

legal

# Hobbs v. Lincoln Case Paves New Development for Wetland Appeals

BY MARK A. KABLACK

A recent superior court case involving the Town of Lincoln Conservation Commission provides valuable insight, and the prospect of



significant relief, to property owners and developers who are faced with concurrent appeals under both the Wetlands Protection Act, M.G.L. c.131, Section 40 (WPA) and a local wetland bylaw. The case is *Hobbs Brook Farm Property Company Limited Partnership v. Conservation Commission of Lincoln*, Middlesex Superior Ct. Case No. 00-03755 (Jan. 2004). The superior court's decision in the Hobbs case, while not binding, recognizes that in certain instances a decision under the WPA can preempt a pending appeal and decision under a bylaw.

The bifurcated appeals process, whereby separate appeals to the Massachusetts Department of Environmental Protection (DEP) and to superior court regarding a single project, with the same wetland resources, and substantially similar state and local laws (WPA and bylaw jurisdiction — recognizing that there is also potential for a third regulatory review under the federal Clean Water Act)

has been cause for repeated consternation and hardship for those owners and developers who are attempting to develop a project near wetlands. The concept of preemption within this arena of wetland regulation may bring “relatively expedient” closure to the appeals process. I use the term “relatively expedient” because the timeline, while potentially cut in half, is still quite extensive.

In the Hobbs case, a Notice of Intent was filed by the owner of property off of Route 2 in Lincoln, Mass., proposing the development of two house lots, with two driveways, a well, and improvement to an existing wooden bridge crossing at Hobbs Brook, within 100 feet of identified wetland areas and a perennial stream (invoking jurisdiction of the Rivers Protection Act as well as wetland protection jurisdiction). Over the course of several hearings beginning in April and ending in June 2000, the conservation commission found that the work proposed under the Notice of Intent would have significant adverse impacts to identified resource areas, and that the bridge crossing at Hobbs Brook was not considered in light of other economic alternatives. The conservation commission issued separate denials under both the WPA and the Lincoln bylaw. In order to protect its rights of development of the two lots, the property owner brought an appeal to DEP under the WPA, and

brought a second appeal to the Middlesex Superior Court for certiorari review under the Lincoln bylaw.

In October 2000, the superior court stayed the Lincoln bylaw appeal while the DEP proceeding was pending. The stay recognized that DEP had jurisdiction in the case over issues regarding the WPA. Such a stay in a bifurcated appeal process is typical when there are common issues to both appeals, and one appellate review may serve to guide the second.

Subsequent to the stay of the superior court case, the DEP conducted an on-site review of the property and a review of the record that was presented to the conservation commission in support of the Notice of Intent. In May 2001, (note that this is almost a full year after the owner brought the appeal), DEP issued a Superseding Order of Conditions allowing the work proposed, finding that the project constituted a “limited project” under 310 CMR Section 10.53(3)(e) and finding also that the project would not have adverse impacts on identified resource areas as long as certain mitigation measures were followed.

Following the issuance of the Superseding Order of Conditions, the conservation commission made a timely request for administrative review before an administrative law judge at DEP. The conservation commission then requested

that the administrative appeal be stayed while the bylaw appeal before the superior court could be decided. DEP refused this stay, ruling in accordance with a DEP Policy Statement (DW 89-1) that the bylaw was no more stringent than the WPA. Subsequently, in August 2003 (note that this is a full two years after the granting of a Superseding Order of Conditions), in an interesting turn of events, the conservation commission withdrew its administrative appeal at DEP to focus the town's energy on the appeal to superior court. The conservation commission claimed that it could not afford to pursue both the DEP administrative appeal and the appeal to superior court.

At the superior court, Judge Gershenhorn entertained cross-motions for summary judgment based in large part on the prior administrative record before DEP. The property owner argued that the Lincoln bylaw was no more stringent than the WPA, and DEP's Superseding Order of Conditions should be binding on the conservation commission's actions under the bylaw. The judge entertained this argument and stated that the preemptive effect of a DEP decision must be based upon the particulars of the WPA and a bylaw as applied to a given project. In other words, a bylaw may be drastically different and more stringent in protecting a variety of different resource areas, but if the set of bylaws as applied to a given project are "functionally equivalent" to the WPA's application, the preemption argument may stand.

In opposition to the property owner's pleadings, the conservation commission argued that the Lincoln bylaw was more stringent than the WPA in two important respects: First, it argued that the Lincoln bylaw established a presumption that any work within 50 feet of a wetland resource area would cause significant adverse effect on wetland values. No such presumption is found in the WPA. Sec-

ond, the conservation commission argued that the Lincoln bylaw has no provision for "limited project" status. According to the conservation commission, the "limited project" status of the proposed bridge crossing at Hobbs Brook allowed DEP to consider the project and approve of it without requiring that the project meet riverfront performance standards.

Judge Gergenshorn recognized that such distinctions may in some cases thwart a preemption argument. In the Hobbs case, however, the judge held that the WPA and the Lincoln bylaw were substantially the same, or "functionally equivalent," when applied to the work proposed. Despite the differences noted by the conservation commission, ultimately, the property owner was required to show, under both sets of laws, that there would be no significant adverse impact to wetlands. The judge found that DEP had in fact considered this standard, even under "limited project" review, citing to the DEP record of investigation of impacts to water quality in Hobbs Brook, recognition that the driveway would be constructed over a denuded cart path, and requiring a "Riverfront Area Revegetation Plan." By decision, dated January 2004, Judge Gergenshorn ruled that the DEP Superseding Order of Conditions did in fact preempt the Lincoln bylaw, and the conservation commission's denial. The judge ruled in favor of the property owner on Summary Judgment thereby eliminating the need for further discovery and a full trial.

The case was a tremendous victory for the property owner, but it came at some cost. You will note over the time frame of the case that the property owner waited almost four years to bring resolution to this issue (the Notice of Intent was filed in April, 2000 and the final Superior Court ruling was not issued until January, 2004). While the Summary Judgment decision avoided what would

have most definitely been further delay and cost in concluding the Superior Court appeal, the four-year ordeal would be long enough for most property owners and developers to rethink and/or reject a project completely.

While offering some promise to other owners and developers facing bifurcated wetland appeals, the decision also has limitations on any type of broad application. The preemption standard used in Hobbs is case specific. The WPA does not trump a bylaw in all instances. Each case will need to be tested based on the work proposed, the impact on wetland resources, and the scope of the bylaw in regulating those resources as compared to the WPA. There are also instances whereby a bylaw, when carefully drafted, will automatically eliminate claims for preemption. Judge Gergenshorn referenced two such instances in her decision. While not applicable to the Hobbs case, a no-build buffer, regulating all activities within 100 feet of a wetland resource area, would clearly be more stringent and not preempted by the WPA. Also, to the extent a bylaw seeks to protect interests other than wetland interests, such as erosion control, sedimentation control and recreation, those interests would also not be preempted by the WPA.

Property owners and developers should be careful to scrutinize the text of a bylaw to see if any of the preemptive issues raised by the Hobbs case may apply. In those instances where a preemption argument can be brought forward, the Hobbs case may offer some expediency to the appeals process and some relief to quagmire of bifurcated appeals. ♦

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