

legal

Court Strikes No-Build Buffer Zone

BY MARK A. KABLACK

Calendar year 2004 proved to be an interesting year with respect to wetland cases. Several of my prior articles over the last year have



already focused on wetland matters such as the pre-emption of local wetland by laws (Hobbs Brook Farm Property Co. Limited Partnership v.

Conservation Commission of Lincoln, Middlesex Superior Court Case 00-0375) and public hearing attendance requirements for conservation commission members (Jeffries v. Conservation Commission of Milton, Norfolk Superior Court Case 02-2160). The October 2004 decision by the Massachusetts Court of Appeals in Fieldstone Meadows Development Corp. vs. Conservation Commission of Andover adds another interesting twist to the analysis of wetland regulation and restriction in Massachusetts. The Fieldstone case, which was spearheaded on behalf of the plaintiff-developer by attorney Howard Speicher, a supporter of a number of homebuilder initiatives, has stricken a 25-foot no-build buffer zone policy in the town of Andover.

The Fieldstone case involved a proposal for the creation of a five-lot residential subdivision on land in Andover within 100 feet of a wetland

resource area. A particular issue in the case dealt with the developer's proposal to install a detention basin within 25 feet of a bordering vegetated wetland. Based upon my own prior experience, the location of the detention basin in proximity to the wetland was probably due in large part to existing grades and drainage patterns on the property. The developer's notice of intent to the Andover Conservation Commission under the Wetland Protection Act (WPA) and the Andover Wetland Bylaw resulted in a denial order of conditions. The Conservation Commission's denial focused on the fact that the proposed detention basin would violate a policy of preserving a 25-foot no-build buffer zone around any wetland resource area. On appeal to Superior Court, summary judgment was awarded to the town of Andover, and the developer further appealed its case to the Massachusetts Court of Appeals. The developer on appeal argued that the no-build buffer zone policy was not part of any provision of the wetland bylaw or town of Andover regulation and, therefore, the denial order of conditions was arbitrary and capricious. The Appeals Court agreed, and this case is currently binding on all subsequent decisions of the Massachusetts Superior Court on this issue.

The Fieldstone decision in essence breaks down into two components, both of which are important in predicting the precedent value of the case for future development projects. The first

component is procedural in nature and has to do with the requirement that a conservation commission must act in accordance with the WPA or an established town bylaw or regulation. A commission may not rely on policy alone. In Fieldstone, the denial order of conditions stated that "effective Jan. 1, 1999, the conservation commission will expect proposals to locate no alteration or disturbance of land closer than 25 feet to any wetland boundary. Special justification will be required for any proposal that seeks a lesser distance." The Andover Conservation Commission based its policy on a provision of the wetland bylaw that stated that the commission should promulgate regulations that require the "maintenance of an undisturbed vegetated buffer of not more than 25 feet from the edge." The Appeals Court found no record of evidence, however, that the commission ever promulgated a regulation supporting the no-build policy. A policy alone is problematic in that it may or may not be published, it may or may not be available to a developer-applicant and there are no standards by which a developer may argue that he/she is in compliance. Most importantly, there is no guarantee that a conservation commission will in fact enforce the policy with any consistency. Such a policy, without more (meaning a specific bylaw or regulation) is patently unfair, as it is subject to unequal enforcement and interpretation. Decisions such as

the denial order of conditions in Fieldstone, which are based upon policy alone, are by definition arbitrary and capricious, and illegal.

The second component of the Fieldstone case involves a more substantive critique of no-build buffer zones. Clearly, a local conservation commission can plan around the procedural flaw in the Fieldstone case by making sure a no-build buffer zone requirement was properly documented in either a town bylaw or regulation. The Appeals Court, however, found other aspects of the denial order of conditions to be faulty. The court record showed that the Andover Conservation Commission had no basis for the assumption that a 25-foot no-build buffer offers greater protection to a wetland resource area. The assumption originated with several unidentified Andover commissioners attending a seminar sponsored by the Massachusetts Association of Conservation Commissions, entitled "Use of Vegetated Buffers as a Water Quality Technique,"

but the assumption was without scientific support. The Court of Appeals held that a non-substantiated assumption is legally insufficient to form the basis of a denial order of conditions.

Furthermore, the Appeals Court recognized that a conservation commission may well find that a particular proposal, such as the installation of a detention basin, will have unacceptable effects on a wetland resource area. A conservation commission may also find that there is no circumstance whereby a certain proposal can be conditioned or otherwise mitigated to avoid known adverse effects. Such determinations, however, must be particularized and supported by substantial evidence. According to Fieldstone, it is improper for a conservation commission to make a generalized finding that all alteration within a certain distance of a resource area is bad and therefore prohibitive. Conservation commissions who continue such a practice are making decisions that are not supported by substantial evidence.

The Fieldstone case offers relief to homebuilders in two respects. First, a town must clearly document and incorporate as part of a published bylaw or regulation any policy on no-build buffer zones. This clearly levels the playing field within the regulatory arena of land development. As many developers understand, half the battle is to know what the rules are before a project is commenced and significant funds are expended. Second, a town may not rely on generalized assumptions and non-substantiated claims as a basis of a denial. The denial must be particularized and scientifically based. This second aspect of Fieldstone may have more dramatic benefit to homebuilders as the concept is not limited to the concept of no-build buffer zones. ♦

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