

Westlaw Delivery Summary Report for HILL,DANIEL

| | |
|-----------------------|---------------------------------------|
| Your Search: | 62 /3 265 |
| Date/Time of Request: | Tuesday, March 17, 2009 15:42 Central |
| Client Identifier: | MISC |
| Database: | MA-CS-ALL |
| Citation Text: | Slip Copy |
| Lines: | 108 |
| Documents: | 1 |
| Images: | 0 |

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson Reuters, West and their affiliates.

H

Only the Westlaw citation is currently available. NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

Appeals Court of Massachusetts.
TREMONT REDEVELOPMENT CORPORATION
v.
CONSERVATION COMMISSION OF WEST-
WOOD & another. ^{FN1}

^{FN1}. Town of Westwood.

No. 08-P-298.

March 16, 2009.

By the Court (GRASSO, TRAINOR & MEADE, JJ.).

*MEMORANDUM AND ORDER PURSUANT TO
RULE 1:28*

*1 The town of Westwood's conservation commission (commission) appeals from a judgment in favor of Tremont Redevelopment Corporation (Tremont). A judge of the Land Court declared that with respect to the work proposed by Tremont within the thirty-five buffer zone, the town's local wet-

lands protection bylaw (local bylaw) ^{FN2} is not more stringent than the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40(act). Accordingly, the commission could not invoke the local bylaw to deny Tremont an order of conditions that it had approved under the act. For substantially the reasons given by the judge and amplified in Tremont's brief, we affirm.

^{FN2}. See art. 18 of the town's General Bylaws & Chapter.

While local communities may enact more stringent controls than those provided in the act, *Lovequist v. Conservation Commn. of Dennis*, 379 Mass. 7, 15 (1979), the ability and desire to do so does not suffice absent the promulgation of stricter governing regulations of neutral application. See *Fieldstone Meadows Dev. Corp. v. Conservation Commn. of Andover*, 62 Mass.App.Ct. 265, 268 (2004) ("a no-build zone 'policy' not lawfully adopted as a regulation, and containing no requirement of uniform application, cannot form the basis of [a] denial"). The judge correctly concluded that the town's local bylaw is not more stringent than the act because the local bylaw lacks the requisite performance standards for work within a buffer zone of an isolated freshwater wetland.

Although it identifies an isolated freshwater wetland as an object of protection, the local bylaw fails to provide any performance standards or governing regulations that can be applied neutrally by the commission. Indeed, the local bylaw expressly adopts the performance standards in the act until such time as the town promulgates its own. ^{FN3} At the time Tremont submitted this project to the commission for approval, the town had promulgated no such regulations or performance standards. ^{FN4} Accordingly, the act and its regulations are the sole measure by which the commission may evaluate the proposed work in the thirty-five foot buffer zone. See *DeGrace v. Conservation Commn. of Harwich*, 31 Mass.App.Ct. 132, 136 (1991) (where town spe-

cifically adopted definition section of act and failed to impose more stringent controls under the bylaw, the decision under the act controlled); *Fieldstone Meadows Dev. Corp. v. Conservation Commn. of Andover*, *supra* at 268.

FN3. Section 7 of the local bylaw authorizes the commission to promulgate rules and regulations to effectuate the purposes of the bylaw, and goes on to state that “[u]ntil such time as regulations are promulgated, the regulations promulgated under the [Act] shall be deemed to effectuate the purposes of this Bylaw.”

FN4. Apparently, the town has recently implemented its own regulations under the local bylaw. Because these regulations were adopted after the commission's review of the project, they are not germane to the case before us.

The judge properly looked to *Hobbs Brook Farm Property Co. Ltd. Partnership v. Conservation Commn. of Lincoln*, 65 Mass.App.Ct. 142 (2005), for guidance regarding whether a local bylaw is in fact more stringent than the act. There, the court concluded that the town's bylaw was more stringent than the act based on the combination of three bylaw requirements.^{FN5} See *id.* at 152. Here, the town's local bylaw comes nowhere close to the specificity of the bylaw requirements in *Hobbs Brook Farm*. The judge properly rejected the commission's claim that the town's local bylaw is stricter than the act because it contains a thirty-five foot buffer zone and protects isolated freshwater wetlands because neither of those bylaw provisions provides standards by which the commission is to evaluate a potential project's harm. See *Fieldstone Meadows Dev. Corp. v. Conservation Commn. of Andover*, 62 Mass.App.Ct. at 269.

FN5. The bylaw required (1) direct consideration of erosion and sedimentation control as wetlands values; (2) more stringent burdens of proof; and (3) a more wide-

-ranging “alternatives” analysis. See *Hobbs Brook Farm Property Co. Ltd. Partnership v. Conservation Commn. of Lincoln*, *supra* at 149-152.

*2 Likewise without merit is the commission's contention that the presumption contained in the local bylaw provides stricter performance standards than the act.^{FN6} See Tremont's brief at 8-14. The local bylaw's presumption is simply an evidentiary rule applicable to all wetlands subject to protection under the bylaws. The bylaw itself fails to provide the requisite guidelines for a developer to follow and for the commission to apply in determining whether a developer has overcome the presumption. See *Fieldstone Meadows Dev. Corp. v. Conservation Commn. of Andover*, *supra* at 268.

FN6. The local bylaw contains a presumption of significance for activities within the buffer zone, whereas the act and its regulations impose a presumption only in “Areas Subject to Protection.” See 310 Code Mass. Regs. § 10.00 et seq. (2005).

Because the local bylaw is not more stringent than the act, the commission's determination that Tremont's project satisfies the act controls and precludes disapproval under the local bylaw. See *Hobbs Brook Farm Property Co. Ltd. Partnership v. Conservation Commn. of Lincoln*, 65 Mass.App.Ct. at 149. See also *DeGrace v. Conservation Commn. of Harwich*, 31 Mass.App.Ct. at 136.

Judgment affirmed.

Mass.App.Ct., 2009.

Tremont Redevelopment Corp. v. Conservation Com'n of Westwood
Slip Copy, 2009 WL 648897 (Mass.App.Ct.)

END OF DOCUMENT