

Appendix A-1

17-P-1189

Appeals Court

JANICE SMYTH vs. CONSERVATION  
COMMISSION OF FALMOUTH & another.<sup>1</sup>

No. 17-P-1189.

Barnstable. September 7, 2018. – February 19, 2019.

Present: Green, C.J., Milkey, & Singh, JJ.

Eminent Domain, Jury trial, What constitutes taking.

Constitutional Law, Eminent domain, Taking of property, Trial by jury. Practice, Civil, Eminent domain proceeding, Jury trial, Judgment notwithstanding verdict.

Civil action commenced in the Superior Court Department on November 27, 2012.

A motion to bifurcate the trial was considered by Cornelius J. Moriarty, II, J.; the case was tried before him; and a motion for judgment notwithstanding the verdict was considered by him.

Michelle N. O'Brien (Nicholas P. Brown also present) for the defendants.

Brian J. Wall for the plaintiff.

Edward J. DeWitt, for Association to Preserve Cape Cod, Inc., amicus curiae, submitted a brief.

Rebekah Lacey, for Massachusetts Association of Conservation Commissions, amicus curiae, submitted a brief.

---

<sup>1</sup> Town of Falmouth.

## Appendix A-2

GREEN, C.J. A land owner brought this action in the Superior Court, claiming that local land use regulation effected a taking of her property, requiring just compensation under the Fifth Amendment to the United States Constitution and art. 10 of the Massachusetts Declaration of Rights. This appeal presents a question of first impression in Massachusetts: whether the land owner is entitled to have her regulatory taking claim decided by a jury. We conclude that the jury right does not attach to such a claim, and that the judge erred in denying the defendants' motion to submit only the question of damages to a jury. We further conclude that the evidence presented at the trial did not, as matter of law, support a claim of regulatory taking. We accordingly reverse the judgment in the plaintiff's favor and direct that judgment enter for the defendants.<sup>2</sup>

Background. We summarize the facts appearing in the record, which are for the most part undisputed.<sup>3</sup> The plaintiff owns an unimproved lot of land at 250 Alder Lane (property) in Falmouth (town). She inherited the property from her parents, who purchased it for \$49,000 in 1975.<sup>4</sup> The property is

---

<sup>2</sup> We acknowledge the amicus briefs submitted by the Association to Preserve Cape Cod, Inc. and the Massachusetts Association of Conservation Commissions.

<sup>3</sup> Though the evidence presented by the parties conflicts in certain respects, the divergence is not material to the issues we address below and does not affect the accuracy of the summary that follows.

<sup>4</sup> The plaintiff's parents also purchased, and the plaintiff inherited, another nearby (but not contiguous) lot at 269 Alder Lane in 1972. The record does not disclose the original purchase price for 269 Alder Lane. The plaintiff sold that unimproved lot

### Appendix A-3

located within a residential subdivision known as “Wild Harbour Estates,” which contains approximately 174 lots.<sup>5</sup> Though the plaintiff’s parents purchased the property with the intention of someday building a residence to occupy in retirement, they took no steps toward planning or building a home on it. From 1975 through the end of 2005, the plaintiff’s parents (and later the plaintiff) paid property taxes and homeowners’ association dues on the property, and certain legal fees incident to transferring title to the plaintiff, but otherwise incurred no development or other costs or expenses associated with their ownership.

In June, 2006, the plaintiff retained a consultant to perform a soil evaluation test for a proposed septic system on the property, and her husband (an architect) prepared two sketches for a potential house on the property. In late 2007 and early 2008, the plaintiff engaged various professionals to prepare formal plans for a house on the property, and to assist in the preparation of applications for the required approvals. In 2012, the plaintiff filed a notice of intent with the defendant town conservation commission

---

in August, 2006, for \$300,000. The defendants press no contention that the two noncontiguous lots, purchased at different times, should be considered a single economic unit comprising the “denominator” for assessing the impact of the regulations on the plaintiff’s investment-backed expectations. See Giovanella v. Conservation Comm’n of Ashland, 447 Mass. 720, 726-731 (2006).

<sup>5</sup> Under the town zoning bylaw, permitted uses in the zoning district in which the property is located include, among other things, one-family detached houses; parks; playgrounds; beaches; watershed; agriculture and floriculture; and common piers, floats, and docks.

#### Appendix A-4

(commission), seeking approval, under both the Wetlands Protection Act, G. L. c. 131, § 40, and the town wetlands protection bylaw (and related regulations), of her plans to construct a residence on the property. As submitted, the plaintiff's plans required several variances from the wetlands protection bylaw, as they did not comply with its requirements covering coastal banks, salt marshes, or land subject to coastal storm flowage. The commission denied the plaintiff's variance requests, and the plaintiff filed the present action. In her amended complaint, the plaintiff sought relief in the nature of certiorari, under G. L. c. 249, § 4, and declaratory relief, in both instances directed to the denial of her variance requests. Count III of the amended complaint asserted that the application of the town's wetlands protection bylaw to the property effected a regulatory taking, for which she was entitled to compensation under the Fifth Amendment to the United States Constitution and art. 10 of the Massachusetts Declaration of Rights.

A judge of the Superior Court denied the plaintiff's motion for judgment on the pleadings, thereby upholding the commission's decision and disposing of counts I and II of the complaint; thereafter, a different judge denied the defendants' motion for summary judgment on the plaintiff's regulatory taking claim. The defendants then moved to bifurcate the trial, so that the question whether a regulatory taking had occurred would be tried without a jury and only the question of damages (if a taking had occurred) would be tried before a jury. The judge denied the defendants' motion, submitting both the question of liability and of damages to the jury. At trial, among other evidence, the plaintiff presented

## Appendix A-5

the testimony of an appraiser who determined that the property in 2014 had a value, if buildable, of \$700,000 and, if unbuildable, of \$60,000.<sup>6</sup> After trial, a jury found that the wetlands protection bylaw effected a regulatory taking of the plaintiff's property, and awarded damages in the amount of \$640,000. The plaintiff filed a motion for costs and for interest on the damages award pursuant to G. L. c. 79, § 37 (governing eminent domain), or alternatively, pursuant to G. L. c. 231, § 6H (governing damages generally). In her subsequent reply to the defendant's response to her motion, the plaintiff argued that the interest should be calculated pursuant to G. L. c. 231, § 6H, and not G. L. c. 79, G. L. c. 37. The trial judge awarded costs and directed that interest be calculated pursuant to G. L. c. 79, § 37, citing Lopes v. Peabody, 430 Mass. 305, 314 (314) (1999). After judgment entered, the defendants moved unsuccessfully for judgment notwithstanding the verdict. Both parties appealed.

Discussion. 1. Jury right. Under Mass. R. Civ. P. 39(a), as amended, 450 Mass. 1403 (2008), it is error to submit an issue to a jury over objection, unless the party seeking the jury determination has a right to a jury trial on the issue.<sup>7</sup> The right to a jury trial is established by art. 15 of the Massachusetts Declaration of Rights, which "has been construed as preserving the right to trial by jury in actions for

---

<sup>6</sup> The appraiser also testified that the values of the property in 2012, when the commission denied the plaintiff's application, would be "very similar" to those determined in his 2014 appraisal.

<sup>7</sup> The rule is the same in the Federal courts. See Fed. R. Civ. P. 39(a).

## Appendix A-6

which a right to trial by jury was recognized at the time the Constitution of the Commonwealth was adopted in 1780.” New Bedford Hous. Auth. v. Olan, 435 Mass. 364, 370 (2001).<sup>8</sup> “If a wholly new cause of action is created, a jury trial right does not attach to that claim.” Department of Revenue v. Jarvenpaa, 404 Mass. 177, 188 (1989). A new cause of action nonetheless may fall within the jury trial right if it is analogous to a common-law claim entitled to trial by jury in 1780. See Stonehill College v. Massachusetts Comm’n Against Discrimination, 441 Mass. 549, 561 n.16 (2004).

The parties in the present case agree that a claim based on an alleged regulatory taking or, as such a claim is sometimes described, inverse condemnation, did not exist when the Massachusetts Constitution was adopted, or for a considerable time thereafter; it came into existence only when the Supreme Court of the United States issued its decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-416 (1922). The question whether the plaintiff is entitled to a jury trial on her claim of regulatory taking accordingly depends on whether it is analogous to a common-law claim entitled to trial by jury in 1780, or whether it is a wholly new cause of action.

We are not persuaded that an ordinary claim of a regulatory taking sufficiently resembles an action in tort to warrant a conclusion that the claim is analogous to such a claim for purposes of recognizing

---

<sup>8</sup> Essentially the same analysis is used to determine whether the jury right attaches under the Seventh Amendment to the United States Constitution. See Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 224 n.5 (1994).

## Appendix A-7

the right to a jury trial. Among other differences, a claim of regulatory taking — at least of the type framed by the plaintiff's amended complaint — is markedly different from an action for trespass, in that the plaintiff raises no claim of physical invasion of her property. Compare, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), in which a requirement that the property owners maintain a pathway for public access on their property effected a regulatory taking requiring just compensation; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982), in which a physical invasion of private property authorized by the government for installation of cable lines and related equipment constituted a compensable taking, without regard to the public purposes it may serve.

The comparison of a claim of regulatory taking to common law tort fails from another perspective. As Justice Souter observed in his dissenting opinion in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 747 (1999) (Del Monte Dunes), unlike the question of liability in a common law tort claim, the question of liability in a claim of regulatory taking does not concern whether a wrongful act occurred; indeed, the “very assumption that liability flows from wrongful or unauthorized conduct is at odds with the modern view of acts effecting inverse condemnation as being entirely lawful. . . . Unlike damages to redress a wrong as understood in Gardner [v. Newburgh, 2 Johns. Ch. 162 (N.Y. 1816) (Kent, Ch.)] or Bradshaw [v. Rodgers, 20 Johns. 103 (N.Y. 1822)] (or even in a modern tort action), a damages award in an inverse condemnation action orders payment of the ‘just compensation’ required by the Constitution for payment of an obligation lawfully incurred.”

## Appendix A-8

The essence of the plaintiff's claim of regulatory taking is that enforcement of the regulatory scheme has unfairly burdened her ability to use the property, in comparison to her distinct investment-backed expectations. Claims of regulatory taking in circumstances such as those of the present case, where the regulation at issue effects neither a permanent physical invasion of property nor a complete deprivation of all economically beneficial use, require a highly nuanced balancing of multiple factors. Under Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (Penn Central), the factors that have "particular significance" include "[t]he economic impact of the regulation" on the plaintiff; "the extent to which the regulation has interfered with [the property owner's] distinct investment-backed expectations"; and "the character of the governmental action." See Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass. 754, 764 (2005). The claim itself, and the balancing test employed to evaluate it, find no apt comparison in actions recognized at common law in 1780; it is instead a "wholly new" cause of action.<sup>9</sup>

---

<sup>9</sup> In our view, the application of the multifactored Penn Central test to the effect of a particular regulatory scheme on a particular parcel of land is perhaps most similar to the question whether acts are "unfair or deceptive" within the meaning of G. L. c. 93A. In that context, the Supreme Judicial Court noted that a "flexible set of guidelines" is used to determine what is lawful or unlawful, and that, though "certain consumer violations are perhaps rooted in common law claims," the terms "unfair and deceptive" are "sufficiently open-ended to embrace causes of action for which there are no common law analogues." Nei v. Burley, 388 Mass. 307, 313 (1983). Though the ultimate remedy — just compensation in the form of money damages — is legal rather than equitable in nature, "[a]n award of monetary relief does not



## Appendix A-9

For their part, the defendants suggest that a claim of regulatory taking most closely resembles a direct eminent domain proceeding. We disagree. While both claims rest on the same constitutional guarantee against governmental taking of property without just compensation, and both ultimately result in the same remedy — just compensation — a claim of regulatory taking involves a preliminary (albeit significant and complex) question whether a taking has occurred at all. It is that determination of liability, based on the multifactored Penn Central test we have discussed, that is entirely different in kind from any question undertaken in a traditional direct condemnation action. See, e.g., Del Monte Dunes, 526 U.S. at 712-713.<sup>10</sup>

Finally, we reject the plaintiff's contention that Del Monte Dunes itself established a right to a jury trial for a claim of regulatory taking. Del Monte Dunes was brought under 42 U.S.C. § 1983, because “the State of California did not provide a compensatory remedy for temporary regulatory takings.” 526 U.S. at 710. Though the Court found a jury right for the property owner in that case, it expressly observed that

---

always implicate, a fortiori, an art. 15 right to a jury trial.” Stonehill College, 441 Mass. at 568.

<sup>10</sup> Though both parties appear to assume in their respective arguments that treating a claim of regulatory taking as analogous to a direct condemnation action would result in a conclusion that no jury right attaches, that conclusion is not at all clear. Province Law 1756-1757, c. 18, enacted in 1756 and still in effect when the Massachusetts Constitution was adopted in 1780, provided for the layout of highways and the assessment of related damages and that landowners could appeal to a jury “if the person complaining desires the same.

## Appendix A-10

its decision did “not address the jury’s role in an ordinary inverse condemnation suit.” Id. at 721.<sup>11</sup>

We conclude that the question whether a particular regulatory scheme has effected a regulatory taking, as distinct from the question of what constitutes just compensation for the taking — or, in other words, the question of liability in a regulatory taking claim — is a “wholly new” cause of action, to which the right to a jury trial does not attach. See Jarvenpaa, 401 Mass. at 188.<sup>12</sup>

---

<sup>11</sup> Pluralities in Del Monte Dunes adopted contrasting views of the nature of an inverse condemnation claim and the extent to which it might be analogized to a claim in tort or a direct condemnation claim. Justice Kennedy, writing for himself, Chief Justice Rehnquist, and Justices Stevens and Thomas, concluded that the claim is sufficiently analogous to a common law tort claim to warrant submission of the question of liability to a jury, see 526 U.S. at 715, while Justice Souter, writing in dissent for himself and Justices O’Connor, Ginsburg, and Breyer, concluded that the claim is not analogous to a claim in tort but instead is more appropriately analogized to a classic eminent domain action, to which no jury right applies. See supra at 536-537 (Souter, J., dissenting). There is no majority holding in Del Monte Dunes for the proposition that an ordinary regulatory taking claim, outside the context of a claim under 42 U.S.C. § 1983 occasioned by the absence under the relevant State law of a postdeprivation remedy, is analogous to a common law tort claim.

<sup>12</sup> Our conclusion that no jury trial right attaches to the question of liability in a regulatory taking claim is in accord with the vast majority of other States that have considered the question. See, e.g., Marshall v. Department of Water & Power, 219 Cal. App. 3d 1124, 1141 (1990); Scott v. County of Custer, 178 P.3d 1240, 1243 (Colo. App. 2007); Cumberland Farms, Inc. v. Groton, 262 Conn. 45, 70 (2002); Department of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 28 (Fla. 1990); Covington v. Jefferson County, 137 Idaho 777, 780 (2002); Hampton v. Metropolitan

## Appendix A-11

2. Regulatory taking. Our analysis does not end with our conclusion that it was error to submit the question of liability to the jury over the defendants' objection. The question remains whether to remand the case for a new trial without a jury or whether, as the defendants contended in their motion for judgment notwithstanding the verdict, the question of liability can be determined as matter of law on the basis of the trial record. To that end, we consider whether the evidence at trial, viewed in the light most favorable to the plaintiff, supports a claim of regulatory taking. See Boothby v. Texon, Inc., 414 Mass. 469, 470 (1993).<sup>13</sup>

---

Water Reclamation Dist., 2016 IL 119861, ¶ 23; Zimmerman v. County Comm'rs of Wabaunsee County, 293 Kan. 332, 344 (2011); Alevizos v. Metropolitan Airports Comm'n of Minneapolis & St. Paul, 298 Minn. 471, 484 (1974); 6224 Fontenelle Blvd., L.L.C. v. Metropolitan Utils. Dist., 22 Neb. App. 872, 879 (2015); McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 661 (2006); Wilkinson v. Board of Univ. & Sch. Lands, 2017 N.D. 231, ¶ 22; Harris v. Lincoln, 668 A.2d 321, 327 (R.I. 1995); WRB Ltd. Partnership v. County of Lexington, 369 S.C. 30, 32 (2006); Hallco Tex., Inc. v. McMullen County, 221 S.W.3d 50, 56 (Tex. 2006); E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist., 2010 WI 58, ¶ 29 n.20. Contrast Leone v. County of Maui, 141 Haw. 68, 85 (2017); Iowa Dev. Co. v. Iowa State Highway Comm'n, 255 Iowa 292, 297 (1963); Carter v. Oklahoma City, 862 P.2d 77, 81 (Okla. 1993).

<sup>13</sup> The defendants first raise their contention that no regulatory taking occurred by claiming error in the denial of their motion for summary judgment. However, the denial of a motion for summary judgment is not reviewable on appeal after a trial on the merits. Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 126 (1986). We instead consider the question through the lens of the defendants' posttrial motion for judgment notwithstanding the verdict.

## Appendix A-12

As we have discussed above, the question whether a regulatory scheme effects a taking calls for application of a balancing test, in which the “relevant ‘guideposts’ include: the actual ‘economic impact of the regulation’ on the plaintiff; the extent to which the regulation ‘has interfered with’ a landowner’s ‘distinct investment-backed expectations’; and the ‘character of the governmental action’” (citation omitted). Gove, 444 Mass. at 764. Against that background, we consider the evidence elicited at trial.<sup>14</sup>

a. Economic impact. Evaluation of the economic impact of a regulation on the plaintiff begins with a comparison of the value of the property with and without the regulation. See Giovanella v. Conservation Comm’n of Ashland, 447 Mass. 720, 734 (2006). However, even quite significant reductions in value do not necessarily constitute a regulatory taking. See, e.g., Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1348 (Fed. Cir. 2004), cert. denied, 543 U.S. 1188 (2005) (finding no taking after decreases in value of seventy-eight per cent and ninety-two per cent on two combined lots). Based on the valuation determined by the plaintiff’s appraiser, the regulation reduced the value of the property from \$700,000 (if buildable) to \$60,000 (if unbuildable). While significant, we observe that even as unbuildable the property’s value is still greater than the amount (\$49,000) the plaintiff’s parents paid for the property when they purchased it.<sup>15</sup>

---

<sup>14</sup> Though the parties sharply dispute whether a regulatory taking occurred, our review of the record reveals that the facts bearing on that question are largely not in dispute.

<sup>15</sup> The plaintiff presented no evidence at trial of the present value of the price her parents paid for the property in 1975. While

## Appendix A-13

As for other uses to which the property might be put, the zoning bylaw allows it to be used, among other things, as a park or a playground, and the plaintiff's appraiser testified at trial that it would be attractive to abutting owners on either side either for privacy or for expansion of their respective properties. See FIC Homes of Blackstone v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 694 (1996).

b. Investment-backed expectations. The fact that a property owner acquired property by means of inheritance rather than purchase does not by itself defeat a claim of interference with investment-backed expectations. See Gove, 444 Mass. at 766. However, the record shows a distinct lack of any financial investment toward development of the property, whether by the plaintiff or her parents, at any time over more than thirty years, including a substantial period within which it could have been built upon. The plaintiff (and her parents before her) paid property taxes on the property, assessed in its undeveloped state, and the plaintiff spent \$600 on a percolation test in 2006 as she began to explore development possibilities.<sup>16</sup> In such circumstances, and considering

---

we recognize the likelihood that the present value of the original purchase price may exceed the current value of the lot in its unbuildable condition, as we have observed, even a substantial reduction of the value of property can occur without effecting a regulatory taking. See Giovanella, 447 Mass. at 734-735, and cases cited.

<sup>16</sup> As the plaintiff developed and prosecuted her variance applications in the proceedings that led to the present action, she spent approximately \$70,000 for professional services. We note, however, that by definition those fees were spent at a time when

## Appendix A-14

that (as we have observed) the property even as unbuildable is worth more now than its purchase price, “it seems clear that any compensation would constitute a ‘windfall’ for [the plaintiff].” Gove, supra.

c. Character of the governmental action. In evaluating the character of the governmental action, “[t]he most straightforward analysis . . . is whether the character of the governmental action is like a physical invasion.” Giovanella, 447 Mass. at 735. “The Supreme Court also has considered whether a regulation unfairly singles out the owner. Other courts have looked at whether the government regulation is limited to mitigating harms or nuisances. Such regulations typically do not require compensation” (citation omitted). Id.

Here, the government’s action was clearly not like a physical invasion, and the plaintiff admits as much. The regulations at issue are of general applicability to all property in the town that has wetland resources and, by their terms, are designed to protect coastal and wetland resources generally. “Reasonable government action mitigating such harm, at the very least when it does not involve a ‘total’ regulatory taking or a physical invasion, typically does not require compensation.” Gove, 444 Mass. at 767.

Conclusion. In sum, based on the undisputed facts in the record, viewed in the light most favorable to the plaintiff, we conclude that the regulations at issue in the present case did not effect a regulatory taking of

---

she knew her property could not be developed under applicable regulations, but only with the relief of several variances.

## Appendix A-15

the property.<sup>17</sup> The order denying the defendants' motion for judgment notwithstanding the verdict is reversed. The judgment is reversed, and a new judgment shall enter for the defendants.

So ordered.

---

<sup>17</sup> Our conclusion renders moot the plaintiff's cross appeal, challenging the trial judge's conclusion that interest on the damage award should accrue at the statutory rate applicable to eminent domain awards, under G. L. c. 79, § 37, rather than to damage awards more generally, under G. L. c. 231, § 6H. We note that, though the plaintiff dismisses the discussion of the topic in Lopes, 430 Mass. at 314, as dictum, it is clear from its opinion that the court intended to provide conclusive guidance on the subject for application to future cases.

Appendix B-1

Filed April 4, 2016

**COMMONWEALTH OF MASSACHUSETTS**

**BARNSTABLE, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 2012-00687**

**JANICE SMYTH**

**vs.**

**CONSERVATION COMMISSION OF  
FALMOUTH & another<sup>1</sup>**

**MEMORANDUM OF DECISION  
AND ORDER ON DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Janice Smyth, the plaintiff, brought this action claiming a regulatory taking of an undeveloped residential lot at 250 Alder Lane, North Falmouth, resulting from the Conservation Commission of Falmouth's application of the Falmouth Wetlands Protection Bylaw and Wetlands Regulations to the property. The Commission now moves for judgment as a matter of law that the plaintiff cannot establish a regulatory taking where she had no reasonable investment-backed expectation of developing the property, the economic impact of the wetlands regulations is not sufficiently severe, and the character of the governmental action is not a physical invasion of the land or unfair singling out of the plaintiff. For the reasons set forth below, the

---

<sup>1</sup> Town of Falmouth



## Appendix B-2

defendant's Motion for Summary Judgment is **DENIED**.

### **BACKGROUND**

The plaintiff owns an undeveloped lot located at 250 Alder Lane in North Falmouth, in a development known as Wild Harbor Estates. The property is approximately 16,477 square feet and abuts a salt marsh and coastal bank. The plaintiff's parents purchased the lot in 1975 for \$49,000, intending to build a home. The plaintiff acquired a one-half interest in the lot in 2001, and became sole owner in 2005. In June 2006, the plaintiff hired a consultant to perform soil evaluation and percolation testing of the lot in preparation for a proposed septic system. The plaintiff also consulted her husband, an architect, for some rough sketches of a design for a home and septic system. In 2008, the plaintiff obtained formal plans for the construction of a three bedroom single-family dwelling with a de-nitrifying septic system, driveway and native plantings, and in 2012, she filed a Notice of Intent with the Commission to develop the lot. The Commission denied the NOI under both the state Wetlands Protection Act and the local Falmouth Wetlands Regulations. The plaintiff obtained a superseding order of conditions from the Department of Environmental Protection approving the project under the WPA.

Plaintiff filed the present action November 27, 2012. Her Amended Complaint sets forth three counts, the first and second counts sought to overturn the Commission's decision under the local by law while the third count alleges a regulatory taking. The Commission's by law based decision was effectively affirmed by the Court's earlier denial of plaintiff's

### Appendix B-3

motion for judgment on the pleadings (Muse, J. pleading no. 13). Plaintiff continues to press her claim of regulatory taking.

There are two versions of the Falmouth Wetlands Regulations that were in place in the years since the plaintiff acquired an interest in the undeveloped lot. The regulations in place at the time of the plaintiff's 2012 permit application bar development of the lot with a residence, unless a variance is granted. (Joint Appendix Ex. 3, 4). In particular, the western portion of the lot lies within a 100 foot no-disturbance zone extending from the edge of the salt marsh (FWR 10.18(8)(a)(1)), while nearly all of the eastern portion of the lot lies within a 50 foot no disturbance zone extending from the non-eroding coastal bank located in the center of the lot. (FWR 10.18(5)(a)(3)). Only a small, 115 square foot wedge of land at the extreme northeastern corner of the lot falls outside these no-disturbance zones. Additionally, due to a 25 foot front-yard setback required by both local zoning regulations and a restrictive covenant particular to this lot, a portion of the proposed residence would have to be located in the area of a coastal bank within the velocity zone (FWR 10.30(7)(b)), and in the area of a coastal bank within 100 feet of a salt marsh (FWR 10.30(7)(d)(1)(b)).

The regulations in effect in 2001, when the plaintiff first acquired an interest in the lot, were the 1998 amended version. The 1998 regulations contain many of the same provisions as those in place in 2012, including a prohibition against construction "on" a coastal bank in a v-zone or within 100 feet of a salt marsh, as well as within a further 100 feet landward of such coastal banks, as such banks were presumed

#### Appendix B-4

significant to resource area protection. (Joint Appendix Ex. 5, FWR 10.30(7)(b), 10.30(7)(d)(1)(b)). Similarly, the 1998 regulations contained a 100 foot buffer zone applied to salt marsh, with the presumption that the buffer is significant to the resource areas where the project proposes “building upon . . . or otherwise altering” the buffer. (Joint Appendix Ex. 5, FWR 10.18(3), 10.18(8)).

However, the 1998 regulations differed in two significant ways from those in place in 2012. First, the portion of the buffer zone provisions contained within FWR 10.18(8) only applied to an “*eroding* coastal bank”, not just any coastal bank, like in those separately set out in FWR 10.30(7). (Joint Appendix Ex. 5, FWR 10.18(8)(a)(4), 10.18(8)(b)(4)). Second, the 1998 FWR 10.18 buffer requirements contained a ‘flexibility’ provision, FWR 10.18(7), that was later eliminated by amendments in 2008. FWR 10.18(7) stated that the Commission “may issue a permit for activity on a parcel that existed as of August 15, 1998, where no practicable alternative exists on the parcel that would allow a resource area buffer the width required in FWR 10.18(8)(a) and (b) for new construction due to site constraints provided a resource area buffer is maintained as close as practicable to those required for new activity in FWR 10.18(8)(a) and (b) and in no case less than twenty-five (25) feet.” Thus, the Commission might have reduced the 100 foot salt marsh buffer required by FWR 10.18(8)(a)(7) to a minimum of a 25 foot buffer under this 1998 regulation if it found there to be no practicable alternative.

## Appendix B-5

### DISCUSSION

A grant of summary judgment is appropriate where there are no genuine issues of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. *Pederson v. Time Inc.*, 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial either by submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). It is necessary, however, for the summary judgment movant "to show by credible evidence from . . . affidavits and other supporting materials that there is no genuine issue of material fact and that [the party is] entitled, as matter of law, to a judgment." *Smith v. Massimiano*, 414 Mass. 81, 85 (1993) (citations omitted).

Where, as here, a plaintiff does not allege a permanent physical intrusion onto the land by the government, nor that a regulation has deprived her of all economically beneficial use of the land, the court applies the three-part framework set out in *Penn. Central Transportation Co. v. New York City*, 438 U.S.

## Appendix B-6

104, 124 (1978). See *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 764-767 (2005). The court must consider: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with the plaintiff's distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* Importantly, "[a] property owner's investment-backed expectations must be reasonable and predicated on existing conditions." *Leonard v. Town of Brimfield*, 423 Mass. 152, 155 (1996). "[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those [investment-backed] expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

The Commission moves for summary judgment on the grounds that the undisputed facts show that the plaintiff had no reasonable investment-backed expectation of development under the 1998 regulations in place at the time she first acquired an interest in the lot. Further, the Commission argues that the 91% decrease in value of the unbuildable lot is not sufficiently severe to constitute a taking, and that the character of the governmental action is not a physical invasion of the land or unfair singling out of the plaintiff. Thus, the Commission concludes, the plaintiff cannot establish a takings claim as a matter of law.

The plaintiff opposes, relying upon the affidavit of engineer Michael J. Borselli, which asserts that the lot would have been buildable under the 1998 regulations, which were in place until after the plaintiff started preparations in 2006 to construct a

## Appendix B-7

residence. (Joint Appendix Ex. 18). Borselli opines that the plaintiff could have rebutted FWR 10.30's presumption, that the coastal bank and/or the impact of the proposed project thereupon was significant, by showing that the bank was heavily vegetated and gently sloping. Such a finding would have rendered the 100 foot no-disturb zone in FWR 10.30 inapplicable to the project. (Joint Appendix Ex. 18). Further, Borselli opines that constructing the residence on elevated piles or in a cantilevered fashion would remove it from the restrictions of FWR 10.30 because it wouldn't be "on" the coastal bank, and that, in his experience, the Commission accepted such an interpretation at the time the plaintiff acquired an interest in the property. (Joint Appendix Ex. 18). Lastly, Borselli argues that the salt marsh buffer zone restriction in FWR 10.18(8) could have been avoided under FWR 10.18(7), which allowed the Commission to reduce that zone to a minimum of 25 feet because there was no practicable alternative. (Joint Appendix Ex. 18). Borselli attests that, in his experience, the Commission interpreted FWR 10.18(7) as "trumping other setbacks in the Regulations", such as FWR 10.30(7). (Ex. A to Paper 26, Affidavit of Michael J. Borselli, P.E. dated December 31, 2015). Based on these conclusions, Borselli opines that the proposed project would have been eligible for a permit under the 1998 version of the local wetlands regulations.

The Commission submits a dueling affidavit, from Conservation Administrator Jennifer L. McKay. (Joint Appendix Ex. 1). McKay opines that the plaintiff's project would have been subject, among other provisions, to the 1998 version of FWR 10.38(4)(d), which prohibited alterations in a velocity zone to vegetative cover for the construction of a new

## Appendix B-8

building or foundation other than open pilings or columns. McKay further attests that, in her experience, the Commission has never determined that a structure elevated on pilings is exempt from the FWR 10.38(4)(d) prohibition, and therefore a variance was required to obtain a permit at the time the plaintiff acquired an interest in the property. (Joint Appendix Ex. 1).

Thus, there is a significant dispute of material fact regarding whether the plaintiff had a reasonable expectation of development of a residence under the 1998 wetlands regulations in place at the time she acquired an interest in the lot. If it was reasonable to expect a permit under the 1998 regulations, the 2006 soil samples and sketches by the plaintiff's husband could constitute "substantial personal financial investment" in the lot above and beyond the payment of taxes and association dues, thus supporting a finding of reasonable investment-backed expectations before the 2008 regulatory amendments removed FWR 10.18(7). See *Giovanella v. Conservation Comm'n of Ashland*, 447 Mass. 720, 734 (2006) (failure to show "any substantial personal financial investment in the development of [the] lot" undercuts argument that party had reasonable expectation of building a house on the lot).

Further, the reasonableness of expecting a permit under the various versions of the local wetlands regulations is also pertinent to the determination of the magnitude of the regulations' economic effect on the plaintiff. See *Penn. Central Transportation Co.*, 438 U.S. at 124. The Commission relies upon an appraisal reporting the reduction in value of the lot if unbuildable as of 1998, when it argues that the

## Appendix B-9

plaintiffs' parents ceased to have a reasonable expectation of obtaining a permit. This report sets the reduction from \$250,000 to \$25,000. In contrast, the plaintiff relies on an appraisal of the property's value as of 2014, which finds that the value of the lot, if unbuildable, as been diminished from \$700,000 to \$60,000.

Thus, the parties' dueling affidavits create material issues of fact with respect to two of three "guideposts" under the *Penn. Central* framework, economic impact and investment-backed expectations, which must be resolved by the finder of fact. As the Commission has not affirmatively demonstrated that there is no genuine issue of material fact on every issue relevant to the takings claim, the Motion for Summary Judgment must be **DENIED**. See *Pederson*, 404 Mass. at 17.

### **ORDER**

For the reasons stated herein, it is **ORDERED** that the defendant's Motion for Summary Judgment be **DENIED**.

s/ Gary A. Nickerson  
Gary A. Nickerson  
Justice of the Superior Court

April 4, 2016

A true copy, Attest: s/ Scott W. Bickerson  
Clerk



Appendix C-1

**Supreme Judicial Court for the  
Commonwealth of Massachusetts  
John Adams Courthouse  
One Pemberton Square, Suite 1400,  
Boston, Massachusetts 02108-1724  
Telephone 617-557-1020, Fax 617-557-1145**

Jan David Breemer, Esquire  
Pacific Legal Foundation  
930 G Street  
Sacramento, CA 95814

RE: Docket No. FAR-26693

**JANICE SMYTH**

**vs.**

**FALMOUTH CONSERVATION COMMISSION &  
another**

Barnstable Superior Court No. 1272CV00687  
A.C. No. 2017-P-1189

**NOTICE OF DENIAL OF APPLICATION  
FOR FUTHER APPELLATE REVIEW**

Please take note that on May 9, 2019, the  
application for further appellate review was denied.

Francis V. Kenneally, Clerk

Dated: May 9, 2019

To: Seth G. Roman, Esquire  
Brian J. Wall, Esquire  
Jan David Breemer, Esquire

## Appendix C-2

Michelle N. O'Brien, Esquire  
Patricia A. Harris, Esquire  
Nicholas P. Brown, Esquire  
Edward J. DeWitt, Esquire  
Rebekah Lacey, Esquire