SJC-13058

CONSERVATION COMMISSION OF NORTON vs. ROBERT PESA[1] & another.[2]

Bristol. April 9, 2021. - August 31, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Wetlands Protection Act. Municipal Corporations, Conservation commission. Repose, Statute of. Practice, Civil, Claim barred by statute of repose.

Civil action commenced in the Superior Court Department on June 22, 2016.

The case was heard by Thomas F. McGuire, Jr., J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

A. Alexander Weisheit for the plaintiff.
David S. Frankel, Special Assistant Attorney General, for the Commonwealth.
Donald P. Nagle for the defendants.
Donald D. Cooper, for Massachusetts Association of Conservation Commissions, amicus curiae, submitted a brief.

[1] Individually and as trustee of the Pesa 2000 Realty Trust.

[2] Annabella Pesa, individually and as trustee of the Pesa 2000 Realty Trust.

WENDLANDT, J. The Wetlands Protection Act, G. L. c. 131, § 40 (act), generally prohibits removing, filling, dredging, or altering wetlands without an order of conditions from a local conservation commission or issuing authority. The act also provides that "[a]ny person" who acquires property on which work has been done in violation of the act shall restore the property to its original or permitted condition; but the act limits the time period during which an enforcement action against "such person" may be brought. See G. L. c. 131, § 40. Specifically, the act provides that any action must be brought within three years of the recording of the deed (or date of death) by which "such person" acquires the property. See id.

In this case, the conservation commission of Norton (commission) issued an enforcement order to owners of property on which unauthorized fill had been placed by a prior owner, directing the current owners to remove the fill. When the current owners neither challenged nor complied with the order, the commission brought an action against them in the Superior Court, seeking injunctive relief and civil penalties. A Superior Court judge construed the act as creating a statute of repose that prevents a conservation commission from bringing an enforcement action more than three years following the first transfer of ownership in the property after the asserted

violation occurred. Because the current owners acquired title after this period, the judge denied the commission's motion for summary judgment, and granted the owners' cross motion.

We agree with the judge that the act creates a statute of repose. The repose, however, does not run with the land; rather, the repose is personal. It requires the commission to commence an enforcement action within three years of the recording of the deed (or date of death) pursuant to which the new owner acquires the property. After that period, the commission may not commence an action against that owner for preexisting violations. Once the property again changes hands, however, the act permits the commission to commence an action against the subsequent owner, so long as it does so within three years of the triggering event -- the recording of the deed or date of death by which title was acquired. Accordingly, because the commission commenced this enforcement action against the current owners within three years of the recording of the deed by which they acquired title, the act does not bar the action. The order granting summary judgment for the owners therefore must be vacated and set aside, and the matter remanded to the

Superior Court for further proceedings consistent with this opinion.[3]

1. Background. a. Facts. We recite the material, undisputed facts from the record. See Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 626 (2019).

John Teixeira purchased a 2.3-acre property in the town of Norton (town) in 1967. In 1979, he filed a notice of intent with the commission, in which he proposed to construct a store, install a sanitation system, and place fill for a parking lot on the property. The commission determined, after a public hearing, that a freshwater meadow adjacent to the proposed fill site was significant to the public's interest in flood control and storm damage prevention, but approved the project and issued an order of conditions, allowing the project with the specific plan that had been submitted.

In 1984, the commission sent a letter to John Teixeira asserting that the fill limits delineated in the approved plan "appear[ed] to have been exceeded" and asking him to submit an updated "sketch" of the fill locations.[4] In 1996, he deeded the

[3] We acknowledge the amicus briefs submitted by the Commonwealth and the Massachusetts Association of Conservation Commissions.

[4] There is no indication in the record whether John Teixeira responded to this letter. The commission wrote to him again in 1987, asking how much additional fill he intended to place on the property, and, in 1988, based on an apparent response by the

property to himself and his wife, Ann Teixeira, as tenants by the entirety; he died in 2006.

In 2014, Ann Teixeira decided to sell the property to the defendants, Robert and Annabella Pesa. An attorney working on the closing contacted the commission to request a "certificate of compliance," which the commission was required to grant if the completed work on the property complied with the order of conditions issued to John Teixeira in 1979. See G. L. c. 131, § 40. In conjunction with that request, an "as-built plan" was submitted on behalf of Ann Teixeira, delineating the areas of the property that had been filled. The plan indicated that fill had been placed to the south of the approved work limit set forth in the order of conditions; notations on the plan stated that it was not clear whether that area had contained wetlands. A commission conservation agent also conducted a site inspection and reviewed historical aerial photographs of the property. The commission wrote to Ann Teixeira in October 2014, explaining that there were 11,000 square feet of excess, unauthorized fill on the property and that, between 1995 and 2004, 2005 and 2006, and 2006 and 2013, vegetation had been cleared beyond the

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Army Corps of Engineers to the commission, stating that the project was not in violation of Federal law, provided that he did not place additional fill.

approved work limit; the commission requested that the unauthorized fill be removed.[5]

The defendants, then prospective buyers of the property, wrote to the commission in November 2014, stating, "As the buyers, it is in our best interest [to] be involved in any changes to the property, to ensure that our investment meets our needs." They asked the commission to give them time to contact engineering firms to solicit bids "for the removal of material as identified in the [o]rder of [c]onditions" and to provide a solution "that best meets the regulations as set forth in the [act]." In December 2014, the defendants, as trustees of the Pesa 2000 Realty Trust, purchased the property.

Over the following months, the defendants and the commission engaged in discussions regarding the property and the order of conditions. In June 2015, the defendants proposed to complete certain work enumerated in the 1979 order of conditions that was not yet completed, such as installing a perforated dry well and siltation control to comply with the commission's original request to Teixeira to provide a final stabilization plan. The defendants did not suggest that they would undertake

[5] Alternatively, the commission advised that a new notice of intent could be filed, which would allow some of the excess fill to remain in place. The commission noted that, should this option be pursued, at least 6,000 square feet of excess fill would have to be removed due to "storm water management requirements and the Rivers Act."

to remove any excess fill, which they asserted was not necessary. At an August 2015 public meeting, defendant Robert Pesa again indicated that he did not intend to remove fill from the property. The commission voted at the meeting to proceed with issuing an enforcement order. The defendants responded by letter the following day, disputing "that there is any valid or beneficial reason to remove the 35-year-old fill and disrupt the surrounding wetlands, vegetation, and thriving businesses on the property."

On August 25, 2015, an enforcement order issued stating that, in violation of the 1979 order of conditions, approximately 13,000 square feet of unauthorized fill had been placed on the property between 1980 and 1984, and vegetation had been cleared beyond the approved work limit between 1995 and 2004. The enforcement order directed the defendants to cease all activities in the affected areas and to restore the affected areas to their "original condition." The defendants did not comply with the order and did not commence legal action to challenge it.

b. Superior Court proceedings. In June 2016, the commission commenced an action in the Superior Court seeking injunctive relief and civil penalties, in the form of fines, as a result of the defendants' failure to comply with the enforcement order, in violation of G. L. c. 131, § 40. In

December 2018, the parties filed cross motions for summary judgment. In June 2020, a Superior Court judge granted the defendants' motion for summary judgment and denied the commission's.

The commission's complaint included separate claims regarding the excess fill and the unauthorized clearing of vegetation.[6] With respect to the latter, the judge determined that because the clearing was a single act and not a continuing violation, see Worcester v. Gencarelli, 34 Mass. App. Ct. 907, 908 (1993), and because the commission alleged that clearing had last been undertaken in 2004, the commission's enforcement order as to the clearing was barred by the two-year statute of limitations, see G. L. c. 131, § 91. Before us, the commission does not challenge this determination.

With respect to the unauthorized fill, the judge determined that because G. L. c. 131, § 40, contains a statute of repose, the commission's action was prohibited. He viewed the provision as requiring the commission to bring an enforcement action within three years of the first transfer of ownership in the property occurring after the unauthorized filling originally took place. Because the unauthorized filling occurred no later

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[6] The defendants disputed that there was an underlying violation of the act. The judge concluded that having failed to challenge the order in an action in the nature of certiorari, see G. L. c. 249, § 4, they had waived that argument.

than 1984, when John Teixeira owned the property, and because he transferred the property to himself and his wife in 1996,[7] the judge determined that the statute of repose barred enforcement actions commencing after 1999, and thus denied the commission's motion for summary judgment. The commission appealed from this portion of the decision, and we transferred the matter to this court on our own motion.

2. Discussion. We review a decision on a motion for summary judgment de novo. See Boss v. Leverett, 484 Mass. 553, 556 (2020). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See id.; Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Because the parties filed cross motions for summary judgment, we view the evidence in the light most favorable to the party against whom summary judgment was entered, see Miramar Park Ass'n, Inc. v. Dennis, 480 Mass. 366, 377 (2018), here, the commission.

a. Preclusion from challenging enforcement order. As a preliminary matter, the commission maintains that the judge erred in allowing the defendants' motion for summary judgment

[7] Given the result we reach, we need not address the commission's contention that the transfer from John Teixeira to himself and his wife, Ann Teixeira, as tenants by the entirety, was not the triggering first transfer of property, and that instead the first transfer was the sale to the defendants in 2014.

because the defendants failed timely to seek review of the commission's enforcement order pursuant to G. L. c. 249, § 4, and therefore were barred from challenging its validity. See Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779, 791-792 (2012) (review of conservation commission's enforcement order is "available only through an action in the nature of certiorari pursuant to G. L. c. 249, § 4"). We disagree.

A statute of repose has the effect of "abolishing" a cause of action after a certain date. See Rudenauer v. Zafiropoulos, 445 Mass. 353, 358 (2005); Klein v. Catalano, 386 Mass. 701, 702 (1982). Thus, the defendants' argument that the present action is barred by the statute of repose in essence states that the statute of repose has abolished the cause of action the commission purported to enforce, and that the enforcement order was issued outside the commission's authority. Such a defense is not waived by the failure to seek review of an enforcement order; instead, it asserts a substantive right to be free from liability. See Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 352 (2018). Compare Director of the Div. of Water Pollution Control v. Uxbridge, 361 Mass. 589, 592-593 (1972) (judge may consider whether agency action is within its jurisdiction, even if aggrieved party has not sought review of agency decision pursuant to G. L. c. 30A); Lippman v. Conservation Comm'n of Hopkinton, 80 Mass. App. Ct. 1, 5-6

(2011) (party contending commission's order is without effect is not seeking review of discretionary order by commission).

b. Subsequent owners' liability under the act. General Laws c. 131, § 40, provides,

> "Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person."

The commission argues that the judge erroneously interpreted G. L. c. 131, § 40, as establishing a statute of repose limiting the commission's enforcement authority to three years after the first transfer of property by an owner who placed unauthorized fill.

We review questions of statutory interpretation de novo. See Boss, 484 Mass. at 556. "Our primary goal in interpreting a statute is to effectuate the intent of the Legislature . . . ." Casseus v. Eastern Bus Co., 478 Mass. 786, 795 (2018), quoting AIDS Support Group of Cape Cod, Inc. v. Barnstable, 477 Mass. 296, 300 (2017). "The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in

connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Commissioner of Revenue v. Dupee, 423 Mass. 617, 620 (1996), quoting Industrial Fin. Corp. v. State Tax Comm'n, 367 Mass. 360, 364 (1975).

"The language of the statute is the primary source of insight into" legislative intent (citation omitted). Casseus, 478 Mass. at 795. "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent," and "courts enforce the statute according to its plain wording . . . so long as its application would not lead to an absurd result." Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013) (College Hill), quoting Martha's Vineyard Land Bank Comm'n v. Assessors of W. Tisbury, 62 Mass. App. Ct. 25, 27–28 (2004). "All the words of a statute are to be given their ordinary and usual meaning, and each clause or phrase is to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose." College Hill, supra at 139, quoting Selectmen of Topsfield v. State Racing Comm'n, 324 Mass. 309, 312–313 (1949). "Ultimately, we must avoid any

construction of statutory language which leads to an absurd result, or that otherwise would frustrate the Legislature's intent" (quotation and citation omitted). Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019).

i. Statute of repose. We agree with the judge that the act establishes a statute of repose. "A statute of repose eliminates a cause of action at a specified time, regardless of whether an injury has occurred or a cause of action has accrued as of that date." Bridgwood, 480 Mass. at 352. A statute of repose is distinct from a statute of limitations, which "specifies the time limit for commencing an action after the cause of action has accrued." Id. at 351. While a statute of limitations provides a procedural defense to a legal claim, a statute of repose provides a substantive right to be free from liability. See id. at 352.

The act prohibits the commission from bringing a cause of action against a person who acquires property on which work has been done in violation of the act three years after either of two numerated events: "the recording of the deed or the date of the death by which such real estate was acquired by such person." G. L. c. 131, § 40. Compare D'Allessandro v. Lennar Hingham Holdings, LLC, 486 Mass. 150, 154 (2020) (G. L. c. 260, § 2B, which provides that in no event shall actions be commenced more than six years after earlier of two events, establishes

statute of repose). The act does not specify a period of time within which an action must be commenced after a cause of action has accrued. Compare Commonwealth v. John G. Grant & Sons Co., 403 Mass. 151, 158-159 (1988) (G. L. c. 131, § 91, which provides that action must be commenced within two years after time when cause of action accrued or offense was committed, is statute of limitations). Regardless of when a conservation commission discovers a preexisting violation (or when it reasonably could have discovered the violation), the act prohibits it from seeking to enforce an order to cure the violation against the owner at a time certain, three years after the recording of the deed (or the date of death) by which the owner acquired the property. See McGuinness v. Cotter, 412 Mass. 617, 622 (1992).

ii. Entitlement to repose. The judge construed the act as proscribing actions against subsequent owners of property on which work has been done, in violation of the act, more than three years after the first subsequent owner had acquired the property following the initial violation. He based this interpretation on his conclusion that the statute of repose applies to all those in privity with the first subsequent owner to acquire the property.

By its plain language, see D'Allessandro, 486 Mass. at 154, however, the act permits a conservation commission to bring an

enforcement action against "any person" who acquires property on which work has been done in violation of the act, not just the first such person. The act provides that no action shall be brought against "such person" unless the action is commenced within three years of "such person" having acquired the property. The act, therefore, permits an action to be initiated against any subsequent owner, so long as that action is commenced within three years of that particular individual obtaining title to the property.

This construction is bolstered by the legislative history of the act. See Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 609 (2019) ("Although 'legislative history is not ordinarily a proper source of construction,' we use it to augment our interpretation of the language of a statute" [citation omitted]). General Laws c. 131, § 40, first enacted in 1967, see St. 1967, c. 802, § 1, "was created to protect wetlands from destructive intrusion" (quotation and citation omitted). Miramar Park Ass'n, Inc., 480 Mass. at 368.[8] While, initially, the act had authorized local conservation commissions only to "recommend" protective measures

[8] The Legislature previously had enacted protections for coastal wetlands in 1963, see St. 1963, c. 426; and for inland wetlands in 1965, see St. 1965, c. 220. See generally Hamilton v. Conservation Comm'n of Orleans, 12 Mass. App. Ct. 359, 364-365 (1981).

concerning work on wetlands, see Hamilton v. Conservation Comm'n of Orleans, 12 Mass. App. Ct. 359, 354-365 (1981), by 1972, the act expanded the purview of local conservation commissions, vesting them with the statutory authority to issue orders of conditions to regulate work affecting wetlands, as well as to commence enforcement actions to cure violations of the act, see G. L. c. 131, § 40; St. 1972, c. 784, § 1. At that time, the act also provided that any person who acquired property on which work had been done in violation of its provisions was required to restore the property to its original or permitted condition; the act contained no period of repose. See St. 1972, c. 784, § 1.

In 1974, the Legislature rejected a proposal by the Massachusetts Conveyancers Association[9] that would have limited liability for subsequent landowners to "three years following the commencement of the work alleged to be violation" of the act. See 1974 House Doc. No. 689. One year later, in 1975, the

[9] The Massachusetts Conveyancers Association, a group of approximately 3,000 real estate attorneys in Massachusetts, is now known as the Real Estate Bar Association for Massachusetts, Inc. (REBA). See, e.g., Real Estate Bar Ass'n for Mass., Inc. v. National Real Estate Info. Servs., 459 Mass. 512, 516, 518-519 (2011). REBA's mission statement notes, "For nearly 150 years, REBA's shared legacy has been advancing the practice of real estate law while upholding and promoting fair dealing, professional networking and collegiality among members of the real estate bar." The Real Estate Bar Association for Massachusetts, Our Mission, https://www.reba.net/about-us/our-mission/ [https://perma.cc/49CM-WVD4].

Massachusetts Conveyancers Association proposed another, related amendment, entitled, "An Act to regulate the enforcement of violations of the wetlands law against subsequent owners." See 1975 House Doc. No. 655. The language of the proposed amendment stated that no action could be brought against any person who acquires property on which work had been done in violation of the act unless the action were commenced within "two years" after the date of acquisition "by the first such person to acquire it." Id.

The Legislature did not adopt the amendment as proposed, and instead adopted a modified version that replaced the two-year period of repose with a three-year period and struck out the phrases "the first" and "to acquire it." The amendment the Legislature ultimately enacted, entitled, "An Act relative to the enforcement of violations of the wetlands law against subsequent owners of certain real property," thus provided that no action shall be brought against any person who acquires property on which work has been done in violation of the act unless the action is commenced within "three years" following the date of acquisition "by such person." St. 1975, c. 334.[10]

[10] A summary of the amendment in the package provided to the Governor stated that the amendment "[p]rovides [a three]-year statute of limitations on operation of [G. L. c. 131, § 40,] by which a person acquiring real estate by purchase or inheritance, on which work has been carried out in violation of the Wetlands

Thus, the Legislature was squarely presented with the suggestion to use language that would have barred all actions against subsequent owners for two years following the first transfer of a property; yet the Legislature chose not to do so. See Commonwealth v. Newberry, 483 Mass. 186, 195 (2019); Canton v. Commissioner of the Mass. Highway Dep't, 455 Mass. 783, 794 (2010). Because the Legislature rejected the proposed amendment and replaced it with broader language, it is evident that the Legislature did not intend the provision to bar all actions commenced three years after the first transfer of a property. See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 220 (1983) ("While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected"). See also City Elec. Supply Co. v. Arch Ins. Co., 481 Mass. 784, 791-792 (2019) (statute cannot be read to include rejected language); Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 164 (1998) (inappropriate for judge to reinsert rejected language).

The defendants argue, as the judge reasoned, that interpreting the act to permit conservation commissions to bring

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Act, may be compelled to return the land to its condition prior to the violation."

enforcement orders within three years of each subsequent acquisition of property would defeat the general purpose of statutes of repose to provide finality. We disagree. The period of repose, set forth in plain language, provides finality for each subsequent owner. The repose is personal. Three years after each subsequent owner acquires title, any cause of action under the act against that owner, for preexisting violations on the property, is precluded. See Rudenauer, 445 Mass. at 358; Klein, 386 Mass. at 702.

Interpreting the act in this way also is consistent with the over-all statutory scheme. See Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. 859, 862 (2007) (G. L. c. 131, § 40, sets out "comprehensive scheme" to manage wetlands projects). The act not only prohibits unauthorized filling of wetlands, but also provides that leaving unauthorized fill in place is a continuing violation. See G. L. c. 131, § 40. The statutory language specifies that "[e]ach day" a person "fails to remove unauthorized fill" constitutes a separate offense. Id. Thus, a property owner who leaves in place unauthorized fill on his or her property -- regardless of the origin of the fill -- is committing a distinct and separate violation of the act and may be required to cure that violation. See John G. Grant & Sons Co., 403 Mass. at 157 (presence of

unauthorized fill is continuing wrong warranting injunctive relief).

An interpretation that enforcement is possible only with respect to the first subsequent owner would leave conservation commissions without a means to enforce certain continuing violations, contrary to the Legislature's apparent intent that wetlands be protected against ongoing violations. Interpreting the act to permit enforcement actions against each subsequent owner thus is more consistent with the statutory scheme and the recognition that each subsequent owner may be committing independent, daily violations by leaving in place unauthorized fill.

Interpreting the act to permit enforcement against each subsequent owner also is consistent with the act's recording scheme. The act provides that orders of conditions authorizing work in protected resource areas must be recorded at the registry of deeds (or, if applicable, the Land Court) before work may begin. See G. L. c. 131, § 40. Once the work is complete, the property owner must seek a certificate of compliance, see 310 Code Mass. Regs. § 10.05(9)(a) (2014), at which point a commission conservation agent must inspect the property to determine whether the work was done in accordance with the order of conditions, see G. L. c. 131, § 40, and 310 Code Mass. Regs. § 10.05(9)(b). Once a certificate of

compliance has been issued, that certificate also is recorded in the registry of deeds or in the Land Court. See 310 Code Mass. Regs. § 10.05(9)(f).

This recording scheme provides prospective purchasers of property with notice that an order of conditions exists and, if no certificate of completion has been recorded, the possibility that any work accomplished under that order may have been done in violation of the order. Here, for example, as stated, during the process of the defendants' purchase of the property, an attorney working on the closing requested a certificate of compliance for the property. When none was issued, the defendants contacted the commission concerning changes to the property that were required to be made. While the defendants are correct that the purpose of statutes of repose is to prevent older claims from "surprising the parties" (citation omitted), Joslyn v. Chang, 445 Mass. 344, 351 (2005), here, the defendants could not have been surprised that the commission brought an enforcement action against them after their months-long interactions concerning the asserted violations and requested restoration of the property. Interpreting the statute of repose to apply personally, and to permit enforcement against each subsequent owner, thus is consistent with the act's recording scheme. Accordingly, G. L. c. 131, § 40, does not bar the instant action.

3. Conclusion. The order granting summary judgment in favor of the defendants is vacated and set aside. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.