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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-2585-H

MARIA A. KITRAS and JAMES J. DECOULOS, as Co-Trustees,
of the GORDA REALTY TRUST

vs.

TOWN OF AQUINNAH CONSERVATION COMMISSION & others¹

**MEMORANDUM OF DECISION AND ORDER ON THE
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**

The plaintiffs, Maria A. Kitras and James J. Decoulos, as trustees of the Gorda Realty Trust ("Gorda") brought this action in the nature of certiorari, pursuant to G. L. c. 249, § 4, seeking judicial review of the Town of Aquinnah Conservation Commission's ("Commission") decision denying Gorda's application for the construction of a single-family house.² This matter is before the court on Gorda's motion for judgment on the pleadings. For the reasons set forth below, Gorda's motion is **ALLOWED**.

BACKGROUND

Gorda has been seeking approval to build on its property for over ten years. The project consists of plans to construct a house, a well, a sewage disposal system, and a driveway on a parcel of land Gorda owns in the Town of Aquinnah. A portion of the proposed driveway runs over an easement that provides access to Gorda's otherwise landlocked property from Moshup Trail. The

¹Sarah Thulin, Walter Delaney, and Katherine Newman, as members of the Conservation Commission of the Town of Aquinnah

²Gorda also asserted claims for taking property without just compensation in violation of the Fifth Amendment of the U.S. Constitution and arts. 10 and 12 of the Massachusetts Declaration of Rights. By agreement of the parties, the court stayed these counts pending resolution of the certiorari count of the complaint.

lengthy procedural history, which includes five applications filed with the Commission requesting an order of conditions, a superseding order of conditions issued by the Department of Environmental Protection ("DEP"), an appeal before the Division of Administrative Law Appeals ("DALA"), and two prior complaints for judicial review, is briefly summarized below.³

Gorda first sought the Commission's approval for the project by filing a notice of intent on July 28, 1998. The Commission denied Gorda's application on September 12, 1998.

After Gorda revised the design plans and conducted additional field investigations, it submitted a second notice of intent to the Commission on March 15, 2000. The Commission initially declined to act on Gorda's application on the ground that a moratorium associated with the Martha's Vineyard Commission prevented review of the project. The moratorium expired on May 23, 2000, and the Commission denied Gorda's application two months later, on July 25, 2000.

On May 30, 2000, while the application to the Commission was still pending, Gorda requested a superseding order of conditions from the DEP on the ground that the Commission failed to act within twenty-one days from the date of filing. In connection with a review of the project by the Executive Office of Environmental Affairs, Gorda modified the plans by proposing to build a fifty-foot bridge within the easement area in order to reduce the potential impact on the surrounding wetlands. The DEP ultimately approved the project, as modified, and issued a superseding order of conditions on July 12, 2001.

Two appeals followed. On July 23, 2001, the Commission and two abutters to the easement portion of the project requested administrative review by appealing the superseding order of

³As is evident from the parties' pleadings, most of the procedural history is undisputed.

conditions to the Division of Administrative Law Appeals.⁴ Both the abutters and the Commission argued that Gorda failed to accurately delineate the wetlands in the easement area and that the project would alter more than 5,000 square feet of bordering vegetated wetlands. Gorda, in turn, sought judicial review of the Commission's denial of its application under the Town of Aquinnah Wetland Bylaw ("Bylaw") by filing a complaint in the Essex Superior Court on September 27, 2002.⁵

On December 23, 2002, Gorda and the Commission settled the Superior Court action. Under the terms of the settlement agreement, the Commission approved Gorda's project, as amended through the date of the superseding order of conditions. The resulting permit for the project related back to the same date (i.e., July 12, 2001) and was set to expire on July 12, 2004. The Commission also agreed to withdraw its administrative appeal before DALA, and its appeal was dismissed in March 2003. (R. at 44.)

Due to unforeseen circumstances that were not the fault of any party,⁶ the abutters' administrative appeal had not been resolved prior to the expiration date of Gorda's permit. Gorda therefore requested a one-year extension of the permit in July 2004. The Commission held a public hearing on the matter, at which Gorda failed to attend, and the Commission denied the request for an extension for failure to appear at the hearing. Gorda unsuccessfully sought judicial review of the Commission's denial in this court.⁷

⁴It appears that at the time of filing, the DEP Office of Administrative Appeals heard appeals from DEP decisions. By the time a decision was reached, however, DALA had assumed responsibility for handling DEP appeals.⁶

⁵Kitras v. Thulin, No. ESCV2002-01828 (Mass. Super. Ct.).

⁶See In the Matter of Kitras, No. 2001-114, at 5 n.3 (DALA Aug. 23, 2005) (recommended final decision). (R. at 45.)

⁷Kitras v. Thulin, No. MICV2004-03216 (Mass. Super. Ct.).

On August 23, 2005, an administrative magistrate at DALA issued a recommended decision in favor of Gorda in the abutters' appeal. The administrative magistrate was particularly persuaded by the testimony of DEP's witness, Daniel Gilmore, who concluded that Gorda's "wetland line accurately demarcated the wetlands on the site in accordance with the Wetlands Protection Regulations and the Wetlands Handbook." (R. at 50.) Gilmore based his decision on on-site inspections and review of Gorda's wetland delineation, during which he examined the vegetation and dug test pits in the soil. (R. at 50.) Based primarily on Gilmore's testimony, the administrative magistrate held that Gorda "accurately delineated the wetlands on the project site" and that Gorda's wetland replication plan "provides a replacement area greater than the surface area of the wetland that will be lost." (R. at 51.) The magistrate therefore recommended upholding the superseding order of conditions, and the commissioner of the DEP adopted the magistrate's decision on November 10, 2005. (R. at 51, 55.) The DEP recently extended the superseding order of conditions to November 10, 2011.

Having prevailed in the abutters' appeal, Gorda resumed its attempt to gain the Commission's approval under the Bylaw. Gorda submitted a notice of intent to the Commission on August 31, 2005, but the Commission denied the application on the ground that Gorda refused to flag the wetland boundaries on the site and would not permit the Commission to utilize its own expert to evaluate the project. Gorda filed a fourth notice of intent on November 2, 2006, but the Commission denied that application as well.

On March 2, 2007, Gorda submitted a fifth notice of intent to the Commission. The design and plans for the project were consistent with the plans that were previously subject to the DEP superseding order of conditions. The Commission held a public hearing on March 20, 2007, at

which it determined that it would need to hire consultants to properly evaluate the project. (R. at 78.) At the Commission's request, Gorda agreed to pay up to \$2,500 toward the cost of the consulting services.

The Commission hired two consultants, Mark Manganello and Peter Fletcher (the "consultants"), to evaluate the project. Before conducting an on-site evaluation, the consultants requested that Gorda flag and label the wetland areas at the project site. The consultants visited the site on several occasions during May, September, and October 2007. They also established their own wetland demarcation, which depicted a greater wetland area than that reflected in Gorda's plans. Based on their review, the consultants prepared a report, dated November 8, 2007, in which they posed a number of questions and comments concerning the methodology Gorda used to delineate the wetlands, the characteristics of the survey lines depicting the wetland areas on the site plan map, the accuracy of the flag locations at the site, discrepancies between Gorda's wetland delineations and those identified on a site plan map prepared for an abutting landowner, the potential impact on intermittent stream banks, and the possible existence of a vernal pool habitat. (R. at 162-165.) The consultants concluded that the project review could not be completed until Gorda resolved the issues raised in the report. (R. at 165.)

On December 11, 2007, Gorda provided written responses to the consultants' concerns, supported by additional field data sheets and a report prepared by Gorda's own wetland expert, Mario DiGregorio. Among other things, Gorda and its land surveyor reevaluated the location of the wetland flags at the site and repositioned a number of the flags to more accurately reflect their locations on the site plan map. (R. at 177-178.) Gorda further explained the methodology used to delineate the wetland area, the specialists that participated in the delineation process, and the method

used to generate the survey line structure reflected on the map. (R. at 176-181.)

The Commission's consultants completed additional reports on December 26, 2007, and February 28, 2008, in which they requested additional details to be included in the plans and continued to express concerns regarding the accuracy of Gorda's wetland delineations and flagging. (R. at 205-206, 229-232.) The additional information requested included the identification of field sampling locations, stream banks, and contour lines on Gorda's wetland delineation plan so that the consultants could conduct a field review of the wetland boundaries. (R. at 205-206.) The consultants also requested cross-sections of Gorda's proposed retaining walls. (R. at 232; see also R. at 362-363 for Gorda's cross-sections). In addition, the consultants performed another on-site investigation, this time accompanied by Gorda (i.e., James Decoulos) and Mario DiGregorio. Gorda accepted some of the consultants' revisions to the wetland boundary, but would not consider any changes to the wetland line within the easement area. (R. at 229.)

In March 2008, the consultants completed a comprehensive report that detailed the results of their project review and on-site investigations. The consultants concluded that Gorda's application did not accurately portray the scope of wetlands affected by the project. The consultants observed that an additional wetland area, not reflected in Gorda's notice of intent, would be affected due to regrading of the road within the easement area. (R. at 252.) According to the consultants, regrading of the section of road in question was required because the road had been rerouted outside of the easement area, and the area previously used as a road (or driveway) is now a protected wetland. In light of this newfound wetland area, the consultants concluded that Gorda's plans did not accurately identify the wetland alteration associated with the project and that its wetland replication plan failed to comply with DEP performance standards. (R. at 253.) The consultants

further criticized Gorda for failing to demonstrate that there were no alternative means of accessing the property (aside from the easement connecting the property to Moshup Trail),⁸ and asserted that Gorda would need to provide a more thorough description of the project's impacts on the wetlands and of proposed mitigation measures in order for the consultants to fully analyze the project. (R. at 253-254.)

Although Gorda disagreed with the consultants' wetland delineation, and insisted that its own delineation was correct, Gorda proposed to alter the design of the bridge in the easement area and extend it from fifty to one-hundred feet in order to mitigate the impact on the additional wetland area identified by the consultants. (R. at 355-356.) Gorda also proposed to build a thirty-foot pile supported bridge across an intermittent stream, rather than a twelve-foot steel or wood bridge. (R. 355.) Gorda's revised plans indicated that even under the consultants' wetland delineation it still could replicate a wetland area greater than the area of wetlands impacted by the project. (R. at 356, 361.)

To rebut the consultants' reported inaccuracies in Gorda's wetland delineation, Gorda submitted the sworn testimony of DEP environmental analyst Daniel Gilmore, dated January 27, 2004, in which he detailed his determinations that Gorda's plans identified all existing wetland resource areas, DiGregorio's wetland demarcation was accurate, and the project complied with applicable DEP performance standards. (R. at 365-373.) Gilmore based his conclusions on, among other things, several on-site inspections of the property. (R. at 367.) With respect to alternate access routes, Gorda explained that its attempts to obtain access easements from abutting landowners had

⁸Without identifying any additional easement rights held by Gorda over adjacent properties, it is unclear what the consultants expected Gorda to do to demonstrate that the easement running to Moshup Trail was the sole means of accessing its landlocked property.

proven futile. (R. at 353-354.) In its closing remarks, Gorda expressed its opinion that, with the additional documentation and project revisions, the Commission should have sufficient information to render a decision. (R. at 357.)

The consultants' final report appearing in the record, dated April 8, 2008, reiterated their determination that Gorda's plans understated the extent of wetlands within the easement area. (R. at 405.) The consultants challenged the accuracy of Gorda's site plan maps and wetland delineation, and rejected Gilmore's testimony, as well as the DALA decision, on the ground that it did not include data that would contradict the consultants' own findings or those of the abutters' expert that were produced during the DALA proceedings. (R. at 405.) The consultants also dismissed the mitigation afforded by the extended bridge design on the ground that shading could affect the plant community and "may result in additional alteration of wetlands beneath the bridge." (R. at 407.) Additionally, they found the cross-section and design details of a proposed retaining wall (identified as "cross section D-D," see R. at 361, 363) to be inadequate (without explanation), and noted that the absence of a retaining wall in a nearby section of the project "will likely result in erosion into the adjacent wetlands during construction." (R. at 407-408.) The consultants requested further review of the project, including a vernal pool study (although no vernal pools had been identified) and documentation from Gorda supporting compliance with DEP performance standards. (R. at 408.)

In May 2008, the Commission issued a written decision denying Gorda's application. The decision was largely based on the consultants' determination that Gorda failed to accurately delineate the wetland boundaries on its site plans. The Commission determined that the wetland boundary established by its own consultants was correct, and that the DEP testimony and DALA decision to the contrary were insufficient to refute its consultants' delineation. (R. at 469-470.) Under the

revised wetland delineation, the Commission determined that Gorda was required to submit an environmental impact report pursuant to the Massachusetts Environmental Policy Act and obtain a water quality certification from the DEP. (R. at 471.)

The Commission dismissed each of Gorda's proposed mitigation measures as insufficient. With respect to Gorda's proposed retaining wall, the Commission found that the design of the wall "is inadequate to protect the adjacent wetland resource area." (R. at 471.) The Commission also rejected Gorda's plans to place a bridge over the wetlands in the easement area, stating that it "will result in alteration to the underlying wetland due to shading impacts." (R. at 471.)

The Commission determined that Gorda's wetland replication plan fails to comply with DEP regulations, and that the project fails to satisfy DEP performance standards. (R. at 471-472.) The Commission also criticized Gorda for not investigating further as to whether any vernal pools exist in the vicinity and, based on this failure, found that the project would not "protect the interest of wildlife habitat, among other interests." (R. at 471-472.) At the end of the decision, the Commission denied Gorda's application "for failure to protect the interest of the By-law." (R. at 472.)

DISCUSSION

I. Standard of Review

Judicial review under certiorari "is limited to correcting 'substantial errors of law apparent on the record adversely affecting material rights.'" FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 684 (1996), quoting Commissioner of Revenue v. Lawrence, 379 Mass. 205, 208 (1979). In reviewing a local conservation commission's denial of a permit, the court considers "whether the commission's action was arbitrary or capricious, based

upon error of law, or unsupported by substantial evidence.” Conroy v. Conservation Comm’n of Lexington, 73 Mass. App. Ct. 552, 558 (2009). The court confines its “review to the reasons given by the commission for the denial of the application.” Fieldstone Meadows Dev. Corp. v. Conservation Comm’n of Andover, 62 Mass. App. Ct. 265, 266 n.2 (2004).

The central issue raised in this appeal is whether the DEP’s superseding order of conditions supersedes the Commission’s decision. Gorda argues that because the Commission did not base its decision on Bylaw provisions that are more protective than the Wetlands Protection Act or DEP regulations, the superseding order of conditions preempts the Commission’s decision. The Commission disagrees, arguing that the Bylaw is more stringent than the Act in that it adds erosion and sedimentation control to the list of protected wetland values, provides more expansive regulation of land lying within the wetland “buffer zone,” and protects against the cumulative adverse impacts on protected wetland values.

II. Review Under Town of Aquinnah Wetland Bylaw

The Wetlands Protection Act (the “Act”) “establishes minimum Statewide standards leaving local communities free to adopt more stringent controls.” T.D.J. Dev. Corp. v. Conservation Comm’n of North Andover, 36 Mass. App. Ct. 124, 125-126 (1994), quoting Golden v. Selectmen of Falmouth, 358 Mass. 519, 526 (1970). “When a local conservation commission rests its decision on a wetlands by-law that provides greater protection than the act, its decision cannot be preempted by a DEP superseding order.” Hobbs Brook Farm Prop. Co. v. Conservation Comm’n of Lincoln, 65 Mass. App. Ct. 142, 149 (2005), quoting FIC Homes of Blackstone, Inc., 41 Mass. App. Ct. at 686-687. In contrast, “[w]here the local bylaw does not impose more stringent controls than those set by the Legislature, the DEP has authority to issue a superseding order.” Id.

A comparison of the Aquinnah Wetland Bylaw to the Act and DEP regulations indicates that the Bylaw is more protective in some respects. Compare G. L. c. 131, § 40 (public interests) and 310 Code Mass. Regs. § 10.02(2)(b) (regulating activity within 100 feet of a wetland resource area if it alters a nearby wetland) with Bylaw § 1 (including erosion and sedimentation control among wetland values) and Bylaw § 2 (regulating removal, filling, dredging, building upon, or alteration of land within 200 feet of a protected resource area). As discussed below, however, the Commission's decision is not focused on these more protective provisions.

A. Wetland Delineation & Compliance with DEP Performance Standards

The majority of the Commission's decision criticizes Gorda's diligence during the project review process and the accuracy of Gorda's wetland delineation. Specifically, the Commission admonishes Gorda for failing to flag the wetland boundaries in the field, failing to map all of the flags once set in place, failing to include a topography, overlay, and other details on revised plans, and refusing to cooperate with the consultants regarding their expansion of the wetland boundary within the easement area. On several occasions, the Commission suggested that the DEP and DALA had acted on inaccurate or misleading plans because the Commission's consultants had made changes to Gorda's wetland delineation.⁹

Although there is sufficient support in the record for the Commission's finding that the extent of wetlands at the project site is greater than that reflected in Gorda's application, it erred in

⁹The Commission, citing pages 177-179 of the record, claims that Gorda conceded that the wetland boundaries identified on the plans submitted to the DEP were inaccurate. The pages cited do not support this contention. Rather, Gorda conceded that some of the wetland flags placed in the field had to be repositioned in order to accurately correspond to the flagging depicted on the site plans. Gorda further explained that the wetland flagging on the plans corresponded with the wetland delineation prepared by its expert, Mario DiGregorio.

dismissing the DEP's determination of the wetland boundaries in favor of its own demarcation. The Bylaw looks to the DEP regulations for determining what constitutes a wetland "resource area." See Bylaw § 8 (adopting definitions set forth in DEP regulations, with exception of "person" and "alter"); 310 Code Mass. Regs. § 10.04, and statutes cited (defining, among other things, "resource area" and various categories of resource areas). Accordingly, the Bylaw is no more stringent than the Act with respect to which areas are protected wetland resources.¹⁰

In DeGrace v. Conservation Comm'n of Harwich, for example, the Department of Environmental Quality Engineering ("DEQE")¹¹ and a local conservation commission arrived at different conclusions as to whether a particular area constituted a protected wetland resource. 31 Mass. App. Ct. 132, 133-134 (1991). In the applicant's appeal from the commission's order denying approval of the project, the District Court concluded that the commission was not bound by the DEQE's determination that the area in question was not a protected resource area, and affirmed the commission's decision. Id. at 134. The Appeals Court reversed, holding that because the town's bylaw incorporated the definitions section of the Act and regulations, "the town chose not to impose 'more stringent controls' than those set by the Legislature concerning those areas which are subject to wetland protection." Id. at 136.

As in DeGrace, the DEP's determination of which areas are subject to wetland protection is

¹⁰Although the Bylaw provides more stringent regulation of activity within the buffer zone, the Commission did not make any findings concerning the project's impact on land lying within the buffer zone. Cf. FIC Homes of Blackstone, Inc., 41 Mass. App. Ct. at 687-688 (more expansive protection of buffer zone served as basis for commission's decision). Indeed, the Commission's decision does not mention either the buffer zone or the Bylaw provision under which the buffer zone is regulated. See Fieldstone Meadows Dev. Corp., 62 Mass. App. Ct. at 266 n.2 (court must confine its "review to the reasons given by the commission for the denial of the application").

¹¹The DEP is the successor agency to the DEQE. Taygeta Corp. v. Varian Assocs., Inc., 436 Mass. 217, 219 n.3 (2002).

controlling. The appropriate avenue for relief from the DEP's determination is to pursue an appeal, which in fact the Commission had done. Having abandoned that appeal, the DEP's decision became final. The Commission cannot now revisit the issue through the project review process under the Bylaw by concluding that the DEP's assessment, under the DEP's own regulations, was incorrect.¹²

For this same reason, the Commission cannot base its denial of Gorda's application on the ground that the project does not satisfy DEP performance standards or that Gorda's wetland replication plan does not comply with DEP regulations. The Commission exercises final authority only where it acts pursuant to a more stringent ordinance, bylaw, or local regulation. Healer v. Department of Env'tl. Protection, 73 Mass. App. Ct. 714, 718 (2009) ("A local authority exercises permissible autonomous decision-making only when its decision is based exclusively on the specific terms of its by-law which are more stringent than the act."). The DEP, not the Commission, has final word with respect to the project's compliance with the Act and DEP regulations. Id. at 719.

B. Erosion & Sedimentation Control

Unlike the Act, the Bylaw includes erosion and sedimentation among the list of protected wetland values. See Hobbs Brook Farm Prop. Co., 65 Mass. App. Ct. at 149-150 (finding that addition of erosion and sedimentation control to list of wetland values, at least when combined with additional requirements, rendered town bylaw more stringent than Act). The Commission, citing Hobbs Brook Farm and the Land Court's decision in Dooley, argues that it relied on this distinction in denying Gorda's application.

¹²The DEP may deny an extension of a superseding order of conditions in the event that new information indicates that the project will not protect the interest of the Act, or where the applicant's resource area delineation is no longer accurate. 310 Code Mass. Regs. § 10.05(8)(b)(2), (5). In this case, it is undisputed that the DEP granted Gorda's request for an extension.

Although the Commission's decision cites erosion and sedimentation control as a protected interest under the Bylaw, and concludes that Gorda's project fails to protect the interests of the Bylaw, there are no express findings relative to the project's impacts on erosion and sedimentation. This case thus stands on much different footing than the situation in Hobbs Brook Farm. In that case, the local conservation commission made specific findings regarding the proposed project's impacts on the banks of Hobbs Brook. Hobbs Brook Farm Prop. Co., 65 Mass. App. Ct. at 145-146; Hobbs Brook Farm Prop. Co. v. Conservation Comm'n of Lincoln, No. MICV2000-03755 (Mass. Super. Ct. Jan. 27, 2004) (Gershengorn, J.) (noting evidence and findings regarding adverse impact of project on banks of brook). As the Appeals Court observed, "erosion control in and of itself was a focal point of the commission's decision" (emphasis added). Hobbs Brook Farm Prop. Co., 65 Mass. App. Ct. at 150. Similar findings were made by the Lincoln Conservation Commission regarding the project at issue in Dooley. See Dooley v. Meadors, 2008 WL 2737431, at *4 (Mass. Land Ct. July 15, 2008) (Sands, J.) (noting a number of findings concerning erosion and sedimentation control, including conclusion that "there would be long term erosion and sedimentation damages since 'a substantial amount of surface water containing sediment loads would likely still flow from the impervious surfaces into the vegetative cover on the site'"). Findings of this nature are absent in the present case.

The Commission argues, nonetheless, that the decision to deny Gorda's application was based in part on the project's impact on erosion. To reach this conclusion, the Commission cites the following two statements:

- (1) The consultants' determination that "[t]he lack of a wall between flags ACC 19 and W21 will likely result in erosion into the adjacent wetlands during construction." (R. at 408.)

(2) The Commission's finding that "the design of the retaining wall proposed in the vicinity of wetland flags W21, ACC 19 and ACC 20 is inadequate to protect the adjacent wetland resource area." (R. at 471)

The court is not persuaded by the Commission's argument. First, the consultants stopped short of concluding that the project would result in erosion, but rather suggested that erosion was a likely possibility. Second, the Commission's finding related to the design of the retaining wall Gorda proposed in the vicinity of flag W21, whereas the consultants were referring to the absence of a wall in that same general area.¹³ Third, the Commission does not mention erosion, and does not explain why it considers the design of either the proposed stone wall or the proposed hay bales and silt fencing in the vicinity of flag W21 to be inadequate. Fourth, the record does not contain any evidence concerning the inadequacy of the wall and fencing, aside from the consultants' assertion, without explanation, that the details regarding the design of the retaining wall are inadequate.¹⁴ See Fieldstone Meadows Dev. Corp., 62 Mass. App. Ct. at 267, 269-270 (commission cannot assume inadequacy of particularities of applicant's project). Indeed, the minutes from the hearings before the Commission do not reflect that erosion or inadequate retaining wall designs were ever raised as concerns. The court therefore rejects erosion control as a basis for the Commission's decision.

Furthermore, the Bylaw does not contain any performance standards by which to evaluate Gorda's project. See Tremont Redevelopment Corp. v. Previtera, 15 Mass. Land Court Rptr. 603,

¹³See Gorda's March 31, 2008, submissions to the Commission for maps and cross-sections regarding the stone retaining wall, hay bales, and silt fencing near flag W21. (R. at 359-363.)

¹⁴The Commission "paraphrased" the consultants' April 8, 2008, report as stating that the "proposed cut into a steep slope and lack of a retaining wall between flags ACC 19 and W21 will likely result in erosion into the adjacent wetlands during construction." The report, however, mentions only the lack of a wall in the area of flags ACC 19 and W21, and says nothing about any proposed cuts. Compare R. at 407-408 with R. at 467-468.

605 (2007), aff'd 73 Mass. App. Ct. 1127 (holding that even though Bylaw regulated activity within thirty-five foot buffer zone and protected isolated freshwater wetlands, it was not more stringent than Act because commission failed to adopt regulations establishing uniform performance standards). Although the Bylaw contemplates the adoption of regulations setting forth design specifications and performance standards, see Bylaw § 6, the Commission had not promulgated any regulations at the time that Gorda's project was reviewed. As the Appeals Court recently explained, the ability of a local conservation commission to impose more stringent controls "does not suffice absent the promulgation of stricter governing regulations of neutral application." Tremont Redevelopment Corp. v. Conservation Comm'n of Westwood, 73 Mass. App. Ct. 1127, 2009 WL 648897, at *1 (2009) (order pursuant to Rule 1:28). In this case, the Bylaw is silent with respect to any objective standards under which the Commission must evaluate the sufficiency of Gorda's proposed project designs, implementation, and impact on wetland values.¹⁵

C. Conclusion

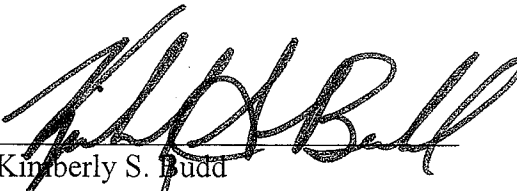
In sum, the court holds that the Commission did not base its decision on Bylaw provisions that are more stringent than the Act and DEP regulations. The Commission's disagreement with the DEP's conclusions regarding Gorda's wetland delineation and the project's compliance with DEP performance standards and regulations is not an adequate basis for denying the application. In addition, the Commission failed to adopt any uniform performance standards or design specifications

¹⁵Under § 11 of the Bylaw, the applicant must demonstrate that the project will not have an "unacceptable significant or cumulative effect" on wetland values. The wholly subjective inquiry of whether a project's impact on wetland values is "unacceptable" is insufficient to establish a performance standard that may be applied with any uniformity. See, e.g., Tremont Redevelopment Corp., 15 Mass. Land Court Rptr. at 605 n.4, aff'd 73 Mass. App. Ct. 1127 (explaining that Bylaw's burden of proof provision "gives no guidance to an applicant as to what is required by the Bylaw [or] advise the Commission on how to apply the Bylaw uniformly").

to evaluate the project. Gorda's project is therefore governed by the DEP's superseding order of conditions. Accordingly, the court vacates the Commission's decision.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion for judgment on the pleadings on Count I of their amended complaint be **ALLOWED**. The Town of Aquinnah Conservation Commission's decision denying the plaintiff's application is hereby **VACATED**. The plaintiff's project shall be governed by the Department of Environmental Protection's superseding order of conditions.



Kimberly S. Budd
Justice of the Superior Court

Dated: March 1, 2010