COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

BARNSTABLE COUNTY

2017-P-1189

JANICE SMYTH,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,

V.

FALMOUTH CONSERVATION COMMISSION AND
THE TOWN OF FALMOUTH,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
BARNSTABLE SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS ASSOCIATION OF CONSERVATION COMMISSIONS IN SUPPORT OF DEFENDANTS-APPELLANTS

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SJC Rule 1:21 Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, the Massachusetts Association of Conservation Commissions, Inc. ("MACC") states that it is a member-based, not-for-profit Massachusetts corporation. Exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, MACC has no parent company and has not issued any stock, so there is no publicly held corporation that owns any such stock.

Statement of the Issues To Be Addressed by the *Amicus*

1. Whether the trial court erred by failing to evaluate the character of the governmental action at issue at the summary judgment stage.

2. Whether the trial court erred in its instructions to the jury on evaluating the "character of the governmental action."

Interest of the *Amicus*

The Massachusetts Association of Conservation Commissions, Inc. ("MACC") and its members have a strong interest in this case, which has implications for wetlands and floodplain restrictions employed by municipalities across the Commonwealth. If the decision of the Superior Court is upheld, municipalities may be inundated with takings claims simply for implementing sensible land-use regulations restricting development in locations where it has the potential to harm public welfare, safety, and the environment.

MACC seeks to provide argument in support of the Defendants/Appellants, the Falmouth Conservation Commission and the Town of Falmouth (collectively, "Falmouth"), regarding the "character of the governmental action" prong of the three-pronged

regulatory takings analysis articulated by the United States Supreme Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). The "character of the governmental action" prong was not discussed in the Superior Court's summary judgment decision. MACC believes that this prong is highly significant in this case, because the Commission's action "is the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings." *See Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 767 (2005).

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."

Each Massachusetts municipality has a conservation commission, established by vote of the municipality's town meeting or city council under the authority of the Conservation Commission Act, G.L. c. 40, §8C. Conservation commissions manage town-owned conservation land and administer the Wetlands Protection Act, G.L. c. 131, §40. In many municipalities, conservation commissions also administer one or more local bylaws or ordinances addressing land use issues such as wetlands protection and stormwater management.

More than 330 of the 351 conservation commissions in Massachusetts are currently dues-paying MACC members, and these commissions are MACC's voting members. MACC also has many individual, corporate, and non-profit members. MACC conducts a number of training programs and educational conferences, advises conservation commissions, advocates on behalf of commissions and the resources they steward, and distributes educational publications, including the widely used *Environmental Handbook for Conservation Commissioners*.

MACC has played a significant role in the implementation of the Wetlands Protection Act. MACC

also trains and advises local conservation commissions regarding the drafting and implementation of local wetlands and floodplain bylaws and ordinances, which have been adopted by municipalities under the "home rule" provisions of the Massachusetts Constitution. MACC tracks and tabulates these enactments; at last count, 196 Massachusetts municipalities had adopted a home-rule wetlands bylaw or ordinance[1]. These laws play an important role in protecting public health, safety, and natural resources.

MACC has considerable expertise in the legal, technical, and practical aspects of state and local regulation of land use in and near wetlands, floodplains, and other environmentally significant areas. MACC has submitted *amicus curiae* briefs to the Appeals Court and the Supreme Judicial Court in several important land use cases, including *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7 (1979), *Wilson v. Commonwealth*, 413 Mass. 352 (1992), *Gove v. Zoning Board of Appeals of Chatham*, 444 Mass. 754 (2005), *Hobbs Brook Farm Property Company Limited Partnership v. Conservation Commission of Lincoln*, 65

[1] MACC provides this information on its website at https://www.maccweb.org/news/343934/Updated-list-of-Municipal-Wetlands-BylawsOrdinances-Available.htm.

Mass. App. Ct. 142 (2005), and *Blair v. Department of Conservation and Recreation*, 457 Mass. 634 (2010). A number of these cases involved regulatory takings claims.

Statement of Facts Relevant to the Issues Addressed by the Amicus

The following facts were undisputed in the summary judgment record.

The Falmouth Wetlands Bylaw (the "Bylaw") was adopted in 1979, amended in its entirety in 1993, and further amended in 1994 and 1996. App. I at 12-22, 533. The Falmouth Wetlands Regulations (the "Regulations") were adopted by the Falmouth Conservation Commission ("Commission"), pursuant to its authority under the Bylaw, in 1989, and were recodified in 1998 and amended in 2003, 2006, 2008, 2010, and 2014. App. I at 629-630. The Bylaw and the Regulations are intended to protect wetlands, related water resources, and adjoining land areas in Falmouth by controlling activities deemed by the Commission as likely to have a significant or cumulative impact upon resource area values, including, but not limited to, public or private water supply, groundwater, flood control, erosion and sedimentation control, storm

damage prevention, water pollution control, fisheries, shellfish, wildlife and plant species and habitats, agriculture, aesthetics, recreation, and aquaculture. App. I at 13, 628. Plaintiff-Appellee Janice Smyth ("Smyth") admitted that Falmouth has a legitimate interest in protecting wetland resource areas, including salt marshes, coastal banks, and land subject to coastal storm flowage. App. I at 534.

With limited exceptions, the Bylaw requires a permit from the Commission to

> remove, fill, dredge, build upon, degrade or otherwise alter the following resource areas: any freshwater or coastal wetland; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds; streams; creeks; beaches; dunes; estuaries; oceans; lands under water bodies; lands subject to flooding or inundation by groundwater or surface water; lands subject to tidal action, coastal storm flowage or flooding; lands within one hundred feet of any of the aforesaid resource areas...

App. I at 14. The Regulations specify how each of the kinds of protected resource areas is significant to the resource area values protected by the Bylaw and impose performance standards for permissible work in these resource areas. App. I at 307-402.

The Regulations define "velocity zones" as "those portions of land subject to coastal storm flowage

which are coastal high hazard areas or areas of special flood hazard extending from the inland limit within the one-hundred-year floodplain seaward supporting waves greater than three feet in height." App. I at 359. The landward boundary of the velocity zone is presumed by the Regulations to be 25 feet landward of the boundary shown on the federal Flood Insurance Rate Map. App. I at 360. The Regulations explain the significance of velocity zones in detail, prefaced by the following introductory statement:

> Velocity zones (V-zones) and AO-zones of Land subject to coastal storm flowage (V-zones especially so) are areas which are subject to hazardous flooding, wave impact, and, in some cases, Significant rates of Erosion as a result of storm wave impact and scour. V- and AO-zones in coastal areas are generally subject to repeated storm damage which can result in loss of life and property, increasing public expenditures for storm recover activities, historic taxpayer subsidies for flood insurance and disaster relief, and increased risks for personnel involved in emergency relief programs. ...

App. I at 357-358.

The Regulations also explain the importance of buffer zones in protecting the wetlands values identified in the Bylaw and reducing adverse effects from development. App. I at 307-311. Among other things, they note that vegetated buffer zones

stabilize banks, slow runoff velocity, and absorb pollution. *Id.* at 307-308.

The parcel owned by Smyth at 250 Alder Lane in Falmouth (the "Property") contains resource areas protected by the Bylaw and Regulations, including coastal bank, salt marsh, and land subject to coastal storm flowage, as well as land within 100 feet of these areas. App. I at 639-641. In July 2012, Smyth submitted a Notice of Intent to the Commission seeking approval to construct a residence, septic system, driveway, and plantings on the Property (the "Project"). App. I at 626. A portion of the proposed Project was on a coastal bank within the velocity zone. App. I at 642. The proposed Project did not comply with certain provisions of the Regulations regarding coastal bank (including coastal bank near a salt marsh), buffer zones, and land subject to coastal storm flowage. App. I at 641.

The Commission issued an Order of Conditions on October 2, 2012, denying Smyth's proposal to build a residence at 250 Alder Lane. App. I at 436-454. The Order set forth the resource areas present at Smyth's property, the functions served by those resource areas, and the ways in which the proposed project

would harm those functions. *Id.* For example, the Commission noted that evidence had been provided that Smyth's property "is subject to severe flooding during large coastal storm events," and it found that "the removal of vegetation (shrubs and trees) from the project site would alter the coastal bank's ability to act as a natural wall or buffer during coastal storm events." *Id.* at 452. The Commission also found that Smyth had not met the requirements for a variance provided in the Regulations. *Id.* at 453.

Argument

I. The trial court erred in denying summary judgment without evaluating the character of the action taken by the Falmouth Conservation Commission.

In its decision denying Falmouth's motion for summary judgment, the lower court acknowledged that its regulatory takings analysis should employ

> the three-part framework set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 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.*

Appellants' Brief, Addendum at 65. However, the court then completely ignored the third part of the *Penn*

Central test. It held that there were "material issues of fact with respect to two of the three 'guideposts' under the *Penn Central* framework, economic impact and investment-backed expectations, which must be resolved by the finder of fact." *Id.* at 67. This was error, because the import of the third factor – the "character of the governmental action" – is so significant in this case that the two other factors cannot be considered in isolation.

A. The Falmouth Conservation Commission's application of a limited regulation designed to mitigate public harm from private use of land is the type of government action that does not require compensation.

In *Penn Central*, the U.S. Supreme Court discussed at length how its past takings jurisprudence had evaluated the import of the character of the governmental action, particularly in the area of land-use regulations. In general, it observed, "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." 438 U.S. at 125. "[T]he decisions sustaining other land-use regulations

which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Id.* at 131.

Subsequently, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 488-492 (1987), the Court observed that it had shown "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances," citing cases such as *Miller v. Schoene*, 276 U.S. 272 (1928) (holding that an order by the state of Virginia requiring the destruction of trees to prevent the spread of disease was not a taking). The Court went on to say:

> In *Agins v. Tiburon*, we explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and we recognized that this question "necessarily requires a weighing of private and public interests." 447 U.S., at 260-261, 100 S.Ct., at 2141. As the cases discussed above demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.

Id. at 492.

In its most recent regulatory takings case, *Murr v. Wisconsin*, __ U.S. __, 137 S.Ct. 1933, 1947 (2017), the Court stated unequivocally that "reasonable land-use regulations do not work a taking." It went on to hold that, in the case at hand, "the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land," and was not a taking. *Id.* at 1949-1950.

In a landmark regulatory takings case that predated *Penn Central*, the Massachusetts Supreme Judicial Court noted that consideration of the restrictions imposed on property owners by a floodplain bylaw "must be balanced against the potential harm to the community from overdevelopment of a flood plain area." *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 235 (1972). The court held that application of the bylaw to the plaintiff's land, resulting in a reduction in value that the plaintiff's expert estimated at eighty-eight percent, did not constitute a taking. *Id.* at 235-237.

Similarly, in its later decisions applying the *Penn Central* framework, the SJC has held that, where private land use has the potential to adversely affect

surrounding areas, "[r]easonable 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 (holding that prohibition on residential construction on lot in coastal flood zone was not a taking); *accord*, *Blair v. Dep't of Conservation and Recreation*, 457 Mass. 634, 646 (2010) (holding that prohibition on alterations within 200-foot buffer zone to public water supply was not a taking).

Undisputed evidence in the summary judgment record established that the Falmouth Conservation Commission's denial of Smyth's application for a permit was exactly the type of reasonable land-use regulation that courts have found does not require compensation. As discussed above, the Regulations explain in detail the harms that their requirements and prohibitions are intended to prevent; the permit was denied because the Project did not comply with the Regulations.

These facts are very similar to those in *Gove*. In that case, a Chatham bylaw prohibited the construction of residential structures within the 100-

year coastal floodplain. 444 Mass. at 757-758. The Massachusetts SJC held that the denial of a building permit on the basis of that bylaw was "the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings." *Id.* at 767.

The character of the government action in this case is clearly of the type that the U.S. Supreme Court and the SJC have held not to be a taking.

B. The restrictions imposed by the Falmouth Wetlands Regulations are not the equivalent of a physical taking.

Smyth makes the following argument in her brief (at p. 40):

> The "no disturb zones" imposed by the Falmouth Regulations impacted Smyth's right of possession, use and disposition and deprived Smyth of all beneficial use of her land. Thus, the character of the governmental action at issue is the functional equivalent of a classic taking because Falmouth has essentially appropriated Smyth's private property and ousted her from her domain to the point that compensation is required.

This claim is wholly incorrect.

First, Smyth inaccurately cites *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), for the proposition that "[a] regulation that substantially burdens an owner's ability to use his

land ... is 'the equivalent of a physical occupation.'" Appellee's Brief at 40. *Loretto* does not contain the quoted phrase, nor does it provide any support for Smyth's proposition; the holding in *Loretto* is limited to *actual* physical occupations. 458 U.S. at 441.

Second, Smyth did not present evidence that the Regulations "deprived Smyth of all beneficial use of her land." According to her appraiser, the land retained a value of $60,000 even if "unbuildable." App. I at 647. Smyth does not – and cannot - argue that there has been a *per se* taking under the holding of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992), which applies only if the property owner has been deprived of all economic use of the property.

C. If actions such as that taken by the Falmouth Conservation Commission are held to constitute takings, municipalities' ability to prevent harm from flooding and coastal storms will be severely impeded.

In Massachusetts, land use is regulated primarily at the municipal level, through zoning and non-zoning bylaws and ordinances as well as local implementation of state statutes. *See, e.g., Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship*, 436

Mass. 811, 822 n.22 (2002) (discussing municipal authority over land use in Massachusetts). The SJC has opined that land use poses "essentially local problems." *Com v. Sostilio*, 351 Mass. 419, 422 (1966) (holding that municipalities may enforce zoning bylaws via criminal prosecution).

As MACC's website explains, restricting development in wetlands and other water resource areas is an important component of local land use regulation.[2] In their natural state, these resource areas slow and hold floodwaters, prevent storm damage, protect water supplies, replenish beaches, and filter pollution. In recent years, many presentations at MACC's Annual Environmental Conference have focused on the heightened importance of wetlands protection to help mitigate the effects of climate change (and associated increased flood risk) in both inland and coastal communities.[3]

In *Turnpike Realty*, the SJC recognized that "[t]he general necessity of flood plain zoning to reduce the damage to life and property caused by flooding is unquestionable." 362 Mass. at 233. In

[2] See https://www.maccweb.org/page/ResWPAFAQS.
[3] See, for example, information on MACC's 2018 conference at https://www.maccweb.org/page/EDAEC2018.

fact, the National Flood Insurance Program regulations provide that "flood insurance shall not be sold or renewed under the program within a community, unless the community has adopted adequate flood plain management regulations consistent with Federal criteria." 44 C.F.R. §60.1(a). The SJC also recognized long ago that municipalities have the power to protect wetland resources more stringently than state law, via zoning or non-zoning bylaws. *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 15 (1979) (non-zoning); *Golden v. Selectmen of Falmouth*, 358 Mass. 519, 526 (1970) (zoning). Massachusetts courts have also specifically upheld protections of buffer zones to wetland resources. *See, e.g., FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 690-693 (1996); *T.D.J. Development Corp. v. Conservation Comm'n of North Andover*, 36 Mass. App. Ct. 124, 129 (1994).

The majority of Massachusetts municipalities have exercised their local authority to regulate development of wetlands and floodplains, in part to prevent harm from flooding and coastal storms. Almost every municipality participates in the National Flood Insurance Program (and thus must have adopted the

required floodplain restrictions).[4] More than 190 municipalities have adopted home-rule wetlands bylaws and ordinances (see *supra* at 8-9). *See also* Gregor I. McGregor, *Wetlands and Floodplain Law*, *in Massachusetts Environmental Law* 10-1 (MCLE 2016). Falmouth's Bylaw and Regulations are representative of these home-rule enactments relied on by so many Massachusetts cities and towns to prevent the harms that come from development in wetland resource areas.

If this kind of necessary regulation to prevent public harm from certain uses of private property were deemed a regulatory taking, the potential cost to Massachusetts municipalities would be staggering. Massachusetts cities and towns rely heavily on the local property tax to fund essential municipal services, and increases in property taxes are capped by the state law known as "Proposition 2½" (G.L. c. 59, §21C). Forcing municipal taxpayers to compensate landowners for commonplace restrictions on harmful land uses would "transform government regulation into a luxury few governments could afford," as the U.S. Supreme Court observed regarding a similar argument in

[4] A list is provided on FEMA's website at https://www.fema.gov/cis/MA.html.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002). Rather than risk having unaffordable damage awards imposed on them, most municipalities would likely revise their laws and regulations to relax restrictions on development in and near wetlands – thus increasing the risk of public harm that those restrictions were intended to prevent.

For all of the above reasons, even if the disputed evidence regarding the other two prongs of the *Penn Central* test is viewed in the light most favorable to Smyth, the action of the Falmouth Conservation Commission does not constitute a taking under U.S. Supreme Court and Massachusetts precedent. The trial court should have granted summary judgment to Falmouth.

II. The trial court erred in instructing the jury on evaluating the "character of the governmental action."

The trial court committed further reversible error in its instructions to the jury regarding the "character of the government action" prong of the *Penn Central* test. The court adopted the entirety of Smyth's proposed instructions on that issue, then added a portion of the instructions proposed by

Falmouth. App. II at 291 (Smyth's proposed instructions), 324 (Falmouth's proposed instructions); App. IV at 634-635 (court's instructions).

The instructions contributed by Smyth were erroneous. They state a due process test, not a takings test, and are not supported by the cases cited by Smyth (*Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754 (2006), and *Leonard v. Town of Brimfield*, 423 Mass. 152 (1996)). *See* App. II at 291. To the contrary, *Gove* makes very clear that due process considerations regarding the degree of advancement of legitimate state interests are not relevant to a regulatory takings inquiry. 444 Mass. at 759-767.

Moreover, the court failed to include a key sentence from Falmouth's proposal: "Reasonable government action mitigating such harm[ful land uses]...typically does not require compensation." App. II at 324, quoting *Gove*, 444 Mass. at 767.

The court's error was so significant, and so prejudicial to Falmouth, that a new trial is warranted if this Court does not hold that Falmouth should have been granted summary judgment.

Conclusion

The lower court erred in wholly failing to consider the character of the government action at the summary judgment stage, and in instructing the jury on that issue at trial. Affirming the judgment of the trial court would be a significant departure from Massachusetts precedent, with major adverse consequences for local land use regulation. This Court should, instead, reverse the judgment of the trial court and either order entry of summary judgment in favor of Falmouth or remand the case for a new trial.

Respectfully submitted,
Massachusetts Association of
Conservation Commissions, Inc.

By its attorney,

/s/ Rebekah Lacey

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July 31, 2018

Certification of Compliance
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Rebekah Lacey, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations, etc. required for determination of the issues);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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Dated: July 31, 2018

Certificate of Service

I, Rebekah Lacey, hereby certify under penalty of perjury that on July 31, 2018, I have made service of this Brief upon the attorney of record for each party, as follows:

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