MH
MiyaresHarrington

J. Raymond Miyares Thomas J. Harrington Christopher H. Heep Donna M. Brewer Jennie M. Merrill
Rebekah Lacey Bryan Bertram | Ivria Glass Fried Eric Reustle Katherine E. Stock

March 22, 2019

ELECTRONICALLY FILED

Francis V. Kenneally, Esq.
Clerk for the Commonwealth
Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square
Boston, MA 02108

Re: *Janice Smyth v. Falmouth Conservation Commission and the Town of Falmouth*
No. FAR-26693/ Appeals Court No. 17-P-1189
Statement of MACC (Appeals Court *Amicus Curiae*) in Opposition to Application for Further Appellate Review

Dear Mr. Kenneally:

This firm represents the Massachusetts Association of Conservation Commissions, Inc. ("MACC")[1], which was granted leave by the Appeals Court to file an *amicus curiae* brief in the above-referenced case. MACC hereby expresses its opposition to the application for further appellate review ("FAR") filed by the Plaintiff/Appellee, Janice Smyth.

MACC's *amicus* brief focused on the "character of the governmental action" prong of the *Penn Central* regulatory takings test, which is of particular importance when the test is applied to local regulation of land use in wetlands and floodplains. Smyth's FAR application wrongly

[1] MACC is a non-profit organization, founded as an unincorporated association in 1961 and organized as a Massachusetts corporation in 1978. MACC's bylaws state that the organization's purpose is "to promote the preservation and enhancement of natural resources in Massachusetts primarily through guidance, encouragement, and critical support for municipal Conservation Commissions, helping them to fulfill their potential as environmental leaders in their communities through exercise of their legal authorities and duties." More than 330 of the 351 conservation commissions in Massachusetts are currently dues-paying MACC members.

asserts that Massachusetts courts' analysis of this prong is outdated and not in conformance with current U.S. Supreme Court precedent. The argument in support of this erroneous assertion (at pp. 17-19 of the application) mischaracterizes the Appeals Court decision in this case as well as the takings jurisprudence of Massachusetts appellate courts and the U.S. Supreme Court. In reality, there is no need for this Court to "clarify" the "proper approach" to the analysis of the character of the governmental action.

In 2005 and 2006, this Court decided two cases involving regulatory takings claims based on regulation of land use in wetlands and floodplains, *Gove v. Zoning Board of Appeals of Chatham*, 444 Mass. 754 (2005), and *Giovanella v. Conservation Commission of Ashland*, 447 Mass. 720 (2006). In each of those decisions, the Court reviewed in detail U.S. Supreme Court precedent regarding the "character of the governmental action" prong of the *Penn Central* test. *Giovanella*, 447 Mass. at 735; *Gove*, 444 Mass. at 767. The *Gove* decision also noted that *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), had established that the question of the legitimacy of the government action is a due process issue and not part of a regulatory takings analysis. *Gove*, 444 Mass. at 759-761. Thus, Smyth's claims that Massachusetts courts ignore current Supreme Court precedent and improperly apply a "legitimate purpose" test to the character of the governmental action are unsupportable.

In *Gove*, this Court cited a line of U.S. Supreme Court decisions holding that reasonable government action to prevent harm from private land use is not a taking. 444 Mass. at 767. Consistent with these previous decisions, the U.S. Supreme Court recently stated that its case law "recognizes that reasonable land-use regulations do not work a taking." *Murr v. Wisconsin*, __ U.S. __, 137 S.Ct. 1933, 1947 (2017). In *Murr*, the Supreme Court repeated its previous

statement that the purpose of the Takings Clause is to ensure that government does not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr*, 137 S.Ct. at 1943 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

In its decision in this case, the Appeals Court was wholly in line with the precedent of this Court and the U.S. Supreme Court when it held that generally applicable wetlands regulations intended to mitigate harm do not represent the kind of burden-shifting that have the character of a taking. For this reason and the reasons set forth by the Town of Falmouth in its opposition to Smyth's application for FAR, this Court should deny the application.

Respectfully submitted,
Massachusetts Association of
Conservation Commissions, Inc.

By its attorney,

Rebekah Lacey (BBO #673908)
Miyares and Harrington LLP
40 Grove Street, Suite 190
Wellesley, MA 02482
(617) 489-1600
rlacey@miyares-harrington.com

CERTIFICATE OF SERVICE

I, Rebekah Lacey, hereby certify under penalty of perjury that on March 22, 2019, I have made service of this document upon the attorney of record for each party as listed below, by the Appeals Court Electronic Filing System (if available) or first-class mail:

Michelle N. O'Brien, Esq.
Nicholas P. Brown, Esq.
Pierce Atwood LLP
100 Summer Street, Suite 2250
Boston, MA 02110
mobrien@pierceatwood.com
nbrown@pierceatwood.com

Patricia A. Harris, Esq.
Office of Town Counsel
Town of Falmouth
157 Locust Street
Falmouth, MA 02540
patricia.harris@falmouthma.gov

Brian J. Wall, Esq.
Troy Wall Associates
90 Route 6A
Sandwich, MA 02563
bjw@troywallassociates.com

J. David Breemer, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
jbreemer@pacificlegal.org