

Issues Presented

- I. Whether the Superior Court erred in placing a burden of persuasion on the Sunderland Zoning Board of Appeals "to show that its wetlands concerns outweigh the regional need for affordable housing" where the applicant Sugarbush and not the board has both the burden of production and persuasion to establish the project will not adversely impact protected wetland resources.

- II. Whether an applicant for a comprehensive permit under M.G.L. ch. 40B §§ 20-23 must fully comply with a local wetlands bylaw that is more stringent than the Wetlands Protection Act, M.G.L. ch. 131 § 40.

Interest of Amicus

The Association to Preserve Cape Cod (APCC) files this brief pursuant to the Court's April 6, 2012 solicitation for memoranda from *amicus curiae*. APCC is a member supported, nonprofit organization of more than 5,600 members founded in 1968 to protect our environment and natural resources, which are essential

for protecting human health and quality of life, and which are at the core of the Cape Cod economy. APCC is Cape Cod's leading advocate for preserving our water resources, wetlands, open space and way of life.

The case at bar challenges APCC's core belief that under the Massachusetts Declaration of Rights all citizens share a fundamental right to clean water. The genuine need for affordable housing does not and cannot trump this fundamental right.

With increasing frequency and cost, APCC devotes much of its energy and resources toward undoing development decisions of the past that directly and adversely impact our wetland resources. Wetland buffer areas are of particular interest on Cape Cod because of eutrophication of ponds and bays, sea level rise, stormwater mismanagement, as well as cumulative impacts from development which are challenging our water and wetland resources on a daily basis. Effective buffers are the least expensive tool to protect water resources. Sea level rise, a foot already and still rising, encroaches resources landward. Development encroaches the same coastal resources seaward as well as surrounding the Cape's inland resources. Our wetland resources are literally

being squeezed out of existence. Buffers are integral to wetland resource function. They filter out pollutants and allow coastal wetlands to migrate as the sea advances. This cannot occur naturally if courts and agencies myopically continue to find that wetland buffers have little or no value and can be easily sacrificed for affordable housing or other legitimate public interests. The consequences of this myopia include destroyed ecosystems, flooding in areas previously not flooded, erosion and degraded water quality.

Wetland restoration is necessary, expensive and complex. Recognizing this dilemma, Massachusetts established an agency solely dedicated to undoing poor land use decisions of the past, the Massachusetts Division of Ecological Restoration.

APCC has a long history of pragmatic, environmental advocacy that recognizes the implications and consequences of the environment taking a back seat to poorly planned land use and development. Our history has taught us that well planned development enhances both the environment and the economy. Environmental stewardship does not inhibit affordable housing, it enhances affordable

housing. Environmental standards should be the same for all citizens and all developers regardless of perceived value.

As such, APCC believes our legal and practical perspective would be of assistance to the Court.

Statement of the Case

APCC relies upon the Statement of the Case and Statement of Facts contained in the brief the Sunderland Zoning Board of Appeals.

Argument

- I. The Applicant and not the town had the burden of production and persuasion concerning potential wetlands impacts.

Clean water is not simply a local interest. It is a fundamental right. "The people shall have the right to clean air and water, . . ." Mass. Constitution Pt. 1 Article 97. "There is a deep connection between the way water is used, treated and discharged on the one hand and the health of natural water systems on the other hand." COMM. OF MASS, MASS. WATER INFRASTRUCTURE: TOWARD FINANCIAL SUSTAINABILITY, 20 (2012). Wetland buffers are critical components of

our natural water systems that protect and maintain clean water.

The Superior Court found that the Sunderland Wetlands Bylaw (hereinafter Bylaw) was more stringent than the Wetlands Protection Act, M.G.L. ch. 131 § 40 (hereinafter WPA). "Accordingly, there is merit to the ZBA's objection that the HAC erred in concluding the Town Wetlands Bylaw is not more restrictive."

A.488. The judge then placed an erroneous burden on the ZBA to show that the "wetlands concerns outweigh the regional need for affordable housing because the Town of Sunderland's Wetlands By-law permits the SCC to allow work within the buffer zone with proper review and approval." A.488. This is not a balancing test, it is a trump test. The Superior Court conclusion is without legal foundation and misconstrues the purpose of allowing work in buffer zones.¹ Moreover there is no such burden on the ZBA and

¹ The logic appears to be that if some work is allowed inside buffers then affordable housing must be allowed. Improving buffers and their function is an important component of wetlands protection. Work must be allowed within buffers or there would be no possibility of improving buffer conditions or functions. Conservation commissions evaluate such buffer impacts with an eye on overall water quality. For instance in Conroy v. Conservation Comm'n of Lexington, 73 Mass. App. Ct. 552, 557 (2009),

a Constitutional right should trump a statutory property right, not the other way.

The reach of ch.40B §§ 20-23 has definite, defined limits. Ch. 40B does not trump or override other state law. Zoning Bd. of Appeals of Groton v. Housing Appeals Comm., 451 Mass. 35, 41 (2008). "It has been 'long recognized that the Legislature's intent in enacting G.L. c. 40B §§ 20-23, is to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing'" Jepson v. Zoning Bd. of

The Commission has great concerns regarding the removal of 78.8 percent of the forested 100-foot buffer zone along the western side of the bank that is presently providing a substantial buffer to the bank bordering on the stream and providing protection to the bank from the impacts of development. Published evidence indicates that a forested buffer serves to intercept surface runoff, waste water, subsurface flow and deeper groundwater flows from upland sources for the purpose of removing or buffering the effects of associated nutrients, sediments, organic matter, pesticides, or other pollutants prior to entry into surface waters and groundwater recharge areas (The Role and Function of Forest Buffers in the Chesapeake Bay Program, EPA, February 1993. See also Wetland Buffer Zones, Massachusetts Association of Conservation Commissions, 1995). The forested area also serves to control runoff and to mitigate flooding and water damage to surrounding lands and wildlife habitat downstream.

Appeals of Ipswich, 450 Mass. 81, 95 (2007), quoting
Standerwick v. Zoning Bd. of Appeals of Andover, 447
Mass. 20, 28-29 (2006). The purpose is to counteract
so-called snob zoning and not derogate wetland
protection or clean water. Protecting water is not
snobbery, it is sound public policy and investment.
Neither the Superior Court nor the Housing Appeals
Committee found that Sunderland's quest for additional
information on wetlands impact was inconsistent with
either the Bylaw or the past practices, i.e. that
Sunderland was arbitrary and capricious in expecting
Sugarbush to meet its burden of production and
persuasion.

Nonetheless there is support, albeit erroneous
support, for the judge's holding. In Zoning Bd. of
Appeals of Holliston v. Housing Appeals Com., 80 Mass.
App. Ct. 406, 420 (2011), the Appeals Court imposed a
similar balancing test between local wetlands
protection and the need for affordable housing. There
again the need for affordable housing trumped clean
water. There is no statutory support for this
erroneous balancing approach or burden shifting
approach.

M.G.L. ch. 40B § 22 provides a waiver and special condition spectrum tied expressly and exclusively to zoning, subdivision control, site plan review and building regulations. The local board of appeals is given power to attach to a comprehensive permit or its conditions and/or requirements "with respect to height, site plan, size or shape, or building materials" consistent with purposes of the law. Id.

The various local boards and commissions included for comprehensive permit review are listed in the definition section. The board with local review of wetlands related issues is specifically excluded. "Conservation commission" is absent from the definition of "local board" in M.G.L. ch. 40B § 20. Both the subject matter and relevant local board are not included within the umbrella of ch. 40B. A comprehensive permit does not have any legal foundation to trump or even balance against wetlands protection. While this Court has established that comprehensive permits are not limited to the specific examples listed above, the "power is circumscribed in substance by those examples, and conditions imposed by the board must fit within." Zoning Bd. of Appeals of Holliston v. Housing Appeals Com., 80 Mass. App. Ct.

406, 420 (2011). Wetlands and wetlands protection do not fit within the umbrella of ch. 40B §§ 20-23. This argument that wetlands and wetlands protection are outside the realm of ch. 40B is easily distinguishable from the holding in Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71 (2003) which focused on historic district regulations. In that case this Court articulated the nexus of historic regulation to building and building materials both of which fall clearly under the umbrella outlined above. Id. at 79.

In Lovequist v. Conservation Comm'n of Dennis, 379 Mass 7, 13 1979, this Court specifically found that local wetlands bylaws do "not prohibit or permit any particular listed uses of land or the construction of buildings or the location of businesses or residences in a comprehensive fashion. On its face it does not deny or invite permission to build any structure. It does not regulate density." Such laws protect wetland resources. It is no accident that the Court chose to use the words "not" and "comprehensive", the same term used for the permit under review in accordance with ch. 40B.

II. Wetland buffers are critical to clean water.

Wetland buffer zones have posed a challenging quandary for courts over the years. Slight differences in local bylaws often determine the ultimate outcome. Some of the challenges have focused on whether buffer zones are to be treated as resource areas. Compare, Fafard v. Conservation Comm'n. of Reading, 41 Mass. App. Ct. 565 (1996) (arbitrary to prohibit activity in buffer zone), T.D.J. Development v. Conservation Comm'n. of North Andover, 36 Mass. App. Ct. 124 (1994) (reasonable to regulate activity in the buffer zone), FIC Homes of Blackstone v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681 (1996) (reasonable to have 100 foot setback for all buildings, i.e. buffer zone treated the same as other resource area). Other cases have focused on the nexus of harm in the buffer to the harm in the identified wetland area. See e.g. Fieldstone Meadows Development Corp. v. Conservation Comm'n of Andover, 62 Mass. App. Ct. 265, 269 (2004) ("The commission's findings demonstrate no consideration of the particularities of the proposed detention basin or of the evidence as to the actual or potential effect of the proposed work on the adjacent

wetlands."). Still other cases focus on the evidentiary burdens. In Conroy, 73 Mass. App. Ct. at 560-62 the Appeals Court rejected the imposition of additional increase of the evidentiary standards and elevated burdens of proof as well as reiterating the discretion afforded local boards in evaluating substantial evidence, in that case reliance upon published scientific papers. "We think an administrative body like the commission charged with a specialized task may take notice of published scientific works as the commission did here." Id. at 562.

The case at bar has elements of all three types of buffer cases cited above. Sugarbush argued that buffers were not resource areas under the local bylaw. A.470. HAC agreed with this position. A.273-274. The Superior Court found that buffers were resource areas requiring a notice of intent (NOI) regardless of the nexus of harm to other resource areas employing the rationale in T.D.J. Development, 36 Mass. App. Ct. at 129.

In imposing the no-cut and no construction limitation [in the buffer zone], the commission asserted that the proposed construction work would have impact upon the adjacent wetland resource areas. In

reaching that conclusion, the commission relied on research suggesting the need for buffer strips to protect water quality and wildlife habitat. Imposition of that condition was within the reasonable range of the commission's authority to regulate activity in the buffer zone.

Buffers are needed to protect water quality, a fundamental right in Massachusetts.

HAC also dismissed the ZBA's argument involving sufficiency of the evidence. Appearing to want to avoid the issue in total, HAC cited dubious procedural grounds. "[A] claim regarding sufficiency of the application must be raised at the beginning of the Committee's hearing and is therefore waived." A.273. The issue raised was not sufficiency of the application, but rather whether the evidence introduced by the applicant was sufficient to overcome a presumption. Whether there is substantial evidence to support a quasi-judicial decision is inherent in any appeal.

The Superior Court seemed to believe that providing "a superseding order of resource delineation, monitoring well test results, drainage calculations, storm water management plans, and project plans" described impacts.

A.489. There is no analysis. There are no apparent impacts on either the buffer function or protected wetlands. Logic dictates that so much activity in such close proximity to a wetland will have some impact including added surface runoff, sediment transfer, erosion, flooding, flood storage capacity, fisheries and wildlife habitat.² These are some of the impacts the Bylaw requires be analyzed. A.15 These are the same impacts the Commonwealth has identified as part of our clean water infrastructure gap.

As a Commonwealth and a nation we are just beginning to appreciate the magnitude of the challenge of increased management of stormwater. The impacts of stormwater include changes in the hydrology and water quality of a watershed, leading to a series of interrelated problems including increases in flooding, habitat modification and loss, nutrient pollution, increased sedimentation, erosion, public health issues, decreases in habitat diversity and aesthetic degradation.

COMM. OF MASS., MASS. WATER INFRASTRUCTURE: TOWARD FINANCIAL SUSTAINABILITY, 26-27 (2012).

It is settled law in Massachusetts that wetlands bylaws can be more stringent than the WPA. Lovequist, 379 Mass. at 14-15. This preemptive authority is

² Sugarbush will create these impacts to a large extent from construction and stormwater. A.184-186

constitutional and not statutory. Section 6 of the Home Rule Amendment is the genesis of local wetlands regulation. Lovequist, 379 Mass. at 15. This makes sense because local conditions and resources vary tremendously statewide. Protecting coastal dunes is a very high priority for a town like Truro and of no consequence whatsoever in Sunderland. Moreover under Section 7 of the Home Rule Amendment, there is no limitation of this authority.

In Sunderland the burden of production and persuasion is squarely on the applicant.

The applicant for a permit shall have the burden of proving by the preponderance of credible evidence that the work proposed in the application will not have any significant or cumulative detrimental effect upon the wetland values protected by this chapter. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit with conditions.

Bylaw §122-17, A.19.

"We see no functional difference between placing the burden of proof on the applicant to show that activities in protected areas will not harm interests protected by the by-law and a presumption of significance for protected areas."

FIC Homes of Blackstone, Inc. v. Conservation

Comm'n of Blackstone, 41 Mass. App. Ct. 681, 685 (1996). Therefore buffers are presumed significant to protection of wetland values. The applicant has the sole burden to overcome any presumption. There is no basis in law to overcome this presumption by balancing the wetland impacts against the need for affordable housing. The applicant must persuade with credible evidence that there is no detrimental impact on the wetland interests of Sunderland. The HAC didn't simply get this wrong, it fabricated an affordable housing fantasy. "But most important, even if the local bylaw were more strict than state law, the Board has not presented substantive evidence to show that local wetland concerns outweigh the regional need for housing." A.274. There is no balancing test, wetlands get the same protection regardless of the need for affordable housing. This isn't a simple, subtle burden shift. It turns the burden of proof on its head, derogates wetland protection, and leads to water pollution. Relaxed environmental standards for affordable housing create

incentives to build upon land otherwise not developable or, that should never be developed.

The BOA didn't have either a burden of production or persuasion. The applicant had the burden to convince the appropriate board that there would be no "significant or cumulative detrimental effect upon wetland values" including the buffer zone. A.19. The Superior Court doubled down on the burden shift and concluded, "None of the Town's experts testified that the Project as designed would adversely impact the wetlands or other protected areas on the property." A.488.

The record appears void of any substantial evidence other than puffing opinions by the Sugarbush consultant Marcus and limited drainage calculations. "While the Testimony of Mr. Marcus makes several conclusions with respect to potential wetlands impacts, the Applicant has never submitted any analysis or allowed for a peer review of potential wetlands impacts." A.185-186. Additionally, there is evidence that the applicant applied the incorrect stormwater standards to the project. A.201-203.

Under HAC regulations an applicant "must establish a prima facie case by proving 'that its proposal complies with federal or state statutes or regulations or with generally recognized standards as to matters of health, safety, the environment, design, open space or other matters of local concern.'" Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm., 80 Mass. App. Ct. 406, 415 (2011) quoting 760 Code Mass. Regs. § 56.07(2)(a)(2) (2008) (emphasis added). There was no proving that the project protects the interests of local wetlands bylaw despite numerous requests by the town to obtain the information. A.88-89, A.185.

Part of the problem is the preliminary aspect of plans for comprehensive permits. The Appeals Court wrestled with this in the Holliston case. Citing the "regulatory scheme", the Appeals Court allowed substantial environmental uncertainty to exist after the permit is issued as long as the DEP eventually approves necessary changes. Id. at 415-16. As noted there is no statutory support for such a regulatory scheme.

Sugarbush must comply with the Bylaw and at a minimum provide credible evidence that persuades a reasonable person that there will not be any detrimental impacts to the wetland buffer function and wetland values.³

It is not snobbery that is the hurdle for Sugarbush, it is wetlands degradation. Sugarbush can pay now and minimize its wetlands impacts, or the taxpayers can pay over and over again for degraded water, added stormwater infrastructure and overall environmental degradation. There should be no debate over who should rightfully pay. Affordable housing should not be incentivized to land that is otherwise not developable. The same environmental standards must apply across the board. Wetlands buffers should be protected. Our Declaration of Rights requires no less.

³ The BOA specifically found, "The Board directed the Applicant to demonstrate that it could meet the performance standards delineated under the local wetlands by-law. However, the applicant repeatedly refused to address this issue in any manner." A.88. See also, A.89 (lack of cooperation by Sugarbush), Neither the HAC nor the Superior Court addressed this finding other than to burden shift.

Conclusion

The foregoing reasons, the Superior Court erred by placing the burden of production and persuasion concerning wetlands impacts on the town instead of the applicant. Because the record is void of evidence that Sugarbush overcame its burden of establishing that the project will not have a significant or cumulative detrimental effect on Sunderland's wetland values, the comprehensive permit must be invalidated.

Respectfully submitted,
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By its attorney

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