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21-Day Deadlines to Convene Hearings and Issue Permits under Wetlands Act are Mandatory and Pre-empt Bylaws

Local wetlands bylaw (or ordinance) jurisdiction over projects in and near resource areas depends on Conservation Commission compliance with the 21-day deadlines for commencing public hearings and issuing decisions on Notices of Intent (NOI).

Those timing provisions in the Act are binding on the Commission, with failure to meet them potentially fatal to any decision the Commission may render. This could apply to Determinations of Applicability as well.

21-Day Deadlines to Convene Hearings and Issue Permits under Wetlands Act are Mandatory and Pre-empt Bylaws

A Commission loses its "Home Rule" local bylaw control (with the result that the applicant does not need the local permit) if it fails to issue its denial, permit or other decision on an NOI by the deadline of 21 days from the close of the public hearing and the applicant appeals this "inaction" to the MassDEP. *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007).

Now, by virtue of *Boston Clear Water Company, LLC v. Town of Lynnfield*, 100 Mass. App. Ct. 657 (2022), the Commission loses its control, and the applicant does not need to obtain the local permit, if the Commission fails to convene the public hearing by the deadline of 21 days from the NOI being filed and the applicant appeals this inaction to MassDEP.

21-Day Deadlines to Convene Hearings and Issue Permits under Wetlands Act are Mandatory and Pre-empt Bylaws

Home Rule authority of cities and towns, while broad and deep in Massachusetts, is subject to state preemption in certain circumstances. One is when the Legislature has made specific provision for a procedure with which a city or town may not conflict.

The 21-day periods specified in the state Act for convening the hearing and issuing the decision, as interpreted in these two court decisions, are such specific provisions and thus critical timelines to meet for the municipality to be able to exercise its Home Rule wetlands power.

These *Oyster Creek* and *Boston Clear Water* cases dealt with Commission disapprovals of proposed projects (either after the time for commencing the public hearing or after the time for issuing a decision).

They warrant special attention to the Commission's timing of all its hearings, meetings, and decisions. even though at times that can be challenging, inconvenient, difficult, and even impossible.

It is wise to use the common practice where the Commission and applicant time the NOI filing to fit the hearing schedule so as to start on time, and likewise to agree on continuances to dates certain until the hearing is over.

SJC Rules Each New Property Owner Opens New Window for Local and State Enforcement Against Old Wetland Violations

Town of Norton Conservation Commission v. Robert Pesa, 488 Mass. 325 (2021) is a seminal case of the Supreme Judicial Court supporting a Commission, under the state Wetlands Protection Act, in a long-running attempt to get compliance from recalcitrant landowners.

The decision is of singular importance to Commissions, the MassDEP, municipalities, and 10-citizen suit plaintiffs who can enforce the Act and must pay attention to the 2-year statute of limitations. .

SJC Rules Each New Property Owner Opens New Window for Local and State Enforcement Against Old Wetland Violations

- Original property owner in 1979 filed a Notice of Intent (NOI) to construct a store and parking lot. An Order of Conditions (OOC) allowed the work per the plan, and the project was built, but a Certificate of Compliance (COC) was never requested.
- Owner died and property transferred to his wife. In 1984, 1987 and 1988 the Commission sent letters about excess fill beyond the approved project plans.
- In 2014 the Commission inspected the site, reviewed aerial photographs of the property, and informed prospective purchasers of 11,000 square feet of unauthorized fill on the property and vegetation removal.

- Prospective purchasers acknowledged the issue, asked for time to resolve it, but bought the property in December 2014 and said they would not remove the fill.
- In 2015 the Commission issued an Enforcement Order directing removal and restoration to the original condition. The new owners did not appeal that Enforcement Order to court or comply with it.
- In 2016 the Commission sued the new owners in Superior Court.

The Town lost in the trial court, the SJC took the case for direct review, and the SJC ruled favorably for the Town that the 2-year statute of limitations had expired against the original violator, but there is 3-year time limit for actions against new owners which did NOT apply to just the first new owner.

The SJC ruled a court action can be initiated against any subsequent owner within 3 years of that particular individual obtaining title to the property on which a continuing violation is present. Typically this is illegal fill or violation of an Enforcement Order.

This decision gives Commissions a useful weapon to cure historic fill violations and some other types of noncompliance. In effect, each transfer of title reopens the window for the Commission to enforce against each subsequent owner who allows unauthorized fill to remain in place or fails to obey an Enforcement Order.

Note that an Enforcement Order is not sufficient to toll the statute, a common misperception. Rather, the action must be a court action, meaning a civil suit or criminal prosecution, within the 3 years.

Use and Abuse of Real Estate Easements to Reach Massachusetts Great Ponds and Other Water Bodies

Anyone contemplating using a right-of-way to reach a Great Pond in Massachusetts, must read the Appeals Court decisions in Kubic v. Audette, 98 Mass. 289 (2020) (Kubic I) and Kubic v. Audette, 102 Mass. App. Ct. 228 (2023) (Kubic II).

They explain the principles of ownership of accreted land bordering a Great Pond, the rights and limits of access to a Great Pond, the tests for overburdening of an easement, and the proper interpretation of easements.

Use and Abuse of Real Estate Easements to Reach Massachusetts Great Ponds and Other Water Bodies

The result is respect for but reasonable limits on use of an easement to reach a Great Pond, reflecting both the intent of the parties in creating the original easement, as well as the traditional limits on uses of a Great Pond itself.

Recall that a Great Pond is defined as a natural pond the area of which is twenty acres or more. G.L. c. 131, § 1 and the Commonwealth has a sovereign interest in it as a resource for the good of the general public.

- Plaintiffs Kubic own adjacent lots separated by a 50-foot wide unpaved right of way that extends from the street to Webster Lake, a Great Pond with the Native American name reputed to be the longest: Lake Chaubunagungamaug.

- Audette owns an inland lot with a deeded right of access over the right of way to get to the Lake. He constructed a dock at the end of the right of way, 35 feet wide, protruding 50 feet into the Lake.

- He docked his large boat there, used the right of way regularly, as much as every day during the summer, and has a large family, who had an open invitation and were regular guests. He graded the right of way and installed pavers to facilitate motor vehicle access.

- Legal principles govern accretion and reliction of the ocean and certain water bodies. Many cases deal with who owns "new land" when it appears, or loses "their land" when it goes under water.

- Generally, sunken land is lost from the riparian or littoral owners (fresh or marine) and reemerged land belongs to them. Thus, the waterside boundaries of shorefront property follow the changing waterline.

- There are exceptions to this general rule. An owner cannot artificially add to his land and then claim the benefit of the addition.
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- Disputes arise in coastal areas, where lands are affected by tidal action and by storms, so the landforms are dynamic, and also in lakes, ponds, rivers and streams where alterations may be natural or man-made.

The Appeals Court held in Kubic I that the Kubics owned the fee in the right of way down to the waterline, and the easement holders were given the right to use the right of way to gain access to the Lake, which, once there, they could use for fishing, swimming, boating, and other uses that are reserved for the public in Great Ponds, but that Audette's easement there does not mean that Audette had the right to park motor vehicles on the right of way.

Rather, Audette only had the right to temporary parking on the right of way to offload people or items. Also, Audette could not occupy the right of way by hosting social events and placing a picnic table in it, interfering with the right of the Kubics and others to gain access to the Lake.

Not uncommon for an easement to be created merely by a brief, one-or two-sentence statement in a deed. It is helpful that the Appeals Court here recognized that evidence of the interpretation the parties themselves gave to the easement at the time may be considered by the reviewing court to assist determining the intent of the parties.

Land Court had determined intended uses of the right of way were limited to the "transient uses traditionally associated with public access to tidal waters, navigable streams, and great ponds," such as fishing, swimming, boating, and other uses reserved for the public in Great Ponds, and Audette could use the right of way for temporary parking and placing items (for no more than 15 minutes) to serve such purposes.

The Appeals Court affirmed that limitation in Kubic II. Audette had argued that because the right of way was unquestionably intended to provide easement holders access to the lake for boating, it follows that it must also provide him access for a dock. Appeals Court rejected this argument, stating that the fact that he has a general right of way does not mean that he may exercise it in any manner he sees fit.

These cases protect Great Ponds by recognizing the uses of easements to the water are limited by the proper uses of a Great Pond, in which the Commonwealth has an interest in protecting and managing for the benefit of the public.

FBT Everett Realty, LLC v. Massachusetts Gaming Commission, 489 Mass. 702 (2022)

Relatively rare decision from the Massachusetts Supreme Judicial Court on regulatory taking (yes, Virginia, there is a valid claim for taking) and impairment of contract (no, sorry, there is no valid claim).

FBT Everett Realty, LLC v. Massachusetts Gaming Commission, 489 Mass. 702 (2022)

Case arose from financial disputes about the former Wynn casino, now operating as Encore Boston Harbor in Everett, MA.

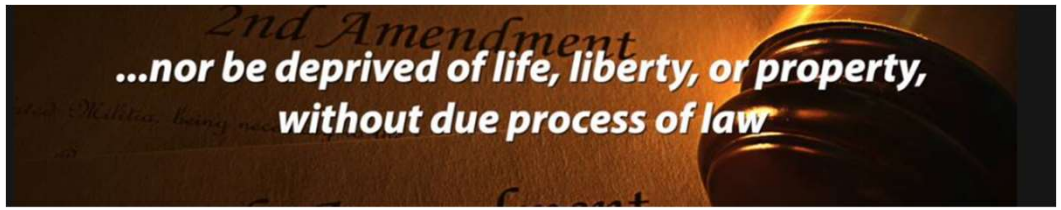
SJC handed a win to the former owners of the casino site, ruling their lawsuit could proceed against the Massachusetts Gaming Commission seeking to collect an additional $40 million for the Everett land.

Wynn's casino license was approved after it slashed the purchase price for the 35 acres on the Mystic River to $35 million, the estimated value of the land if the buyer were not building a casino.

Superior Court's had dismissed FBT's claim the sharp price cut constituted an unjust "regulatory taking" by the Gaming Commission.

SJC reversed citing jurisprudence from both the SJC and the Supreme Court. This decision is a fine law review article.

"The regulatory takings inquiry is a fact-intensive evaluation that should consider multiple factors, including not only reasonable investment-backed expectations but also the economic impact and character of the challenged regulatory action."



"We note that the Court has expressly cautioned that interference with investment-backed expectations is only 'one of a number of factors that a court must examine'"

"…*Penn Central* inquiry does not turn "exclusively" on regulation's economic impact and degree of interference with legitimate property interests…"

"Investment-backed expectations … are not talismanic under *Penn Central*"…"

"All three *Penn Central* factors are important, or at least may be important in determining whether a regulatory taking occurred, and should be considered in the regulatory takings inquiry."

Cedar Point Nursery et al. v. Hassid et al., 141 S. Ct. 2063 (2021)

California regulation allowed union organizers access to farmer's property for 3 hours per day for 120 days a year. The growers asserted it was an unconstitutional taking of their rights.

Can physical access to private property required by regulation be a per se taking if not permanent or continuous?

Cedar Point Nursery et al. v. Hassid et al., 141 S. Ct. 2063 (2021)

Supreme Court said yes, that less than continuous occupation goes to the amount of compensation payable, not to whether or not it is a per se taking. So, it was a taking, albeit partial.

Regulations which restrict property use and are not a per se taking are addressed on a balancing test involving the economic impact of the regulation, interference with reasonable investment backed expectations, and the character of the government action.

Pakdel v. City & Cnty. of San Francisco, 141 S. Ct. 2226, (2021)

When is a government decision final enough to sue for regulatory taking? Supreme Court set a new Finality Rule: "Once the government is committed to a position…the potential ambiguities evaporate and the dispute is ripe for judicial resolution."

A property owner has an actionable 5th Amendment takings claim when the government takes their property without paying for it and so may bring suit in federal court under section 1983 at that time, without "exhausting" state court suits. *Knick v. Township of Scott, Pennsylvania*, 862 F. 3d 310 (2019)

Pakdel v. City & County of San Francisco, 141 S. Ct. 2226, (2021)

It used to be the law that courts must know the extent of a regulation's interference with property rights prior to making any adjudication on its validity. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)

This decision is being read as "you can go direct to federal court without exhausting your state remedies."

Regulatory Takings: Ripeness: Exhaustion and Finality

More recently the 10th Circuit applied and enunciated these finality principles in *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021).

"The finality requirement does not require landowners to exhaust administrative procedures, or to 'submit applications for their own sake.' . . . Instead, a "final decision" has been reached and a regulatory takings claim becomes prudentially ripe for judicial resolution '[o]nce the government is committed to a position.'

NECEC Transmission LLC v. Bureau of Parks and Lands, 281 A.3d 618 (Me. 2022), rev 9/8/22

Avangrid plans a $1B, 145-mile power line in Maine. In 2021, 59% of Maine voters approved a ballot measure blocking the partly-built project.

In the context of large-scale infrastructure development, a claim of impairment of vested rights in violation of due process arises when:

- claimant holds valid and final permit, license, or other grant of authority from a governmental entity that is not subject to any further judicial review; and
- claimant undertook substantial good-faith expenditures on authorized activity prior to enactment of retroactive law.

U.S. EPA Designation of PFAS as a Superfund Substance

U.S. EPA has proposed to designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This is the federal Superfund law. Collectively these chemicals are known as "PFAS."

EPA Administrator may designate a substance as hazardous if, when released into the environment, it may present substantial danger to the public health or welfare or the environment.

PFAS are water soluble and over time have seeped into surface soils, leached into groundwater and surface water, and contaminated drinking water. PFAS are now found in rivers, lakes, fish, and wildlife. That scientific reality is why the EPA is moving in this direction.

U.S. EPA Designation of PFAS as a Superfund Substance

CERLCA imposes liability on a large class of "potentially responsible parties" (PRPs) for the actual or threatened release of any hazardous substances and the cleanup costs of any release.

PRPs include: current owners and operators of a facility, past owners and operators of a facility at the time hazardous wastes were disposed, generators, parties that arranged for the disposal or transport of the hazardous substances, and transporters of hazardous waste that selected the site where the hazardous substances were brought. 42 U.S.C. § 9607(a).

U.S. EPA Designation of PFAS as a Superfund Substance

Another law, Section 304 of the Emergency Planning and Community Right-to-Know Act requires facility owners or operators to immediately notify their community emergency coordinator or local emergency planning committee of a release.

EPA designation of PFAS would affect PFAS manufacturers and processors, manufacturers of products containing PFAS, downstream product manufacturers, users of PFAS products, and waste management and wastewater treatment facilities where PFAS end up.

Affected businesses includes car washes, carpet manufacturers, airports, landfills, firefighting foam manufacturers, fire departments, paper and textiles mills, wastewater treatments plants, waste management services, water utilities, and more.

U.S. EPA Designation of PFAS as a Superfund Substance

Bringing PFOA and PFOS under CERCLA will bring new parties to existing Superfund sites since the EPA is authorized to bring in new liable parties, expand the geographic scope of current remediation projects, and reopen old Superfund sites.

SJC Rules Bourne's Ban on Recreational Marijuana Establishments is Valid as a Home Rule General Bylaw

Supreme Judicial Court, in Haven Center, Inc. v. Town of Bourne, 490 Mass. 364 (2022), upheld as valid the Town of Bourne's general bylaw ban on recreational marijuana establishments. The Town's approach was impeccable and the decision is instructive.

In 2016, Massachusetts voters enacted a state ballot initiative legalizing the sale and use of recreational marijuana. This law, codified as M.G.L. c. 94G, gave individual cities and towns the ability to ban recreational marijuana establishments from their communities if the majority of voters in the municipality voted "no" on that ballot initiative and then enacted such a local ban by December 30, 2019.

SJC Rules Bourne's Ban on Recreational Marijuana Establishments is Valid as a Home Rule General Bylaw

Majority of the voters in the Town of Bourne on Cape Cod in 2016 had voted "no" on this ballot initiative.

Haven Center, Inc.—seeking to operate a retail recreational marijuana establishment—claimed that Article 14 violated the Home Rule Amendment because it constituted a zoning bylaw and was inconsistent with the Zoning Act, M.G.L. c. 40A, §§ 5-6.

The Home Rule Amendment allows municipalities to enact local ordinances or bylaws that are not inconsistent with the Massachusetts Constitution or laws.

M.G.L. c. 94G provides a municipality may prohibit recreational marijuana establishments through general bylaws or zoning bylaws. Under Massachusetts court precedents, even if the Town intended Article 14 to be a general bylaw, it could be deemed a zoning bylaw subject to M.G.L. c. 40A if certain factors were met.

Factors: whether other municipalities adopted similar bylaws as zoning bylaws, whether the municipality previously regulated the topic through comprehensive zoning, whether the bylaw is intended to prohibit or permit particular listed uses of land, and whether the dominant purpose pertains to interests typically addressed by zoning.

SJC ruled Article 14 was not a zoning bylaw on these factors and simply because it indirectly prohibited the use of land for recreational marijuana establishments, and so was not subject to the procedural requirements in the Zoning Act such as a public hearing and 2/3 vote.

Under the principles of Home Rule, bylaw application, and statutory interpretation in Massachusetts, the Town of Bourne succeeded in prohibiting all commercial recreational marijuana establishments.

City of Austin v. Reagan National Advertising of Austin, LLC
142 S.Ct. 1464 (2022)

Advertising company sued challenging prohibition of digitized off-premises signs, but not on-premises signs, as violation of First Amendment's Free Speech Clause.

Issue was whether the City's ordinance was content neutral under the strict sign case Reed v. Town of Gilbert, 576 U.S. 155 (2015).

Federal Court of Appeals found the on-/off-premises distinction to be facially content neutral as a government official had to "read a sign's message to determine whether the sign was off-premises." City lost.

U.S. Supreme Court reversed, holding the City's on-/off-premises distinction is facially content neutral, so it does not violate the Free Speech Clause. Explained the test and softened the rigidity of Reed.

Reed caused consternation as apparently applying to all regulation of speech, not just signs for advertising, political, informational, directional and other purposes, and virtually banning whatever remotely controls speech or expression.

Austin decision brings order to chaos created by Justice Thomas' decision in Reed affecting speech nationwide.

The ordinary time, place and manner restrictions on signs do not trigger strict scrutiny, just intermediate scrutiny. Typical on-/off-premises signs distinctions, and rules on directional or event signs, likely will be upheld.

- Prohibitions or limits on off-premise advertising signs will remain valid and likewise on digitized, moving and changing signs;
- Beware any underlying impermissible purpose or justification which will change the nature of the restriction, level of scrutiny; and
- Ensure any restrictions imposed on signs are narrowly directed to accomplish a significant government interest.

SJC Gives Shot in Arm for Commercial Solar Developments

- Tracer Lane II Realty, LLC v. City of Waltham was eagerly awaited by municipalities and solar project sponsors alike. No. SJC-13195 (Mass. Jun. 2, 2022). Real estate, land use, environmental, and energy attorneys and their clients take note.
- The Zoning Act, M.G.L. c. 40A, § 3, protects solar energy systems from local regulation that is not "necessary to protect the public health, safety or welfare."
- SJC was faced with issue whether ancillary structure was a part of the zoning bylaw's legally protected solar use.
- In the Town of Lexington and City of Waltham, solar developer Tracer Lane owned two properties, the Lexington land in a commercial and manufacturing use zoning district, the Waltham land in a residential use zoning district.

- Waltham officials informed Tracer Lane it could not construct the access road as a road for commercial use was "not permitted in a residential zone."
- Tracer Lane filed suit in Land Court against Waltham pursuant to M.G.L. c.240, §14A (portions of which are called the Dover Amendment).
- Tracer Lane sought protection under the Act: "no zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety, or welfare."

- The SJC reasoned that the access road is imperative to the proposed solar energy system's construction and therefore is "part of the solar energy system." Therefore, the statute protects the access road.
- The Court added that "these standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth" and limiting solar energy development directly conflicts with the statute's purpose.
- *Tracer Lane* confirms large-scale solar systems are protected under M.G.L. c. 40A, § 3. The unanimous SJC decision clarifies a municipality cannot justify "zoning out" such solar developments just because of the uses or features ancillary to the solar facility.

Tracer Lane should encourage municipalities now banning large scale solar facilities to adopt reasonable regulations permitting such facilities with site plan or special permit review.
Effectively, solar developers cannot be stopped from using residential zones for all or some of their project facilities except on a "very site-specific basis, use-by-use, parcel-by-parcel, neighborhood-by-neighborhood."

EPA Updates CERCLA Regulations to Include ASTM Phase I Standards for Due Diligence

Current and prospective property owners who may wish to be able to invoke certain legal defenses to liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) should be aware that EPA has amended its regulations governing such defenses.

The update to EPA's so-called All Appropriate Inquiries (AAI) regulations, 40 CFR Part 312, was announced in a Final Rulemaking published in the December 15, 2022 Federal Register.

CERCLA requires EPA to promulgate regulations outlining standards and practices for a party to conduct AAI prior to acquiring land.

AAI is essentially a prerequisite to claiming protection from CERCLA liability as an "innocent" landowner, abutting property owner, or prospective purchaser.

AAI regulations govern Due Diligence standards and practices used in evaluating environmental conditions at a site, which may impact responsibility and/or liability for contamination for the property.

Effective February 13, 2023, the AAI regulations incorporate the current ASTM International (formerly, American Society for Testing and Materials) (ASTM) E1527-21 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process."

This Final Rulemaking thus incorporates the current standard (E1527-21) for entities attempting to qualify for CERCLA liability protections by conducting AAI.

EPA included a sunset clause for landowners who already began Phase I investigations using the prior ASTM E1527-13 standard. The new rules allow f use of that old standard until December 15, 2023, or one year from publication of the Final Rule.

The current ASTM E1527-21 Phase I standard was introduced in November 2021. Some key changes from the prior standard include new definitions (e.g., the term "Property Use Limitation") and expanded guidance (e.g., distinguishing between Recognized Environmental Condition, Controlled Recognized Environmental Condition, and Historical Recognized Environmental Condition with diagrams and examples).

Also, the current Phase I standard incorporates modern, best practices for historical research (e.g., aerial photographs, fire insurance mapping, and topography).

EPA Updates CERCLA Regulations to Include ASTM Phase I Standards for Due Diligence

As a result of this Final Rulemaking under CERCLA, EPA has incorporated the updated ASTM Phase 1 standards into its AAI regulations.

Engineers and consultants, property owners and managers, buyers and sellers, lenders and investors, commercial and industrial tenants, attorneys and their clients, and others who wish to find safe harbor from certain Superfund liabilities, will find new clarity and objectivity in the All Appropriate Inquiry part of their Due Diligence.

Federal Housing Act, Equal Protection, and Substantive Due Process Claims Upheld in Federal Court

The U.S. District Court for Massachusetts issued an important civil rights decision in *Valentin v. Town of Natick et al.*, 2022 WL 4481412 (D. Mass. Sept. 27, 2022). Suit arose from the denial of an application for a permit to develop a condominium project that included affordable housing in Natick, MA, after many hearings and project revisions.

Plaintiffs Valentins are a black couple who have lived in Natick for thirty years. They proposed a condominium project to be located in a predominantly white neighborhood and were denied. They filed suit alleging discrimination based on race, color, and national origin.

Federal Housing Act, Equal Protection, and Substantive Due Process Claims Upheld in Federal Court

On November 4, 2020, the Board voted to approve the massing, scale, and layout of the Valentins' project, but did not vote on whether to grant the special permit. On November 10, 2020 the Town voted to repeal the Historic Preservation Bylaw under which the project had been proposed.

On December 2, 2020, the Board denied the Valentins' application solely on the basis of the repeal of the Historic Preservation Bylaw. The Board did not consider the project "vested," despite previously having indicated that it would receive such protection.

Federal Housing Act, Equal Protection, and Substantive Due Process Claims Upheld in Federal Court

Plaintiffs sued under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604 and 3617; 42 U.S.C. § 1983 for violations of their constitutional rights to Equal Protection ("EP"); Substantive Due Process ("SDP"); and Procedural Due Process ("PDP"). Also claims against the individual defendants under the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen Laws c. 12, § 11H.

A Substantive Due Process claim may be brought in federal court where the alleged abuse of power "shocks the conscience." Typical land use permit disputes in Massachusetts and New England do NOT rise to this level of civil rights violation. One tainted with procedural irregularity and racial animus, however, might be ruled by the federal court to qualify.

Federal Housing Act, Equal Protection, and Substantive Due Process Claims Upheld in Federal Court

District Court held the Valentins had "plausibly alleged procedural irregularities in the number of hearings and delays, along with acquiescence to the racist opposition sufficient to state a substantive due process claim."

In the end, the Valentins' Fair Housing Act, Equal Protection, and Substantive Due Process legal claims all survived the Town of Natick's motion to dismiss, while their Procedural Due Process and Massachusetts Civil Rights Act claims were dismissed. As of now the case is in the discovery and surviving claims will proceed toward trial.

Shurtleff v. City of Boston
142 S.Ct. 1583 (2022)

U.S. Supreme Court held City of Boston's flag-raising program did not constitute government speech. Thus, City's refusal to allow plaintiff to fly their Christian flag because of its religious viewpoint violated the Free Speech Clause of the First Amendment to the US Constitution.

Result hangs on whether governmental entity engages in government speech (which can be highly regulated) and when it does not engage in government speech (not so much regulated).

Decision affects governmental flag-flying plus Free Speech controls on all kinds of signs, posters, flyers, forums, programs, exhibitions, announcements, and (nowadays) government social media posts.

Plaintiff asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community. He wished to raise what he described as the "Christian flag."

Worried that flying a religious flag at City Hall could violate the First Amendment's Establishment Clause, and never having flown such flag, the City told the plaintiff no.

Plaintiff sued, claiming Boston's refusal to let him raise his flag violated his Free Speech.

Lower Federal District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech. So Boston legally could refuse petitioners' request without violating Free Speech. The First Circuit Court of Appeals affirmed and the City was pleased.

Supreme Court granted certiorari to decide whether the flags Boston allows others to fly express government speech, and whether Boston, under the Free Speech Clause, could legally deny the plaintiff's flag-raising request.

Supreme Court says Free Speech does not prevent government from declining to express a view. Government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies, or implements programs.

Case clarifies boundary between government speech and private expression, which can blur when, as here, the government invites the people to participate in a program. Governments should review their flag, sign, message, and comment-posting policies.

Be mindful of the rightful controls which can be imposed on what is properly classified as government speech.

Federal Clean Water Act Citizen Plaintiffs Are Not Completely Trumped by Past or Pending EPA or State Agency Enforcement

Can citizen plaintiffs in federal court sue the same violator for the same water pollution violation against which the U.S Environmental Protection Agency (EPA) or state agency is taking or has taken administrative enforcement?

The answer is yes, as long as the federal citizen suit does not seek civil penalties. This according to the First Circuit Court of Appeals decision, issued April 28, 2022, in the case of *Blackstone Headwaters Coalition, Inc. v. Gallo Builders*, No. 19-2095, 32 F. 4th 99 (1st Cir. 2022).

Federal Clean Water Act Citizen Plaintiffs Are Not Completely Trumped by Past or Pending EPA or State Agency Enforcement

Civil penalties are court-ordered money sanctions. Previously, the conventional wisdom was that EPA or state enforcement of any kind against the same violator for the same violation could entirely preclude a federal water pollution suit filed by citizens, seeking any type of relief.

Until recently, EPA or state enforcement was regarded as a complete defense to a federal citizen suit. Courts have declined to order permanent injunctive relief where the defendant made a persuasive showing it was complying with orders issued as a result of a federal or state administrative enforcement action and that the defendant's compliance yielded improvement in the environmental conditions of concern.

Federal Clean Water Act Citizen Plaintiffs Are Not Completely Trumped by Past or Pending EPA or State Agency Enforcement

In this case, though, the First Circuit Court of Appeals sitting en banc ruled that under the CWA, administrative enforcement action by the government (here EPA or MassDEP) results in preclusion only a citizen's "civil penalty action."

Court of Appeals interpreted this term in the CWA to mean only a court suit seeking civil monetary penalties. A federal citizen suit seeking other (non-monetary) forms of relief, such as equitable relief like a prospective injunction or declaratory judgment, therefore, may proceed anyway.

- Court of Appeals ruled that Section 1319(g)(6)(A) bars only a citizen suit that seeks to impose a civil penalty for an ongoing violation of the CWA and does not bar a citizen suit for declaratory and prospective injunction relief to redress an ongoing violation of the CWA.
- The practical implications are important. The CWA and several other federal environmental statutes contain citizen suit provisions. These simplify standing for private persons by eliminating the "injury in fact" half of the test of standing to sue in court.
- These citizen suit provisions effectively make private plaintiffs "little attorneys general" who can and do the same or similar civil remedies (sometimes more extensive or stricter) as do the federal and state air, water, wetlands, sewage, drinking water, solid waste, and hazardous waste agencies.

Public Lands Preservation Act Codifies EEA Policy and Article 97 "No Net Loss"

Article 97 of the Amendments to the Massachusetts Constitution, approved by the voters in 1972, established a right to a clean environment including its natural, scenic, historical, and aesthetic qualities for the citizens of the Commonwealth.

Article 97 also declared the conservation of natural resources to be a public purpose, and provided that land, easements, or real property interests protected by Article 97 shall not be used for other purposes or disposed of without a 2/3 roll call vote of both houses of the Legislature.

This is a high level, super-majority legislative and executive check on changes of use or transfers of Article 97 protected properties.

Public Lands Preservation Act

An Act Preserving Open Space in the Commonwealth, known as the Public Lands Preservation Act (PLPA), took effect February 15, 2023, establishing a process and criteria for submitting an "Article 97 bill" to the Legislature to authorize a new use and/or disposition ("Article 97 Action") affecting "Article 97 land."

Article 97 lands are those areas of state, regional or local government or authorities and various kinds of districts, originally taken or acquired, or subsequently dedicated, for natural resource purposes, broadly defined. They typically are called parklands but include other types of properties.

Public and private landowners, land managers, facility operators, boards and agencies, and legal counsel involved in transactions, permitting and authorizing legislation should be familiar with the new PLPA obligations.

Public Lands Preservation Act

Studies and anecdotal evidence over the years showed that roughly 16 to 20 Article 97 bills passed the Legislature and were signed by the Governor each year. Typically, they dealt with municipal changes or exchanges involving parkland, forest, open space, or water supply land for some public project, private development, city or town building, residential project, etc.

Other typical bills have been about state, county, authority, or governmental districts' changes or exchanges involving parks, forests, reservations, monuments, historic sites, water supply lands, reservoirs, lakes, rivers, or ocean properties.

Public Lands Preservation Act

PLPA was introduced over 20 years ago to strengthen and codify the EEA-announced goal of No Net Loss, which had been set by administrative policy, which stated that Article 97 land before transfer or change of use must be replaced with land of equivalent financial and natural resource value.

In recent years EEA issued a set of Appraisal standards and a Land Disposition Policy, which made the process more formal for those bills which came to the attention of EEA, or for those projects which proactively sought clearance by the agency in order to simplify and streamline the legislative process and approval by the Governor.

Public Lands Preservation Act

PLPA's core provisions provide clarity, consistency, transparency, and compliance measures to achieve No Net Loss by building on that existing administrative process requiring replacement of Article 97 public land to be transferred or used for a new purpose.

A provision added to PLPA before passage permits and provides specific rules for what are supposed to be limited cases where cash payments or other financial arrangements are offered in lieu of designating replacement land, easement, or other real property interest.

Public Lands Preservation Act

PLPA gives a major role for the Executive Office of Energy and Environmental Affairs (EEA), which is to review and publish an advance notice a public notice, needs assessment, alternatives analysis, natural resource assessment, financial appraisal, any proposed waiver or modification of the rules, the designated replacement land, easement, or interest, any proposed funding-in-lieu of that replacement, approvals by public agencies involved, and the authorizing legislation to be submitted, which is to be accompanied by some of these and EEA findings.

Public Lands Preservation Act

PLPA took effect 90 days after enactment on November 17, 2022. Since PLPA did not have an emergency preamble, it took effect 90 days later on February 15, 2023.

PLPA appears to apply to any transfer or new use which had NOT been authorized already by the enactment of an Article 97 bill (assuming it met the existing EEA Land Acquisition Appraisals standards and EEA Article 97 Land Disposition Policy).

But the EEA Regulations mandated by PLPA, now in process and due in 18 months, may deal with vesting or staged effectiveness in some different way for projects caught in the pipeline.

Public Lands Preservation Act

Even before the EEA Regulations in 18 months, the basics apply to Article 97 lands in accord with a comprehensive Guidance EEA issued in February 2023.

Key requirements for Article 97 Actions are (i) public and EEA notification; (ii) an alternatives analysis; and (iii) identification and dedication of replacement land to Article 97 purposes.

In certain cases, the replacement land requirement may be waived or modified by the EEA Secretary, or provision of funding may be authorized in lieu of replacement land.

Public Lands Preservation Act

EEA has created a "PLPA Portal" to streamline the new PLPA submission process by providing an online tool to file required documents and post alternative analyses and other reports, facilitating compliance with the PLPA's public notice requirement.

The Portal presents the existing EEA "Land Acquisition Policy—Appraisals", dated January 2015, and the EEA "Article 97 Land Disposition Policy", dated February 1998, also known as the No Net Loss policy, noting that a new draft of the Policy is being prepared to be consistent with the new Act.

Proponents must use the PLPA Portal to notify EEA of proposed Article 97 Actions and to make submissions.

Public Lands Preservation Act

Prior to making any submission, proponents must engage in discussions with the public entity with care and control of the involved Article 97 land.

Submissions via the PLPA Portal must include information needed for EEA, the public entity that has care and control of the Article 97 land, and the Legislature to review proposed Article 97 legislation, such as documentation of the location and ownership of the affected and replacement land.

The information required will vary based on the type of project and the materials available to the proponent. The Portal guides users through a series of fields that gather required information.

Public Lands Preservation Act

EEA will review submissions to determine consistency with the PLPA and with the Article 97 existing and eventual expected new Policy regulations.

Based on this review, the Secretary will make requested determinations and findings on any waivers, modifications, and in lieu funding proposals.

EEA will post on the PLPA website all such determinations and findings and any waivers to be reported to the Legislature.

Public Lands Preservation Act

In the PLPA Portal is a document entitled "Guidance on Public Lands Preservation Act Implementation." This document is intended to aid the public in understanding and complying with the new law.

It states, however, that this Guidance is not to be construed as encouraging the use for another purpose or disposition of land protected by Article 97, it is not to be relied on, does not create any enforceable right, and cannot construed to create a right to judicial review.

Nonetheless, it says EEA and its agencies will not authorize, approve or support a change in use or disposition unless in accordance with the Article 97 Policy.

Public Lands Preservation Act

The Guidance describes how PLPA applies to any change in use or disposition of land or interests in land subject to Article 97 and specifies what qualifies as an Article 97 Action:

1. transfer or conveyance of ownership or another property interest, whether by deed, easement, lease or any other instrument effectuating such transfer or conveyance;

2. change in physical or legal control; or

3. change in use of the land.

EEA does not consider the issuance of a revocable permit or license of limited duration a disposition of land subject to Article 97 or the PLPA, however, provided that:

1. no interest in land is transferred to the permittee or licensee, and

2. the permit or license does not authorize a change in use of the land.

Public Lands Preservation Act

EEA offers a consultation method for those who wonder. EEA policy, legal, and legislative staff will collaboratively answer questions regarding Article 97 Actions. A dedicated email address, plpa@mass.gov, has been established to accept requests for assistance.

All PLPA related inquiries are properly directed to this address including: questions on the use of the PLPA Portal, the application itself, the status of a submission, or the availability of information on PLPA submissions; policy oriented or substantive questions about Article 97; and technical questions around the proper drafting of PLPA legislation.

QUESTIONS & DISCUSSION

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