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MASSACHUSETTS WETLANDS AND FLOODPLAINS REVISITED

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I. INTRODUCTION

With the passage of the Jones Act¹ in 1963, Massachusetts became the first state in the nation to protect wetlands by specific statute. Communities simultaneously were developing bylaws to protect wetlands and floodplains under the implied powers of the Zoning Enabling Act.² Almost two decades of experience have generated a number of legal decisions³ of interest to states that have enacted laws specifically protecting coastal wetlands⁴ and freshwater wetlands,⁵ and to states that have, or are working on, plans under the Coastal Zone Management Act of 1972.⁶

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1. Act of May 22, 1963, ch. 426, § 27A, 1963 Mass. Acts 240 (repealed 1972).

2. MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979).

3. *E.g.*, MacGibbon v. Board of Appeals, 369 Mass. 512, 340 N.E.2d 487 (1976), Christoffels v. Alton Properties, Inc., 362 Mass. 862, 285 N.E.2d 453 (1972); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973); Attorney General v. Baldwin, 361 Mass. 199, 279 N.E.2d 710 (1972); Golden v. Board of Selectmen, 358 Mass. 519, 265 N.E.2d 573 (1970); MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970); Bay State Lobster Co. v. Perini Corp., 355 Mass. 794, 245 N.E.2d 759 (1969); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); MacGibbon v. Board of Appeals, 347 Mass. 690, 200 N.E.2d 254 (1964).

4. *See e.g.*, CONN. GEN. STAT. ANN. §§ 22a-28 to -45 (West 1975); DEL. CODE ANN. tit. 7, §§ 6601-6620, 7001-7013 (1975); ME. REV. STAT. ANN. tit. 12, §§ 4701-4709 (1974) (repealed 1975); MD. NAT. REC. CODE ANN. §§ 718-731 (Supp. 1970) (repealed 1973); MISS. CODE ANN. §§ 49-27-1 to -69 (Supp. 1981); N.H. REV. STAT. ANN. §§ 483-A:1 to -5 (1968); N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979); N.Y. ENVIR. CONSERV. LAW §§ 25-0101 to -0601 (McKinney Supp. 1981); N.C. GEN. STAT. §§ 113-230 (1978); OR. REV. STAT. §§ 541.605 to -665 (1981); R.I. GEN. LAWS ANN. §§ 2-1-13 to -18 (1976); and VA. CODE §§ 62.1-13.1, 62.1-13.5 to -6, 62.1-13.20 (1982).

5. *See e.g.*, CONN. GEN. STAT. ANN. §§ 22a-36 to -45 (West 1975); N.H. REV. STAT. ANN. §§ 483-A:1 to -5 (1968); N.Y. ENVIR. CONSERV. LAW §§ 24-0101 to -0705 (McKinney Supp. 1981); R.I. GEN. LAWS ANN. §§ 2-1-19 to -25, (1976 and Supp. 1981).

6. 16 U.S.C. §§ 1452-1464 (1976). Of 35 eligible states and territories, 19 have approved plans as of 1979. For a general overview of federal, state and local laws on this subject, see Dawson, *Land Use Implications of Wetlands and Floodplain Regulation*, 2

This article is intended to complement and update *Protecting Massachusetts Wetlands*,⁷ a lengthy study of the Massachusetts statutes and decisions on wetlands and floodplains prior to 1978, with a discussion of cases from other states and an analysis of the impact of federal law. It focuses on cases decided by the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court in the intervening years, with reference to two important recent decisions from other jurisdictions.

The decisions reported since 1978 further illuminate specific issues: The degree to which a town can protect floodplains through zoning bylaws;⁸ whether Massachusetts communities may protect wetlands through home rule nonzoning bylaws;⁹ and the complexities of the Commonwealth's Wetlands Protection Act (WPA).¹⁰ The first decision under the Commonwealth's Inland Wetlands Restriction Act of 1968 (IWRA)¹¹ and further rulings on the public trust in tidal lands¹² are also discussed.

II. A BRIEF REVIEW OF THE MASSACHUSETTS STATUTORY STRUCTURE AND PREVIOUS DECISIONS

The Commonwealth rejoices in three statutes governing alteration of wetlands. The Coastal Wetlands Restriction Act of 1965 (CWRA)¹³ and the IWRA are prospective in operation. Each law permits the state Department of Environmental Management to map important coastal¹⁴ and inland¹⁵ wetlands and, after notice and hearings, to record restrictive orders limiting alteration of the land. The two laws permit appeal of the order, within ninety days from recording, on constitutional grounds of excessive restriction.¹⁶ Many such appeals have been filed, although the first decision of the supreme

ZONING AND PLANNING L. REPORT 178-82, 185-90. For a much briefer treatment, see McGregor & Dawson, *Wetlands and Floodplain Protection*, 64 MASS. L. REV. 73 (1979).

7. Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK U.L. REV. 755 (1978).

8. See notes 47-65 *infra* and accompanying text.

9. See notes 114-34 *infra* and accompanying text.

10. MASS. GEN. LAWS ANN. ch. 131, § 40 (West 1974 & Supp. 1982); see notes 78-113 *infra* and accompanying text.

11. MASS. GEN. LAWS ANN. ch. 131, § 40A (West Supp. 1982); see notes 135-49 *infra* and accompanying text.

12. See notes 150-69 *infra* and accompanying text.

13. MASS. GEN. LAWS ANN. ch. 130, § 105 (West Supp. 1982).

14. *Id.* ch. 130, § 105.

15. *Id.* ch. 131, § 40A.

16. *Id.* & ch. 130, § 105.

judicial court on these laws did not come down until 1981.¹⁷ Due to budget constraints, the prospective laws have not been used extensively, except in some coastal areas.

The more familiar law, the WPA or Hatch Act, requires no advance state action; the WPA simply declares that no person shall fill, dredge, remove, or alter any defined coastal or inland wetland without a permit from the local conservation commission or from the state Department of Environmental Quality Engineering (DEQE) on appeal.¹⁸ Because wetlands are defined to include "lands subject to flooding," the WPA also protects floodplains.

The WPA is an outgrowth of the Jones Act and a companion law passed in 1965 that requires a state permit for filling or dredging inland wetlands.¹⁹ The laws were repealed and combined into the WPA in 1972; and original jurisdiction was shifted from the state to the local conservation commissions.²⁰ Thousands of hearings are held annually under the WPA and about ten percent of the local decisions are appealed. Considering the scope and familiarity of the law, surprisingly few court decisions have been rendered. This is because the series of local and state hearings provide an extensive forum. Recently, however, two appeals court cases have been decided.²¹

Municipalities in Massachusetts have long protected wetlands, especially floodplains, through local ordinances and bylaws adopted under the Zoning Act²² or, more recently under the home rule amendment,²³ as general ordinances or bylaws not requiring the complex procedures needed for adopting or amending zoning

17. *Moskow v. Commissioner of Environmental Management*, 1981 Mass. Adv. Sh. 2134, 427 N.E.2d 750. *Moskow* is discussed at text accompanying notes 135-45 *infra*.

18. MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1982).

19. Act of Mar. 29, 1965, ch. 220, § 117 C, 1965 Mass. Acts 116 (repealed 1972).

20. For regulations adopted under the law, see 310 CODE MASS. REGS. 10.00 (1980); 45 Mass. Reg. 1-36 (1977).

21. The two cases, *Town of Rutland v. Fife*, 1981 Mass. App. Ct. Adv. Sh. 308, 416 N.E.2d 518, *rev'd*, 385 Mass. 1001 (1982) and *Hamilton v. Conservation Comm'n*, 1981 Mass. App. Ct. Adv. Sh. 1521, 425 N.E.2d 358 are discussed at text accompanying notes 78-104 *infra*.

22. MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979 & Supp. 1981).

23. MASS. CONST. amend. art. II. Prior to the adoption of the home rule amendment, Massachusetts cities and towns were subject to the complete control of the General Court. *Board of Appeals v. Housing Appeals Comm'n*, 363 Mass. 339, 355-56, 294 N.E.2d 393, 407-08 (1973). The home rule amendment grants cities or towns independent legislative powers as well as any power or function which the general court has power to confer upon it, provided that it is not inconsistent with the constitution or laws enacted by the legislature, nor denied by its own charter. MASS. CONST. amend. art. II § 6.

codes.²⁴ These local efforts were supported by the requirements of the federal flood insurance program, which mandates that participating communities regulate use of the hundred-year floodplain through local enactments.²⁵ Recent cases have tested three such zoning bylaws and one nonzoning bylaw.²⁶

Of the numerous wetlands and floodplains cases decided before 1978,²⁷ four are of greatest interest. In *Commissioner of Natural Resources v. S. Volpe & Co.*,²⁸ the first to interpret the WPA, the issue was whether denying a permit allowing filling of a marsh for the construction of residences was such a deprivation of the practical uses of the landowner's property as to constitute a taking.²⁹ The court held that a regulation which goes "too far" is an impermissible taking without compensation.³⁰ The application of the test was inconclusive in *Volpe* because the case was remanded for findings, and the decision of the superior court on remand was not appealed. Reference to *Pennsylvania Coal Co. v. Mahon*,³¹ however, indicated a conservative tendency in defining public regulatory power.³²

The conservative point of view was given clearer, though not definitive expression in *MacGibbon v. Board of Appeals (MacGibbon I, II & III)*,³³ in which a prohibition against fill in seven acres of coastal wetlands was held to be confiscatory because it left the owner no "practical use" of his land.³⁴ In denying rehearing, however, the *MacGibbon III* court stated specifically that, as the case was decided under the Zoning Enabling Act, the decisions had no relation to the WPA.³⁵ Further, the court stated that its decision did not "discuss or

24. General bylaws are adopted under MASS. GEN. LAWS ANN. ch. 40, § 21 (West 1958 and Supp. 1981).

25. Flood Disaster Protection Act of 1973, 42 U.S.C. §§ 4001-4128 (1976). For regulations pertaining to the Act, see 44 C.F.R. §§ 60.1-60.26 (1980).

26. For a discussion of these cases, see notes 47-76 *infra* and accompanying text.

27. For a discussion of these cases, see Dawson, *supra* note 7.

28. 349 Mass. 104, 206 N.E.2d 666 (1965).

29. *Id.* at 107, 206 N.E.2d at 669.

30. *Id.* at 110, 206 N.E.2d at 670 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

31. 260 U.S. 393 (1922).

32. References to *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), or to *Agins v. City of Tiburon*, 447 U.S. 255 (1980) usually indicate a more liberal approach.

33. *MacGibbon III*, 369 Mass. 512, 340 N.E.2d 487 (1975), *reh'g denied*, 369 Mass. 523, 344 N.E.2d 185 (1976); *MacGibbon II*, 356 Mass. 635, 255 N.E.2d 347 (1970); *MacGibbon I*, 347 Mass. 690, 200 N.E.2d 254 (1964).

34. *MacGibbon III*, 369 Mass. at 517, 340 N.E.2d at 490-91.

35. *MacGibbon v. Board of Appeals*, 369 Mass. 523, 524-25, 344 N.E.2d 185, 186-87 (1979).

decide any constitutional issue whatever."³⁶

It should be noted that the *MacGibbon* triad involved that bug-bear of land regulators, a situation in which all of the landowner's property is strictly regulated and rendered economically unusable. In upholding regulation in other cases, courts have found the potential for residual or accessory use of the regulated area, an issue which appears in several cases discussed below.³⁷ While *Volpe* did not involve considerable upland acreage, the case failed to recognize the importance of the accessory use issue. As a result, the issue of the trial was limited to the effects of filling the coastal wetland. There was no discussion of whether the marsh had value for minor accessory uses to the adjacent uplands in the same ownership.³⁸

In *Golden v. Board of Selectmen*,³⁹ the court established that local regulation was not preempted by the state laws covering wetlands.⁴⁰ The court held that state law would be preemptive only if the local bylaw was "repugnant to . . . [or] inconsistent with" the state scheme.⁴¹

*Turnpike Realty Co. v. Town of Dedham*⁴² is a leading case on floodplain restriction. Although *Turnpike Realty* concerned a local floodplain protection bylaw, the court's reasoning applies equally well to any level of wetlands regulation. The opinion contains broad language supporting regulation of floodplains and emphasizes the hazards in permitting their uncontrolled development.⁴³ The total-loss-of-practical-use problem did not arise in *Turnpike Realty* because the landowner had not investigated development possibilities of two areas that rose above the floodplain.⁴⁴ *Turnpike Realty* clearly governs the three most recent Massachusetts floodplain cases.⁴⁵

III. RECENT CASES

The basic issue evident in most of the recent Massachusetts cases is one of taking: the amount of environmental regulation of

36. *Id.* at 524, 344 N.E.2d at 186.

37. *See Dawson, supra* note 7, at 790-92.

38. 349 Mass. at 110-11, 206 N.E.2d at 671.

39. 358 Mass. 519, 265 N.E.2d 573 (1970).

40. *Id.* at 524, 526, 265 N.E.2d at 576, 577.

41. *Id.* at 524, 265 N.E.2d at 576.

42. 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973).

43. *Id.* at 227-29, 233-35, 284 N.E.2d at 895-96, 899.

44. *Id.* at 223, 235-36, 284 N.E.2d at 893, 899-900.

45. *See* text accompanying notes 47-65 *infra*.

private property without compensation that is permissible under the state and federal constitutions.⁴⁶ The constitutional test in Massachusetts appears to be one of balancing. The public hazard controlled by the regulation is balanced against the burden inflicted on the landowner. *Turnpike Realty* continues to be the governing case, but *MacGibbon III* may have an impact on subsequent cases in which the landowner asserts that the government restriction has deprived him of the practical use of his remaining land. Additionally, *Turnpike Realty* seems to have made the courts comfortable with the regulation of floodplains even in situations where the exact degree of hazard has not been ascertained.

A. *Three Attempted Incursions into the Floodplain*

During 1979 and 1980, the Massachusetts Appeals Court rendered three decisions interpreting local floodplain protection bylaws. In *Subaru of New England, Inc. v. Board of Appeals*,⁴⁷ the town denied plaintiff a special permit to place fill along the Neponset River. The fill would have resulted in a loss of fifteen acre feet of floodwater storage capacity.⁴⁸ Testimony indicated that this loss would result in a rise of one quarter of an inch in the flood stage of the river related to the maximum area of the floodplain zone.⁴⁹ The trial court found the effect minimal and concluded that the town acted unreasonably and arbitrarily in refusing to grant Subaru a permit.⁵⁰ In reversing the trial court, the appeals court held that as "reasonable persons could differ as to the severity of danger from flooding . . . the board's decision was not arbitrary and must prevail."⁵¹ Thus, because the local board showed some basis for its decision, the court refused to substitute its opinion for that of the board's.⁵² The court's decision in *MacGibbon III* directing the board to issue a permit was distinguished on the ground that in the case at bar, filling would cause water to flow over the land of others, not merely the landowner's property.⁵³ The opinion shows a distinct disposition to follow *Turnpike Realty* rather than the *MacGibbon* reasoning.

46. See Volpe, 349 Mass. at 107-10, 206 N.E.2d at 669-70.

47. 8 Mass. App. Ct. 483, 395 N.E.2d 880 (1979).

48. *Id.* at 485, 395 N.E.2d at 882.

49. *Id.* at 485-86, 395 N.E.2d at 882. The rise of one quarter of an inch, however, may have represented the rise to be expected if the entire floodplain of 825 acres were filled, not plaintiff's 2.98 acres. *Id.* at 486 n.4, 395 N.E.2d at 882 n.4.

50. *Id.* at 486, 395 N.E.2d at 882.

51. *Id.* at 488, 395 N.E.2d at 883.

52. *Id.*, 395 N.E.2d at 883.

53. *Id.* at 487 n.5, 395 N.E.2d at 882 n.5.

In *Turner v. Town of Walpole*,⁵⁴ the appeals court summarily upheld the floodplain bylaw of Walpole against a claim that it was confiscatory as applied to the landowner.⁵⁵ What is interesting about the case is that Judge Kass declared that *Turnpike Realty*, cited six times in his brief opinion, clearly governed, although the Walpole bylaw lacked any provision for individual review of applications to build residential or commercial buildings.⁵⁶ In effect, special permits were available only for industrial uses. The court felt that this was a reasonable distinction. It is not clear from the opinion what zoning governed plaintiff's property. The case, however, appeared to demonstrate that the availability of the special permit procedure, greatly emphasized in *Turnpike Realty*,⁵⁷ may not be constitutionally required.

The third decision, also written by Judge Kass, upheld denial by the Concord Board of Appeals of a special permit to fill land in the floodplain of the Assabet River. In *S. Kemble Fischer Realty Trust v. Board of Appeals*,⁵⁸ the trial court found that the proposed filling of an old canal in the floodplain would have a number of adverse effects:

[T]he proposed filling of a canal by the plaintiff would defeat the drainage function which the canal served; the velocity of water flow over a dam in the Assabet River would be increased such that erosion of an existing dam, washing out of existing fill and a change in the course of the Assabet River were likely; compensatory water storage in the locus would be reduced; the land of others would be adversely affected; and filling the upstream end of the canal would contribute to stagnation and pollution in the downstream unfilled end, causing detriment to the public health.⁵⁹

In view of the findings, the result was to be expected. The decision, however, is interesting for its treatment of the taking issue. Plaintiff asserted that it was left with no practical use of its property.⁶⁰ The court declared that, after *Turnpike Realty*, "the prospects for the plaintiff's assault on this score are meager. That decision forecloses the argument that the exceedingly limited use which a flood plain

54. 1980 Mass. App. Ct. Adv. Sh. 1745, 409 N.E.2d 807.

55. *Id.* at 1745, 409 N.E.2d at 808.

56. *Id.* at 1746, 409 N.E.2d at 808.

57. 362 Mass. at 230, 284 N.E.2d at 897.

58. 1980 Mass. App. Ct. Adv. Sh. 637, 402 N.E.2d 100.

59. *Id.* at 639-40, 402 N.E.2d at 102. The court remarked that "[t]his sampling of the judge's findings does not exhaust his compilation of what was likely to go wrong if the plaintiff obtained the permit it wanted." *Id.* at 640, 402 N.E.2d at 102.

60. *Id.* at 641, 402 N.E.2d at 103.

zoning by-law may leave to the owner of land constitutes a *de facto* taking.”⁶¹ Plaintiff pointed out that the trial judge himself had found that plaintiff could not use its land in its present condition for any of the uses permitted within the Flood Plain Conservancy District.⁶² The trial judge, however, also had found “that the plaintiff’s land was not worthless”⁶³ The appeals court speculated that it was “by no means clear from the record that the plaintiff could not use that portion of its land in the flood plain zone for some purpose which did not require filling, for example to enhance that portion of its land which is outside the flood plain.”⁶⁴ Although the town succeeded on that conjecture, the decision provides a useful caution on the importance of introducing evidence at trial regarding the presence or absence of some kind of “residual economic utility.”⁶⁵ Massachusetts courts are not yet ready to uphold regulation on the basis of hazard alone, in the face of total depreciation of value.

A recent New Hampshire case offers an instructive contrast to the three Massachusetts floodplain cases. In *Burrows v. City of Keene*,⁶⁶ the New Hampshire Supreme Court struck down designation of plaintiff’s property as an unbuildable “conservation district” and required payment of damages in inverse condemnation to compensate plaintiff for the loss of value during the period of overregulation.⁶⁷ The strongly worded opinion discusses the history of American and English constitutional law, describing the protection in the New Hampshire Constitution against a regulatory taking⁶⁸ as “a principle that lies at the very foundation of civilized society as we know it.”⁶⁹ The instructive facts illustrate the regulatory debacle involved in the case. Although the subject area was located in an environmentally sensitive area, no mention of this was made as a basis for regulation. The planning board, however, in considering the proposed subdivision, opined that the land “should be protected as a wilderness area.”⁷⁰ Further, the city, in attempting to buy the land, refused to pay more than 27,900 dollars, although the property had been purchased for almost twice that amount and was assessed at

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 121 N.H. 590, 432 A.2d 15 (1981).

67. *Id.* at 601, 432 A.2d at 22.

68. N.H. CONST. pt. 1, art. II.

69. 121 N.H. at 595, 432 A.2d at 18.

70. 121 N.H. at 600, 432 A.2d at 21.

41,406 dollars.⁷¹ The conclusion was, to the court, inescapable: Rather than regulating land of unique value⁷² so as to prevent injury to others, the city was merely "attempting to obtain for the public the benefit of having this land remain undeveloped as open space without paying for that benefit in the constitutional manner."⁷³

Any visible intent to exercise the police power so as to retain developable land in a natural condition almost always is fatal in cases involving taking. For example, in *Aronson v. Sharon*,⁷⁴ large-lot zoning was struck down on the basis of such a stated intent; whereas in a later case, lots of similar size were upheld on a showing of public health concerns.⁷⁵ The implications are all the worse if the community has previously considered buying the land for open space and turns to regulation when the sale falls through.⁷⁶

B. *Two Tests of Procedures Under the WPA*

From a simple regulatory law, the WPA has grown to a lengthy statute, filed with Latin definitions and administrative procedures, and governed by complex and detailed regulations.⁷⁷ The pitfalls of its interpretation are considerable and are demonstrated in two recent cases concerning the towns of Rutland and Orleans. These cases reflect the complexities of the language and procedure of the WPA, rather than constitutional verities.

In *Town of Rutland v. Fife*,⁷⁸ the only real legal issue was whether the land on which defendant Fife wanted to build was a wetland as defined in the statute.⁷⁹ The only evidence the town produced at trial that touched upon the criteria for a protected wetland was a letter from an environmental consultant and registered sanitarian.⁸⁰ Because the letter failed to mirror the language of the WPA regarding the level of the water table or the incidence of wetland

71. *Id.* at 594, 432 A.2d at 17.

72. *Id.* at 601, 432 A.2d at 21 (distinguishing *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975) in which the court upheld a prohibition on the filling of a coastal saltmarsh).

73. 121 N.H. at 600, 432 A.2d at 21.

74. 346 Mass. 598, 195 N.E.2d 341 (1964).

75. *Wilson v. Town of Sherborn*, 3 Mass. App. Ct. 237, 326 N.E.2d 922 (1975); *see also Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 541, 193 A.2d 232, 234 (1963).

76. *See Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 544, 193 A.2d 232, 235 (1963); Dawson, *supra* note 7, at 772-74.

77. MASS. GEN. LAWS ANN. ch. 131, § 40 (West 1974 and Supp. 1982).

78. 1981 Mass. App. Ct. Adv. Sh. 308, 416 N.E.2d 518.

79. *Id.* at 309, 416 N.E.2d at 519.

80. *Id.* at 312-13, 416 N.E.2d at 521.

plants, the appeals court granted summary judgement, holding that the letter fell short of establishing that the land was a wetland.⁸¹ The message here for conservation commissions and town attorneys is very clear. The court also struggled with the meaning of the statutory requirement that a subject wetland border on surface water.⁸² The court stated that the definition of "bordering" in the regulations leaves the reader "mired in hopeless circularity . . ."⁸³ in that it defines bordering as including land "within '100 feet horizontally landward from the bank of any . . . swamp bordering the . . . pond'"⁸⁴ Judge Kass dealt with the circularity by deciding that a wetland is subject to the law if any portion of it lies within one hundred feet of a pond, ocean, estuary, creek, river, stream, lake, or land subject to tidal action and other flooding, whereas a wetland beyond this expanded version of a bank is not subject to the law.⁸⁵ *Fife* marks the first judicial attempt at reconciling the statutory and regulatory definitions of the bordering jurisdiction.⁸⁶ On appeal, the Massachusetts Supreme Judicial Court determined that the disputed letter was "sufficiently substantial . . . to raise an apparent issue of fact" and remanded the case for trial.⁸⁷

*Hamilton v. Conservation Commission of Orleans*⁸⁸ also was decided on a single legal point. Plaintiff Hamilton, dissatisfied with the decision of the local conservation commission regarding her application to build a house by Cape Cod Bay, appealed to the DEQE.⁸⁹ The DEQE made a *de novo* decision under the WPA following an adjudicatory hearing.⁹⁰ Similar to the local conservation commission, the DEQE prohibited the proposed work unless the work was to be constructed on pilings, without a revetment, and with no work seaward of twenty feet from the mean high water mark.⁹¹ Claiming that the conservation commission's decision was confiscatory, plaintiff neither sought judicial review within the thirty-day limit under

81. *Id.* at 314, 416 N.E.2d at 522.

82. *Id.* at 312, 416 N.E.2d at 520.

83. *Id.* at 310, 416 N.E.2d at 520.

84. *Id.* (quoting 310 CODE MASS. REGS. 10.02(4)&(6) (1980)).

85. 1981 Mass. App. Ct. Adv. Sh. at 311 & n.5, 416 N.E.2d 520 & n.5.

86. During informal discussions, members of the Massachusetts Association of Conservation Commissions have indicated that most conservation commissions interpret the regulation to mean that they may control activities within 100 feet from any wetland; an area known as the "buffer zone."

87. 385 Mass. 1001, 1001, 433 N.E.2d 424, 424 (1982).

88. 1981 Mass. App. Ct. Adv. Sh. 1521, 425 N.E.2d 358.

89. *Id.* at 1522, 425 N.E.2d at 360.

90. *Id.* at 1523-24, 425 N.E.2d at 361.

91. *Id.* at 1524, 425 N.E.2d at 361-62.

the State Administrative Procedures Act,⁹² nor did she elect to sue the DEQE.⁹³ Plaintiff instead sued the local conservation commission in inverse condemnation for depriving her of all use of her property.⁹⁴ After a long discussion of the history of the WPA, the court concluded that the WPA "reserves to the DEQE the power to make the final decision on applications involving the specified concerns and to preserve thereby the statewide interest in the protection of our wetlands."⁹⁵ As the DEQE bears the liability for any taking, the case was brought against the wrong party and, therefore, was dismissed.⁹⁶

The court, however, did state that the plaintiff was able to seek redress under the eminent domain law,⁹⁷ which thus far had been considered applicable only to actual takings of property for public purposes. This theory of action has several implications. First, it establishes an appeal period of two years from the date of the final order.⁹⁸ The WPA states that "[n]o person shall remove, fill, dredge or alter any [defined] wetland . . . or any land subject to . . . flooding . . . without receiving and complying with an order of conditions *and provided all appeal periods have elapsed.*"⁹⁹ Heretofore, these appeal periods generally have been deemed to be the ten day period after the local conservation commission has acted or failed to act, or the thirty-day period under the State Administrative Procedures Act (APA)¹⁰⁰ after the issuance of a final, superseding order by the DEQE. Thus, the question becomes whether *Hamilton* signifies that no one may do work in a subject area for a full two years after a state order is issued, for fear of a taking claim. If so, grave difficulties would be presented, as the orders on their face are good only for a year.¹⁰¹ The historical facts show an inadvertence: A provision did appear in the WPA naming the APA as the sole remedy on appeal, but this provision was omitted when the law was subjected to a total redrafting in 1974.¹⁰² The court, however, noted that during

92. MASS. GEN. LAWS ANN. ch. 30A, § 14 (West 1979).

93. 1981 Mass. App. Ct. Adv. Sh. at 1525, 425 N.E.2d at 362.

94. *Id.* at 1522, 425 N.E.2d at 360.

95. *Id.* at 1531, 425 N.E.2d at 365.

96. *Id.* at 1532, 425 N.E.2d at 366.

97. *Id.* at 1534, 425 N.E.2d at 366 (citing MASS. GEN. LAWS ANN. ch. 79, §§ 16, 18 (West 1969)).

98. 1981 Mass. App. Ct. Adv. Sh. at 1534, 425 N.E.2d at 367.

99. MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1982) (emphasis added).

100. *Id.* ch. 30A, §§ 14-17 (West 1979).

101. 310 CODE MASS. REGS. 10.06(4) (1980). An exception is made under 310 CODE MASS. REGS. 10.05(9) for dredging of ports.

102. Act of Aug. 13, 1974, ch. 818, § 40, 1974 Mass. Acts 834.

the same legislative session a similar provision was placed into another environmental law.¹⁰³ By expressly including an exclusive remedy provision in one law and excluding it from the WPA, the court concluded that the legislature did not intend to limit the remedy under the WPA.¹⁰⁴

Hamilton not only extended the limitations period, it also signaled the abandonment of the standard of review under the APA, which generally is limited to the question of whether the state agency acted arbitrarily.¹⁰⁵ Finally, an action brought under the eminent domain statute opens the door towards adoption of the new doctrine, recently expressed in a United States Supreme Court minority opinion,¹⁰⁶ that an over-regulated landowner ought to be compensated in cash and not merely by the removal of the restriction on the land.¹⁰⁷ The New Hampshire Supreme Court has adopted this doctrine in *Burrows*.¹⁰⁸

C. *Protection of Wetlands Through Local Home Rule Measures*

*Lovequist v. Conservation Commission*¹⁰⁹ is interesting for two reasons: Its broad statements on taking¹¹⁰ and its holding that state law does not preempt communities from adopting nonzoning "general" environmental protection ordinances and bylaws as well as zoning controls.¹¹¹ Although this kind of local bylaw is not included in the statute listing permissible local measures,¹¹² the court upheld it as authorized by the Commonwealth's home rule amendment.¹¹³

After *Golden*, it was improbable that the Massachusetts courts would find that the state scheme of wetlands controls preempted local controls. What was more uncertain, however, was the degree to which the Zoning Act,¹¹⁴ and its predecessor the Zoning Enabling Act,¹¹⁵ might be construed as the exclusive means for regulating wet-

103. See MASS. GEN. LAWS ANN. ch. 131, § 39A (West Supp. 1982) (allowing local conservation commissions to regulate "scenic mountains" in Berkshire County).

104. See 1981 Mass. App. Ct. Adv. Sh. at 1536-37, 425 N.E.2d at 368.

105. MASS. GEN. LAWS ANN. ch. 30A, § 14(7)(g) (West 1979).

106. *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting).

107. *Id.* at 658.

108. 121 N.H. at 598-99, 432 A.2d at 19-20.

109. 379 Mass. 7, 393 N.E.2d 858 (1979).

110. *Id.* at 19-21, 393 N.E.2d at 866.

111. See *id.* at 11-16, 393 N.E.2d at 861-64.

112. MASS. GEN. LAWS ANN. ch. 40, § 21 (West 1958 & Supp. 1982).

113. See 379 Mass. at 14-15, 393 N.E.2d at 863.

114. MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979).

115. *Id.* §§ 1-22 (West 1968).

lands or floodplains. In *Rayco Investment Corp. v. Selectmen of Raynham*,¹¹⁶ the supreme judicial court disapproved the efforts of that town to limit the number of trailers by a "general" nonzoning bylaw, because the "nature and effect of the 1971 bylaw is that of an exercise of the zoning power."¹¹⁷ The *Rayco* court also showed a preference for the use of the zoning power in land use regulations because of its comprehensiveness and the assorted protections it afforded to landowners.¹¹⁸

The *Lovequist* court distinguished *Rayco* on two grounds. First, the town had not demonstrated a history of comprehensive wetlands controls through a zoning bylaw;¹¹⁹ and second, the bylaw manifested "neither the purpose nor the effects of a zoning regulation."¹²⁰ It did not prohibit or permit any particular uses of land, deny or invite permission to build any structure, or regulate density.¹²¹ It related only to wetlands values, not to other municipal concerns, and regulated them on a case-by-case basis.¹²² Having passed over this hurdle, the court had no trouble finding that regulation by a nonzoning bylaw was as valid as regulation through zoning.¹²³ Plaintiff, however, argued that the use of the local bylaw eliminated an appeal to DEQE from a local decision under the WPA.¹²⁴ The court made short work of this argument. It stated that the aggrieved applicant still had the right to judicial review in the nature of a writ of certiorari.¹²⁵ It should be noted that *Golden* did not raise the important point that under the WPA the state agency has the last administrative word, whereas under a local bylaw the court directly reviews a town decision. If *Golden* had not been decided first, an interesting question arises as to whether the *Lovequist* court would have been more sympathetic to the argument.

116. 368 Mass. 385, 331 N.E.2d 910 (1975).

117. *Id.* at 392, 331 N.E.2d at 914.

118. *Id.* at 393-94, 331 N.E.2d at 915. Presumably the court was referring to the greater procedural requirements under the then Zoning Enabling Act, as well as to the numerous exemptions and limitations contained in the law. It is clear from *Rayco* that the town, being unable to use its zoning to stop a plan for a trailer park because of the exemption under the Zoning Enabling Act, tried to circumvent this limitation by using the general bylaw power. *Id.*

119. 379 Mass. at 14, 393 N.E.2d at 863.

120. *Id.* at 13, 393 N.E.2d at 862.

121. *Id.*

122. *Id.* at 13-16, 393 N.E.2d at 863-64.

123. *Id.* at 15, 393 N.E.2d at 863.

124. *Id.* at 15, 393 N.E.2d at 863-64.

125. *Id.* at 16, 393 N.E.2d at 864; see MASS. GEN. LAWS ANN. ch. 249, § 4 (West Supp. 1982).

Lovequist involved denial of a permit to put in a road over a marshy neck in order to create access to twenty-six acres of upland.¹²⁶ Building the road would have required removal of 6,000 cubic yards of peat, to be replaced with more permeable gravel.¹²⁷ The town conservation commission denied the application on the basis of groundwater depletion and pollution. That is, removal of the peat might act like "taking the plug out of a bathtub,"¹²⁸ resulting in a loss of groundwater. The court upheld the denial even though the groundwater was not being used currently as a water supply.¹²⁹

In rejecting plaintiff's taking claim, the *Lovequist* court stated that a government decision may deprive an owner of even the most beneficial use of property without rendering the action an unconstitutional taking.¹³⁰ The court noted that the only evidence of value loss due to the restriction of use was a hearsay statement that plaintiff had been offered 250,000 dollars for the property if it could be developed.¹³¹ In addition, the land had residual use for a single family house, a camp, or a cranberry bog.¹³² Finally, the court pointed out that as plaintiff had paid 38,200 dollars for the property which recently had been appraised for 122,000 dollars, plaintiff would realize a gain of over two-hundred percent if he immediately sold the property.¹³³ The manner and limits of these findings contain valuable lessons for attorneys on both sides of a taking case, particularly the court's comment that "the plaintiffs themselves presented little evidence of projected loss."¹³⁴

D. *First Impression of the Inland Wetlands Restriction Act*

*Moskow v. Commissioner of Environmental Management*¹³⁵ is the first decision under either the coastal¹³⁶ or the inland¹³⁷ wetlands restriction laws. The opinion followed the reasoning of *Lovequist* and extensively quoted *Penn Central Transportation Co. v. New York*

126. 379 Mass. at 9, 393 N.E.2d at 860.

127. *Id.* at 18, 393 N.E.2d at 865.

128. *Id.*

129. *Id.* at 18-19 & 19 n.12, 393 N.E.2d at 865 & 865 n.12.

130. *Id.* at 19, 393 N.E.2d at 866.

131. *Id.* at 20, 393 N.E.2d at 866.

132. *Id.*

133. *Id.* at 20-21, 393 N.E.2d at 866. It was not clear, however, whether the appraisal reflected expectations of development.

134. *Id.* at 20, 393 N.E.2d at 866.

135. 1981 Mass. Adv. Sh. 2134, 427 N.E.2d 750.

136. MASS. GEN. LAWS ANN. ch. 130, § 105 (West Supp. 1981).

137. *Id.* at ch. 131, § 40A (West Supp. 1981).

City.¹³⁸ The *Moskow* court focused on two points: That “diminution in value” is not in itself a taking¹³⁹ and that the value of the owner’s property as a whole must be considered, not merely the value of the restricted portion.¹⁴⁰

In *Moskow*, plaintiff owned about seven and one-half acres of land in densely developed Newton.¹⁴¹ The Commonwealth’s restrictive order limited use of about four acres to recreation, wharves and other boating uses, and utility lines.¹⁴² The trial court determined the restrictive order confiscatory, in part because without the restriction plaintiff could have subdivided the land into eight lots.¹⁴³ The supreme judicial court, however, found that the residual utility of the land as a site for one, single family dwelling presented a “sufficient practical use to prevent the wetland restrictions from constituting a taking.”¹⁴⁴ It is worth noting that, once again, “[t]he plaintiff offered no evidence which showed that he suffered an actual financial loss as a result of the restrictions.”¹⁴⁵

The floodplain protection bylaw considered in *Turnpike Realty*¹⁴⁶ had three purposes: To protect the owner’s land; to protect upstream and downstream land; and to protect “the entire community from individual choices of land use which require subsequent public expenditures for public works and disaster relief.”¹⁴⁷ The third purpose, which might be objectionable to those who believe that a community cannot use the zoning power simply to avoid public expenditures,¹⁴⁸ was not discussed in *Turnpike Realty*. The court, however, did approve the bylaw. In view of this distinction, it is interesting that the *Moskow* court extended the principle of the Dedham bylaw to the inland wetlands restriction act which, it stated, “helps society avoid the relief expenditures connected with flooding

138. 438 U.S. 104 (1978).

139. 1981 Mass. Adv. Sh. at 2137-38 n.3, 427 N.E.2d at 753 n.3.

140. *Id.* at 2137, 427 N.E.2d at 753.

141. *Id.* at 2135, 427 N.E.2d at 751.

142. *Id.* at 2135-36, 427 N.E.2d at 752.

143. *Id.* at 2137, 427 N.E.2d at 752.

144. *Id.*, 427 N.E.2d at 753 (citing *Lovequist*, 379 Mass. 7, 393 N.E.2d 866 (1979)).

145. 1981 Mass. Adv. Sh. at 2137-38 n.3, 427 N.E.2d at 753 n.3.

146. *Turnpike Realty*, 362 Mass. at 227, 284 N.E.2d at 896.

147. 362 Mass. at 228, 284 N.E.2d at 896.

148. *See e.g.*, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975) (town zoning must provide for a fair share of low-cost housing despite local costs); *Simon v. Needham*, 311 Mass. 560, 565, 42 N.E.2d 516, 519 (1942) (zoning bylaws cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens).

and pollution control.”¹⁴⁹

E. *Further Evidence on the Public Trust in Tidal Lands*

State and federal laws have given special protection to areas subject to the “public trust” doctrine,¹⁵⁰ especially coastal areas below mean high or, in Massachusetts, mean low tidal lines. The public trust was the basis of the famous *Just v. Marinette Co.*,¹⁵¹ in which the Wisconsin Supreme Court upheld a prohibition on the filling of a freshwater coastal marsh. The court held that as the shorelands of Wisconsin were held under a public trust to protect navigable waters, an owner of such land could not claim compensation for government exercise of a servitude that interfered with his private use.¹⁵² Similarly, in *Zabel v. Tabb*,¹⁵³ the Fifth Circuit held that the federal servitude to which coastal areas¹⁵⁴ are subject also bars any compensation to landowners affected by restrictions on the use of such land.¹⁵⁵

In Massachusetts, the public trust over areas below mean low water level has developed over a period of many years.¹⁵⁶ The issue has been brought into prominence by the dispute over title to filled land in the valuable Boston harbor area.¹⁵⁷ Most recently the supreme judicial court has declared that “[a]s to submerged lands . . . no littoral landowner or anyone else has any special rights unless granted them by the Legislature.”¹⁵⁸ The disposition of such lands by the legislature must be for a public purpose only.¹⁵⁹ Thus, the issue is of continued interest in the Commonwealth.

149. 1981 Mass. Adv. Sh. at 2139 n.4, 427 N.E.2d at 754 n.4.

150. For a general discussion of the “public trust” doctrine, see Dawson, *supra* note 7, at 781-90.

151. 56 Wis. 2d 7, 201 N.W.2d 761 (1972). See also *Sibson v. State*, 115 N.H. 124, 130, 336 A.2d 239, 243, (1972) (citing *Just* in upholding prohibition of fill in a tidal wetland).

152. 56 Wis. 2d at 19, 201 N.W.2d at 769.

153. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

154. In *Zabel*, the coastal area in question was a Florida mangrove swamp. *Id.* at 215.

155. *Id.*

156. For a discussion of the early history of “public trust” doctrine in Massachusetts, see *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851); Dawson, *supra* note 7, at 781-85.

157. See *Boston Waterfront Dev. Corp. v. Commonwealth*, 6 Mass. App. Ct. 214, 374 N.E.2d 598 (1978), *aff'd*, 378 Mass. 629, 393 N.E.2d 356 (1979).

158. Opinion of the Justices, 1981 Mass. Adv. Sh. 1361, 1369, 424 N.E.2d 1092, 1099.

159. *Id.* at 1371, 424 N.E.2d at 1100.

In *Graham v. Estuary Properties, Inc.*,¹⁶⁰ the Florida Supreme Court gave powerful expression to the public trust in protecting coastal mangrove swamps. Estuary owned approximately 6,500 acres of land on the southwest coast, less than ten percent of which was nonwetlands.¹⁶¹ It sought to convert 1,800 acres of black mangroves, adjacent to 2,800 acres of tidal red mangroves, into a large residential and commercial center.¹⁶² The local board of county commissioners and the Florida Land and Water Adjudicatory Commission refused to allow the project, on the grounds of degradation of adjacent bays.¹⁶³ The court upheld the denial, citing *Just* and noting the "close proximity of the land in question to navigable waters which the state holds in trust for the public."¹⁶⁴

In considering taking, the *Graham* court emphasized two points. First, it pointed out that the land was bought by Estuary with "full knowledge that part of it was totally unsuitable for development."¹⁶⁵ Second, the court distinguished other Florida cases in which landowners had prevailed because "all of the owners' lands were submerged and were totally useless without the right to fill them."¹⁶⁶ Estuary's land, however, was "not entirely submerged."¹⁶⁷ Furthermore, Estuary's claim that it would make no beneficial use of the nonsubmerged part of its property was "supported mainly by the self-serving testimony of the president of Estuary"¹⁶⁸ The company "offered no independent evidence to support this contention."¹⁶⁹ In spite of the ninety-to-ten ratio between regulated and unregulated land, the "residual use" argument once again was decided in favor of the regulators, in part because of the absence of competent evidence of total deprivation of practical use.

IV. CONCLUSION

Despite claims of diminished land value, recent Massachusetts cases show the continued force of the *Turnpike Realty* doctrine in

160. 399 So. 2d 1374 (Fla. 1981).

161. *Id.* at 1376.

162. *Id.*

163. *Id.* at 1376-77.

164. *Id.* at 1382.

165. *Id.* This reasoning would apply equally well to anyone buying a Massachusetts wetland, especially land subject to recorded restrictions under any of the three wetlands laws or the Scenic Rivers Act, MASS. GEN. LAWS ANN. ch. 21, § 17A (West 1981).

166. 399 So. 2d at 1381.

167. *Id.*

168. *Id.* at 1382.

169. *Id.*

upholding regulation of floodplains and wetlands, providing that the regulation is applied properly to the land and the owner fails to prove that the property has no residual practical value. Courts generally are becoming more knowledgeable about the ecological value of wetlands, especially coastal marshes, and the hazards from development of floodplains. A strong minority surge of support for the position that compensation should accompany regulation makes it more imperative than ever that some practical use of the land, however reduced, be left to the landowner.