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legal

Leveling The Wetlands Playing Field

By Mark A. Kablack

A recent Massachusetts Appeals Court ruling involving wetlands bylaws in the Town of Norfolk, MA, provides some much needed balance to the rigors of local land use regulation. The case, entitled: *Pollard v. Conservation Commission of Norfolk*, 73 Mass. App.Ct. 340 (December, 2008), was recently decided by the Massachusetts Appeals Court, and affirms a lower court ruling in favor of the property owner. Pollard will be of interest to all property owners, developers and builders who have land within wetland resource areas governed by the Wetlands Protection Act or local wetlands bylaws.

In the *Pollard* case, property owners filed a Notice of Intent (NOI) under the Wetlands Protection Act and the Norfolk Wetlands Bylaw for construction of a three bedroom single family home, well and septic system on a 70,878 sq. ft. lot located within a residential subdivision. The lot in question contained wetland resource areas, including a man-made drainage channel and a stormwater detention basin, which features were designed to manage stormwater runoff from a nearby roadway and neighboring properties. As a result of the initial filing, the NOI was approved under the Wetlands Protection Act, subject to conditions, and denied under the Wetlands Bylaw. The property owners requested a Superseding Order of Conditions from DEP, with respect to the state-based ruling, and DEP issued a Superseding Order, finding that the project as proposed and conditioned adequately protected the interests of the Act. The property owners then withdrew the initial NOI filing and submitted a second NOI, attempting to meet the concerns of the Conservation Commission under the Wetlands Bylaw.

Under the second NOI filing, the property owners diligently attempted to overcome burdens imposed by local regulations that created a fifty foot no-disturb area around all locally defined wetlands, and equally burdensome regulations to prevent loss of resource areas within one hundred feet of wetlands. In order to overcome stated presumptions within the Wetlands Bylaw, the owners hired an environmental consulting and engineering firm to review the proposed project impacts. The consultant performed a detailed analysis which addressed issues of erosion control, protection of groundwater, protection of private and public water supplies, storm damage prevention, protection of wildlife habitat and pollution prevention. Specific attention was given on the impacts to the 50-foot no-disturb area, and more general analysis was afforded to the one hundred foot buffer zone. The consultant opined that reasonable efforts had been made by the owners to minimize work within resource areas, many of the disturbances were deemed temporary, permanent impacts would not disturb the form or function of the channel and basin as stormwater structures, and substantial mitigation had been proposed to ameliorate or compensate for any adverse impacts. No other party offered evidence to the Commission during its hearing process.

The Conservation Commission denied the second NOI filing, despite the work of the consultant, finding that there would be 191 sq. ft. of disturbance within the 50-foot no-disturb area (due to the construction of a drinking water well and waterline) and 9,023 sq. ft. of disturbance within the one hundred foot buffer zone. More importantly, the Commission found that "no credible evidence" had been submitted which would allow the project to overcome the presumption of "unacceptable significant and cumulative effects upon wetland values." *Id.* at 346. As to mitigation offered, the Commission was unimpressed with a proposed conservation restriction, stating that: (i) the restricted area was too small; and (ii) the restricted area was of little value in area already subject to regulatory control under the local bylaws.

The property owners filed a further appeal of the Conservation Commission decision under the second NOI filing. This time they sought review of the Commission's decision under the Wetlands Bylaw in an appeal filed with Norfolk Superior Court. Judge Dortch-Okara reviewed the Commission's denial under the substantial evidence test and found that the record evidence "overwhelmingly" supported the property owners' position. Judge Dortch-Okara found nothing in the record that contradicted the evidence of the owners' consultant, or otherwise supported the Commission's findings and conclusions. As a result, the Commission's decision was overturned and the Commission sought further review by the Appeals Court.

The Appeals Court decision, authored by Judge Perretta, affirmed the lower court ruling under the same standard imposed in the Superior Court, finding that the Commission's decision was not legally tenable or supported by substantial evidence. Judge Perretta recognized that the Commission has the "prerogative to determine the probative value of expert evidence," but such prerogative is "not without its limitations." *Id.* at 349. "[T]here must be a basis in the record for the rejection of uncontradicted expert opinion evidence or for remaining unpersuaded." *Id.* Otherwise, there would be no potential check against "arbitrary rulings by administrative agencies." *Id.* The Commission cannot simply and summarily dismiss expert testimony without some basis for doing so.

In a footnoted discussion, the Appeals Court cautions that the Commission is not required to hire its own independent consultant to produce conflicting expert testimony. A Commission may discount and/or reject expert opinion based upon any number of reasonable review criteria, including, but not limited to, a review of technical or non-technical facts in evidence, or a review

of flawed methodology or assumptions. It must, however, articulate these conclusions in the record decision in order for the decision not to appear arbitrary or capricious.

The *Pollard* ruling is an important check on the balance of power between property owners and regulators. An arbitrary Conservation Commission ruling confounds a regulatory process that is already burdened with redundancy and inefficiency caused by dual regulations under state and local law. When regulations in this dual system become conflicting, or when proper standards of review get ignored, the pattern of abuse can only be reversed by pursuing appellate rulings. Hopefully, the *Pollard* ruling will provide some measure of comfort going forward for those owners, developers and builders attempting to chart a development course for land within wetland resource areas.

Lastly, it is interesting to note that the wetland resource areas identified in the *Pollard* case are man-made stormwater facilities. Recent amendments in the Massachusetts Stormwater Regulations provided a mechanism of grandfathering such facilities, so that stormwater improvements do not become wetland resource areas over time. Massachusetts DEP has recognized that jurisdictional creep can deter and dissuade some stormwater facility designs. The problem, again, is whether municipalities will be equally sensitive to such issues. If not, what is grandfathered (and excluded) under state law can still be jurisdictional under local law. ◆

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