



FIELDSTONE MEADOWS V. CONSERVATION COMMISSION OF ANDOVER: THE PENDULUM SWINGS THE OTHER WAY

By Howard P. Speicher

The recent clipping of the wings of local conservation commissions in *Fieldstone Meadows Development Corp. v. Conservation Commission of Andover*,¹ represents just the latest adjustment in a 25-year process of attempting to define the limits of the authority of local conservation commissions to regulate activities in and near wetland resource areas pursuant to local wetlands bylaws. After many years in which the scope of authority of local conservation commissions to regulate activity in or near wetlands seemed to be expanding with-

out any clear indication of where the limits would be, the Appeals Court in *Fieldstone Meadows* has given developers and conservation commissions an indication that local authority is not without limits and must be exercised in a uniform and predictable manner. *Fieldstone Meadows* provides a useful guide to developers and to conservation commissions regarding the limits of the local agencies' authority to act on the basis of policies that are not part of a uniformly applied regulatory scheme.

Some history...

Until 1979, conservation commissions, although locally appointed, were largely viewed as, and served as, the local administrators of the state wetlands protection regulatory scheme imposed by the Wetlands Protection Act, Massachusetts General Laws chapter 131, section 40, and by the regulations under the act found in 310 C.M.R. 10.00 *et seq.* Local commissions were governed by the state regulations, and were not free under the state regulations to adopt more stringent regulations than those found in the state regulatory scheme. Perhaps most importantly for local developers who found themselves at odds with local commissions, an adverse decision of the local commission was subject to administrative review by the Department of Environmental Quality Engineering (later renamed the Department of Environmental Protection). The agency was empowered to review an application on a *de novo* basis and issue a superseding order of conditions, which had the effect of overriding and superseding an adverse decision by the local commission. This procedure frequently resulted in the imposition of conditions by DEP that allowed a project to go forward where the local commission had either denied the project or

imposed more stringent conditions of approval.

The response of some local conservation commissions was to seek the adoption of local wetlands bylaws to give them direct local authority to regulate activities in and near wetland resource areas. In many cases, the local bylaw tracked the authority of the conservation commission under the act, but with one important difference — an adverse decision could not be appealed administratively to a state regulatory agency. Appeals were to be governed by General Laws chapter 249, section 4, which provides for an action in the nature of *certiorari*.² A *certiorari* action is limited to the record before the local agency and is designed to correct errors of law that are apparent on the record. While the precise standard of review will vary according to the nature of the particular action for which review is sought, the review is generally a much more limited review than is available in the administrative review by the Department of Environmental Protection.³

The use of local wetlands bylaws, even if they largely tracked the regulatory scheme under the act, thus empowered local conservation commissions by avoiding DEP review and limiting aggrieved applicants to the more limited review available in superior court by way of an action in the nature of *certiorari*. The imposition of a parallel local regulatory scheme also had the practical effect of requiring an aggrieved applicant to pursue two separate appeals, one to DEP and the other to superior court. The result for aggrieved applicants was greater expense, more delay and less certainty or predictability of outcome.

In 1979, the Supreme Judicial Court validated the new approach of the local conservation commissions when it ruled against a challenge to a local wetlands bylaw. In *Lovequist v.*



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Conservation Commission of Dennis,⁴ the Supreme Judicial Court first held that a local wetlands bylaw was not preempted by either the Zoning Act, General Laws chapter 40A, or the Wetlands Protection Act, General Laws chapter 131, section 40. The court specifically held that the act leaves local communities “free to adopt more stringent controls” than are found in the act or the state regulations.⁵ And that is exactly what many local communities proceeded to do.

A prime battleground in the post-*Lovequist* relationship between applicants and conservation commissions was the buffer zone; that is, the area adjacent to and within 100 feet of a wetland resource. This area is subject to conservation commission under the act only when proposed activity in the buffer zone will “alter” the wetland resource area. In response to *Lovequist*, some communities added direct regulation of activity in the buffer zone to their bylaws.

In *T.D.J. Development Corporation v. Conservation Commission of North Andover*,⁶ the Appeals Court held that by directly regulating activity in the buffer zone, a local wetlands bylaw was more stringent than the act. The court held that this more stringent regulation under the local bylaw “trumps what is required under G. L. c. 131, §40,” thereby allowing stricter local regulation of activity in the buffer zone than is possible under the act. Consequently, the court upheld a condition imposed on a project under the North Andover local wetlands bylaw that prohibited any work within 25 feet of a wetland resource and prohibited any structures within 50 feet of a wetland resource. The court held that the local commission adequately demonstrated that the proposed work in these areas would have had an impact on the adjacent wetland resources.

Thus empowered by *T.D.J. Development* to regulate activity in the buffer zone in a way that was not possible under the act, conservation commissions took different tacks in exercising their authority, some relying on express authorization in their wetlands bylaws, some enacting regulations and some adopting less formal policies or acting on a case-by-case basis to determine whether and to what extent activity in the buffer zone would be permissible. This ratcheted-up level of regulation sometimes led to anomalous results, whereby a conservation commission would issue a positive order of con-

ditions authorizing a project under the act, while at the same time finding that the project does not meet local requirements, and denying the project under the local bylaw.

For instance, in *Fafard v. Conservation Commission of Reading*,⁷ the Reading Conservation Commission approved a project under the act. As Justice Kass aptly recounted what happened next, “That done, the commission doffed its State hat, replaced it with its local hat, and came to a quite different conclusion,” issuing a denial that the Appeals Court eventually reversed.⁸ The Appeals Court found that the commission had no lawful basis for denying the project on the basis of its conclusion that work outside the limits of a 25-foot wide “zone of natural vegetation” would cause “degradation” of the “zone of natural vegetation.” Part of the basis of the court’s holding was that the commission did not take any formal action to properly establish a protective zone wider than 25 feet. With *Fafard*, the pendulum had begun to swing the other way.

Fieldstone Meadows development

This brings us to the *Fieldstone Meadows* case. In *Fieldstone Meadows*, a real estate developer sought an order of conditions from the Andover Conservation Commission to install the roadway, drainage system and related infrastructure for a five-lot residential subdivision. The proposed drainage system included a detention basin, which is simply a depression with a loamed and grass-seeded bottom, designed to detain stormwater runoff so that it can be released from the site at a controlled rate. The detention basin was proposed to be located within 25 feet of a wetland resource area.

The location of the detention basin violated an announced policy of the commission that no disturbance or alteration of land closer than 25 feet to a wetland boundary would be permitted. This 25-foot “no-build” policy was announced publicly by the commission, but was not otherwise found in the local wetland bylaw or in the commission’s published regulations. The bylaw authorized the adoption of a regulation instituting a 25-foot “no-build” zone, but no such regulation had been formally adopted. Justice Duffy, writing for the Appeals Court, held that the commission lacked the authority to impose

such a policy, “existing outside of the regulatory framework.”⁹ By adopting a policy, and not a regulation, the commission was avoiding the strictures of a regulatory framework that would require uniform application. The lack of a requirement of uniform application rendered the imposition of the policy arbitrary and thus beyond the authority of the commission.¹⁰

Perhaps as significantly, the court rejected the commission’s attempt to justify its denial on the basis of evidence in the record that the 25-foot zone was justified by findings that the detention basin would impact the wetland, and that no explicit bylaw or regulation was needed to justify such a conclusion. The court found such justifications to be pretextual: “It is apparent, despite invocation of the town by-law as the ostensible basis for its decision, that the denial was in fact based entirely on the commission’s assumption that only a twenty-five foot no-build zone will ensure that the proposed work will have no impact on the wetlands.”¹¹

With *Fieldstone Meadows*, the Appeals Court placed some overdue parameters on the discretion with which conservation commissions have felt emboldened to act. The guidance given by the court in *Fieldstone Meadows* adds some needed predictability for the benefit of those applying for approval to local conservation commissions, and it provides the local commissions with ground rules for their decision-making that will render the entire approval process more fair and more objective, thus providing a benefit to both the regulators and the regulated.

End notes

1. 62 Mass. App. Ct. 265 (2004).
2. See generally *Conservation Comm’n of Falmouth v. Pacheco*, 49 Mass. App. Ct. 737, 741 (2000).
3. See *Carney v. City of Springfield*, 403 Mass. 604 (1995); *Fafard v. Conservation Comm’n of Reading*, 41 Mass. App. Ct. 565, 567 (1996).
4. 379 Mass. 7 (1979).
5. *Id.* at 15.
6. 36 Mass. App. Ct. 124 (1994).
7. 41 Mass. App. Ct. 565 (1996).
8. *Id.* at 566.
9. *Fieldstone Meadows*, 62 Mass. App. Ct. at 267.
10. *Id.* at 268.
11. *Id.* at 269.