forward. The town based its "local" decision on its prohibition against work outside a 25-foot buffer zone, based on the commission's presumption that the work would degrade the buffer zone. Because Reading had not established a

protective zone wider than 25 feet, it could not deny a permit based on the project's possible impact on the buffer zone.

In a similar case in Connecticut, a local conservation commission denied a permit because construction outside both the wetlands and the buffer zone might reduce the spotted salamander population in those non-jurisdictional areas, thereby decreasing biodiversity inside the wetland when the salamanders used the wetland for breeding a few weeks each spring. (The commission's expert had seen no more than four salamanders on the 10-acre site during a three-hour tour.) Unswayed, the Connecticut Supreme Court held that the commission had no authority over activities outside the wetlands and the buffer zone that might affect wildlife or biodiversity within wetlands.

The Fieldstone Meadows case furthers this trend reining in the power of local conservation commissions by requiring them to act within uniform written ground rules established as lawful regulations when seeking to impose more stringent requirements than those articulated under state law for work in buffer zones. In a time in which marginal land is often the only land available for development in Massachusetts and in other areas in New England, such limits are welcome. Moreover, these newly articulated parameters are vital to any fair, predictable and objective approval process. ■