

## Local Wetlands Bylaw Decision Survives Pre-emption Challenge



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The **Massachusetts Appeals Court** has again upheld the validity of a local conservation commission's ruling under a local wetlands bylaw notwithstanding that the commission's partial reliance on the **State Wetland Protection Act** was erroneous. [Parkview Electronics Trust v. Conservation Commission of Winchester](#), Appeals Court No. 13-P-276 (January 12, 2016).

The Massachusetts Wetlands Protection Act, G. L. c. 131, § 40, sets forth minimum wetlands protection standards. Local communities are free to impose more stringent requirements. As a result, local commissions may find that a project meets state law while also concluding that it fails the more rigorous local requirements. Previously, in *Healer v. Department of Env'tl. Protection*, 73 Mass. App. Ct. 714, 718-19 (2009), the Court outlined the requirements that a local conservation commission must meet in order to exercise jurisdiction over wetlands exclusively on the basis of a more stringent local by-law:

A local authority exercises permissible autonomous decision-making authority only when its decision is based *exclusively* on the specific terms of its by-law which are more stringent than the act.... The simple fact, however, that a local by-law provides a more rigorous regulatory scheme does not preempt a redetermination of the local authority's decision by the [Department of Environmental Protection] except to the

extent that the local decision was based *exclusively* on those provisions of its by-law that are more stringent and, therefore, independent of the act. (Emphasis added.)

In this case, the Winchester Wetlands Bylaw has a broader definition of “land subject to flooding” than does the state statute. Nonetheless, Parkview argued that an order of resource area delineation (ORAD) issued by the Winchester Conservation Commission was invalid under *Healer* because it was not based “exclusively” on the more stringent provisions of local law. The case arose after Parkview, the owner of an industrial park that was often subject to flooding, raised the driveway on its property to, in effect, create a berm to prevent future flooding. An abutter filed a request for an abbreviated notice of resource area delineation (ANRAD) with the Commission claiming that the berm diverted water onto his property. The Commission issued an ORAD with a heading referring to both the state Wetlands Protection Act and the Winchester Wetlands Bylaw.

Parkview appealed to Superior Court and unsuccessfully sought to annul the local bylaw decision. Parkview also filed an appeal from the ORAD with the Massachusetts Department of Environmental Protection (MassDEP), requesting a superseding order of resource area delineation (SORAD) claiming that the Commission’s decision to assert jurisdiction was in error. MassDEP issued a SORAD that concluded that since the driveway was not within the 100-year flood plain shown on the Federal Emergency Management Agency’s flood insurance rate map, it was not within the jurisdiction of the Wetlands Protection Act and that “MassDEP’s responsibility [is] to address only those interests identified in the Wetlands Protection Act....”

On appeal to the Appeals Court, Parkview maintained that since the ORAD issued by the Commission was not based “exclusively” on the local by-law, it was, under *Healer*, preempted by the SORAD. The Appeals Court first reiterated that to the extent that “the commission relied on the [state] act in asserting jurisdiction, *Healer*, makes clear that its decision is subject to being superseded by that of the DEP.” But, when a local commission “in addition to reliance on State law, also relies independently on a local by-law, as in this case, its decision interpreting and applying the local by-law is not subject to DEP review.” Therefore, notwithstanding that the Commission initially asserted jurisdiction on the basis of both State and local law, and MassDEP subsequently found that the property was not governed by the State law, “the local by-law remain[ed] as an alternative basis for the commission's jurisdiction.” Carefully reviewing the ORAD, the Court satisfied itself that there was some reference to and reliance upon the more stringent local definition of “land subject to flooding” in the ORAD to serve an alternative basis for the commission’s decision.

Interpreting the “exclusivity” language in *Healer*, the Court opined that it meant only that “in order for a local commission to ensure that its decision is not subject to MassDEP review, the commission must base its decision exclusively on local law. Insofar as a commission's decision is based on local law and State law, MassDEP has jurisdiction to review it and supersede that portion of the commission’s decision that is based on State law. For this reason, local commissions purporting to act under both State law and independently under local law should make it clear in their written decisions and orders that there is a dual basis for their determinations.”

The Court also rejected Parkview's claims that the definition of "land subject to flooding" in the local by-law was so vague as to violate due process.

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