COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2020-P-0923

Bristol County, ss.

Town of Norton Conservation Commission, Appellant

v.

Robert Pesa and another,[1] Appellees

On Appeal from the Bristol Superior Court

Appellant's Brief

Date: 10/28/2020

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[1] Annabella Pesa, individually and in her capacity as Trustee of the Pesa 2000 Realty Trust.

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STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in granting summary judgment for the defendants, where the defendants' failure to appeal the enforcement order at issue precluded them from contesting its substantive validity in these subsequent proceedings?

2. Whether the Superior Court erred in interpreting the Wetlands Protection Act, G.L. c. 131, § 40, para. 30, as a statute of repose prohibiting local conservation commissions from enforcing ongoing violations of the Act?

STATEMENT OF THE CASE

This appeal involves the Norton Conservation Commission's (the "Commission") appeal from the Bristol Superior Court's (McGuire, J.) decision denying the Commission's Motion for Summary Judgment and granting the defendants' Cross-Motion for Summary Judgment, dismissing the Commission's Complaint which sought injunctive relief to compel compliance with the Commission's enforcement order issued to the defendants. Although the defendants failed to exhaust their administrative remedies by filing a *certiorari* appeal of the enforcement order within sixty days of

issuance pursuant to G.L. c. 249, § 4, the Superior Court accepted substantive arguments from the defendants challenging the validity of the enforcement order. Ultimately, the Superior Court determined that the enforcement order was invalid based on a novel interpretation and application of Para. 30 of the Wetlands Protection Act as a "statute of repose." For the reasons that follow, the Superior Court erred in dismissing the Commission's Complaint seeking enforcement of the enforcement order. Accordingly, this Court should vacate the Superior Court's judgment and instead direct the Superior Court to enter judgment in favor of the Commission, requiring the defendants to comply with the enforcement order.

STATEMENT OF THE FACTS

1. Factual background. Robert and Annabella Pesa, as trustees of the Pesa 2000 Realty Trust (the "defendants"), are the current record owners of 2.3 acres of land located at 162 West Main Street, in Norton, Massachusetts (the "Property"). R.A. 10; 14.[2] The Property contains a commercial building which

[2] Volume I of the Record Appendix is cited as R.A. [page]; Volume II is cited as R.A. II, [page].

serves as a business location for various tenants to which the trust rents out its space. R.A. 12. The Property contains multiple wetland resource areas including bordering vegetated wetlands and a bank, both of which are protected inland resource areas under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 and its implementing regulations, 310 CMR 10.00, et seq. (the "Act"). R.A. 12.

In 1979, a previous owner of the Property, John Teixera, filed a Notice of Intent[3] with the Town of Norton Conservation Commission (the "Commission") to make commercial use of the land by constructing a store, parking lot, and sanitary system on the Property. R.A. 13; 171. The Commission approved the proposed activity and issued an Order of Conditions allowing the project, subject to conditions limiting filling activities[4] to specific areas shown on a plan

[3] The Wetlands Protection Act prohibits the removal, dredging, filling, or altering of wetlands without a permit. G.L. c. 131, § 40. A Notice of Intent is an application to obtain a permit for any proposed work in a wetlands resource area or within a wetlands buffer zone, which may be issued by a local conservation commission. Id.; 310 CMR 10.02.

[4] The implementing regulations provide detail as to the permitting process for landowners who seek local approval for projects that involve the removal,

in order to protect the adjacent fresh water meadow, which is a wetland resource area significant for flood control and storm damage prevention. R.A. 13; 46.

Later that year, the Commission issued a formal notice to the prior property owner informing him that he had exceeded the filling limits delineated on the plan that was approved by the Commission as part of the Order of Conditions issued for the project. R.A. 13. The Commission also informed him that he would be required to submit a new request to the Commission with modified plans to determine the extent to which the filling activities had adversely impacted the protected wetlands resource areas. Id.

Between 1984 and 1988, the Commission attempted to work with the prior property owner to address the excessive and unlawful fill that had been placed on the property. Id. Unfortunately, the prior owner failed to remove the fill or submit any modified plans to the Commission. R.A. 14. The permit (order of conditions) that Mr. Texeira had received for the

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filling, dredging, or altering of wetlands on their properties. 310 CMR 10.00, et. seq. As pertinent here, the regulations define "fill" as "to deposit any material so as to raise an elevation, either temporarily or permanently." 310 CMR 10.04.

property expired in 1988, but Mr. Texeira never requested and the Commission never issued a Certificate of Compliance[5] which would have been recorded against the Property at the Registry of Deeds. R.A. 13-14.

In 2014, the defendants were interested in purchasing the Property. R.A. 14. During the closing process, the defendants' attorney notified the Commission that a Certificate of Compliance never

[5] A Certificate of Compliance ("COC") is the final document issued by a conservation commission to certify that the work performed under an Order of Conditions ("OOC") has been satisfactorily completed in compliance with the requirements of the OOC. Prior to the issuance of a COC, "a site inspection shall be made by the issuing authority, in the presence of the applicant or the applicant's agent." 310 CMR 10.05(9)(b). In this matter, the first time a COC was requested and a site visit occurred relative to the 1979 OOC was in September of 2014, as part of the defendants' due diligence in deciding whether to purchase the Property from Mrs. Texeira. Therefore, the failure of any prior or current owner of the Property to request a COC until 2014 precluded the Commission from determining whether the filling on the Property occurred consistent with the 1979 OOC, until 2014. In fact, the Commission is unauthorized to enter onto private property to conduct an inspection for compliance without the landowner's consent or without a warrant; the OOC and COC process, then, is the only avenue which could trigger such review and lead to a determination whether the project was constructed consistent with the requirements of the OOC. See Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151, 159 (1988).

issued or was never recorded for the Property, and therefore requested that the Commission issue one. R.A. 14. In connection with ensuring the Property's compliance with the Order of Conditions, the Commission reviewed the plans and submissions, along with the Order of Conditions for the previous work at the Property, and conducted a site visit. R.A. 13-16. The conservation agent also visited the site and reviewed historical aerial photographs of the Property showing the areas where significant filling of wetland resource areas occurred. Id.

Because of the prior owners' failure to request a Certificate of Compliance, the Commission became aware during September of 2014 that the prior property owner had illegally deposited approximately 13,000 square feet of fill, construction debris, concrete, asphalt, metal, tires, junk, and pollutants of similar kind into the protected wetlands resource areas on the Property outside of areas allowed in the 1979 OOC. R.A. 15; 130; R.A. II, 58.

In October of 2014, the Commission issued a letter to the owner of the Property, Ann Teixeria, informing her of the violations and requesting that

she bring the Property into compliance with the Wetlands Protection Act and Regulations. R.A. 15. In response, the Commission received a letter from the defendants, who indicated that they were prospective purchasers of the Property, and would work with the Commission and engineering firms to remove the fill. R.A. 15; R.A. II, 75. The Commission, therefore, authorized a ninety-day extension for the defendants to contact companies and investigate the most economically feasible option for them to restore the wetlands on the Property. R.A. 66-68; R.A. II, 75. The defendants agreed that they would submit a restoration plan within those deadlines. R.A. 17; 80-83; R.A. II, 157.

In December of 2014, the defendants purchased the Property. Id. Following their purchase of the Property, until about March of 2015, the defendants continued working with the Commission to develop a plan to remediate the wetlands violations. Id. In June of 2015, however, the defendants submitted formal notice to the Commission that they had changed their minds and had decided not to remove any fill from the wetlands resource areas. R.A. 15-16; R.A. II, 157.

In August of 2015, the Commission held a public hearing, attended by the defendants, during which the Commission detailed the long history of violations occurring at the Property and the various options available to remedy those environmental violations. R.A. 152; R.A. II, 157-158. Robert Pesa indicated that, as the current record owners of the Property, he and Mrs. Pesa would no longer agree to remedy the violations. Id. Accordingly, the Commission voted to issue an enforcement order relative to the Property. R.A. II, 177. On August 25, 2015, having attempted, unsuccessfully, for almost one year to obtain voluntary compliance with respect to removing the unlawful fill, the Commission issued the enforcement order to the defendants. R.A. 177; R.A. II, 58. The defendants failed to appeal the enforcement order to Superior Court pursuant to G.L. c. 249, § 4, and refused to comply with the enforcement order. R.A. 17-20; 132.

On June 22, 2016, therefore, the Commission filed a complaint in the Bristol County Superior Court, seeking injunctive relief to compel the defendants to comply with the Commission's duly-issued enforcement

order to remediate the environmental harm occurring on the Property by removing the illegal fill placed in excess of the amount allowed under the 1979 OOC. R.A. 5-22. The Commission promptly moved for preliminary injunctive relief as to the remediation. R.A. 95.

2. Prior proceedings. On August 10, 2016, following a hearing, the Superior Court (Kane, J.) issued a decision partially granting and partially denying the Commission's Motion for preliminary injunctive relief. R.A. 123-124. The court required the defendants to abstain from any further violations of the Act, but denied the remainder of the Commission's request for compliance based on its interpretation of the following provision of the Act:

> Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.

G.L. c. 131, § 40, para. 30 (emphasis added). In that regard, the judge observed:

> The statute ostensibly precludes a civil action commenced after the passage of three years from a party's inheritance of the property. According to the papers, John Texeira died in 2006, making Ann Texeira the owner. The court interprets the preclusion as applying to parties in privity with Anne Texeira. While the dates of work done in violation of orders issued by the Commission are unclear, the petition as to its affirmative orders fails to show sufficient promise to warrant issuance of the orders.

Otherwise put, the judge interpreted the Act to mean that an enforcement action can only be brought within three years after the first transfer of the Property by the person who committed the original violation. R.A. 123.

Subsequently, on December 5, 2018, the parties cross-moved for summary judgment on the issue of compelling compliance with the enforcement order. R.A. 6. The defendants argued, inter alia, that the enforcement order was invalid and that the Commission could not compel compliance with it because they were barred by the applicable statute of limitations. R.A. II, 155-166. The Commission argued, inter alia, that the defendants were precluded from now contesting the validity of the enforcement order because they never appealed it and it was, therefore, final and binding. R.A. 132-136. The Commission also argued that, in any

event, the enforcement order was valid and that Para. 30 of the Act does not prohibit the Commission from seeking compliance with the enforcement order.

On June 16, 2020, following a hearing, the Superior Court (McGuire, J.), granted the defendants' motion for summary judgment and ordered that the Commission's complaint be dismissed, determining that the enforcement order was invalid because Para. 30 of the Wetlands Protection Act operates as a "statute of repose," requiring that enforcement occur within three years of the transfer of title by the original violator. R.A. II, 155-166. Following the entry of judgment for the defendants, this appeal followed. R.A. II, 167.

SUMMARY OF ARGUMENT

First, the Superior Court erred in accepting substantive arguments from the defendants challenging the validity of the Commission's enforcement order because the defendants failed to timely appeal the enforcement order pursuant to G.L. c. 249, § 4, and were therefore barred from collaterally attacking the order in subsequent proceedings. (P. 20, infra).

Second, the Superior Court erred by interpreting Para. 30 of the Act as a statute of repose and in applying Para. 30 to prohibit the Commission from requiring the defendants to remove fill that was unlawfully placed in wetland resource areas by a prior owner. (P. 28, infra).

Third, assuming arguendo that the Superior Court correctly interpreted Para. 30 as a statute of repose, the Court misapplied the provision because the first relevant transfer of the Property occurred in 2014 when Mrs. Texeira conveyed the Property to the Pesa Trust. (P. 39, infra).

Finally, the Superior Court's application of Para. 30 of the Act as a statute of repose, preventing the Commission from requiring the defendants to remove unlawfully placed fill from the Property, is inconsistent with the regulations established under the Act, 310 CMR 10.00, et seq., regarding the procedure for the issuance of Orders of Conditions and Certificates of Compliance. (P. 41, infra).

ARGUMENT

The Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, provides, in pertinent part:

> No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, ... without filing written notice of his intention to so remove, fill, dredge or alter, ... and without receiving and complying with an order of conditions [from the local conservation commission].

G.L. c. 131, § 40 (the "Act"). One purpose of the Act is to provide for a local permitting process through conservation commissions, who are tasked with overseeing and protecting wetlands resource areas in the Commonwealth.

The Act also empowers conservation commissions with independent authority to enforce against any violations of the Act. G.L. c. 131, § 40, para. 31. Indeed, under the Act, a conservation commission is authorized to "issue enforcement orders directing compliance with the act and ... to order [a]ny person who violates the provisions of [§ 40] ... to restore property to its original condition." Craig v. Conservation Comm'n of Mattapoisett, 93 Mass. App. Ct. 1108, review denied, 480 Mass. 1103 (2018) (unpublished) (conservation commission is "well within its authority in ordering [property owners] to restore the property to its original condition").

Similarly, the Act's implementing regulations authorize local conservation commissions to issue enforcement orders when they have determined that an activity "is in violation of [the Act], 310 CMR 10.00 or a Final Order." 310 CMR 10.08(1). Enforcement orders may be issued for, inter alia, the "failure to comply with any certification on project plans" and "leaving in place unauthorized fill or otherwise fail[ing] to restore illegally altered land to its original condition, or the continuation of any other activity in violation of [the Act]." 310 CMR 10.08(1).

It is pursuant to this statutory and regulatory scheme that the Town of Norton Conservation Commission issued the underlying enforcement order to the defendants in this matter.

I. Standard of Review.

The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c). "Where, as here, both parties have

moved for summary judgment, 'the evidence is viewed in the light most favorable to the party against whom judgment is to enter.'" Winbrook Communication Servs., Inc. v. United States Liab. Ins. Co., 89 Mass. App. Ct. 550, 553 (2016), quoting Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4 (2010). This Court reviews the judge's decision to grant summary judgment de novo.[6] Winbrook, supra.

II. The Superior Court erred in granting summary judgment against the Commission because the defendants failed to exhaust all available administrative remedies, and therefore, were barred from challenging the substantive validity of the Enforcement Order in these subsequent proceedings.

"A land owner aggrieved by a local conservation commission's enforcement order, issued in furtherance of a wetlands law, has a right of immediate appeal to the Superior Court." TH Claims, LLC v. Town of Hingham, 84 Mass. App. Ct. 1124 (2013) (unpublished). "The action is in the nature of a writ of certiorari, G.L. c. 249, § 4, and shall be commenced within sixty days next after the proceeding complained of." Id.

[6] The Appeals Court also exercises "de novo review of questions of statutory construction." In re MacDonnell's Case, 82 Mass. App. Ct. 196, 198 (2012).

In this matter, the defendants never appealed the Commission's enforcement order, which was the final adverse determination of the Commission, within sixty days of its issuance on August 25, 2015, as required by G.L. c. 249, § 4. The defendants were therefore barred from collaterally challenging the order in these subsequent proceedings. As such, the Superior Court judge plainly erred in issuing his decision against the Commission with respect to the substantive issues and validity of the underlying enforcement order in this action, and the decision must be vacated and set aside, with judgment to enter for the Commission.

It is well-settled that, in order to avoid frustrating the statutory scheme under which an enforcement action may be brought by a local board, agency, or commission, any and all available administrative remedies available to a party must be exhausted before a court may intercede. See, e.g., Gallo v. Division of Water Pollution Control, 374 Mass. 278, 288 (1978) (preclusion applies even where administrative relief is no longer available because of failure to appeal within time set by statute);

Stowe v. Bologna, 415 Mass. 20, 22 (1993) (unappealed-from order precludes relitigation of same issues between same parties). A party challenging the validity of an enforcement order in subsequent proceedings "is bound by an unappealed-from adverse decision, not only as to the grounds he [or she] raised, but as to those he [or she] might have raised but elected to forgo." Giuffrida v. Zoning Bd. Of Appeals Of Falmouth, 68 Mass. App. Ct. 396, 401 (2007). Otherwise put, the doctrine of preclusion renders final judgments and orders of administrative bodies "conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action." Id.[7]

[7] These authorities reflect the public policy that "those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. Considerations of fairness and the requirements of efficient judicial administration dictate that an opposing party ... is entitled to be free from continuing attempts to relitigate the same claim. [T]he doctrine has been applied in both its prongs to the decisions of administrative agencies and covers unappealed agency final orders," such as enforcement orders by local conservation commissions. See Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 742 n.5 (2000) (internal quotations and citations omitted).

Similarly here, it is undisputed that the defendants failed to appeal the Commission's final enforcement order within the requisite sixty-day time frame required by G.L. c. 249, § 4. Rather, they simply ignored it. Only when the Commission subsequently filed a complaint in the Superior Court to compel compliance with the order, which required remediation of significant violations of the Wetlands Protection Act, did the defendants seek to challenge the order.

As the defendants failed to exhaust their administrative remedies by filing a certiorari appeal of this adverse order from the Commission, they were precluded from contesting the validity of the Commission's enforcement order in these subsequent proceedings, which, regardless of the affirmative or defensive nature, was the equivalent of an untimely appeal of an adverse order. See, e.g., Klein v. Planning Bd. of Wrentham, 31 Mass. App. Ct. 777, 778 (1992) ("Having failed to take a timely appeal from the board's action in granting the special permit with conditions, ... the plaintiff did not have the right to challenge the validity of ... the [special permit]

conditions in a proceeding which, regardless of its form, was the equivalent of an appeal"); Iodice v. City of Newton, 397 Mass. 329, 333 (1986) (same).

In fact, specifically with respect to enforcement orders issued by local conservation commissions, this Court has concluded on several occasions that, where the defendants fail to appeal the validity of an enforcement order, and where the outcome of the defensive or affirmative claims in a subsequent proceeding turns on the validity of the unappealed order, the defendants are bound by that adverse order and their claims or counterclaims must be dismissed. See, e.g., Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 741 (2000) ("Having forgone his opportunity to [appeal the commission's orders], he is precluded from relitigating his jurisdictional contentions"); TH Claims, LLC, supra at 1124 (property owner's claims "amounted to an untimely challenge to the local conservation commission's enforcement order" under wetlands protection laws and must be dismissed); Comley v. Town of Rowley, 74 Mass. App. Ct. 1122 (2009)(unpublished)(same); Carney v. Town of Framingham, 79 Mass. App. Ct. 1129 (2011)(unpublished)

(same); Gargano v. Barnstable Conservation Comm'n, 58 Mass. App. Ct. 1106 (2003)(unpublished)(same).[8]

Notwithstanding these well-settled principles, the Superior Court judge ignored this issue and instead rendered a decision overturning the Commission's enforcement order based on a novel substantive application and interpretation of Para. 30 of the Act as a statute of repose. The Superior Court judge erred in this regard because the defendants' failure to file a timely certiorari appeal of the Commission's enforcement order deprived the Superior Court of subject matter jurisdiction to entertain the defendants' substantive attacks on the validity of the enforcement order. See Bonfatti v. Zoning Bd. of Appeals of Holliston, 48 Mass. App. Ct. 46, 50 (1999) (where property owner failed to timely appeal from adverse order under G.L. c. 40A, § 17, "the Superior Court judge was therefore without jurisdiction to

[8] Likewise, the Superior Court has observed that, in cases in which a conservation commission simply seeks "the Court's enforcement of its ... orders" as opposed to litigating or issuing a new enforcement order which revives the prior issues, the case is "over" and must be dismissed. Gargano v. Barnstable Conservation Comm'n, No. 033141, 2008 WL 2895849, at *1, nn.1-3 (Mass. Super. July 14, 2008).

entertain the appeal"); Comley, supra at 1122 ("having failed to challenge the validity of the ... enforcement orders within the sixty-day period provided for in G.L. c. 249, § 4, the [defendants] are now precluded from doing so"); Gargano, supra at 1106 (2003) ("Having failed to timely appeal the ... enforcement action, ... [the plaintiff] was precluded from challenging these decisions under the guise of what he erroneously characterizes as an entirely new proceeding and order. Timely institution of an appeal to meet the statutory deadline for certiorari review is a condition *sine qua non* to such review.").

In light of the preclusive effect of the defendants' failure to timely appeal the enforcement order, the Superior Court judge erred in granting summary judgment in favor of the defendants based on his determination that the enforcement order was invalid pursuant to a substantive novel interpretation of the Act. Accordingly, the court's decision should be vacated and set aside, with judgment to enter in favor of the Commission, upholding the validity of the enforcement order.

III. Even assuming *arguendo* that the court had subject matter jurisdiction to determine the validity of the enforcement order, the court erred in its novel interpretation of Para. 30 of the Wetlands Protection Act, G.L. c. 131, § 40, as a statute of repose as applied to leaving unauthorized fill in resource areas.

Because the case should have been adjudicated in favor of the Commission on the procedural and jurisdictional grounds described above, this Court need not reach the question of whether the Superior Court correctly interpreted Para. 30 of the Wetlands Protection Act as a statute of repose. If this Court decides to reach the issue, however, it should reject the Superior Court's novel and unsupported interpretation of Para. 30 of the Act as a "statute of repose."

a. Paragraph 30 of the Wetlands Protection Act does not fit squarely within the definition of a Statute of Repose or a Statute of Limitation.

"Statutes of repose and statutes of limitations are different kinds of limitations on actions." Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 351-352 (2018). "A statute of limitations specifies the time limit for commencing an action after the cause of action has accrued, but a statute of repose is an absolute limitation which prevents a cause of

action from accruing after a certain period which begins to run upon occurrence of a specified event." Id. "Statutes of limitations have been described as a procedural defense to a legal claim, whereas statutes of repose have been described as providing a substantive right to be free from liability after a given period of time has elapsed from a defined event." Id. (internal quotations and citations omitted). "The statutes are independent of one another and they do not affect each other directly as they are triggered by entirely distinct events." Id.

In this matter, the Superior Court determined that the Commission's enforcement action seeking the removal of excess fill in protected wetlands on the Property was barred by the following provision of the Act:

> Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.

G.L. c. 131, § 40, para. 30 (emphasis added).

Paragraph 30 acts as a defense based both upon when the cause of action accrues (i.e., when the subject violation(s) occurred) and the occurrence of a specific event (i.e., the transfer of the property to any person who purchases, inherits, or otherwise acquires the property with the violation(s)).

Despite their failure to challenge the enforcement order through appropriate channels, the defendants argued below that Para. 30 was a "statute of limitations" which procedurally barred the issuance of the enforcement order. The Superior Court, however, rejected the defendants' argument that the Commission's enforcement order was barred by the statute of limitations set forth in G.L. c. 131, § 91. The Superior Court correctly held as follows:

> Both the Supreme Judicial Court and the Appeals Court have said that unlawful fill is a "continuing" violation and a cause of action for injunctive relief continues to accrue each day the fill remains on property. "The presence of fill is a continuing violation of G.L. c. 131, § 40, warranting injunctive relief .... This case is analogous to a proceeding against a continuing nuisance which is not barred by the statute of limitations because of the recurring nature of the harm." Worcester v. Gencarelli, 34 Mass. App. Ct. 907, 908 (1993), citing Commonwealth v. John G. Grant & Sons Co., Inc., 403 Mass. 151, 157 (1988) ("[t]he presence of the

> unauthorized fill is a continuing wrong warranting injunctive relief ...."). Since the fill remains on the locus, Section 91 does not bar the commission's action for an injunction to remove it. R.A. II, 156-161.

The Court also correctly determined that leaving fill in a resource area constitutes an ongoing harm which creates a continuing violation of the Act, with a new violation occurring every day. R.A. 161, citing G.L. c. 131, § 40, para. 32.

The Court then proceeded to render a novel interpretation of Para. 30 as a "statute of repose," concluding that the Commission was barred from issuing an enforcement order in this case on substantive grounds because over three years had lapsed since John Texeira, the owner of the Property who caused and/or allowed the filling to occur, transferred title to the Property to himself and his wife as tenants by the entirety in 1996. R.A. 98; 158. Therefore, the court concluded, the Commission could not enforce against past violations on the property as more than three years had lapsed since the first transfer of title. R.A. ÍI, 162-165. In reaching this conclusion, however, the court ignored its own finding that "between 1995 and 2004 vegetation was cleared beyond

the work line limit," R.A. 157-158, and the unlawful filling activity continued through at least 1996. R.A. 63; 148; R.A. II, 137; 157. Therefore, Mrs. Texeira owned the Property as a tenant by the entirety during a time when additional filling and other unlawful work including clearing of vegetation was occurring at the Property. Accordingly, the initial transfer of the Property that would arguably have triggered Para 30. did not occur until the sale of the Property from Mrs. Texeira to the Pesa Trust in 2014. The Commission's 2015 enforcement order was, therefore, timely under the court's own interpretation of Para 30.

b. The plain language of the Wetlands Protection Act demonstrates that Para. 30 is not a Statute of Repose, particularly as applied to leaving unauthorized fill in protected resource areas.

Contrary to the court's determination, and by its express terms, Para. 30 of the Act is not limited to the first transfer of the Property from the original violator. As with all matters of statutory interpretation, a court tasked with construing the Wetlands Protection Act must "ascertain and effectuate legislative intent, as expressed in the statutory language." See Bellalta v. Zoning Bd. of Appeals of

Brookline, 481 Mass. 372, 378 (2019) (internal quotations and citations omitted). Where "the meaning of [the] statute is not clear from its plain language, well-established principles of statutory construction guide our interpretation." Id. Specific provisions of a statute are to be "understood in the context of the statutory framework as a whole, which includes the preexisting common law, earlier versions of the same act, related enactments and case law, and the Constitution." Id. "A reviewing court's interpretation 'must be reasonable and supported by the ... history of the statute.'" Id., quoting Commonwealth v. Mogelinski, 466 Mass. 627, 633 (2013). Ultimately, the Court must "avoid any construction of statutory language which leads to an absurd result, or that otherwise would frustrate the Legislature's intent." Bellalta, supra.

As discussed, the language of the Act provides that any person who "acquires real estate upon which work has been done in violation of the provisions of [the Wetlands Protection Act] ... shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation." G.L.

c. 131, § 40, para. 30. The provision, however, goes on to exempt such actions "against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person."

In the context of requiring removal of unauthorized fill, the plain language of Para. 30 of the Act does not create a statute of repose which limits the Commission's enforcement authority to the first transfer of the Property from the initial violator. Rather, the language allows a commission to bring an enforcement action against any new owner of property that contains unauthorized fill in resource areas because each day the new owner allows the fill to remain in place constitutes a new violation. See G.L. c. 131, § 40 and R.A. II, 156-160. This interpretation of the statute is especially appropriate where, as here, the new owner had knowledge of the existing violation prior to the purchase of the Property and represented to the Commission that they would address the outstanding violation upon their purchase. R.A. 20-22; 66-70.

Finally, because leaving fill is an ongoing violation, Para. 30 cannot be applied to limit the responsibility of subsequent owners to remove unlawfully placed fill, of which they are on notice due to the recording of an OOC and COC against the Property. The language of Para. 30 only applies to "work that has been done in violation of the provisions of this section or in violation of any order issued under this section ...." In other words, Para. 30 only applies to past violations which are not ongoing. The Superior Court correctly concluded that leaving unauthorized fill in place is an ongoing harm and constitutes a new violation every day it remains in place. R.A. II, 161; John G. Grant & Sons, supra at 158. Based on this conclusion, the Superior Court erred in determining that Para. 30 prevents the Commission from requiring the current owners to remedy the ongoing violations of the Act by removing the unlawfully placed fill from the Property.

c. The legislative history of the Wetlands Protection Act demonstrates that Para. 30 is not a Statute of Repose, particularly as applied to leaving unauthorized fill in resource areas.

The legislative history of the Act also demonstrates that the intent of Para. 30 was not to

prohibit the Commission from pursuing enforcement orders requiring the removal of unauthorized fill against subsequent owners of the Property. See G.L. c. 131, § 40, para. 30, inserted by St.1975, c. 334.

Indeed, Para. 30 was first inserted into the Act in 1975 as part of a bill entitled "An Act Relative to the Enforcement of Violations of the Wetlands Law Against Subsequent Owners of Certain Real Property." St.1975, c. 334 (emphasis added). The chosen language for the exemption was: "provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person." Id. (emphasis added). That same year, however, the Legislature had considered a bill in which the language to be proposed was as follows: "provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within two years following the recording of the deed or the date of the death by which such real estate was acquired by the first such person to acquire it." See H.B. No. 655 (1975).

In explicitly rejecting this language, the Legislature clearly did not intend for conservation commissions' enforcement authority to be limited to actions against the first subsequent owner. Cf. Commonwealth v. Newberry, 483 Mass. 186, 195 (2019) ("Courts may not read into a statute a provision that the Legislature did not enact, nor add words that the Legislature had an option to, but chose not to include" (emphasis added)). Instead, the Legislature chose to enact a law with language which allows commissions to bring enforcement actions against any subsequent owner, provided that such actions are "commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person."

Additionally, the amendment which inserted this provision notably was not entitled "Enforcement of Violations Against the First Subsequent Owner" of real property; but rather, the title of the Act alluded to enforcement of violations "Against Subsequent Owners," plural, indicating that the Legislature intended the enforcement mechanisms to extend to any subsequent transfers of interest, not just the initial or first

transfer. See Sunderland, Statutes and Statutory Construction, § 77:1 Conservation Laws (8th ed.) (title of statute is significant indication of intent of legislature where meaning of law is in doubt, as the title is a legislative declaration of the tenor and object of the act).

Finally, the fact that subsequent amendments to the Act, see, e.g., St.1978, c. 248; St.1989, c. 218, added requirements that any work under an Order of Conditions and the plans for proposed work be recorded in the registry of deeds and attached to the title to the property demonstrates the intent to put any subsequent owners on notice of the potential that work was not done in compliance with an Order of Conditions if, as here, a Certificate of Compliance was never recorded showing compliance with the OOC.[9]

In 1990, the Act was further amended to insert the following: "[n]o person shall ... leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or

[9] In this matter, the defendants were aware of the existing violations on the Property because of the fact that an OOC had been recorded at the Registry and a COC was never recorded releasing the OOC.

fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense ...." St.1990, c. 388. The Legislature would not have inserted this subsequent provision relative to enforcement against unlawful fill as a "continuing violation" unless it intended that any subsequent owner could be required to remove the fill because as soon as any person purchases the property they become "a person leaving in place unauthorized fill." Id.[10]

The statutory and regulatory scheme at issue in this case is designed to stop projects and activities that will have a detrimental effect on wetland resource areas, to prevent or limit detrimental effects in projects and activities that are allowed to proceed, and to remedy and enforce any violations for projects and activities that commenced or continued

[10] The statutory provisions in this regard must be construed as a harmonious whole so as not to undercut one another. See School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, 438 Mass. 739, 751 (2003) (absent explicit command to contrary, statutes are construed as harmonious whole so as not to undercut each other); Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot., 459 Mass. 319, 329 (2011) (courts must not "interpret the statute so as to render any part of it superfluous or ineffective").

unlawfully. See, e.g., Yellin v. Conservation Comm'n of Dover, 55 Mass. App. Ct. 918, 918-919 (2002); Wilczewski v. Comm'r of the Dept. of Envtl. Quality Engr., 404 Mass. 787, 791-792 (1989); Department of Envtl. Quality Engr. v. Cumberland Farms of Conn., Inc., 18 Mass. App. Ct. 672, 675 (1984); DeGrace v. Conservation Commn. of Harwich, 31 Mass. App. Ct. 132, 133 n.2 (1991).

The Superior Court's interpretation and application of Para. 30 of the Act is inconsistent with the overall purpose of the Act and contrary to the intent of the Legislature because it prevents the Commission from requiring a violator of the Act to remedy an ongoing violation which is causing harm to resource areas. Simply put, the defendants are not only persons who purchased real estate upon which work occurred in violation of the Act, but they are also persons who are committing new violations of the Act each and every day that they allow the unpermitted fill to remain in place. John G. Grant & Sons, Co., supra. Therefore, Para. 30 of the Act may not be applied as a Statute of Repose to prevent the Commission from requiring compliance with the Act.

IV. Even assuming *arguendo* that the Superior Court correctly interpreted Paragraph 30, the Court misapplied its own interpretation because the first relevant transfer of the Property did not occur until 2014.

Although the Superior Court's interpretation of Para. 30 of the Act was erroneous, even were this Court to apply that unprecedented standard, the enforcement order is nonetheless valid because the first transfer of title following the last unpermitted work and violation on the Property from 1996 to 2004 was, in fact, from Mrs. Texeira to the defendants in 2014.

As of February 28, 1996, the Property was owned by Mr. and Mrs. Texeira as tenants by the entirety.[11] R.A. 54; 99; 160. As the Superior Court judge noted,

[11] When spouses hold title as tenants by the entirety, it "creates one indivisible estate in them both and in the survivor, which neither can destroy by any separate act." Bernatavicius v. Bernatavicius, 259 Mass. 486, 487 (1927). Either spouse "may convey or encumber his or her interest in property held as tenants by the entirety." Coraccio v. Lowell Five Cents Sav. Bank, 415 Mass. 145, 152 (1993). The death of Mr. Texeira in 2006 bears no relevance to the chain of title for purposes of applying Para. 30 of the Act, because Mrs. Texeira already owned the Property as a tenant by the entirety in 1996 when work was occurring at the Property in violation of the Act, and her status remained unchanged following his death until she effectuated the first transfer of title to the Pesas in 2014.

"between 1995 and 2004 vegetation was cleared beyond the work line limit," R.A. 157-160, and the unlawful filling activity continued through at least 1996. R.A. 147; R.A. II, 137; 161. The Commission's cause of action for the unlawful removal of vegetation thus "accrued no later than 2004" and the unlawful fill constitutes a "continuing violation." R.A. II, 161-162.

The defendants took title to the Property from Mrs. Texeira on December 10, 2014. R.A. 14; 51. Therefore, the first transfer of title following the unlawful clearing of vegetation that occurred from 1996 through 2004 was in December of 2014. The enforcement order was issued within one year of that first transfer, in August of 2015. R.A. 10. Under the Superior Court's own reading of the statute, then, the enforcement order was initiated within the requisite three-year time frame following the first transfer of title after the unlawful work occurred from 1996-2004.

V. The Superior Court's interpretation of Paragraph 30 of the Act is inconsistent with the overall intent of the Act and the procedures for issuance of Orders of Conditions and Certificates of Compliance.

The entirety of the statutory and regulatory scheme at issue is undercut by the Superior Court's interpretation. Pursuant to 310 CMR 10.05(6)(g):

> Prior to the commencement of any work permitted or required by the Final Order, including a Final Order of Resource Area Delineation, or Notification of Non-significance, the Order or Notification shall be recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property.

Pursuant to 310 CMR 10.05(9)(a):

> Upon completion of the work described in a Final Order of Conditions, but not later than the three year term of an Order of Resource Area Delineation or any extension thereunder, the applicant shall request in writing the issuance of a Certificate of Compliance stating that the work has been satisfactorily completed.

Prior to the Commission issuing a Certificate of Compliance ("COC"), the Commission and/or its agent must perform a site inspection of the Property to determine whether work has been completed in compliance with the OOC for which the applicant is seeking a COC. 310 CMR 10.05(9)(b). The Commission may only issue a COC if it has determined that the work was completed in compliance with the OOC. 310 CMR 10.05(9)(c)(d). Accordingly, the only procedural mechanism in the Act which allows the Commission to

determine compliance with an OOC is when an applicant requests a COC thereby allowing the Commission to inspect the property and determine compliance.

Here, the first time the Commission was asked to inspect the Property to determine compliance with the 1979 OOC was when Mrs. Texeira submitted a Request for a COC in 2014. R.A. 14; 45; 63. The Commission was unaware of the transfer of the Property from Mr. Texeira to Mr. and Mrs. Texeira as tenants by the entirety in 1996. Additionally, the Commission would have been unaware of the transfer of the Property from Mrs. Texeira to the Pesa Trust in 2014, but-for the request of Mrs. Texeira for a COC which resulted in an inspection of the Property revealing the violations of the Act which are at issue in this matter. The Superior Court's interpretation of Para. 30 penalizes the Commission for not undertaking enforcement sooner, despite the fact that the Commission had no knowledge or reason to believe a violation occurred until an inspection of the Property was requested and occurred in 2014. This result is patently unfair and contrary to the overall intent of the Act and the procedural mechanisms for the issuance of an OOC and COC.

Moreover, the court has left the defendants in a position in which they will be unable to clear the cloud on the title to their Property, which leads to absurd results for all parties involved. Cf. Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 376 (2000) ("If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce [unreasonable or] absurd results"). The OOC which was recorded at the Registry for the work conducted during the 1980s will remain in the chain of title for the Property without a COC being recorded in the chain of title, effectively releasing the OOC. A COC will never be issued for the OOC until the fill is removed from the areas outside the scope of what was allowed in the OOC.

Although the Superior Court judge was correct that part of the intent of the Act is finality, R.A. II, 164, the Superior Court Judge's interpretation of Para. 30 does not result in finality for purposes of achieving compliance with the Act. There can never be finality until the unlawful fill is removed and the Property is brought into compliance with the OOC,

thereby allowing the Commission to issue a COC releasing the Property from the effects of the unlawful filling in violation of the Commonwealth's environmental protection laws, G.L. c. 131, § 40.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Superior Court's judgment be set aside and that the case be remanded for an entry of judgment in favor of the Commission upholding the Commission's enforcement order.

Respectfully submitted,

/s/ A. Alexander Weisheit

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Date: 10/28/20

734642V10/NORT/0246

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, A. Alexander Weisheit, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16; Mass. R. App. P. 18; Mass. R. App. P. 20; Mass. R. App. P. 21.

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the monospaced font Courier New at size 12, and contains 39 total non-excluded pages.

/s/ A. Alexander Weisheit

A. Alexander Weisheit (BBO# 682323)

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13, I hereby certify that on October 28, 2020, I made service of this Brief and Appendix upon the attorneys of record by electronic mail:

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/s/ A. Alexander Weisheit
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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss. Civil Action No. 1673CV00608

TOWN OF NORTON
By and Through Its Conservation Commission,

Plaintiff

v.

ROBERT PESA,
Individually and as Trustee of the
Pesa 2000 Realty Trust,

And

ANNABELLA PESA,
Individually and as Trustee of the
Pesa 2000 Realty Trust,

Defendants

BRISTOL, SS SUPERIOR COURT
FILED
JUN 16 2020
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The town of Norton's conservation commission brings this action for injunctive relief and civil penalties based on alleged violations of an order of conditions it issued in 1979, pursuant to the Wetlands Protection Act, G.L. c. 131, § 40. The commission found that between 1980 and 1984 a prior owner of premises in Norton placed excess fill in a wetlands resource area and between 1996 and 2004 unlawfully cleared vegetation. In 2015, the commission ordered the present owners of the premises, Robert Pesa and Annabella Pesa, to correct the violations.

The parties have filed cross-motions for summary judgment pursuant to rule 56 of the Massachusetts Rules of Civil Procedure.

FACTS

The court may order summary judgment only where "there is no genuine issue as to any material fact...." Mass. R. Civ. P. 56 (c). "Only those facts that, if true, provide a basis for a reasonable jury to find for a party are material." *Carey v. New England Organ Bank,* 446 Mass. 270, 278 (2006). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the [opposing] party." *Brooks v. Peabody & Arnold, LLP,* 71 Mass. App. Ct. 46, 50, rev. den. 450 Mass. 1109 (2008), quoting *Hickson Corp. v. Northern Crossarm Co.,* 357 F.3d 1256, 1260 (11th Cir.2004). There is no genuine issue as to the following material facts.

On May 20, 1967, John J. Teixeira purchased the real property at 162 West Main Street in Norton (the 'locus") from Eunice Dorr.

On April 30, 1979, Teixeira filed a notice of intent with the Norton conservation commission indicating that he desired to place fill on the locus to make it suitable for use as a store and parking lot.

On June 8, 1979, the commission issued an order of conditions to Teixeira finding that the area to be filled is adjacent to a fresh water meadow that is significant to flood control and storm damage protection. The order permitted Teixeira to place fill on the locus subject to conditions, including a condition that the work be completed within one year.

On September 17, 1984, the commission sent a letter to Teixeira asserting that the limits for fill "appear to have been exceeded."

On April 4, 1988, the commission issued a one-year extension permit to Teixeira, allowing completion of the work by September of 1988.

On February 28, 1996, Teixeira conveyed the locus to himself and his wife, Ann Teixeira, as tenants by the entirety. The deed was recorded on March 1, 1996.

On February 16, 2006, John Teixeira died.

On July 21, 2014, an attorney handling the closing on a sale of the locus from Ann Teixeira to the defendants contacted the commission and requested the issuance of a certificate of compliance for the locus.

On September 3, 2014, Ann Teixeira's representative filed an "as-built" plan of the locus with the commission.

On October 8, 2014, the commission sent a letter to Ann Teixeira asserting that fill had been placed on the locus exceeding what was allowed under the order of conditions.

On November 17, 2014, the defendants sent a letter to the commission identifying themselves as prospective purchasers of the locus and indicating that they were responding to the commission's letter to Ann Teixeira. The defendants requested an extension of time to submit a construction plan and schedule for removal of the excess fill.

On November 25, 2014, the defendants attended a commission meeting at which they agreed to submit a plan for restoration of the locus within ninety days.

On December 9, 2014, Ann Teixeira conveyed the locus to the Pesas as trustees of the Pesa Realty Trust under date of trust of October 5, 2000.

On August 10, 2015, Robert Pesa attended a commission meeting. He informed the commission that he was not required to remove any fill and did not intend to do so. The commission voted to issue an enforcement order.

On August 25, 2015, the commission issued an enforcement order to Robert and Annabella Pesa. The order asserted that between 1980 and 1984 13,000 square feet of excess fill

was placed in bordering vegetative wetlands on the locus in violation of the order of conditions. The order also asserted that between 1995 and 2004 vegetation was cleared beyond the approved work line limit. The order directed the Pesas to correct the violations.

On June 22, 2016, the commission filed this civil action against the Pesas.

ANALYSIS

The commission contends that John Teixeira placed excess fill on the locus and cleared vegetation in violation of its order of conditions. The commission seeks to hold the Pesas, as the present owners of the locus, responsible for correcting the violations. The Pesas contend that: (1) no violation ever occurred; (2) the enforcement order is invalid because it was not signed; (3) they are not liable in their individual capacity for any violation; (4) the commission's action is barred by the applicable statute of limitations; and (5) the commission's claim is barred by the doctrines of laches and unclean hands. Both sides seek summary judgment.

1. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c). *Community National Bank v. Dawes,* 369 Mass. 550, 554 (1976).

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716 (1991).

"Where, as here, both parties have moved for summary judgment, 'the evidence is viewed in the light most favorable to the party against whom judgment is to enter.'" *Winbrook Communication Services, Inc. v. United States Liability Insurance Company,* 89 Mass. App. Ct. 550, 553 (2016), quoting *Albahari v. Zoning Bd. of Appeals of Brewster,* 76 Mass. App. Ct. 245, 248 n.4 (2010).

2. The Enforcement Order Against the Pesas

The Wetlands Protection Act provides in part:

> No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense....
>
> G.L. c. 131, § 40, par. 32.

The Act provides for injunctive relief to remedy a violation, as well as civil penalties:

> Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of ... a city or town....
>
> G.L. c. 131, § 40, par. 30.
>
> Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation.
>
> *Id.* at par. 33.

The parties disagree over whether there was a violation of the Wetlands Protection Act. However, that issue is resolved in the commission's favor due to the fact that the Pesas never challenged the commission's enforcement order in an action in the nature of certiorari, G.L. c. 249, § 4. *Conservation Commission of Falmouth v. Pacheco,* 49 Mass. App. Ct. 737 (2000).

The Pesas contend that the enforcement order issued by the commission is invalid since the commissioners did not sign it. "An Enforcement Order issued by a conservation commission shall be signed by a majority of the commission." 310 CMR 10.08 (3) (with exception not material to this case). However, the affidavit of Jennifer Carlino, Conservation Director for the town, indicates the commissioners signed the enforcement order. Joint Appendix131 & 143.

The Pesas also contend that they are not liable in their individual capacities since they took title to the locus as trustees. That may be the case, but it depends on the terms of the trust, which is not in the summary judgment record.

3. Timeliness of the Action

In its verified complaint, the commission alleges that "excessive fill was placed in the Property's Resource Areas between 1980 and 1984 [and] vegetation was cleared from the Resource Areas beyond the limits permitted by the Order of Conditions between 1995 and 2004...." Verified Complaint, par. 23 & 24. Joint Appendix, Enforcement Order, pp. 51-52. The commission commenced this action in 2016, i.e. twelve years after the last alleged violation.

A. Statute of Limitations

The Pesas contend that the commission's action is barred by the two-year statute of limitations governing the Wetlands Protection Act:

> Actions and prosecutions under this chapter shall, unless otherwise expressly provided, be commenced within two years after the time when the cause of action accrued or the offence was committed.
>
> G.L. c. 131, § 91.

To resolve this issue, the court must determine when the commission's cause of action "accrued." "Absent explicit legislative direction, the determination of when a cause of action accrues, causing the statute of limitations to run, has long been the product of judicial

interpretation in this Commonwealth." *Franklin v. Albert,* 381 Mass. 611, 619 (1980). *Parr v. Rosenthal,* 475 Mass. 368, 377 (2016) ("in the absence of explicit legislative direction, it is our common law that determines when a cause of action accrues, and hence when the limitations period actually begins to run.")

Both the Supreme Judicial Court and the Appeals Court have said that unlawful fill is a "continuing" violation and a cause of action for injunctive relief continues to accrue each day the fill remains on property. "The presence of fill is a continuing violation of G.L. c. 131, § 40, warranting injunctive relief.... This case is analogous to a proceeding against a continuing nuisance which is not barred by the statute of limitations because of the recurring nature of the harm." *Worcester v. Gencarelli,* 34 Mass. App. Ct. 907, 908 (1993), citing *Commonwealth v. John G. Grant & Sons Co., Inc.,* 403 Mass. 151, 157 (1988) ("[t]he presence of the unauthorized fill is a continuing wrong warranting injunctive relief....") Since the fill remains on the locus, Section 91 does not bar the commission's action for an injunction to remove it.

The clearing of vegetation, however, is not a continuing violation, analogous to a nuisance.[1] "An action for a continuing nuisance allows a plaintiff whose claim otherwise would be untimely to sue where its property rights are invaded from time to time because of repeated or recurring wrongs, resulting in new harm to the property on each occasion." *Taygeta Corp. v. Varian Associates, Inc.,* 436 Mass. 217, 231 (2002). The commission does not contend that the clearing of vegetation is ongoing. It alleges that the clearing of vegetation ended in 2004. This is not a situation involving "repeated or recurring wrongs, resulting in new harm to the property on each occasion." *Id.*

[1] The provision in the Act that a new violation occurs each day, G.L. c. 131, § 40, par. 32, subjects a violator to penalties for each day a violation remains uncorrected but it does not "explicitly... determine[] when a cause of action accrues, and hence when the limitations period actually begins to run." *Parr, supra.*

Since the commission's cause of action in regard to the clearing of vegetation accrued no later than 2004, the two-year statute of limitations in Section 91 bars that claim, even though it does not bar the continuing claim for removal of the fill.

B. Statute of Repose

The Pesas also contend that the action for the removal of excess fill is barred by the following provision in the Wetlands Protection Act:

> Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; ***provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.***
>
> G.L. c. 131, § 40, par. 30 (emphasis supplied).

The Pesas and the commission refer to this provision as a "statute of limitations." It is not a statute of limitations, however. It is a statute of repose. "Statutes of repose and statutes of limitations are different kinds of limitations on actions. A statute of limitations specifies the time limit for commencing an action after the cause of action has accrued, but a statute of repose is an absolute limitation which prevents a cause of action from accruing after a certain period which begins to run upon occurrence of a specified event. ... Statutes of limitations have been described as a 'procedural defense' to a legal claim, whereas statutes of repose have been described as providing a 'substantive right to be free from liability after a given period of time has elapsed from a defined event.'" *Bridgwood v. A.J. Wood Construction, Inc.*, 480 Mass. 349, 351-352 (2018), quoting Bain, Determining the Preemptive Effect of Federal Law on State Statutes of Repose, 43 U. Balt. L. Rev. 119, 125 (2014).

The three-year time limitation prescribed by the Wetlands Protection Act for actions against subsequent owners does not begin to run on the date a cause of action accrues. It begins to run on the date the subsequent owner acquires title, either by the recording of a deed or the death of the prior owner. The effect of the clause is to provide a subsequent owner with "a 'substantive right to be free from liability'" three years after that "defined event." *Id.*

The commission argues that it met the three-year time limit of paragraph 30 because the violation is ongoing as determined by the Appeals Court in *Gencarelli, supra.* That would be true if the provision under consideration was a statute of limitations, as it was in the *Gencarelli* decision. The provision in paragraph 30 does not measure the time limit by the lawsuit's temporal proximity to a violation. It measures the time limit from the date of acquisition of title – by deed or inheritance. The date of the violation is not part of the calculation.

The commission also argues that the three-year limit applies to each subsequent owner and not to those in privity with them. "The correct interpretation of the statute, … is to interpret it as allowing the Commission to bring an enforcement action against any new owner of property with a prior existing wetlands violation within three years of the new owner's purchase of the property." Plaintiff's Memo of Law, p. 3 (footnote omitted). "This provision is not limited to the first transfer of the property from the initial violator…. Instead, the provision applies to all transfers of the Property until the fill is removed and the resource area is restored to its pre-altered status." *Id.*, p. 7.

For example, under the commission's interpretation, the statute would apply as follows: Owner A violates the Wetlands Protection Act by unlawfully placing fill on his property. Since the violation is continuing, the commission may bring an enforcement action against Owner A at any time. The commission does not file an enforcement action against Owner A. Ten years

later, Owner A sells the property to Owner B. The commission's ability to sue Owner B is limited to three years. The commission does not bring an enforcement action against Owner B. Fifteen years later, Owner B dies, leaving the property to Owner C. The commission has another three years to bring an enforcement action against Owner C. In other words, although the commission's ability to bring an action against the ***first*** new owner following a violation is extinguished after three years, each time title passes to a subsequent owner, the commission has another three years to commence an action against the new owner, *ad infinitum.*

This argument fails for two reasons. First, statutes of limitations and of repose protect both an owner and those in privity with the owner. *Boy's Town U.S.A., Inc. v. World Church,* 349 F.2d 576, 579 (9th Cir. 1965). When a statute of limitations or repose protects a defendant, it also protects those who derive their rights from the defendant.

Second, the commission's interpretation of the statute would defeat its purpose. "The purpose of a statute of repose is to give particular types of defendants the benefit of a date certain on which their liability for past conduct will definitively come to an end. 'There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not be called on to resist a claim "when evidence has been lost, memories have faded, and witnesses have disappeared."' *Nett v. Bellucci,* 437 Mass. 630, 639 (2002), quoting *Klein v. Catalano,* 386 Mass. 701, 709 (1982) and *Rosenberg v. North Bergen,* 61 N.J. 190, 201, 293 A.2d 662 (1972).

The commission's construction of the statute would permit never-ending, recurring liability each time ownership of a parcel of real estate changed hands. That would run counter to the Legislature's intent in establishing finality. The court is required "to implement the actual, or reasonably perceived, intent of the Legislature." *Larson v. School Committee of Plymouth,* 430

Mass. 719, 724 (2000). The only way to implement the Legislature's intent to establish finality in regard to potential liability for wetlands violations is to interpret the statute as applying the three-year repose period to the first new owner subsequent to the violation and to those in privity with him or her, i.e. later successive owners.

The commission acknowledges that excessive fill was placed on the locus no later than 1984, when John J. Teixeira owned the property. The commission could have brought an action against him to remove the fill anytime up to February 16, 2006, when he died. Ann Teixeira became an owner of the property in 1996, when John Teixeira conveyed the property to himself and Ann Teixeira as tenants by the entirety. The deed was recorded on March 1, 1996. The commission could have brought an action against her to remove the fill up to March 2, 1999. After that, however, her liability expired and both Ann Teixeira and those whose title derived from her were free from liability. When the Pesas purchased the property from Ann Teixeira on December 9, 2014, the statute of repose in paragraph 30 of the Wetlands Protection Act protected them against liability for the excessive fill violation that occurred in the early 1980s.

4. Laches and Unclean Hands

The Pesas also contend that the equitable doctrines of laches and unclean hands bar the commission's action. They imply that conflicts of interest may have existed in the past because John Teixeira served on the Norton conservation commission for a number of years and because Teixeira hired another member of the conservation commission to spread fill on the locus. The materials before the court do not demonstrate any unlawful conflict.

"The doctrine of laches operates in equity as an affirmative defense against a plaintiff whose unreasonable delay in bringing a claim results in some injury or prejudice to the defendant." *West Broadway Task Force v. Boston Housing Authority,* 414 Mass. 394, 400

(1993). The doctrine of laches is inapplicable to the commission. "The defence of laches is not available to the defendants where the proceeding is brought by an authorized public agency to enforce the laws of the Commonwealth." *Board of Health of Holbrook v. Nelson,* 351 Mass. 17, 19 (1966).

"[O]ne must come into a court of equity with clean hands in order to secure relief ...." *Peabody Gas & Oil Co. v. Standard Oil Co. of New York,* 284 Mass. 87, 92 (1933). "The doctrine of unclean hands denies equitable relief 'to one tainted with the inequitableness or bad faith relative to the matter in which [he] seeks relief.'" *Murphy v. Wachovia Bank of Delaware, N.A.,* 88 Mass. App. Ct. 9, 15 (2015), quoting *Fidelity Mgmt. & Research Co. v. Ostrander,* 40 Mass. App. Ct. 195, 200 (1996) and *United States v. Perez–Torres,* 15 F.3d 403, 407 (5th Cir.1994). The materials before the court do not demonstrate any inequitable conduct by the commission.

ORDER

The plaintiff's motion for summary judgment (Paper # 14) is **DENIED**. The defendants' cross-motion for summary judgment (Paper # 14.2) is **ALLOWED**. Judgment shall enter **DISMISSING** the plaintiff's complaint.

June 16, 2020

Thomas F. McGuire, Jr.
Justice of the Superior Court

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIX. Agriculture and Conservation (Ch. 128-132b)
Chapter 131. Inland Fisheries and Game and Other Natural Resources (Refs & Annos)

M.G.L.A. 131 § 40

§ 40. Removal, fill, dredging or altering of land bordering waters

Effective: August 7, 2012
Currentness

No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, sewer, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions and provided all appeal periods have elapsed. Said notice shall be filed by delivery in hand to the conservation commission or its authorized representative or by certified mail, return receipt requested, to said commission, or, if none, to the board of selectmen in a town or the mayor of a city in which the proposed activity is to be located. Upon such filing, the receipt of such notice shall be acknowledged in writing on the face thereof and shall include the time and date so received. A person delivering said notice by hand shall be given a receipt in writing acknowledging the time and date of such filing. Copies of such notice shall be sent at the same time by certified mail to the department of environmental protection. To defray state and local administrative costs each person filing such a notice shall pay a filing fee, determined on a sliding scale basis by the commissioner of administration after consultation with the secretary of environmental affairs. Fifty percent of any filing fee in excess of twenty-five dollars shall be made payable to the department of environmental protection, in a manner to be determined by the commissioner of environmental protection, at the same time as the copies of the notice are sent to the department of environmental protection. The remainder of said fee shall be made payable to the city or town; provided, that said remainder shall be expended solely by the local conservation commission for the performance of its duties under this chapter and shall accompany the copy of the notice sent to the city or town. No such notice shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment. Upon receipt of any notice hereunder the department of environmental protection, hereinafter called the department, shall designate a file number for such notice and shall send a notification of such number to the person giving notice to the conservation commission, selectmen or mayor to whom the notice was given. Said notification shall state the name of the owner of the land upon which the proposed work is to be done and the location of said land.

Any person filing a notice of intention with a conservation commission shall at the same time give written notification thereof, by delivery in hand or certified mail, return receipt requested, to all abutters within one-hundred feet of the property line of the land where the activity is proposed, at the mailing addresses shown on the most recent applicable tax list of the assessors, including, but not limited to, owners of land directly opposite said proposed activity on any public or private street or way, and

in another municipality or across a body of water. When a notice of intent proposes activities on land under water bodies and waterways or on a tract of land greater than 50 acres, written notification shall be given to all abutters within 100 feet of the proposed project site. For the purposes of this section, "project site" shall mean lands where the following activities are proposed to take place: dredging, excavating, filling, grading, the erection, reconstruction or expansion of a building or structure, the driving of pilings, the construction or improvement of roads or other ways and the installation of drainage, sewerage and water systems, and "land under water bodies and waterways" shall mean the bottom of, or land under, the surface of the ocean or an estuary, creek, river stream, pond or lake. When a notice of intent proposes activity on a linear shaped project site longer than 1,000 feet in length, notification shall be given to all abutters within 1,000 feet of the proposed project site. If the linear project site takes place wholly within an easement through another person's land, notice shall also be given to the landowner. Said notification shall be at the applicant's expense, and shall state where copies of the notice of intention may be examined and obtained and where information regarding the date, time and place of the public hearing may be obtained. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the conservation commission.

Within twenty-one days of the receipt by a conservation commission of a written request made by any person and sent by certified mail, said commission shall make a written determination as to whether this section is applicable to any land or work thereon. When such person is other than the owner, notice of any such determination shall also be sent to the owner.

The term "applicant" as used in this section shall mean the person giving notice of intention to remove, fill, dredge or alter.

The term "person" as used in this section shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasipublic corporation or body, or any other legal entity or its legal representative, agents or assigns.

The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (*Sphagnum*) and where the vegetational community is made up of a significant portion of one or more of, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (*Aster nemoralis*), azaleas (*Rhododendron canadense* and *R. viscosum*), black spruce (*Picea mariana*), bog cotton (*Eriophorum*), cranberry (*Vaccinium macrocarpon*), high-bush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), laurels (*Kalmia angustifolia* and *K. polifolia*), leatherleaf (*Chamaedaphne calyculata*), orchids (*Arethusa, Calopogon, Pogonia*), pitcher plants (*Sarracenia purpurea*), sedges (*Cyperaceae*), sundews (*Droseraccae*), sweet gale (*Myrica gale*), white cedar (*Chamaecyparis thyoides*).

The term "coastal wetlands", as used in this section, shall mean any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage.

The term "freshwater wetlands", as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.

The term "swamps", as used in this section, shall mean areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface, and where a significant part of the vegetational community is made up of, but not limited to nor necessarily include all of the following plants or groups of plants: alders (*Alnus*), ashes (*Fraxinus*), azaleas (*Rhododendron canadense* and *R. viscosum*), black alder (*Ilex verticillata*), black spruce (*Picea mariana*), button bush (*Cephalanthus occidentalis*), American or white elm (*Ulmus americana*), white Hellebore (*Veratrum viride*), hemlock (*Tsuga canadensis*), highbush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), cowslip (*Caltha palustris*), poison sumac (*Toxicodendron vernix*), red maple (*Acer rubrum*), skunk cabbage (*Symplocarpus foetidus*), sphagnum mosses (*Sphagnum*), spicebush (*Lindera benzoin*), black gum tupelo (*Nyssa sylvatica*), sweet pepper bush (*Clethra alnifolia*), white cedar (*Chamaecyparis thyoides*), willow (*Salicaceae*).

The term "wet meadows", as used in this section where ground water is at the surface for a significant part of the growing season and near the surface throughout the year and where a significant part of the vegetational community is composed of various grasses, sedges and rushes; made up of, but not limited to nor necessarily including all, of the following plants or groups of plants: blue flag (*Iris*), vervain (*Verbena*), thoroughwort (*Eupatorium*), dock (*Rumex*), false loosestrife (*Ludwigia*), hydrophilic grasses (*Gramincae*), loosestrife (*Lythrum*), marsh fern (*Dryopteris thelypteris*), rushes (*Juncaceae*), sedges (*Cyperaceae*), sensitive fern (*Onoclea sensibilis*), smartweed (*Polygonum*).

The term "marshes", as used in this section, shall mean areas where a vegetational community exists in standing or running water during the growing season and where a significant part of the vegetational community is composed of, but not limited to nor necessarily including all, of the following plants or groups of plants: arums (*Araceae*), bladder worts (*Utricularia*), bur reeds (*Sparganiaceae*), button bush (*Cephalanthus occidentalis*), cattails (*Typha*), duck weeds (*Lemnaceae*), eelgrass (*Vallisneria*), frog bits (*Hydrocharitaceae*), horsetails (*Equisetaceae*), hydrophilic grasses (*Gramineae*), leatherleaf (*Chamaedaphne calyculata*), pickerel weeds (*Pontederiaceae*), pipeworts (*Eriocaulon*), pond weeds (*Potamogeton*), rushes (*Juncaceae*), sedges (*Cyperaceae*), smartweeds (*Polygonum*), sweet gale (*Myrica gale*) water milfoil (*Halcragaceae*), water lilies (*Nymphaeaceae*), water starworts (*Callitrichaceae*), water willow (*Decodon verticillatus*).

The term "Densely developed areas", as used in this section shall mean, any area of ten acres or more that is being utilized, or includes existing vacant structures or vacant lots formerly utilized as of January first, nineteen hundred and forty-four or sooner for, intensive industrial, commercial, institutional, or residential activities or combinations of such activities, including, but not limited to the following: manufacturing, fabricating, wholesaling, warehousing, or other commercial or industrial activities; retail trade and service activities; medical and educational institutions; residential dwelling structures at a density of three or more per two acres; and mixed or combined patterns of the above. Designation of a densely developed area is subject to the secretary of the executive office of environmental affair's approval of a city or town's request for such designation. Land which is zoned for intensive use but is not being utilized for such use as of January first, nineteen hundred and ninety-seven or which has been subdivided no later than May first, nineteen hundred and ninety-six shall not be considered a densely developed area for the purposes of this chapter.

The term "Mean annual high-water line", as used in this section, shall mean with respect to a river, the line that is apparent from visible markings or changes in the character of soils or vegetation due to the prolonged presence of water and which distinguishes between predominantly aquatic and predominantly terrestrial land. The mean high tide line shall serve as the mean annual high water line for tidal rivers.

The term "River", as used in this section, shall mean a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year.

The term "Riverfront area", as used in this section, shall mean that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line. This definition shall not create a buffer zone, so-called, beyond such riverfront area. Riverfront areas within municipalities with (i) a population of ninety thousand or more persons or (ii) a population density greater than nine thousand persons per square mile, as determined by the nineteen hundred and ninety federal census; (iii) that are within densely developed areas as defined herein; (iv) land in Waltham between the Charles river on the north, and the Crescent street and Pine street on the south, and the intersection of the Charles river and a line extended from the center line of Walnut street on the west, and the railroad right-of-way now or formerly of the Boston and Maine Railroad on the east; or (v) property located in the town of Milton shown on Milton assessors Map G, Block 56, Lot 13, located on 2 Granite Avenue shall be defined as that area of land situated between a river's mean annual high-water line and a parallel line located twenty-five feet away, measured outward horizontally, from the river's mean annual high-water line. The riverfront area shall not include land now or formerly associated with historic mill complexes including, but not limited to, the mill complexes in the Cities of Holyoke, Taunton, Fitchburg, Haverhill, Methuen and Medford in existence prior to nineteen hundred and forty-six and situated landward of the waterside

facade of a retaining wall, building, sluiceway, or other structure existing on the effective date of this act. The riverfront area shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act or to forest harvesting conducted in accordance with a cutting plan approved by the department of environmental management, under the provisions of sections forty to forty-six, inclusive, of chapter one hundred and thirty-two; and shall not include any area beyond one hundred feet of river's mean annual high water mark: in which maintenance of drainage and flooding systems of cranberry bogs occurs; in which agricultural land use or aquacultural use occur; to construction, expansion, repair, maintenance or other work on piers, docks, wharves, boat houses, coastal engineering structures, landings, and all other structures and activities subject to licensing or permitting under chapter ninety-one and its regulations; provided that such structures and activities shall remain subject to statutory and regulatory requirements under chapter ninety-one and section forty of chapter one hundred and thirty-one or is the site of any project authorized by special act prior to January first, nineteen hundred and seventy-three.

The term "Riverfront area boundary line", as used in this section, shall mean the line located at the outside edge of the riverfront area.

The conservation commission, selectmen or mayor receiving notice under this section shall hold a public hearing on the proposed activity within twenty-one days of the receipt of said notice. Notice of the time and place of said hearing shall be given by the hearing authority at the expense of the applicant, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the activity is proposed and by mailing a notice to the applicant and to the board of health and the planning board of said city or town. The conservation commission and its agents, officers and employees and the commissioner of environmental protection and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section. No conditions shall be imposed, nor shall any determination be rendered by a conservation commission, in reference to this section, unless the conservation commission meets with a quorum present.

If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries or to the protection of the riverfront area consistent with the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith. If the conservation commission, selectmen or mayor, as the case may be, make a determination that the proposed activity does not require the imposition of such conditions, the applicant shall be notified of such determination within twenty-one days after said hearing. Such order or notification shall be signed by the mayor or a majority of the conservation commission or board of selectmen, as the case may be, and a copy thereof shall be sent forthwith to the applicant and to the department.

If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within twenty-one days to make said determination, or where an order does issue from said commission, the applicant, any person aggrieved by said commission's order or failure to act, or any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which said land is located, may, by certified mail and within ten days from said commission's order or failure to act, request the department of environmental protection to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, to the protection of wildlife habitat or to the protection of fisheries or to the protection of the riverfront area consistent with the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries. The commissioner of environmental protection

or his designee also may request such a determination within said ten days. The party making any such request shall at the same time send a copy thereof by certified mail to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. If such party is other than the applicant, a copy of such request shall also be sent at the same time by certified mail to the applicant. Upon receipt of such request the department shall make the determination requested and shall by written order issued within seventy days of receipt of such request and signed by the commissioner or his designee, impose such conditions as will contribute to the protection of the interests described herein; provided, however, that said department shall notify the applicant within thirty days of the receipt of such request if his application or request is not in proper form or is lacking information or documentation necessary to make the determination. Such order shall supersede the prior order of the conservation commission, board of selectmen or mayor, and all work shall be done in accordance therewith, but in no event shall any work commence until ten days have elapsed following the issuance of said order. In the case of riverfront areas, no order issued by a conservation commission, board of selectmen, mayor, or the department shall permit any work unless the applicant, in addition to meeting the otherwise applicable requirements of this section, has proved by a preponderance of the evidence that (1) such work, including proposed mitigation measures, will have no significant adverse impact on the riverfront area for the following purposes: to protect the private or public water supply; to protect the ground water; to provide flood control; to prevent storm damage; to prevent pollution; to protect land containing shellfish; to protect wildlife habitat; and to protect the fisheries, and (2) there is no practicable and substantially equivalent economic alternative to the proposed project with less adverse effects on such purposes. An alternative is practicable and substantially economically equivalent if it is available and capable of being done after taking into consideration: costs, and whether such costs are reasonable or prohibitive to the owner; existing technology; the proposed use; and logistics in light of overall project purposes. For activities associated with access for one dwelling unit, the area under consideration for practicable alternatives will be limited to the lot; provided, that said lot shall be on file with the registry of deeds as of the[1] August first, nineteen hundred and ninety-six. For other activities including, but not limited to, the creation of a real estate subdivision, the area under consideration shall be the subdivided lots, any parcel out of which the lots were created, and any other parcels that are adjacent to such parcel or adjacent through other parcels formerly or presently owned by the same owner at any time on or after August first, nineteen hundred and ninety-six or any land which can reasonably be obtained; provided, that an ownership interest can reasonably be obtained after taking into consideration: cost, and whether such cost is reasonable or prohibitive to the owner; existing technology; the proposed use; and logistics in light of overall project purposes. At any time prior to a final order of determination by the department, any party requesting a determination may in writing withdraw the request, and such withdrawal shall be effective upon receipt by the department. Notwithstanding the withdrawal, the commissioner or his designee may continue the determination if he notifies all parties within ten days of receipt of the withdrawal. A copy of such order shall be sent to the applicant, to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. As used in this section the words "wildlife habitat" shall mean those areas subject to this section which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.

No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district wherein the land lies. If the final order, determination or notification requires the recording of a plan which (1) shows the location of the work, (2) is prepared by a registered professional engineer or land surveyor and (3) is in recordable form, no work proposed in the notice of intention shall be undertaken until such plan has been recorded in the registry of deeds or, if the land affected thereby is registered land, in the registry section of the land court for the district wherein such land lies.

Within twenty-one days of the receipt of a written request, by the applicant or the owner of the property, for a certificate of compliance, the issuer of the final order shall grant such request if the activity, or portions thereof, complies with such final order. The certificate of compliance shall state that the activity, or portions thereof, has been completed in accordance with such order.

Any site where work is being done which is subject to this section shall display a sign of not less than two square feet or more than three square feet bearing the words, "Massachusetts Department of Environmental Protection File Number ...." and the sign shall display the file number assigned to the project.

If the department of environmental protection finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.

The provisions of this section shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act; to maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use; or to any project authorized by special act prior to January first, nineteen hundred and seventy-three.

Within one hundred and twenty days of the effective date of this act, the department, upon the advice and consent of the Commissioner of the Department of Food and Agriculture, shall promulgate rules and regulations pursuant to this section which shall establish definitions for the term "normal maintenance or improvement of land in agricultural, or in aquacultural use", for each agricultural commodity, or where appropriate because of similarities in cultural practices, groups or commodities in the Commonwealth. The department shall create a farmland advisory board to be appointed by the commissioner consisting of five persons one a member of the cooperative extension service, one a member of the USDA soil conservation service, one a member of a municipal conservation commission who has demonstrated expertise in agricultural issues, and two commercial farmers with expertise in different agricultural commodities to assist the department in the drafting of rules and regulations pursuant to this paragraph.

The notice of intention required in the first paragraph of this section shall not apply to emergency projects necessary for the protection of the health or safety of the commonwealth which are to be performed or which are ordered to be performed by an agency of the commonwealth or a political subdivision thereof. An emergency project shall mean any project certified to be an emergency by the conservation commission of the city or town in which the project would be undertaken, or if none, by the mayor of said city or the selectmen of said town. If the conservation commission, mayor, or selectmen, as the case may be, fail to act favorably within twenty-four hours of receipt of a request for certification of an emergency project, said project may be so certified by the commissioner or his designee. In no case shall any removal, filling, dredging, or alteration authorized by such certification extend beyond the time necessary to abate the emergency. The permitting and emergency provisions in this paragraph shall not apply to severe weather emergencies as declared by the commissioner of environmental protection following a destructive weather event requiring widespread recovery efforts, debris cleanup or roadway or utility repair. A severe weather emergency declaration shall allow for emergency related work to occur as necessary for the protection of the health or safety of the residents of the commonwealth. A severe weather emergency declaration by the commissioner shall describe the types of work allowed without filing a notice of intent, any general mitigating measures to condition the work that may be required in performing such work, any notification or reporting requirements, the geographic area of the declaration's effect and the period of time the declaration shall be in effect which, in no event, shall be longer than 3 months unless extended by the commissioner. A severe weather emergency declared by the commissioner shall be sent electronically to all conservation commissions in the geographic area of the severe weather emergency and shall be made widely available to the general public through appropriate channels for emergency communications. A declaration of a severe weather emergency by the commissioner shall not impact the department's ability to enforce any general or special law or rule or regulation that is not altered by the commissioner's declaration.

Notwithstanding the provisions of section fourteen of chapter twenty-one A or any other provision of law to the contrary, the notice of intention required in the first paragraph of this section shall not apply to a maintenance dredging project for which a license has been previously issued within ten years by the division of waterways of the department of environmental protection. A person intending to fill or dredge under such previously issued license shall file a written notice by certified mail to the conservation commission or if none, to the board of selectmen in a town or mayor of a city in which the land upon which such dredging project is located. Such notice shall contain the name and address of the applicant.

If the conservation commission, the board of selectmen or mayor fails to notify the applicant at the applicant's address within twenty days of the receipt of such notice of the specific objections to the commencement of such dredging fill or maintenance

dredging contemplated under said license, the applicant may commence such work without any further notice to other agencies of the commonwealth. Notwithstanding failure to notify an applicant, as hereinbefore provided, the conservation commission, the board of selectmen or mayor may at any time designate an area at which spoilage from the dredging may be placed and may require the relocation of shellfish before such maintenance dredging takes place.

If the conservation commission, the board of selectmen or mayor cites specific objections to the notice of intention, such conservation commission, board of selectmen or mayor may order a hearing as provided in this section and all other pertinent provisions of this section shall apply.

Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person. Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner, a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth under the provisions of section seven A of chapter two hundred and fourteen.

Rules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section. However, failure by the commissioner to promulgate rules and regulations shall not act to suspend or invalidate the effect of this section. In addition to the other duties provided for in this section, a conservation commission and its agents, officers, and employees; the commissioner, his agents and employees; environmental officers, and any officer with police powers may issue enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of this section may be ordered to restore property to its original condition and take other actions deemed necessary to remedy such violations.

No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense except that any person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter fails to comply with an enforcement order or order of conditions.

Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b), shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation.

Credits

Added by St.1967, c. 802, § 1. Amended by St.1968, c. 444, § 2; St.1971, c. 1020; St.1972, c. 784, § 1; St.1973, c. 163; St.1973, c. 769; St.1974, c. 818, § 1; St.1975, c. 334; St.1975, c. 363, §§ 1 to 3; St.1975, c. 706, §§ 237 to 243; St.1976, c. 53; St.1977, c. 131; St.1977, c. 601, § 1; St.1977, c. 625, § 2; St.1978, c. 95, §§ 1, 2; St.1978, c. 119, § 7; St.1978, c. 248; St.1979, c. 122, §§ 1, 2; St.1979, c. 200; St.1979, c. 598; St.1979, c. 693; St.1983, c. 255; St.1985, c. 231, § 44; St.1986, c. 262, § 1; St.1987, c. 174, § 19; St.1987, c. 465, § 30; St.1988, c. 202, § 26; St.1989, c. 218; St.1989, c. 287, § 54; St.1990, c. 177, §§ 232 to 237; St.1990, c. 388, §§ 1 to 3; St.1991, c. 141, § 2; St.1993, c. 472, § 1; St.1996, c. 258, §§ 17 to 20; St.2012, c. 238, §§ 48 to 50, eff. Aug. 7, 2012.

Notes of Decisions (145)

Footnotes

1 So in enrolled bill.

M.G.L.A. 131 § 40, MA ST 131 § 40

Current through Chapter 113 of the 2020 Second Annual Session of the General Court.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XIX. Agriculture and Conservation (Ch. 128-132b)
Chapter 131. Inland Fisheries and Game and Other Natural Resources (Refs & Annos)

M.G.L.A. 131 § 91

§ 91. Limitation of actions and prosecutions

Currentness

Actions and prosecutions under this chapter shall, unless otherwise expressly provided, be commenced within two years after the time when the cause of action accrued or the offence was committed.

Credits
Added by St.1967, c. 802, § 1.

M.G.L.A. 131 § 91, MA ST 131 § 91
Current through Chapter 113 of the 2020 Second Annual Session of the General Court.

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)
Chapter 249. Audita Querela, Certiorari, Mandamus and Quo Warranto (Refs & Annos)

M.G.L.A. 249 § 4

§ 4. Action in the nature of certiorari; limitation; joinder of party defendant; injunction; judgment

Effective: February 20, 2007
Currentness

A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court or, if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations, in the land court or, if the matter involves fence viewers, in the district court. Such action shall be commenced within sixty days next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require.

Credits

Amended by St.1943, c. 374, § 1; St.1953, c. 586, § 1; St.1963, c. 661, § 1; St.1973, c. 1114, § 289; St.1986, c. 95; St.2002, c. 393, § 20; St.2006, c. 366, eff. Feb. 20, 2007.

Notes of Decisions (376)

M.G.L.A. 249 § 4, MA ST 249 § 4
Current through Chapter 113 of the 2020 Second Annual Session of the General Court.

End of Document

to private ways ordered to be made under this section; provided, that no assessment amounting to less than twenty-five dollars shall be apportioned and no assessment may be apportioned into more than five portions.

A city or town which makes repairs under this section shall not be liable on account of any damage caused by such repairs. The provisions of sections six E, six F, six G, and six H shall not apply in or be accepted by any city or town which accepts this section.

Approved June 13, 1975.

Chap. 333. AN ACT RELATIVE TO THE COMPENSATION OF CERTAIN HEADS OF FIRE DEPARTMENTS AND POLICE DEPARTMENTS.

Be it enacted, etc., as follows:

SECTION 1. Section 57G of chapter 48 of the General Laws is hereby amended by inserting after the word "annual", in line 6, as appearing in chapter 1082 of the acts of 1971, the word: — base.

SECTION 2. The provisions of section one of this act shall not operate to reduce the salary received by a fire chief, chief engineer, chief of police, superintendent of police, city marshall, superintendent of the metropolitan district police or chief of the capitol police on the effective date of this act.

Approved June 13, 1975.

Chap. 334. AN ACT RELATIVE TO THE ENFORCEMENT OF VIOLATIONS OF THE WETLANDS LAW AGAINST SUBSEQUENT OWNERS OF CERTAIN REAL PROPERTY.

Be it enacted, etc., as follows:

The nineteenth paragraph of section 40 of chapter 131 of the General Laws, as appearing in section 1 of chapter 818 of the acts of 1974, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: — Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.

Approved June 13, 1975.

The state secretary shall cause to be placed upon the official ballot to be used in the city of New Bedford at the biennial state election to be held in the year nineteen hundred and seventy-eight the following nonbinding question: "Shall the game of jai alai, including wagering thereon, be legalized and established in the city of New Bedford?".

Approved June 16, 1978

Chap. 246. AN ACT AUTHORIZING THE BARNSTABLE WATER COMPANY TO USE CERTAIN LANDS AS A WATER SUPPLY.

Be it enacted, etc., as follows:

Section 2 of chapter 286 of the acts of 1911 is hereby amended by striking out the second sentence.

Approved June 16, 1978

Chap. 247. AN ACT AMENDING THE DEFINITION OF A PUBLIC RECORD RELATING TO CERTAIN COMMUNICATIONS AS TO BIDS AND PROPOSALS.

Be it enacted, etc., as follows:

Clause Twenty-sixth of section 7 of chapter 4 of the General Laws is hereby amended by striking out subclause (h), as appearing in section 1 of chapter 1050 of the acts of 1973, and inserting in place thereof the following subclause:-

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person.

Approved June 16, 1978

Chap. 248. AN ACT MAKING A CORRECTIVE CHANGE IN THE WETLANDS PROTECTION ACT, SO-CALLED.

Be it enacted, etc., as follows:

Section 40 of chapter 131 of the General Laws is hereby amended by striking out the fourteenth paragraph, as appearing in chapter 818 of the acts of 1974, and inserting in place thereof the following paragraph:-

No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district wherein the land lies.

Approved June 16, 1978

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or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Approved July 11, 1989.

Chapter 217. AN ACT RELATIVE TO NOTICES OF LEASE OF REGISTERED LAND.

Be it enacted, etc., as follows:

Chapter 185 of the General Laws is hereby amended by striking out section 71, as appearing in the 1986 Official Edition, and inserting in place thereof the following section:-

Section 71. Leases, or notices of leases as defined in section four of chapter one hundred and eighty-three, of registered land for more than seven years from the making thereof shall be registered in lieu of recording.

Approved July 11, 1989.

Chapter 218. AN ACT FURTHER REGULATING THE RECORDING OF CERTAIN PLANS RELATIVE TO ORDERS OF A CONSERVATION COMMISSION.

Be it enacted, etc., as follows:

The fourteenth paragraph of section 40 of chapter 131 of the General Laws, as appearing in the 1986 Official Edition, is hereby amended by adding the following sentence:- If the final order, determination or notification requires the recording of a plan which (1) shows the location of the work, (2) is prepared by a registered professional engineer or land surveyor and (3) is in recordable form, no work proposed in the notice of intention shall be undertaken until such plan has been recorded in the registry of deeds or, if the land affected thereby is registered land, in the registry section of the land court for the district wherein such land lies.

Approved July 11, 1989.

Chapter 219. AN ACT FURTHER REGULATING REPORTS OF CHILD ABUSE.

Be it enacted, etc., as follows:

under the provisions of chapter thirty-two of the General Laws for service subsequent to December twenty-third, nineteen hundred and ninety, and upon retirement said employee shall receive a superannuation retirement allowance equal to that which he would have been entitled had he retired on said date.

SECTION 2. The provisions of this act shall take effect upon an affirmative vote of the board of aldermen of the city of Melrose, subject to the provisions of its charter.

Emergency Letter: December 24, 1990 @ 3:12 P.M. Approved December 24, 1990.

Chapter 388. AN ACT RELATIVE TO WETLANDS PROTECTION.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to immediately provide for wetlands protection, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. The twenty-fourth paragraph of section 40 of chapter 131 of the General Laws, as appearing in the 1988 Official Edition, is hereby amended by adding the following two sentences:- In addition to the other duties provided for in this section, a conservation commission and its agents, officers, and employees; the commissioner, his agents and employees; environmental officers, and any officer with police powers may issue enforcement orders directing compliance with this section and may undertake any other enforcement action authorized by law. Any person who violates the provisions of this section may be ordered to restore property to its original condition and take other actions deemed necessary to remedy such violations.

SECTION 2. Said section 40 of said chapter 131, as so appearing, is hereby further amended by inserting after the twenty-fourth paragraph the following paragraph:-

No person shall remove, fill, dredge or alter any area subject to protection under this section without the required authorization, or cause, suffer or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with an enforcement order issued pursuant to this section. Each day such violation continues shall constitute a separate offense except that any person who fails to remove unauthorized fill or otherwise fails to restore illegally altered land to its original condition after giving written notification of said violation to the conservation commission and the department shall not be subject to additional penalties unless said person thereafter

fails to comply with an enforcement order or order of conditions.

SECTION 3. The last paragraph of said section 40 of said chapter 131, as so appearing, is hereby amended by striking out the last two sentences.

Approved December 26, 1990.

Chapter 389. **AN ACT AUTHORIZING THE STATE-BOSTON RETIREMENT SYSTEM TO PAY AN ANNUAL PENSION TO STANLEY G. PUGSLEY, SR.**

Be it enacted, etc., as follows:

SECTION 1. For the purpose of promoting the public good, notwithstanding any general or special law to the contrary, an annual pension shall be paid by the State-Boston retirement system in monthly installments to Stanley G. Pugsley, Sr., who is totally and permanently incapacitated as a result of injuries sustained by him in the course of and while in the performance of his duty as a patrolman in the police department of the city of Boston on September twenty-fifth, nineteen hundred and sixty-eight. Said pension shall at all times be equal to the annual rate of regular compensation which would have been payable to him by said city had he continued in service in the grade held by him at the time of his retirement. Upon Stanley G. Pugsley, Sr.'s death, his wife Evelyn should she survive him, shall be paid in monthly installments an annual benefit equal to three-quarters of the amount of the annual benefit that would have been payable to Stanley G. Pugsley, Sr. had he continued to live.

SECTION 2. On the effective date of this act, all amounts standing to the credit of Stanley G. Pugsley, Sr. in the Annuity Savings Fund of the State-Boston retirement system shall be paid to him.

SECTION 3. Notwithstanding the eligibility provisions of section one hundred B of chapter forty-one of the General Laws to the contrary, on the effective date of this act, said section one hundred B shall apply to Stanley G. Pugsley, Sr. relative to his indemnification by the city of Boston for any reasonable hospital, medical and related expenses incurred by him on or after the effective date of this act as a result of the above mentioned disability.

SECTION 4. The pension awarded under this act shall be construed for purposes of determining income tax liability, as if it were awarded under section seven of chapter thirty-two of the General Laws.

SECTION 5. This act shall take effect upon its passage.

Approved December 26, 1990.

HOUSE . . . . . No. 655

By Mr. Zeiser of Wellesley, petition of the Massachusetts Conveyancers Association and Bruce H. Zeiser for legislation to regulate the enforcement of violations of the wetlands law against subsequent owners. Natural Resources and Agriculture.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT TO REGULATE THE ENFORCEMENT OF VIOLATIONS OF THE WETLANDS LAW AGAINST SUBSEQUENT OWNERS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section forty of chapter one hundred and thirty-one of the General Laws, as appearing in section one of chapter seven hundred and eighty four of the Acts of Nineteen Hundred and Seventy Two, is hereby amended by deleting the first sentence of the Twelfth paragraph and substituting the following: — Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within two years following the recording of the deed or the date of the death by which such real estate was acquired by the first such person to acquire it.

79 Mass.App.Ct. 1129
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

William CARNEY

v.

TOWN OF FRAMINGHAM.

No. 10–P–1676.

July 11, 2011.

By the Court (RAPOZA, C.J., GRASSO & BERRY, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** William Carney appeals from a judgment dismissing his petition for certiorari pursuant to G.L. c. 249, § 4and granting summary judgment to the Town of Framingham on its counterclaim. On appeal, Carney alleges that the Superior Court judge erred in dismissing his action as untimely and that the enforcement orders were unenforceable in any event because he was not properly served in his capacity as trustee. We affirm.

1. *Background.* Carney is a resident of property located at 32 Parker Road in Framingham and a trustee of the realty trust that is record owner of the property.[1] In 2008, Carney's neighbor complained to the Framingham Conservation Commission that Carney had been illegally cutting down trees in a wetland area. A notice of violation issued. After hearing on April 2, 2008, the Commission found that Carney had violated certain provisions of the Wetlands Protection Act and the local wetlands bylaw and voted to issue an enforcement order that, *inter alia,* required Carney to submit a restoration plan by April 15, 2008, to remove all brush piles and branches by May 1, 2008, and to complete the restoration plan by May 30, 2008. The enforcement order required the restoration plan to include the planting of at least twenty-eight saplings and noted that the area would be monitored for four growing seasons. R.A. 17.

On April 3, 2008, the Commission followed up its vote with a written enforcement order.[2] R.A. 18–21. Carney filed a restoration plan on May 16, 2008, two days beyond the extended date for doing so. R.A. 63. On June 4, 2008, the Commission reviewed Carney's plan at a hearing and voted to amend its April 2, 2008, enforcement order. The amended order (1) extended the previous deadline for removing brush and debris from May 1 to June 30, 2008, (2) extended the deadline for completion of the restoration plan from May 30 to September 30, 2008, (3) reduced the monitoring period at the site from four growing seasons to two growing seasons, (4) reduced the number of saplings to be planted from twenty-eight saplings two inches or greater in diameter with a minimum height of six feet to a number and size proposed by Carney in his restoration plan (nineteen saplings of approximately three inches in diameter with no height minimum), and (5) conditionally approved Carney's restoration plan.[3] R.A. 68–69. On June 6, 2008, the Commission followed up its vote with a written amended enforcement order. R.A.71–74.

On August 5, 2008, Carney filed a complaint in the nature of certiorari pursuant to G.L. c. 249, § 4 in the Superior Court. The Town moved to dismiss Carney's complaint as untimely and filed a counterclaim seeking an order requiring Carney's compliance with the enforcement order. On summary judgment, a judge of the Superior Court dismissed Carney's complaint as untimely and entered judgment in favor of the Town on its counterclaim.

2. *Discussion.*a. *Timeliness of the certiorari action.* General Laws c. 249, § 4 provides that a petition for certiorari "shall be commenced within sixty days next after the proceeding complained of." "The term 'proceeding complained of' refers to 'the last administrative action' taken by an agency." *Committee for Pub. Counsel Servs. v. Lookner,*47 Mass.App.Ct. 833, 835 (1999) (internal citation omitted). The last administrative action occurs when the administrative agency makes a final decision on the issue at hand, not when it later memorializes that determination in written form. See *Pidge v. Superintendent, Mass. Correctional Inst., Cedar Junction,* 32 Mass.App.Ct. 14, 18 (1992); *Balcam v.. Town of Hingham,* 41 Mass.App.Ct. 260, 263 (1996); *Committee for Pub. Counsel Servs. v. Lookner, supra* at 836. Whether the last agency action is measured from the April 2, 2008, hearing at which the original enforcement order was issued or from the June 4, 2008, hearing at which the amended order was issued, the judge did not err in concluding that Carney's complaint for certiorari, filed on August 5, 2008, was filed more than sixty days from the "last proceeding complained of."[4] See *Pidge v. Superintendent, Mass. Correctional Inst.,*

Cedar Junction, supra (failure to file within sixty days a serious misstep requiring dismissal). Because he failed to file a complaint for certiorari timely, there is also no merit to Carney's contention that his due process right to an appeal was denied.

**2 b. *Propriety of service.* The judge did not err in concluding that there was no error in serving the notice of a violation on Carney individually rather than as trustee. The governing statute speaks to "any person" who violates its provisions and does not exclude the possibility that the person in violation might not be the property owner. See G.L. c. 131, § 40, para. 30. As Carney is the one charged with violating the statute, he was properly served in his individual capacity, rather than as the trustee of the trust that owns the property.

Judgments affirmed.

All Citations

79 Mass.App.Ct. 1129, 950 N.E.2d 84 (Table), 2011 WL 2672525

Footnotes

1 Parker Realty Trust.

2 The written order specified that the twenty-eight saplings to be planted "shall have a diameter of 2 inches or greater and be at least 6 feet tall." R.A. 20.

3 The Commission also imposed a fine of $10,200 under the local by-law based on Carney's failure to remove dumped brush, leaves, and cut branches by May 1, 2008, with the understanding that it may waive the fine upon Carney's successful compliance with the revised deadline in its amended enforcement order. R.A. 69, 76.

4 Because Carney's complaint is untimely however measured, we need not address the extent, if any, to which the amended enforcement order amounted to such a substantial revision of the original enforcement order as to commence running of the certiorari period anew. Carney cannot resuscitate his already-lapsed challenge to the original enforcement order without a substantial change in the terms of that order. See *Malone v. Civil Serv. Commn.*, 38 Mass.App.Ct. 147, 151 (1995) (motion for reconsideration of administrative decision does not toll statute of limitations for filing of certiorari petition when motion is denied and no change is made to original decision).

74 Mass.App.Ct. 1122
Unpublished Disposition

Appeals Court of Massachusetts.

Judith COMLEY, trustee,[1] & others[2]

v.

TOWN OF ROWLEY & others.[3]

No. 08-P-1527.

July 2, 2009.

By the Court (KANTROWITZ, McHUGH & MEADE, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In January, 2001, June, 2001, and December, 2003, the town of Rowley conservation commission (commission) issued enforcement orders against Stephen B. Comley, II (Comley), limiting the extent to which Comley could conduct certain activities on property owned and possessed by Comley and the other plaintiffs. The plaintiffs failed to appeal the enforcement orders within sixty days as required under G.L. c. 249, § 4. Subsequently, they commenced this action against the defendants alleging breach of contract, promissory estoppel, fraud and misrepresentation, gross negligence, negligence, and nuisance. Concluding that the "gist" of the plaintiffs' action was an untimely administrative appeal of the 2001 and 2003 enforcement orders, a Superior Court judge granted the commission's motion to dismiss. We affirm.

The plaintiffs contend that the judge erred in concluding that their claims were time-barred under G.L. c. 249, § 4, as the claims did not take the form of an administrative appeal from the 2001 and 2003 enforcement orders. The plaintiffs may not escape the consequences of the sixty-day statute of limitations under G.L. c. 249, § 4, merely by labeling an administrative appeal as a contract or tort claim, however. Instead, to determine the appropriate limitations period, we look to "the gist of the action, regardless of its form." *Hendrickson v. Sears,* 365 Mass. 83, 86, 310 N.E.2d 131 (1974). See *Nantucket v. Beinecke,* 379 Mass. 345, 348-349, 398 N.E.2d 458 (1979); *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.,* 396 Mass. 818, 823, 489 N.E.2d 172 (1986); *Barber v. Fox,* 36 Mass.App.Ct. 525, 529, 632 N.E.2d 1246 (1994).

Here, the gist of the action is a challenge to the 2001 and 2003 enforcement orders. Counts I (breach of contract) and II (promissory estoppel) rely on the plaintiffs' allegation that the commission lacked the authority to issue the 2003 enforcement order, both under applicable law and under the agreements entered on July 6, 2001, and December 2, 2003, authorizing certain activities on the property. Count III (fraud and misrepresentation) rests on the allegation that the defendants misrepresented their authority under the Wetlands Protection Act in issuing the enforcement orders and restricting the use of the property. Counts IV (gross negligence) and V (negligence) depend on the allegation that the defendants either failed to determine or misinterpreted the applicable law and regulations in issuing the 2001 and 2003 orders and regulating the plaintiffs' activities on the property. Finally, Count VI (nuisance) turns on the plaintiffs' allegation that, by issuing the 2001 and 2003 enforcement orders and regulating the plaintiffs' activities on the property without authority to do so, the defendants interfered with the plaintiffs' use of the land. However framed, every one of the plaintiffs' claims amounts to a challenge to the commission's authority to regulate the plaintiffs' activities and issue enforcement orders, actions which the plaintiffs failed to appeal within the sixty-day period provided for in G.L. c. 249, § 4. As the plaintiffs filed this action nearly three years after the issuance of the 2003 enforcement order, their claims were properly dismissed as time-barred.

***2** Furthermore, even if, as the plaintiffs argue, the rationale of *Hendrickson v. Sears, supra,* does not apply to the

instant case, the plaintiffs' claims are nonetheless subject to dismissal. Having failed to challenge the validity of the 2001 and 2003 enforcement orders within the sixty-day period provided for in G.L. c. 249, § 4, the plaintiffs are now precluded from doing so. See *Stowe v. Bologna,* 415 Mass. 20, 22, 610 N.E.2d 961 (1993); *Giuffrida v. Zoning Bd. of Appeals of Falmouth,* 68 Mass.App.Ct. 396, 401, 862 N.E.2d 417 (2007). Because the outcome of the plaintiffs' claims turns on the validity of the unappealed enforcement orders, they have failed to state a claim upon which relief can be granted. As such, the Commission's motion to dismiss was properly granted.

Judgment affirmed.

All Citations

74 Mass.App.Ct. 1122, 909 N.E.2d 60 (Table), 2009 WL 1883876

Footnotes

1 Of Scott Pine Realty Trust.

2 Stephen B. Comley, trustee of Kittery Avenue Realty Trust; Grandview Enterprises, Inc.; Grandview Farm; Sea View Retreat, Inc.; Stephen B. Comley; Stephen B. Comley, Second; and Nathan Comley.

3 Town of Rowley board of health; town of Rowley conservation commission; Shanna Hallas-Burt, individually and as agent/administrator for the town of Rowley conservation commission; Curt Bryant; Judy Kehs; James Alexander; Lane Bourn; Sally Taylor; Curt Turner; John Ashworth; Doug Watson; and Richard Malynn.

End of Document

93 Mass.App.Ct. 1108
Unpublished Disposition

Appeals Court of Massachusetts.

Daniel CRAIG

v.

CONSERVATION COMMISSION OF MATTAPOISETT & others.[1]

17–P–269

Entered: May 1, 2018

By the Court (Vuono, Agnes & McDonough, JJ.[2])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** Daniel Craig appeals from a judgment issued by a judge of the Superior Court allowing the defendants' motions for judgment on the pleadings and upholding an enforcement order issued on September 14, 2015, by the conservation commission of Mattapoisett (commission). Substantially for the reasons stated by the judge, we affirm.

Background. Craig's property is in the area of Eel Pond and contains salt marsh and a buffer zone to salt marsh as defined in the Wetlands Protection Act (act), G. L. c. 131, § 40, and 310 Code Mass. Regs. § 10.00 et seq. (2014). The subdivision in which Craig's property lies was developed subject to an order of conditions issued by the commission on June 12, 2000, which, among other things, restricted lawn size to a total of 10,000 square feet per lot and established a seventy-five foot "no disturbance" zone for certain lots, including Craig's lot, "in perpetuity." Craig's home was constructed subject to an additional order of conditions issued on August 28, 2000, and amended in December of 2004, which contained the same restrictions in perpetuity. Craig's home was constructed in compliance with the orders of condition. A certificate of compliance issued with respect to the June 12, 2000, order of conditions on May 23, 2006. A certificate of compliance with respect to the order of conditions as amended in December, 2004, issued on August 17, 2006.

In 2012, Craig and his wife (the Craigs) requested a determination of applicability for work on the property including construction of a pool, concrete apron, pool perimeter fence, and outdoor cooking area within land subject to coastal storm flooding. The commission issued a negative determination of applicability, and the work was allowed to proceed without an order of conditions from the commission.

In 2014, however, the commission learned that Craig had planted lawn and other landscaping that violated the act as well as the orders of condition issued in 2000. The commission notified Craig and met with him and/or his representative. Craig submitted an after-the-fact notice of intent which proposed substantial restoration but retained a portion of the lawn within the buffer zone. After negotiations regarding appropriate restoration failed, Craig withdrew his after-the-fact notice of intent without prejudice on July 27, 2015. On September 14, 2015, the commission issued an enforcement order, finding that Craig had cleared land of native vegetation and placed loam and sod within (a) a wetland resource area, (b) the 100–foot buffer to a resource area, and (c) land subject to coastal storm flowage, without filing a notice of intent or receiving a negative determination of applicability from the commission, in violation of the act and 310 Code Mass. Regs. § 10.00 (2014). The commission ordered Craig to return the property to the conditions approved on August 17, 2006, when the commission issued a certificate of compliance. The commission provided nearly three pages of instructions and special orders describing the required remediation.

***2** Craig appealed by filing an action in the nature of certiorari, see G. L. c. 249, § 4, in the Superior Court, and he also sought a declaratory judgment that the conditions contained in the 2000 and 2004 orders of conditions expired after certificates of compliance were recorded. The parties

submitted cross motions for judgment on the pleadings, Mass.R.Civ.P. 12(c), 365 Mass. 754 (1974), and a judge allowed the commission's and the interveners' motions.

Discussion. An "enforcement order is not the product of an adjudicatory proceeding involving the presentation of evidence. Rather, the order constitutes discretionary action by the commission pursuant to its undisputed authority to enforce the act within the town." Garrity v. Conservation Commn. of Hingham, 462 Mass. 779, 792 (2012). "Accordingly, our task is not to determine whether the record contains substantial evidence to support the commission's action but, rather, to decide whether the commission exercised its discretion arbitrarily and capriciously." Ibid. The plaintiff bears the burden of proof that the commission acted arbitrarily and capriciously. Ibid. "A decision is not arbitrary and capricious unless there is no ground which 'reasonable men might deem proper' to support it." T.D.J. Dev. Corp.v. Conservation Commn. of N. Andover, 36 Mass. App. Ct. 124, 128 (1994), quoting from Cotterv. Chelsea, 329 Mass. 314, 318 (1952). We review the administrative record without giving the view of the Superior Court judge any special weight. Fieldstone Meadows Dev. Corp.v. Conservation Commn. of N. Andover, 62 Mass. App. Ct. 265, 267 (2004).

Other than minor activities,[3] any activity in the buffer zone which, in the judgment of the issuing authority, will alter an area subject to protection under the act, is subject to regulation and requires the filing of a notice of intent. 310 Code Mass. Regs. § 10.02(b) (2014). On appeal, Craig does not deny that he has altered wetlands, the buffer zone, and land subject to coastal storm flowage by installing a lawn and other landscaping without filing a notice of intent. The act authorizes a conservation commission to issue enforcement orders directing compliance with the act and specifically allows a commission to order "[a]ny person who violates the provisions of this section [§ 40] ... to restore property to its original condition." G. L. c. 131, § 40. The commission, therefore, was well within its authority in ordering Craig to restore the property to its original condition.

On appeal, Craig first argues that the commission's order is vague, ambiguous, and inconsistent because it requires him to restore the property to conditions existing on August 17, 2006, when the commission issued a certificate of compliance, but then it partially relies on a 2015 site plan prepared for the Craigs that, he contends, contains a different wetlands delineation than existed on August 17, 2006. Craig argues that the enforcement order does not incorporate a plan, and he cannot possibly comply with such a vague order. His argument is unavailing. The enforcement order provides that "[t]he area seaward of the 100 foot buffer zone as delineated by the purple line on the attached memorandum provided by the Buzzards Bay National Estuary Program dated September 14, 2015 ... must be remediated according to" specific, detailed criteria which contain references to specific plans as needed. It is clear that the commission has determined that remediation according to the detailed enforcement order incorporating the Buzzards Bay National Estuary Program memorandum and designated portions of a 2015 site plan submitted in support of Craig's after-the-fact notice of intent, is sufficient to satisfy the commission that the property will be adequately returned to conditions existing on August 17, 2006. We discern no ambiguity or vagueness in the enforcement order.

*3 Next, Craig claims the commission's enforcement order is a "pretext" to "improperly revive" extinguished conditions contained in the 2000 and 2004 orders of conditions. The short answer to this argument is that if Craig did not want to give the commission an opportunity to order the property returned to its original condition, he should have filed a notice of intent and obtained an order of conditions before he installed over 20,000 square feet of lawn in areas subject to protection. That the commission's authority under the act to order the property returned to its original condition when a property owner disturbs protected lands without filing a notice of intent, and its authority under what Craig insists are extinguished conditions, overlap does not mean there was a nefarious scheme to enforce allegedly expired conditions. Regardless of what may have been discussed at meetings where Craig and the commission negotiated to come to an agreement on the scope of remediation, the commission did not in its enforcement order rely on the conditions contained in the 2000 and 2004 orders of condition. The commission was not required to forego its authority under the act. The commission's order to return the property to its original condition was authorized by the act.[4]

Finally, Craig sought a declaratory judgment that the conditions contained in the 2000 and 2004 orders of condition are nonexistent. Citing 310 Code Mass. Regs. § 10.05(9)(e) (2014), Craig contends that once certificate of compliance issued, the orders of condition expired and were no longer applicable to the property even though the orders of conditions state that they apply to the property in perpetuity.[5] The judge concluded that because the commission issued

the enforcement order pursuant to the act and not pursuant to the conditions contained in the 2000 and 2004 orders of condition, there was no live controversy before him. On appeal, Craig simply argues the merits of his declaratory judgment count but does not refute the judge's conclusion that there was no justiciable controversy before him. Craig thereby waived the argument.

We have considered whether we should exercise our discretion to comment on the status of the "perpetual" restrictions contained in the 2000 and 2004 orders of conditions where they were not restated in the certificates of compliance. See Silva v. Attleboro, 454 Mass. 165, 167 n.4 (2009). They strike us as different from the affirmative "maintenance" and "monitoring" conditions specifically required to be noted on a certificate of compliance. We note, however, that the wetlands legislative and regulatory schemes require conservation commissions to conduct the initial review on issues bearing on wetlands regulation "for the familiar purpose of bringing local knowledge to bear on local conditions and reducing the administrative burden on the department [of environmental protection]." Garrity, 462 Mass. at 786, quoting from Hamilton v. Conservation Commn. of Orleans, 12 Mass. App. Ct. 359, 368 (1981). How a local commission has interpreted the regulation would have bearing on the issue. The deference we owe to a commission's interpretation of a regulation within its charge prevents us from interfering unless it is shown to be "arbitrary or capricious," or "supported by no ground which reasonable men might deem proper to support it," or "is devoid of any conceivable ground upon which [the action] may be upheld," or is "impossible by any reasonable construction [to] be interpreted in harmony with the legislative mandate." Conservation Commn. of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 739 n.3 (2000)(quotations omitted). We conclude that if the issue of the enforceability of the restrictions contained in the 2000 and 2004 orders of condition arises again in the future, the commission should undertake the initial review of the issue. We therefore decline to comment.

*4 Judgment affirmed.

All Citations

93 Mass.App.Ct. 1108, 103 N.E.3d 1237 (Table), 2018 WL 2012095

Footnotes

1 Buzzards Bay Coalition, Inc., and twelve additional citizens, interveners.

2 The panelists are listed in order of seniority.

3 Craig makes a one-line argument in his brief that construction of a lawn is "de minimis" action and is a permissible use under the "minor activity" provisions in 310 Code Mass. Regs. § 10.02(2)(b) (2014). It is Craig's burden to prove that his conduct did not violate the act, and his argument falls far short of carrying that burden. See Garrity, 462 Mass. at 795 (in absence of evidence that work qualifies as "minor activity," homeowner failed to prove commission acted arbitrarily and capriciously in determining order of conditions was required for work).

4 Craig does not argue that in any particular respect the commission exceed its authority under the act, but instead contends that the commission was impermissibly reviving extinguished conditions.

5 Section 10.05(9)(a) of 310 Code Mass. Regs. provides that certificates of compliance stating that the work has been satisfactorily completed shall be issued upon request. Section 10.05(9)(e) provides that "[i]f the final order contains conditions which continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which, if any, of such conditions shall continue."

End of Document

84 Mass.App.Ct. 1124
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

TH CLAIMS, LLC

v.

TOWN OF HINGHAM & others.[1]

No. 12–P–73.

December 10, 2013.

By the Court (MEADE, SIKORA, & HANLON, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In Superior Court, TH Claims, LLC (TH) filed a sprawling complaint—spanning some forty-three pages and thirty-nine separate counts for relief—against the Town of Hingham (town), its boards, departments, officers and employees, the latter in both their official and personal capacities. The plaintiff alleged that the defendants had unlawfully interfered with certain real estate development projects, causing harm to the owners, all of whom are the plaintiff's predecessors-in-interest. Contesting its viability, the defendants moved to dismiss the complaint, Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974), for failure to state a claim. A judge allowed the motions and ordered the entry of a judgment of dismissal in favor of all the defendants. From the judgment of dismissal, the plaintiff appeals. We affirm.

Background. Although the facts in this case are complex, the plaintiff admits in its brief that it is not necessary to discuss these complex facts in great detail. We concur and adopt this approach. Thomas J. Hastings, who is experienced in real estate development, formed TH Claims, LLC for the purpose of consolidating his claims against the town. The plaintiff, in effect, asserts the rights and interests originally held by other entities (TH entities) owned and managed by Hastings. The TH entities have been engaged in development projects[2]—described in the complaint—which are, allegedly, the subject of enforceable agreements with the town. From March, 2000, to March, 2010, the plaintiff alleges that the town pursued a course of obstruction affecting these projects and willfully breached contracts with the TH entities. The TH entities had allegedly performed their side of the contractual bargains but the town, in turn, had refused to honor its obligations. The underlying complaint, in the plaintiff's view, seeks to remedy these losses and inequities.

Standard of review. Review of the allowance of a rule 12(b)(6) motion is de novo. *Harhen v. Brown,* 431 Mass. 838, 845 (2000). *Housman v. LBM Financial, LLC,* 80 Mass.App.Ct. 213, 216 (2011). For purposes of appraising the legal viability of a complaint, we accept as true all factual allegations of the complaint and any reasonable inferences as may be drawn therefrom in the plaintiff's favor. *Golchin v. Liberty Mut. Ins. Co.,* 460 Mass. 222, 223 (2011). We must determine whether the plaintiff's complaint sets out facts which plausibly suggest an entitlement to relief. *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008). Independently of pleading deficiencies, the presence on the face of a complaint of a conclusive affirmative defense will justify dismissal under rule 12(b)(6). See e.g., *Epstein v. Siegel,* 396 Mass. 278, 278–279 (1985) (statute of limitations); *Bagley v. Moxley,* 407 Mass. 633, 637 (1990) (claim preclusion); *Daniels v. Contributory Retirement Appeal Board,* 418 Mass. 721, 722 (1994) (failure to exhaust administrative remedies); *Babco Indus. Inc. v. New England Merchants Natl. Bank,* 6 Mass.App.Ct. 929, 929 (1978) (statute of limitations). We may affirm a challenged judgment of dismissal upon any ground apparent on the record before us. *National Lumber Co. v. Canton Inst. For Sav.,* 56 Mass.App.Ct. 186, 187 n. 3 (2002). Upon review, we believe that solid independent grounds support the dismissal of all the counts of the complaint and that amendments would be futile. Those grounds are as follows.

***2** *Analysis.*1. *Statute of limitations.* The motion judge correctly dismissed more than half of the thirty-nine counts on statute of limitation grounds. The gist or essential nature of a plaintiff's claim denotes the applicable limitations period. *Hendrickson v. Sears,* 365 Mass. 83, 85 (1974) (such statutes should apply equally to similar facts regardless of the form of proceeding). For the counts involving the Back River project, the judge ruled that the gist of these claims amounted to an untimely challenge to the local conservation commission's enforcement order of July 18, 2007, which prevented the project owner from the exercise of its rights to prune and remove trees on the site. A land owner aggrieved by a local conservation commission's enforcement order, issued in furtherance of a wetlands law, has a right of immediate appeal to the Superior Court. The action is in the nature of a writ of

certiorari, G.L. c. 249, § 4, and shall be commenced within sixty days next after the proceeding complained of. *Ibid.*

The statutory phrase proceeding complained of refers to the last administrative action taken by the agency or board in question. *Committee for Pub. Counsel Servs. v. Lookner,* 47 Mass.App.Ct. 833, 835 (1999). That is the final decision on the issue at hand, which, simply put, was the conservation commission's enforcement order. Cf. *Friedman v. Conservation Commn. of Edgartown,* 62 Mass.App.Ct. 539, 542 (2004). Neither the plaintiff (nor the owner) took an appeal. Compare with *Conservation Commn. of Falmouth v. Pacheco,* 49 Mass.App.Ct. 737, 741 (2000). The plaintiff bypassed the opportunity to bring a timely appeal. Section 4 forecloses the attempt to do so belatedly in the guise of a contract or tort-based dispute.[3] Such claims are time-barred. The same holds true for the Harbor Dream project claims; these claims also are essentially a challenge to an order of the conservation commission.

Similarly, to the extent that the complaint raises claims based upon the failure of the Bare Cove Park committee to sign onto a certain negotiated agreement—the vista pruning and mowing agreement—the remedy is in the nature of a writ of mandamus. *Ouelette v. Building Inspector of Quincy,*362 Mass. 272, 277 & n .8 (1972). Under any view, such claims are untimely. Likewise, counts XVII and XIX, which involve a challenge to the refusal of the building department to issue a certificate of occupancy, are barred by the plaintiff's failure to bring a timely appeal under the Zoning Act, G.L. c. 40A. We itemize all the time-barred counts in the margin.[4]2. *Claim preclusion.* The plaintiff's claims relating to the Hingham Square and Boat Yard projects are foreclosed by reason of claim preclusion grounds. Those claims derive from prior actions already concluded by a stipulation of dismissal with prejudice or an arbitration award between the parties. These attempted claims descend from the same transaction (or a series of connected transactions) with respect to the projects.[5] *TLT Constr. Corp. v. A. Anthony Tappe & Assocs., Inc.,*48 Mass.App.Ct. 1, 8–9 (1999).[6]

*3 3. *Governmental regulatory action.* A core allegation is that the town and officials engaged in actionable tortious behavior or promissory relations with the TH entities. The allegation cannot stand. If the town defendants decide to take discretionary action to enforce zoning bylaws, wetlands protection laws, or licensing standards, they are acting in a regulatory (not a proprietary) capacity.[7] As a matter of law, estoppel does not operate against a governmental unit or officials performing police power duties.[8]See *Harrington v. Fall River Hous. Authy.,* 27 Mass.App.Ct. 301, 308–311 (1989); *Dagastino v. Commissioner of Correction,*52 Mass.App.Ct. 456, 459 (2001). 4. *Claims against defendant Judith Sneath.* Substantially for the reasons stated in his memorandum of law and by the defendant Sneath in her brief, the judge properly dismissed counts II and XV.

5. *Alleged tortious conduct by individuals.* Several counts, counts XVI–XXV, accuse town officers or employees with tortious interference with contractual relations or with advantageous relationships between the town and the TH entities. The plaintiff also charges an official with engaging in fraudulent conduct, counts XXVI–XXVII. Material pleading deficiencies mar these counts and justify their dismissal. TH failed to allege facts plausibly showing actual malice, an essential element of an interference claim sounding in tort. See *Blackstone v. Cashman,* 448 Mass. 255, 259–266 (2007); *Psy–Ed Corp. v. Klein,* 459 Mass. 697, 715–717 (2011). Nor did the plaintiff allege with particularity the circumstances constituting fraud. Mass.R.Civ.P. 9(b), 365 Mass. 751 (1974). *Masingill v. EMC Corp.,* 449 Mass. 532, 545 (2007).

6. *Tax abatement claim.* Count III seeks relief for the alleged failure of the town to honor its promise to abate or apportion the real estate taxes assessed on parcel A (formed by a division of the 730 Main Street parcel). The plaintiff failed to exhaust its administrative remedies under G.L. c. 59; count III was properly dismissed. For the same reason, counts XXXVI and XXXVIII are foreclosed.

7. *Civil rights claims.* Plaintiff's equal protection (or discrimination) claims, under art. I of the Massachusetts Declaration of Rights embodied in counts XXXI–XXXV, fail to satisfy the pleading standards of *Iannacchino,*451 Mass. at 636, and therefore warranted dismissal. See, among other authorities, *Willowbrook v. Olech,* 528 U.S. 562, 564 (2000); *Mancuso v. Massachusetts Interscholastic Athletic Assn., Inc.,* 453 Mass. 116, 128–129 (2009).

Conclusion.[9] For these reasons, we affirm the final judgment of dismissal entered by the Superior Court.[10]

So ordered.

All Citations

84 Mass.App.Ct. 1124, 998 N.E.2d 799 (Table), 2013 WL 6431233

Footnotes

1 The town administrator, the board of selectmen, the planning board, the building department, and the harbormasters, and all members of those departments and boards as members of the departments and boards and individually.

2 The projects are known as Back River, Hingham Square, Hingham Boat Yard, Hingham North, Harbor Dream, and 730 Main Street.

3 One cannot escape the consequences of the short limitations period for certiorari actions by labeling a claim in contract. *Fall River Hous. Authy. v. H.V. Collins Co.,* 414 Mass. 10, 15 n .6 (1992), quoting *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engrs., Inc.,* 396 Mass. 818, 823 (1986).

4 The time-barred claims include counts: I, VI, VII, VIII, IX, XI, XIII, XIV, XVII, XVIII, XIX, XX, XXI, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXXII, XXXVII and XXXIX.

5 Counts IV, V, X, XII, XVI, XVII, XIX, XXII, XXIX, XXX and XXXI.

6 A stipulation of dismissal with prejudice constitutes a final judgment for claim preclusion. *Boyd v. Jamaica Plain Co-op. Bank,* 7 Mass.App.Ct. 153, 157 n. 8 (1979).

7 For an illuminating discussion of this area of the law, see Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L.Rev. 209, 222–225 (1963).

8 Estoppel is the plaintiff's theory in support of counts IV, V, VI, VII, IX and X.

9 To the extent that we have not specifically addressed any other argument of the plaintiff (or underlying count in its complaint) we have considered and found no merit in it.

10 The town has requested an award of appellate attorney's fees and costs. In accordance with Mass.R.A.P. 26(c), as amended by 378 Mass.925 (1979), it shall be entitled to an award of costs upon submission of verified, itemized bills to the motion judge or to an alternate judge of the Superior Court.

The appellant's arguments were unmeritorious and burdensome, but not frivolous within the meaning of Mass.R.A.P. 25, 376 Mass. 949 (1979). Therefore we do not allow the request for appellate attorney's fees.

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58 Mass.App.Ct. 1106
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Paul A. GARGANO, v. BARNSTABLE CONSERVATION COMMISSION (and a companion case[1]).

No. 01–P–1739, 02–P–1120.
June 19, 2003.

Synopsis
Landowner brought administrative and certiorari complaints to challenge conservation commission's order requiring landowner to perform certain actions to remediate his unauthorized alteration of oceanfront land. The Superior Court dismissed both complaints. Landowner appealed. The Appeals Court held that: (1) landowner could not file administrative appeal due to failure to exhaust administrative remedies, and (2) review and reconsideration of original order at landowner's request did not restart 60-day period for filing for certiorari review.

Affirmed.

West Headnotes (2)

[1] **Environmental Law** ⚿ Exhaustion of Administrative Remedies

Landowner who wished to protest conservation commission's order requiring him to perform certain actions to remediate his unauthorized alteration of oceanfront could not bring administrative appeal to Superior Court without first exhausting administrative remedies by filing appeal with Department of Environmental Protection. M.G.L.A. c. 30A, § 14.

2 Cases that cite this headnote

[2] **Environmental Law** ⚿ Accrual, Computation, and Tolling

Conservation commission's further review and reconsideration of order requiring landowner to perform certain actions to remediate his unauthorized alteration of oceanfront did not reset 60-day time period for filing petition for certiorari review; commission declined to set aside original order and held that order was "still in effect," there was no new notice of intent or filing number in connection with review, and landowner who requested review did not notify abutters as required under city wetlands ordinance. M.G.L.A. c. 249, § 4.

3 Cases that cite this headnote

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 These two appeals, which we treat as related and address jointly in this memorandum and order, involve the dismissal of two separate complaints filed by the plaintiff, Paul A. Gargano. In both complaints, Gargano sought to challenge a decision imposing orders of conditions issued by the Barnstable Conservation Commission (commission). The commission had also issued an enforcement order. The commission's order of conditions required Gargano to perform certain actions to remediate his unauthorized alteration of a portion of the oceanfront land he owned in West Hyannisport.

The first complaint (appeal 01–P–1739) was filed by Gargano under G.L. c. 30A, § 14 (the administrative complaint). The second complaint (appeal 02–P–1120) was in the nature of certiorari under G.L. c. 249, § 4 (the certiorari complaint). The administrative complaint was dismissed for failure to exhaust administrative remedies. The certiorari complaint was dismissed as untimely. The decisions of the two different Superior Court judges the two complaints are set forth in comprehensive and well articulated memoranda and orders. Basically for the reasons set forth in the Superior Court memoranda and orders, we affirm the dismissal of both complaints.

1. *Background.* On December 4, 1998, the commission issued an enforcement order against Gargano after he altered a portion of his property located within a wetlands resource area. The violation involved Gargano's clearing understory (a layer of lower foliage) on a coastal bank and the edge of a marsh, and installing lighting and a sprinkler system. Following the issuance of this initial enforcement order, the commission and Gargano—by his authorized representative, a professional landscaper—engaged in negotiations to remediate the site. Gargano's proposal was not accepted by the commission; no agreed-upon resolution was achieved, and the commission proceedings continued.

On January 12, 2001, the commission issued its order of conditions. A copy of the order of conditions was served upon Gargano's authorized representative (the landscaper). Gargano claims that he did not receive a copy of the order of conditions until February 19, 2001, thereby suggesting his representative did not give it to him. Even if that were so, service upon the authorized representative was legally sufficient. But notwithstanding that, on May 1, 2001, the commission convened a meeting and gave Gargano the opportunity to state his position. Thereafter, on May 16, 2001, the commission declined to change its original January 12, 2001, order of conditions, stating that "the approved plan of record ... and order of conditions is still in effect." However, to give Gargano more time to comply, the commission issued a second enforcement order that extended the deadline for performance of the remediation work.

[1] 2. *The administrative complaint.* On May 24, 2001, without previously filing an appeal from the January 12, 2001, order of conditions with the Department of Environmental Protection (DEP), Gargano filed the administrative complaint under G.L. c. 30A, § 14, in the Superior Court. The complaint purported to be an appeal from the commission's orders and actions. A Superior Court judge dismissed the complaint because "Gargano failed to appeal the Commission's Order of Conditions to the DEP and therefore failed to exhaust his administrative remedies." The judge's determination is correct. General Laws c. 30A, § 14, grants the Superior Court subject matter jurisdiction over a final decision *of a State agency following an adjudicatory proceeding.*[2] There was no administrative adjudicatory proceeding before a State agency, since Gargano never appealed to the DEP. Having failed to pursue review an adjudication before the DEP, judicial review under G.L. c. 30A, § 14, was unavailable—as the judge rightfully determined. See *Conservation Commn. of Falmouth v. Pacheco,* 49 Mass.App.Ct. 737, 741–742, 733 N.E.2d 127 (2000) and cases cited.

***2** **[2]** 3. *The certiorari complaint.* On July 11, 2001, Gargano filed a second complaint in the nature of certiorari under G.L. c. 249, § 4, in the Superior Court. A different Superior Court judge dismissed the certiorari complaint, holding that Gargano had failed to file a timely appeal from the initial December 4, 1998, enforcement order, as well as from the order of conditions served upon Gargano's authorized representative on January 12, 2001.

Under G.L. c. 249, § 4, as amended by St.1986, c. 95, a civil action in the nature of certiorari "shall be commenced within sixty days next after the proceeding complained of." That deadline was not met in this case. Accordingly, the judge was correct in dismissing the complaint. As the judge held,

> "[Gargano] did not request any judicial review of either the Commission's December 4, 1998 Enforcement Order or the January 12, 2001 Order of Conditions. Since the December 4, 1998 Enforcement Order was the original order from which the current action flows, [Gargano's] failure to file a timely appeal precludes review by this court."

> "[I]t is undisputed that [Gargano] received a copy of the Order of Conditions on February 19, 2001, at which point he was still within the sixty day time frame for filing an appeal under the statute. He simply did not file an appeal within the time prescribed. Even if the time runs from Gargano's stated notice of February 19, 2001 he nonetheless was well beyond the 60 day period when he filed this case on July 11, 2001."

Gargano does not seem to deny the judge's conclusion. Instead, he seems to argue (the argument is not clearly formulated) that the commission's further review, which was in response to his request for reconsideration, reset the time frame for filing the certiorari action with a new beginning date of May 16, 2001. The commission disagrees that the May 1, 2001, review and the May 16, 2001, affirmation of the order of conditions was a new proceeding or yielded any new order. We agree. The May reconsideration did not supercede the original January 12, 2001, order of conditions. To the contrary, the commission declined to set aside its original January 12, 2001, order and held that the order of conditions is "still in effect."

The commission's position that the May review was not a new proceeding is supported by the facts that no new notice of intent was filed, no new DEP filing number was assigned, and, significantly, Gargano did not notify abutters as required under the Barnstable wetlands protection ordinance. Rather, as the judge found, the May proceeding was simply a grant of further review and reconsideration in light of Gargano's request.[3] The Superior Court judge relied, correctly, on the principle that "[i]t is highly unlikely that the Legislature intended that a party seeking extraordinary review by way of certiorari 'should be able to restart the [statutory] period at will by simply petitioning for reconsideration or further hearing." ' *Malone v. Civil Serv. Commn.*, 38 Mass.App.Ct. 147, 151, 646 N.E.2d 150 (1995), quoting from *Curley v. Lynn*, 408 Mass. 39, 41, 556 N.E.2d 96 (1990).

***3** Having failed to timely appeal either the December 4, 1998, enforcement action or the January 12, 2001, order of conditions, Gargano was precluded from challenging these decisions under the guise of what he erroneously characterizes as an entirely new proceeding and order. Timely institution of an appeal to meet the statutory deadline for certiorari review is a condition sine qua non to such review. Cf. *Bingham v. City Council of Fitchburg*, 52 Mass.App.Ct. 566, 568, 754 N.E.2d 1078 (2001) (appeal under G.L. c. 40A, § 17). That condition was not met in this case.

Judgments affirmed.

All Citations

58 Mass.App.Ct. 1106, 790 N.E.2d 242 (Table), 2003 WL 21415302

Footnotes

1 The companion case is between the same parties.

2 A local board, such as the commission, is not a State agency as defined in G.L. c. 30A, § 1(2), for purposes of § 14, and judicial review of a board decision cannot be obtained thereunder. See, e.g., *Roslindale Motor Sales, Inc. v. Police Commr. of Boston*, 405 Mass. 79, 85 n. 8, 538 N.E.2d 312 (1989); *Chase v. Planning Bd. of Watertown*, 4 Mass.App.Ct. 430, 432–433, 350 N.E.2d 470 (1976).

3 The commission's position is that the reconsideration proceeding was simply a courtesy to Gargano arising out of his claim of late receipt of the January 12, 2001, order—even though his representative was timely served.

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24 Mass.L.Rptr. 291
Superior Court of Massachusetts,
Middlesex County.

Paul A. GARGANO
v.
BARNSTABLE CONSERVATION COMMISSION.

No. 033141.
|
July 14, 2008.

FINDINGS, RULINGS AND ORDER FOR JUDGMENT

THAYER FREMONT-SMITH, Justice.

***1** This case is an appeal from an enforcement order of the Barnstable Conservation Commission wherein the Commission reaffirmed previous enforcement orders. Plaintiff Paul A. Gargano's alleged prohibited activities have been the source of constant litigation since 1998.[1] The Commission has counterclaimed, seeking enforcement of its prior orders, including its orders for removal of a miniature golf course consisting of putting greens installed without Gargano's filing of a prior notice of intent or approval by the Commission. The Commission also contends that Gargano has improperly mowed a grassed area behind his garage, placed boardwalks, installed underground lights and sprinklers and cut a thicket of vegetation, all in an area which is behind or adjacent to his garage and is within the fifty-foot buffer zone from a resource area provided by the Wetlands Protection Act or the hundred-foot buffer zone provided by Barnstable's municipal by-laws for the protection of wetlands.

For enforcement of its orders, it is the Commission's burden of proof to substantiate a violation. *Bourne v. Austin,* 19 Mass.App.Ct. 738, 741-42 (1985).

Gargano's earlier appeals, although dismissed on procedural grounds, were never adjudicated on the merits and the Commission's previously-appealed enforcement orders have now been effectively resurrected by its most recent "enforcement order" of July 28, 2003,[2] which is the subject of Gargano's present appeal.[3]

Based on the Court's own view of the property and on all of the credible evidence at trial. the Court makes the following findings and rulings.

Gargano's Engagement in Activities Within the Protected Wetlands Area

The Commission's exasperation with Gargano has understandably resulted from his repeated activities in the protected wetlands area without his filing a notice of intent and without the Commission's prior approval. The Commission is justifiably galled by this, as the Act makes it illegal to alter a protected area without its prior permission.

G.L.c. 131, § 40 provides in relevant part that:

> No person shall remove, fill, dredge or alter[4] any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune ... marsh, ... bordering on the ocean or on any estuary creek, river, stream, pond, or lake ... other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure ... without filing written notice of his intent ... and without receiving and complying with an order of conditions

As noted in the "Commentary" following 310 CMR 10.02,

> The Department has determined that activities within Areas Subject to Protection under G.L.c. 131, § 40 are so likely to result in the removing, filing, dredging or altering of those areas that preconstruction review is always justified, and that the issuing authority shall therefore *always* require the filing of a Notice of Intent for said activities. (Emphasis supplied.)

***2** Thus, Gargano's continuation of such activities in the protected area, except to the extent the Court determines that they are grandfathered or exempted by the Act, will be henceforth enjoined unless a "notice of intent" has first been filed by Gargano and the activity has been approved by the Commission.

Gargano's Installation of Irrigation and Lighting

Gargano does not dispute that he installed, without a previous "notice of intent" or defendants' approval, in-ground lighting

and irrigation in the buffer areas, but contends that these have already been removed. To the extent that they were installed by Gargano[5] and have not been removed, Gargano will be ordered to remove them and all attendant tubing or pipes within thirty days.

Gargano's Cutting of Grass and Pruning of Plants

Gargano has admitted that he has cut the grass without prior approval. He has, however, at various times in the past, sought the Commission's approval to cut his grass as he deemed necessary, but it has agreed only that he may cut the grass, at most, two times a year. The Commission never responded to his most recent "notice of intent" and his request for a hearing in that regard in 2003, and no hearing date was ever scheduled by the Commission.

More importantly, aerial photographs which pre-date his ownership of the property indicate that grass-cutting in the disputed area had been done for decades by previous owners so that a "grand-fathered use" in this regard exists. See 310 CMR 10.58(6).

As the Court observed during the "view," moreover, plaintiff's neighbor has not been prohibited from cutting his grass on an adjacent grassy area within the buffer zone. When a Commission witness was asked at trial why the Commission has not similarly objected to the neighbor's grass cutting, the Commission's witness testified that, if no complaint is made about such grass cutting, it is the Commission's practice to give a landowner "the benefit of the doubt" as to whether such grass cutting was a pre-existing use.[6]

Most importantly, when asked what, if any, adverse impact Gargano's grass cutting could have on the wetlands or on the protected buffer areas, the Commission witness admitted that he could discern none. Gargano's own expert, moreover, who inspected the property in 2003, similarly testified to the lack of any adverse impact.

A Certificate of Compliance was provided to Gargano by the Commission in November 1996, and, in 2001 and 2007, the Department of Environment Protection ("DEP") inspected the premises and concluded, by letters dated August 23, 2001 and May 11, 2007, that "pruning of landscaped areas" and "mowing of lawns" were not violative of the statute. See 310 CMR 10.58(6)and 310 CMR 10.02 (pruning and mowing are "minor activities" not subject to the Act). As a comparison of the relevant sections of the Town by-law with the Wetlands Act indicates that the bylaw is not more stringent than the Wetlands Act as regards "excepted" or "grandfathered" activities, the DEP's superseding orders prevail over the ordinance as well as over the Commission's orders. *Degrace v. Conservation Comm'n of Harwich,*31 Mass.App.Ct. 132, 133-36 (1991); *Hobbs Brook Farm Property, supra.*[7] Accordingly, the Court will dismiss the Commission's counterclaim in this regard.

Gargano's Alleged Cutting of Thickets and Underbrush

***3** In spite of the Commission's admission of spying on Gargano through binoculars from across the inlet, its witnesses at trial admitted that they had never been able to catch Gargano actually cutting a thicket or underbrush within the buffer areas. A Commission employee did testify, however, that she had gained access to Gargano's property (without any authorized permission)[8] and had witnessed newly-cut stubble of a thicket. The photographs offered in support of this contention, however, do not establish any area of newly-cut stubble and the historical aerial photographs do not show any significant previous uncut stubble area or undergrowth in the area. The Commission also complains that Gargano pruned vegetation or brush within the protected area. While there was weak evidence of this at the trial, and a court must defer to any agency's findings of fact if they are supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion after taking into consideration opposing evidence in the record," *Hotchkiss v. State Racing Comm'n.,* 45 Mass.App.Ct. 684, 696 (2000), pruning of vegetation, like grass cutting, is not a prohibited activity and is thus exempt from the Act. 310 CMR, *supra.* Accordingly, the Court will dismiss the Commission's counterclaim in that regard.

Gargano's Installation of a Miniature Golf Course

Gargano admits that he installed miniature golf-putting holes without seeking the Commission's approval, and the evidence indicates that at least two of the putting greens are located within the protected buffer area. However, when asked at the trial how the putting greens adversely affected the protected wetland area, the Commission's witness admitted that he could discern no adverse impact, and Gargano's expert similarly could discern no adverse impact.

Nevertheless, the installation was subject to G.L.c. 131, § 40and 310 CMR 10.02 which requires the filing of a notice of intent. Accordingly, the Court orders Gargano to file a notice of intent within thirty days so that the Commission can decide whether, based on substantial evidence, the artificial grass in the golf course is or is not permeable to water so as to adversely affect the water drainage. If the Commission, after hearing determines on substantial evidence that the golf course does adversely affect the protected area, plaintiff is ordered to remove the golf course insofar as it is within the protected area within an additional thirty days.

Gargano's Installation of Boardwalks

The boardwalks were similarly not shown at the trial to adversely impact the wetlands or the buffer zones in any significant way, but a notice of intent should have been filed. Accordingly, the same procedure shall be followed by the parties as outlined above for the golf course.

ORDER

1. Gargano is *ORDERED* to remove, within thirty days, any remaining lighting and irrigation fixtures and piping or tubing which he installed in the ground and to file a notice of intent as to the miniature golf course and boardwalks located in the buffer area. If, after hearing, the Commission determines, based on substantial evidence, that the golf course and/or boardwalks adversely affect the protected area, Gargano shall remove them within an additional thirty days. Except for continuation of the activities which the Court has determined to be non-violative of the Act and of the town by-law, Gargano shall cease and desist from engaging in any other activities or alterations in the buffer zones without first filing a notice of intent and obtaining the Commission's prior approval. The Commission's counterclaim seeking enforcement of its enforcement orders in all other respects is *DISMISSED*.

***4** 2. The Commission shall cease and desist from issuing, in the future, or recording in the Registry of Deeds, any further notices of violation or enforcement orders to Gargano with respect to his continuance of the same activities which the Court has determined not to be violative of the Wetlands Act or of the town by-law. Within thirty days after Gargano has removed his irrigation and electrical alterations and his removal (if ordered by the Commission pursuant to para 1, *supra*) of so much of the golf course and boardwalk as the Commission finds are adversely affecting the protected area, it shall record in the Registry of Deeds a certificate indicating that all previously-recorded notices of violation and enforcement orders are now discharged.

Any violation of this Order by either side may be made the subject of a petition for contempt of Court.

All Citations

Not Reported in N.E.2d, 24 Mass.L.Rptr. 291, 2008 WL 2895849

Footnotes

1 Plaintiff's appeals of prior enforcement orders were twice dismissed by the Superior Court on procedural grounds (plaintiff having failed to file his appeals within the statutory deadlines or having failed to exhaust his administrative remedies) which dismissals were then affirmed by the Appeals Court on those procedural grounds.

2 This July 28, 2003 "enforcement order" reiterated the Commission's earlier "enforcement orders" and alleged that violations had occurred by Gargano's "construction of a miniature golf course and trenching for additional sprinkler pipes," and by "fill brought in to level 2 or 3 holes." It ordered removal of the miniature golf course and all lighting, water spigots, electrical boxes and it prohibited (after completion of the required replanting) "cutting of vegetation or mowing."

3 Had the Commission simply sought the Court's enforcement of its earlier orders, this case would have been over. But by issuing an entirely new enforcement order, the issues were revived so as to permit Gargano's present appeal. Cf. *Gargano v. Barnstable Conservation Comm'n,* 58 Mass.App.Ct. 1106 (2003), where the court held that the Commission's provision of an additional "review" as a result of Gargano's request for reconsideration was not sufficient to "reset the clock" for an appeal of the 1998 order of enforcement or the 2001 order of conditions, and *Conservation Comm'n of Falmouth v. Pacheco,* 49 Mass.App.Ct. 737 (2000), where the court held that the defendant had waived his right to contest the Commission's jurisdiction by failing to assert any objection to jurisdiction either in his response to the Commission's prior orders or in his response to its most recent orders.

Here, Gargano has timely challenged the Commission's most recent enforcement order in his present action. As discussed below, moreover, the Commission's earlier enforcement orders, at least with respect to grass-cutting and pruning of landscaped areas, were nullified by subsequent "superceding orders" of the D.E.P. which leave the most recent enforcement order as the only extant order in that regard.

4 (310 C.M.R. 10.04) and Section 14 of the By-Laws both define the term "alter," as, *inter alia,* referring to changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics. The definitions of "private water supply" in the Regulations and the By-Laws also are very similar. *See* 310 C.M.R. 10.05; Barnstable Municipal By-Laws § 14.

5 Previous irrigation and electrical fixtures which are now nonfunctional were installed by a prior owner.

6 Although the witness thus indicated that there had been complaints against Gargano in this regard, he would not identify who had complained.

7 Such a superseding order by the DEP preempts a contrary Commission order unless the violation "rests on a wetlands by-law" which is more stringent than the Wetlands Act. *Hobbs Brook Farm Co. v. Conservation Comm'n of Lincoln,* 65 Mass.App.Ct. 142 (2005), at 149. Here, the Commission did not "rest its decision on the town by-law," which is, in any event, not more stringent than the Wetlands Act in regard to what are "grand-fathered" or "excepted" activities involved here.

8 She showed her credentials to a gardener, who, in Gargano's absence, acquiesced in her inspection of the premises. While an earlier "order of conditions" had specified that the Commission might inspect Gargano's premises at any time, this "order of conditions" was nullified by the DEP's superseding orders and would appear, in any event, to be unconstitutional if it were interpreted to permit unauthorized entry onto Gargano's property without a warrant or even advance notice.

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