

BERKSHIRE, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT  
DOC. NO. 19-0032

STOCKBRIDGE BOWL ASSOCIATION, INC.

v.

TOWN OF STOCKBRIDGE CONSERVATION COMMISSION & others<sup>1</sup>

**MEMORANDUM AND ORDER ON CROSS-MOTIONS  
FOR JUDGMENT ON THE PLEADINGS**

This dispute concerns a proposed plan formulated by the plaintiff, the Stockbridge Bowl Association (“SBA”), to treat Lake Mahkeenac, also known as the Stockbridge Bowl (“Stockbridge Bowl” or “lake”), with an herbicide. The purpose of applying the herbicide is to remove an invasive aquatic plant known as Eurasian Watermilfoil (“Watermilfoil”). The SBA filed a Notice of Intent to administer the herbicide with the Stockbridge Conservation Commission (“Commission”). After several hearings, the Commission issued an Order of Conditions denying the proposed application of the herbicide based on both the Massachusetts Wetlands Protection Act, G. L. c. 131 § 40, and the town’s wetland bylaw. The SBA now brings this action in *certiorari* challenging the Commission’s decision under the town’s wetland bylaw.<sup>2</sup>

**BACKGROUND**

The SBA is a group of individuals who have joined together to help maintain and improve the Stockbridge Bowl. A major focus of the SBA has been the proliferation of Watermilfoil throughout the lake. Watermilfoil is a non-native, invasive species of aquatic plant that has grown in increasingly larger numbers since at least the 1960s. In the 1960s and 70s, the SBA attempted to remove the Watermilfoil with a variety of different herbicides. These efforts were not wholly successful and Watermilfoil continues to grow throughout the lake today.

**A. The Notice of Intent**

In November 2018, the SBA submitted a Notice of Intent application to the Commission. The application was prepared by SOLitude Lake Management (“SOLitude”), a company that

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<sup>1</sup> Ron Broucker, Joseph H. DeGiorgis, Louise Gachet, John Hart, Patrick White, Tom Labelle, Jay Rhind, and Charlotte Underwood-Miller, as members of the Stockbridge Conservation Commission.

<sup>2</sup> The plaintiff also brings a claim seeking declaratory judgment. That claim is improperly before this Court and is therefore dismissed. See *Bermant v. Board of Selectmen of Belchertown*, 425 Mass. 400, 402-404 (1997).

provides guidance and services to groups seeking to monitor and improve lake conditions. The application sought approval to treat the entirety of the Stockbridge Bowl with two different herbicides, fluridone and flurpyrauzifen-benzyl, in the spring of 2019, with the goal of achieving “an increased level of long-term control of the expansive non-native and nuisance aquatic plant species.” The application also called for hand harvesting of the Watermilfoil and for the use of benthic barriers to prevent growth, but noted that both of these methods were only advisable in certain small areas of the lake. The application specifically recommended against mechanical harvesting of the Watermilfoil, as the plant’s ability to reproduce through “vegetative fragmentation” allows the plant to spread to areas of lakes that it has not yet taken root after such harvesting.

SOLitude conducted a survey which determined that Watermilfoil was the dominant plant species in the lake’s littoral zone, appearing in 64% of the sites surveyed. SOLitude opined that treatment to remove Watermilfoil was necessary because the plant outcompetes native species. Left untreated the Watermilfoil could lead to losses in aquatic vegetation diversity, and that in turn could alter the conditions in the lake for fish and other organisms. The application stated that a monitoring program would be established and testing would continue into future years. Any future use of the herbicides or other removal methods would depend on the results of that monitoring. The application also included numerous graphs, charts, and diagrams concerning the amount of aquatic vegetation in the lake and its locations, as well as water chemistry and algae lab results.

Because the lake was the habitat of two species protected by the Massachusetts Endangered Species Act, the Boreal Marstonia<sup>3</sup> and the Brindle Shiner, in December 2018, the Massachusetts Division of Fisheries and Wildlife (“DFW”), a division of the DEP, issued a letter to the Commission and the SBA regarding the application. The letter stated that the DFW had reviewed the application under both the Wetlands Protection Act and the Endangered Species Act and approved the project with certain conditions. The DFW determined that the use of the fluridone treatment be limited to a one year application and to a certain concentration. In addition, the DFW stated that the use of the herbicide flurpyrauzifen-benzyl would not be permitted.

## ***B. The December 11, 2018 Hearing***

At the initial hearing before the Commission, a representative of SOLitude gave a presentation on what services the company would provide and took questions. Early in the hearing a Commission member focused on the fact that in the 1960s and 1970s the town had attempted to control aquatic plants in the Stockbridge Bowl by using herbicides to no avail. The Commission member made it clear that there was a concern with adding additional chemicals to the lake. The SOLitude representative informed the Commission that the regulatory process for chemicals had changed markedly since the 1960s and 1970s, and that many of the chemicals used at that time are no longer used. At that point in the presentation, the SBA acknowledged the

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<sup>3</sup> A type of freshwater snail.

conditions required by the DFW and orally agreed to amend its application to comply with those conditions.<sup>4</sup>

The SOLitude representative then explained that fluridone has been used since the late 1980s and has been approved by both the federal Environmental Protection Agency and the state Department of Agricultural Resources for use in lakes and ponds. In addition, before applying fluridone, SOLitude would be required to seek a site-specific license from the Massachusetts Department of Environmental Protection's ("DEP") Office of Watershed Management. The SOLitude representative also stated that because Watermilfoil is particularly susceptible to fluridone, it only needs to be used in concentrations far below the maximum permitted by its labeling when used to treat lakes for Watermilfoil.

Later in the hearing, a Commission member commented "[y]ou are putting a toxic substance that's never been tested for your immunological system, which can involve your liver, which is very common for organic compounds to attack the liver or the nervous system. So I'm just saying, you should be aware of it before you put it in the lake." After a representative of the SBA stated that fluridone had been approved by federal and state agencies, the same Commission member stated "what I would like is for the people who live on the Bowl to understand that when they're told, you know, that this is perfectly harmless, except for there are gaps in the research. And it's their health that I'm concerned with." After a member of the audience stated that fluridone had been used in nearby lakes without any health concerns, a board member remarked that "it can be twenty to thirty years before these substances, organic compounds, can show up as cancer-causing agents."

In 2018, a cyanobacteria outbreak or "bloom" occurred in the lake, forcing the town to close the lake for a period of days. Cyanobacteria can be hazardous to both humans and wildlife when such a bloom occurs. Members of the Commission voiced concerns about the proposed treatment's likelihood of increasing the chances for a cyanobacteria bloom. A member of the town's Board of Health also focused on the chances of such a bloom occurring again, asking the SBA to withdraw its application until further testing was done in the lake. The SOLitude representative stated that in his opinion, the treatment would not increase the chances of a cyanobacteria bloom. One Commission member proposed treating only a portion of the lake to see the effects, but the SOLitude representative opined that the prudent course of action would be to treat the entire lake. The issue of a cyanobacteria outbreak came up frequently throughout the hearing.

Returning to the toxicity of fluridone, a Commission member asked whether any states have found that any of the components of the herbicide "are toxic and cause cancer?" In response, two Commission members stated "I can tell you, the UE has banned it" and "California just banned one of the ingredients." When counsel for SBA commented that the toxicity of fluridone was not to be decided by the Commission, a Commission member stated "I don't care. It's been disapproved elsewhere."

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<sup>4</sup> Later in the hearing, counsel for the SBA stated "We're not amending the Notice of Intent. We're only saying that we will abide by the [DFW] letter."

Another Commission member was concerned about the potential for the decaying Watermilfoil adding to the siltation on the bottom of the lake, and asked whether mechanical harvesting would be a better option because it removes the dead Watermilfoil. A member of the SBA addressed the Commission, stating that currently a mechanical harvester was being used to treat the Watermilfoil, but that the harvester was slow and prone to breakdowns. Additionally, the SBA member stated that the harvester does not sweep up all of the vegetation that it removes. A member of the Commission then asked whether the destruction of the Watermilfoil would remove habitat for the organisms living in the lake. The SBA member replied that the native vegetation would be able to grow in place of the Watermilfoil once the native vegetation would not have to compete. Several Commission members mentioned that they had received reports from nearby lakes that fish and wildlife numbers had decreased after an application of fluridone.

One Commission member hypothesized that removing the Watermilfoil from the lake would impact one of the endangered species protected by the Endangered Species Act. This board member stated that there was no way to know what kind of effect removing the Watermilfoil would have on the lake's ecosystem. This Commission member stated "I think what the bottom line here is, is that there are too many factors that we need to consider. It's not a simple fix. Throwing this poison in the lake is not a simple fix."

After the presentation ended, the Commission allowed various groups and individuals to comment on the application. These comments included concerns about toxicity of the chemicals, the effect on wildlife, the chances of another cyanobacteria bloom, support for using mechanical harvesters, and support for the use of the fluridone. At the end of the hearing, the SBA agreed to allow the Commission to continue the hearing to January 8<sup>th</sup>, 2019 in order to hear from experts retained by the Commission.

### ***C. The January 8, 2018 Hearing***

The Commission heard from two experts when the hearing resumed in January. The first was Doctor Robert Kortmann, a professional limnologist (expert in the study of inland aquatic ecosystems) who had been working on lakes and reservoirs since 1978. Doctor Kortmann originally became involved with Stockbridge Bowl when the cyanobacteria bloom occurred in the fall of 2018. The Commission subsequently asked him to review the SBA's application and give his opinion on its effect on wildlife and the chance of it leading to a second cyanobacterial bloom.

Doctor Kortmann theorized that the cyanobacteria bloom was caused by a variety of factors mixing around different water zones in the lake. This allowed more cyanobacteria to rise higher in the lake than usual. When extended summer-like conditions continued into the fall, it provided a good environment for the cyanobacteria to grow and spread, leading to the bloom. Dr. Kortmann based this opinion on other incidents of cyanobacteria blooms in the area and noted that this was only a hypothesis because there was not an established monitoring routine of the Stockbridge Bowl.

Dr. Kortmann stated that his biggest concern with any project would be to ensure that the calcite formation in the lake remained at proper levels.<sup>5</sup> If calcite levels were significantly altered, the lake could become even more susceptible to a cyanobacteria bloom. He opined that fluridone treatment should be a component of a management plan for the lake, but believed that the herbicide should first only be applied to a “large block” section of the lake rather than to the entire lake. This would allow the town to monitor the effect the herbicide had on calcite formation in a smaller portion of the lake. He stated that if the application did not affect calcite formation, he did not see any problem with applying fluridone to the entire lake. He also pointed out that treatment of only the large block section would assuage concerns about destruction of habitat because it would leave plenty of Watermilfoil in other parts of the lake. Dr. Kortmann did not believe that it was necessary to delay any fluridone treatment to first conduct a study, as in his opinion the only way to determine whether fluridone treatment would lead to a cyanobacteria bloom was to apply the treatment and monitor the lake closely. Dr. Kortmann also submitted a report to the Commission detailing his review of the application.

The second expert advising the Commission was Emily Stockman, a professional wetlands scientist. Ms. Stockman focused her presentation on the detail—or lack thereof—in SOLitude’s application. She stated that many of the stated goals in the application were proper but lacked sufficient detail to explain how they would be carried out. For example, she noted that the application stated that the project would “control” the growth of Watermilfoil, but that the term “control” was not defined. This would hamper the Commission’s ability to determine whether the project was actually successfully completing its stated goals.<sup>6</sup> Additionally, Ms. Stockman was concerned that the project did not qualify as an “ecological restoration limited project” under the Wetlands Protection Act, as in her opinion the application did not constitute a long-term management plan. She also voiced concern that the project would affect different “resource areas” under the Wetlands Protection Act, and that the application did not discuss how the treatment would affect each area. In her opinion, the SBA needed to provide more information to show why the project qualified as an ecological restoration limited project.<sup>7</sup>

After Ms. Stockman’s presentation, the Commission requested a continuance in order for the SBA and SOLitude to provide more information to the Commission. The SBA originally declined to assent to such a continuance, stating that the Commission had sufficient evidence to rule on the application. The SBA and SOLitude made it clear that they would be satisfied if the Commission approved the application with the condition that the fluridone treatment area be confined to the large block area of the lake suggested by Dr. Kortmann. At that point there was some confusion as to whether the Commission could impose such a condition, or whether the application would have to be amended. Both the Commission and the SBA then agreed to continue the meeting for two weeks, during which time the SBA would generate some type of response further clarifying the type of monitoring and goals of the project.

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<sup>5</sup> Calcite is a rock-forming mineral and is the principal constituent of limestone and marble.

<sup>6</sup> Ms. Stockman discussed this requirement as relating to 310 CMR 10.11 & 10.12, which require an applicant to provide a conservation commission with clear ecological goals under the Wetlands Protection Act.

<sup>7</sup> Ms. Stockman’s presentation concerned mostly, if not entirely, requirements under the Wetlands Protection Act. The Commission did not rely on her presentation for any of their findings regarding the town’s wetland bylaw.

#### ***D. January 22, 2019 Hearing***

On January 17, 2019, SOLitude submitted a three page document to the Commission further outlining the goals of the project, reviewing the management and monitoring plan of the lake post-fluridone treatment, and discussing the resource areas affected by the project. This document also discussed the SBA's and SOLitude's willingness to first treat only the large block area suggested by Dr. Kortmann. On January 22, 2019, the Commission resumed the hearing concerning the application.<sup>8</sup> At that hearing, the SBA submitted a revised application which called for an application of fluridone to the portion of the lake recommended by Dr. Kortmann. Ms. Stockman appeared before the Commission once more and stated that the revised proposal did not provide enough detail to determine whether the project would have an adverse effect on wildlife. She noted that the proposal did not explain in which form fluridone would be applied, and that there was no way to determine the effect fluridone would have on the lake without previous monitoring data. The representative from SOLitude explained that the fluridone would be applied by using a pelletized version of the chemical and that the treated area would be retested after a week. He also explained that SOLitude would be performing monitoring tests of the lake after the fluridone was applied.

A letter from a Commission member who could not be present was read at this hearing:

I am a current sitting member of The Stockbridge Conservation Commission. I am not able to attend our meeting on January 22, 2019. It is, however, extremely important to me to weigh in on the issue of applying Sonar, aka fluridone, to our lake in order to 'hopefully' control milfoil in the lake.

Chairman and folks in this room: Some of the past treatments of our lake, 'on record' include but are not limited to: Arsnick, Silvex – now known carcinogens. In the late 1960s, 20,000 pounds of granulated 'agent orange, now a proven carcinogen (thank you Vietnam), were dumped in the Bowl.. They "were all right", until they weren't, right?

Consider those who approved Roundup or Agent Orange during Vietnam – today, proven carcinogens! The human and other mammal genomes have many varying and still mysterious elements to this day. Those who apply to lakes, manufacture, and sell these chemical products have absolutely no idea how they may affect, and or interact with each and every aspect of our dna genomes or those of the critters in lakes. Think DDT. It was alright until it wasn't and the time it took to find this out resulted in untold deaths in our environment.

If this Commission is essentially blackmailed into accepting the SBA's revised NOI because they think it the best alternative available so we can "condition" it, I disagree and will not accept any responsibility for anything other than my NO vote when the time comes.

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<sup>8</sup> The record contains only the minutes from this hearing, not official transcripts.

Bottom line for me? I am only one vote on the commission, MY VOTE IS AN ABSOLUTE, UNEQUIVOCAL, **NO!** I want to sleep at night knowing I did everything I could to prevent, yet another, it's-okay-until-it's-not-scenario. (emphasis in original).

Several other groups and members of the community spoke either in favor of or in opposition to the application. At the end of the hearing, the Commission voted to deny the application under the Wetlands Protection Act and the town's wetland bylaw.

#### ***E. February 5, 2019 Decision***

The Commission issued its decision on February 5, 2019. The Order of Conditions stated that the project was denied because it could not “be conditioned to meet the performance standards set forth in the [state] wetlands regulations” or “conditioned to meet the standards set forth in . . . [the] Stockbridge Wetlands Protection Bylaw.” The Commission's findings pertaining to the Stockbridge Wetlands Protection Bylaw are as follows:

- The Commission finds that the proposed application of the fluridone would prevent the normal growth of Eurasian milfoil and other plant species with similar susceptibility to fluridone. These plants provide fisheries and wildlife habitat.
- The Commission finds that the abundance of fish has been significantly reduced in Berkshire lakes and ponds in which fluridone has been applied.
- The Commission finds that the applicant did not adequately address the concern raised by Dr. Robert Kortmann that, because Stockbridge Bowl is a hard-water, marl-forming lake, herbicide treatment could disrupt normal calcite formation, altering the natural phosphorous-removal mechanism and causing a “switching of state” to a plant community dominated by surface water phytoplanktons (especially cyanobacteria).
- The Commission finds that the applicant did not adequately address the concern raised by Dr. Kortmann that there is no study of the lake or a comparable lake upon which to base their contention that the application of fluridone will not so alter the current habitat as to be impermissible.
- Therefore, the Commission finds that the project would have unacceptable significant and cumulative effects on fisheries, wildlife habitat, and water quality.
- The Commission notes that the Bylaw does not include a “limited project” provision under which a project may be permitted notwithstanding its adverse effects on resource values.

The last, “Additional Finding” offered by the Commission was an “analysis” of Lake Pontoosuc and the Stockbridge Bowl, comparing the type and amount of fish caught in each lake over the course of several “runs.” The Commission stated that this “analysis” showed that the Stockbridge Bowl, without fluridone, supported a “far larger and more diverse fish population than that of Lake Pontoosuc, which has undergone regular fluridone treatment to control its ‘nuisance’ weeds.”

## ANALYSIS

“An action in the nature of *certiorari* serves to correct errors of law in administrative proceedings where judicial oversight is not otherwise available.” *Friedman v. Conservation Com’n of Edgartown*, 62 Mass. App. Ct. 539, 542 (2004). A complaint in the nature of *certiorari* is “the appropriate avenue of review from a discretionary decision of a local licensing authority.” *Ballarin, Inc. v. Licensing Bd. of Boston*, 49 Mass. App. Ct. 506, 510 (2000). This includes review of a local conservation commission’s order under a local wetlands bylaw. See *Friedman*, 62 Mass. App. Ct. at 542. The review by this court is limited to the Commission’s denial of the project under the Stockbridge wetlands bylaw.<sup>9</sup>

### A. Preemptive Effect of The Pesticide Control Act

The SBA argues that the Massachusetts Pesticide Control Act precludes the Commission from denying its application. It claims that because the application only involves the use of fluridone, an herbicide regulated under the Act and approved by the Department of Agriculture for use in lakes, the Commission was powerless to deny the application. I disagree. There are three factors in analyzing whether the Legislature intended to preempt local action relevant to this case: the explicit language of the legislation in question, other legislation that may belie preemption, and the subject matter of the challenged local action.

The Home Rule Amendment states that “[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . and which is not denied, either expressly or by clear implication, to the city or town by its charter.” Art. 89, § 6, of the Amendments to the Massachusetts Constitution. “A local regulation is unconstitutional under the Home Rule Amendment if it is ‘inconsistent’ with the constitution or laws of the Commonwealth.” *Doe v. City of Lynn*, 472 Mass. 521, 525 (2015), quoting *Connors v. Boston*, 430 Mass. 31, 35 (1999). “[T]he touchstone of the analysis [of whether a local ordinance is inconsistent with State law] is whether the State Legislature intended to preempt the city’s [or town’s] authority to act.” *Connors*, 430 Mass. at 31, citing *Bloom v. Worcester*, 363 Mass. 136, 155 (1973). “[T]he legislative intent to preclude local action must be clear.” *Town of Wendell v. Attorney General*, 394 Mass. 518, 523 (1985), quoting *Bloom*, 363 Mass. at 155.

A bylaw challenged under the Home Rule Amendment “should be upheld . . . unless the legislative intent to preclude local action is clear, either because of an explicit statement or because the local enactment prevents the achievement of a clearly identifiable purpose.” *Wendell*, 394 Mass. at 525. The “question is not whether the Legislature intended to grant authority to municipalities to act . . . , but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question].” *Easthampton Savings Bank v. City of Springfield*, 470 Mass. 284, 289 (2014), quoting *Wendell*, 394 Mass. at 524. “A local regulation will not be invalidated unless the court finds a ‘sharp conflict’ between the local and State provisions.” *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 588-589

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<sup>9</sup> The SBA appealed the Commission’s decision under the Wetlands Protection Act to the DEP. That appeal has been stayed pending this decision.



(2018), quoting *Doe*, 472 Mass. at 526. Determining whether municipal action is preempted is simple if the Legislature has made an explicit indication of its intent to preempt. If there is no explicit indication, municipal action which does not conflict with the goals of the State legislative purpose is not inconsistent with State legislation. See *Wendell*, 394 Mass. at 524.

The Pesticide Control Act is intended to create a uniform, state-wide regulatory process for the approval of pesticides. G. L. c. 132B, § 1. The term “pesticide” includes any substance intended for use as a “plant regulator.” G. L. c. 132B, § 2. “The exclusive authority in regulating the labeling, distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth” is controlled by the Act. G. L. c. 132B, § 1.

Of note, the Act establishes a pesticide control board within the Department of Agriculture (DOA) which is responsible for registering all pesticides for use in the state. G. L. c. 132B, §§ 3, 3A. The board may designate a pesticide to be for general use or for a particular restricted use. G. L. c. 132B, § 7. Part of the board’s determination of whether to accept a pesticide for registration includes whether the pesticide will cause “unreasonable adverse effects on the environment.” *Id.* The Act also charges the department with establishing restrictions on the disposal, packaging, and materials used in the testing or application of pesticides for the protection of the public health and the environment. G. L. c. 132B, § 11. The DOA has the power to issue an order imposing restraints to any person it believes is using a pesticide in a way that creates an unreasonable adverse effect on the environment. G. L. c. 132B, § 12.

As stated above, G. L. c. 132B, § 1 explicitly states that the Pesticides Control Act is the exclusive authority for the use and application of pesticides. At first blush, this language appears to categorically bar any entity from conditioning or preventing the use of any type of pesticide approved by the DOA. However, it is unlikely that the Legislature intended to grant such sweeping power without allowing other entities to address on the collateral effects that pesticide use would have, as evidenced by other legislation and the DFW’s role in this case.

The Legislature has explicitly given the power to regulate herbicides in certain circumstances to the DEP. General Laws c. 111, § 5E is entitled “Application of chemicals to control aquatic nuisances; licenses; rules and regulations; violations; penalties; applicability of this section.” The relevant part of the statute states:

No person shall for the purpose of controlling algae, weeds and other aquatic nuisances therein apply chemicals to a lake, pond, stream or other body of water within the territorial limits of the commonwealth without first obtaining a license from the department of environmental protection . . . The department shall . . . issue such license to any person whom it deems responsible and qualified to apply chemicals to lakes, ponds, streams, and other bodies of water for the control of algae, weeds and aquatic nuisances.

If the Pesticides Control Act was truly intended to vest the Department of Agriculture with the “exclusive authority” for regulating pesticides, then the DEP could not withhold these permits if the applicant was using an approved pesticide. This statute clearly shows that the Legislature intends for other agencies besides the Department of Agriculture to consider and

control pesticide use in certain specific circumstances. This is in contrast to the Department of Agriculture's exclusive authority to determine which pesticides are to be registered in the Commonwealth for use and application generally. See *George v. National Water Main Cleaning Company*, 477 Mass. 371, 378 (2017) ("Where two statutes appear to be in conflict . . . we endeavor to harmonize the two statutes so that the policies underlying both may be honored.") (citation omitted).<sup>10</sup>

Further, "in determining whether the Legislature intended to preempt local ordinances and bylaws, it is appropriate to consider whether the subject matter at issue has traditionally been a matter of local concern." *Roma*, 478 Mass. at 591. Here the subject matter is wetlands protection. The Massachusetts Wetlands Protection Act prevents the dredging or altering of a variety of areas denoted as wetlands without filing written notice with the local conservation commission. G. L. c. 131, § 40. With the Act, the Legislature "established a comprehensive scheme of administrative action and remedies with local authorities, i.e., conservation commissions, making the initial review 'for the familiar purposes of bringing local knowledge to bear on local conditions and reducing the administrative burden on a Statewide agency.'" *Department of Environmental Quality Engineering v. Cumberland Farms of Connecticut, Inc.*, 18 Mass. App. Ct. 672, 675-676 (1984), quoting *Hamilton v. Conservation Com'n Of Orleans*, 12 Mass. App. Ct. 359, 368 (1981).

The Act permits local authorities to adopt more stringent controls over wetlands than those contained within the Act. See *Oyster Creek Preservation, Inc., v. Conservation Com'n of Harwich*, 449 Mass. 859, 866 (2007). Finally, the Supreme Judicial Court has expressly stated that land use regulation is traditionally a matter of local concern. See *Roma*, 478 Mass. at 591. Without any express language removing this power from the local conservation commissions when dealing with pesticides, the court "will not infer that the enactment of [the Pesticide Control Act] reflects a clear legislative intent to preempt all local [wetlands] bylaws that might affect [pesticide use] based on the legislative purpose of [creating a uniform process for the approval of pesticides.]" *Id.*

The SBA relies on two decisions to support its contention that the Conservation Commission is compelled to grant the project. In *Wendell*, the town passed a bylaw requiring any person who intended to apply a pesticide other than for agricultural or domestic use to give written notice to the board of health at least ninety days before the proposed use. *Wendell*, 394 Mass. at 521-522. The board of health would then be required to hold a public hearing, and after the hearing would determine whether the applicant had complied with the Pesticide Control Act and did not otherwise create a hazard to public safety. *Id.* at 522. The bylaw did not permit the board of health to forbid the use of the proposed pesticide, but the board could impose more stringent conditions than the Pesticides Control Act on its use. *Id.*

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<sup>10</sup> Additionally, if the Legislature intended for the Department of Agriculture to have the sole power to determine where and when pesticides could be used, then the DFW's actions in this case would be improper. The DFW is not an agency within the Department of Agriculture, and therefore has no authority under the Pesticide Control Act. As a result, under the SBA's argument, neither the DFW nor the Commission could condition the use of pesticides for the purpose of protecting the habitat of endangered species. See *Casseus v. Eastern Bus Company*, 478 Mass. 786, 795 (2018) ("The court must construe clear and unambiguous statutory language as written, unless doing so would produce an absurd outcome or otherwise frustrate legislative intent.").

The Supreme Judicial Court held that the bylaw was impliedly preempted by the Pesticides Control Act. The Court stated that “[t]he Legislature has placed in the subcommittee the responsibility of determining on a Statewide basis, pesticide by pesticide, whether its use will cause unreasonable adverse effects on the environment . . . . An additional layer of regulation at the local level, in effect second-guessing the subcommittee, would prevent the achievement of the identifiable statutory purpose of having a centralized, Statewide determination of the reasonableness of the use of a specific pesticide in particular circumstances. To permit a local board to second-guess the determination of the State board would frustrate the purpose of the act.” *Id.* at 529.

The situation in *Wendell* is a far-cry from the case at hand. The Stockbridge wetlands bylaw was not created to specifically monitor and further regulate pesticide use. Nor does the bylaw or the decision of the Commission “second-guess” the Department of Agriculture as to the reasonableness of specific pesticides. The decision by the Commission is not determining that fluridone is not generally safe for the environment, it is determining that in this specific application, the use of fluridone could lead to the destruction of habitat.

After the Supreme Judicial Court held that the Pesticides Control Act impliedly preempted the town’s bylaw in *Wendell*, the Legislature amended the Pesticides Control Act to include the explicit statement that the Act is the exclusive authority for the use and application of pesticides. After this amendment, a similar challenge to that in *Wendell* was made to a town’s bylaw in Superior Court. In that case, the town of Wayland had adopted a bylaw requiring utility companies to apply to the town’s Board of Health before applying herbicide in the town. *Town of Wayland v. Attorney General of the Commonwealth of Massachusetts*, 32 Mass. L. Rptr. 24 (Mass. Super. 2014). The Superior Court determined that this bylaw was also preempted by the Pesticides Control Act.

Again, the facts in that case materially vary from the facts at hand. As stated above, the Stockbridge bylaw and decision do not attempt to directly regulate pesticides as the Wayland bylaw did. In addition, the Pesticides Control Act contains a section specifically providing for the involvement of municipalities prior to the use of pesticides by utilities. See G. L. c. 132B, §6B. Such an inclusion implies that such procedures are intended to be the only means for municipal involvement. See *St. George Greek Orthodox Cathedral of Western Mass., Inc., v. Fire Dep’t of Springfield*, 462 Mass. 120, 127 (2012). No such section exists relating to conservation commissions or the application of pesticides to wetlands areas.

The ability to deny a project under the Stockbridge wetlands bylaw is not a direct regulation on pesticides. The bylaw gives the Commission the authority to deny projects which may impact wetlands in the town. The Commission’s decision to deny this particular project was made under that authority. This is not the type of “sharp conflict” that has been evident in other cited preemption cases concerning the Pesticides Control Act. See *Roma*, 470 Mass. 588-589. The Commission’s decision on this application under the bylaw will only turn on whether the collateral consequences of using fluridone will have an undesirable impact on the environment and wildlife in the Stockbridge Bowl. Essentially, this means that the Commission’s decision here hinges on whether removal of the Watermilfoil will have an undesirable impact. It is not a decision of whether the fluridone, itself, is toxic to the environment. Unlike the bylaws in

*Wendell* and *Wayland*, the Stockbridge wetlands bylaw and its denial of the project do not prevent “the achievement of a clearly identifiable [legislative] purpose.” *Roma*, 478 Mass. at 589, quoting *Wendell* 394 Mass. at 524.

Therefore, the Town of Stockbridge’s Conservation Commission was not compelled by the Pesticides Control Act to approve the SBA’s proposal to use fluridone to treat Watermilfoil in the Stockbridge Bowl.

### ***B. The Commission’s Decision***

The SBA also challenges the Commission’s decision on the basis that it was not supported by substantial evidence. When considering a decision of a Conservation Commission, this Court must determine whether the Commission’s decision was based on substantial evidence and on “reasoning relevant to the evidence presented before [it].” *Lovequist v. Conservation Committee of Dennis*, 379 Mass. 7, 17 (1979). “An agency’s finding ‘must be set aside if the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.’” *Rodgers v. Conservation Com’n of Barnstable*, 67 Mass. App. Ct. 200, 205 (2006), quoting *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1968). “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Rodgers*, 67 Mass. App. Ct. at 206, quoting *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966).

The SBA, after hearing Dr. Kortmann’s presentation, stated that it was willing to conduct a “pilot program” and treat only the large block area suggested by Dr. Kortmann. This modification was presented to the Commission in a letter dated January 17, 2019. The Commission denied the project in full on January 22, 2019. The Commission’s decision gave three reasons for the denial under the town’s bylaw: 1) the application of fluridone would remove the Watermilfoil and other plants susceptible to the herbicide, resulting in a reduced habitat for wildlife, 2) evidence showed that fluridone treatment in nearby bodies of water caused a reduction in the amount of fish in those bodies of water, 3) the SBA and SOLitude did not adequately address Dr. Kortmann’s concerns about calcite formation, and 4) the SBA and SOLitude did not adequately address Dr. Kortmann’s concerns about the lack of studies on the use of fluridone in similar lakes.

To begin, it is impossible to ignore the anti-herbicide emotion that surrounded this decision. Many of the letters before the Commission were solely concerned with the effects that fluridone may have on humans rather than any effect on the wildlife or environment of the lake. Indeed, a member of the Commission wrote a letter categorically stating that he would never approve any type of herbicide for use in the lake, citing the effects of Agent Orange, DDT, and other pesticides that were later found to be carcinogens. During the first hearing, when a member of the Commission was reminded that the Commission’s job was not to determine the toxicity of fluridone, the member dismissively stated that he or she did not care. During the same hearing Commission members referred to fluridone as “toxic” and “a poison.” A full reading of the transcripts provides several other instances where the issue of toxicity was the true stumbling block. These types of comments were not relevant to the question the Commission faced. The Commission’s job was to determine whether the proposed fluridone application would have

negative effects on the lake and the wildlife in and around it. A full reading of the hearing transcripts also evinces a sentiment that members of the community and the Commission would be amenable to removing the Watermilfoil—just not with fluridone. With these comments from the Commission coloring its decision, I move on to its stated reasons for the denial.

The Commission's decision makes no mention of Dr. Kortmann's recommendation to treat only a large block portion of the lake, nor SBA's assent to that recommendation. In the last bullet point of its decision, the Commission stated: "The Commission notes that the Bylaw does not include a 'limited project' provision under which a project may be permitted notwithstanding its adverse effects on resource values." This language is either irrelevant or misleading. It is true that the wetlands bylaw does not allow the Commission to approve a project that will have unacceptable significant cumulative effects on wetlands. However, it appears that the Commission attempted to use this reasoning to explain why its decision did not discuss the large block treatment option recommended by Dr. Kortmann and assented to by the SBA and SOLitude. This is simply not accurate.

The entire purpose of the administrative procedure is for the Commission to either approve the project in full, condition the project and allow it to proceed under those conditions, or to deny the project outright. Conditioning the project is essentially 'limiting' the project and allowing it to proceed. In the Order of Conditions issued by the Commission, the reason given for the denial is that "the proposed work cannot be conditioned to meet the standards set forth in a municipal ordinance or bylaw, specifically: Stockbridge Wetlands Protection Bylaw." This conclusion, as well as the reasons given in the Commission's decision, are not supported by substantial evidence when viewed in light of SBA's agreement to follow Dr. Kortmann's recommendation and only treat the large block portion of the lake.

i. ***Removal of Habitat***

In its decision, the Commission stated that use of fluridone would remove the Watermilfoil and other aquatic plants which provide habitat for the wildlife in the lake. This was part of its reasoning that the project would "have unacceptable significant and cumulative effects" on wildlife and habitat in the lake. This conclusion is not supported by the evidence in the record, and is in fact contradicted by the DFW and Dr. Kortmann. As Dr. Kortmann explained in his opening statement to the Commission:

I think milfoil should be managed. I mean milfoil does some pretty nasty things. It gets very dense and can actually take nutrient out of the sediment in a luxury amount and bleed it into the water column. It can become so dense that it actually inhibits light reaching a fairly shallow bottom and the deiment water interface can be anaerobic. It can form a canopy that shades out and out-competes more desirable native vegetation. So it is something that you want to reduce significantly, if not ultimately eradicate.

There is also plenty of evidence in the record explaining that fluridone is used to treat Watermilfoil specifically because the plant is particularly sensitive to that herbicide. This allows a limited dosage to be used, meaning that the fluridone does not affect other plants in the same

way at this limited concentration. The application of fluridone would prevent the Watermilfoil from growing, but allow other aquatic plants to take its place. The SOLitude report attached to the SBA's application also states that application of fluridone would be done early in the season, before most native vegetation has started growing.

As to the effect on wildlife, the DFW explicitly approved an entire-lake application of fluridone in the Stockbridge Bowl when it reviewed the project. In addition, during his presentation Dr. Kortmann was specifically asked whether the application of fluridone in a large block of the lake would affect the habitat and spawning of fish in the lake:

Board Member: Is it your sense that there is an issue with the fish spawn attaching to the weeds? And is the timing of – is the timing of the application going to have an impact on the community of fish in the lake?

Dr. Kortmann: That's a really good question for Fish and Wildlife. And I think they've reviewed it. The reason why it would be initiated early [in the] growing season is that you want the plants exposed when they begin active growth. Because fluridone doesn't kill plants, it prevents, disproportionally, species like milfoil from growing. So ultimately other plants can start out competing.

Board Member: But another advantage of the block treatment, if you will, would be that there would be a great deal of habitat left for the fish to spawn on.

Dr. Kortmann: Correct.

There is nothing in the record that substantially contradicts the conclusion of Dr. Kortmann or the DFW. Therefore, the Commission's reasoning that a large block application of fluridone would substantially affect the habitat of wildlife in the lake is not supported by substantial evidence.

## ii. ***Reduction of Fish***

The second bullet point in the Commission's decision states: "The Commission finds that the abundance of fish has been significantly reduced in Berkshire lakes and ponds in which fluridone has been applied." This reasoning is supported by an attached "additional finding" that compares the number of fish found during several "runs" in the Stockbridge Bowl and the nearby Lake Pontoosuc, which has been treated with fluridone. The Commission takes this comparison to mean that fluridone applications leads to fewer fish. This conclusion is sophistry. There are a variety of reasons as to why this so-called study is not sufficient evidence of the result of fluridone application. The comparison does not take into account any number of variables between the two lakes. For example, one lake could be stocked with fish, while the other is not. The two studies were also done three months apart. It is completely unreasonable to simply compare the number of fish caught over the course of a few trips on each lake, months apart, and assert that prior fluridone use is the reason for the differing numbers. This type of comparison is hardly "such evidence as a reasonable mind might accept as adequate to support a conclusion." *New Boston Garden*, 383 Mass. at 466.

The Commission also heard statements from local fisherman at the hearing who believe that the fish population in nearby lakes lessened after fluridone application. Like the comparison of fish in the lakes, this type of anecdotal connection is not substantial evidence in support of fluridone causing a decrease in the fish population, particularly in the face of the opinions of DFW's and Dr. Kortmann, the Commission's expert. Even if one were to assume this to be true, the lakes these fisherman discussed had undergone a full lake treatment of fluridone.<sup>11</sup> Once again, Dr. Kortmann advocated for a large block treatment, which the SBA assented to. The Commission could have conditioned the project to the large block and would have assuaged any concerns over the destruction of fish habitat and a subsequent lessening of the fish population. The Commission's finding relating fluridone to decreased fish populations was not supported by substantial evidence.

iii. *Calcite Formation*

The third bullet point in the decision states: "The Commission finds that the applicant did not adequately address the concern raised by Dr. Robert Kortmann that, because Stockbridge Bowl is a hard-water, marl-forming lake, herbicide treatment could disrupt normal calcite formation, altering the natural phosphorous-removal mechanism and causing a "switching of state" to a plant community dominated by surface water phytoplanktons (especially cyanobacteria)." This conclusion is also not supported by substantial evidence, and is rather disingenuous. Dr. Kortmann was in fact concerned with how fluridone use would affect calcite formation. His solution to this concern was to propose the large block application. This would allow for testing on that portion of the lake to determine whether the fluridone treatment had in fact changed the calcite formation process without affecting the entire lake. He stated:

The only way to determine whether a whole lake application of fluridone might have the impact that I've questioned, as far as nutrient cycling removal, calcite formation, photosynthesis, is to examine a fluridone treatment. We don't have that answer. That's why I suggested a significant block treatment with monitoring, to get that answer before exposing the entire plant community to the concentrations that will have the impact on milfoil.

The SBA assented to this recommendation. By assenting to the recommendation, the SBA squarely addressed Dr. Kortmann's concern over calcite formation. Therefore, the Commission's reasoning was not supported by sufficient evidence.

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<sup>11</sup> Nor is this type of observation similar to that of the recreational shellfishermen in *Comstock v. Conservation Com'n of Barnstable*, 65 Mass. App. Ct. 1121 (2006) (Rule 1:28 decision). In that case, the Commission was permitted to rely on the testimony of shellfishermen who opined that they would be physically blocked from fishing in their normal area if a pier was built in that certain area. That testimony was based on something that would be a directly observable consequence. Here, the fishermen's testimony is a speculative connection between fluridone use and fish populations.

iv. *Lack of Studies on Similar Lakes*

The fourth bullet point in the Commission's decision reads: "The Commission finds that the applicant did not adequately address the concern raised by Dr. Kortmann that there is no study of the lake or a comparable lake upon which to base their contention that the application of fluridone will not so alter the current habitat as to be impermissible." This finding is also not supported by substantial evidence, and is again rather misleading. In his opening statement to the Commission, Dr. Kortmann explicitly states: "I think fluridone should be a component of a management plan for the lake. I think that the plan that was put together is a very good one." Dr. Kortmann did note that he was not aware of any study that had monitored the effects of fluridone use in a lake similar to that of the Stockbridge Bowl, and that there had been no recent study of the Stockbridge Bowl itself. However, Dr. Kortmann explicitly stated that he believed that a fluridone application of the lake was proper while a study of the lake was being performed:

Ms. Goodman<sup>12</sup>: Could I just ask for a clarification of a statement you just made? The question was, do you recommend monitoring as a condition or can this treatment occur before there was a lake plan, before there is monitoring? So in your report you stated: I do not recommend additional routine annual monitoring as a condition of permit approval.

Dr. Kortmann: Right. I think that should have been going on all along --

Ms. Goodman: Right.

Dr. Kortmann: -- and is the responsibility of the whole lake community, not necessarily the folks that are most interested in aquatic plant management.

Ms. Goodman: And that this treatment can occur despite the fact that there is no current monitoring. Is that --

Dr. Kortmann: Yeah. I think that's accurate.

Later in his presentation Dr. Kortmann was asked again whether it would be wise to delay the treatment for a year and conduct a study of the lake. He responded: "So I don't think just putting off a fluridone treatment and studying it -- studying it would help answer the question how vulnerable this lake is to ongoing [cyanobacteria] blooms."

Based on Dr. Kortmann's own recommendation and opinions, the Commission's reasoning is not supported by substantial evidence.

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<sup>12</sup> Counsel for the SBA.



v. ***The Final Decision***

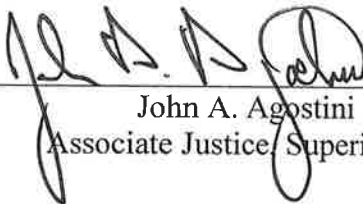
The Commission concluded that based on its reasoning, the project could not be conditioned so as to prevent significant effects on the lake's habitat and wildlife. For all of the reasons above, the evidence "points to an overwhelming probability of the contrary." *New Boston Garden*, 383 Mass. at 466.

**CONCLUSION AND ORDER**

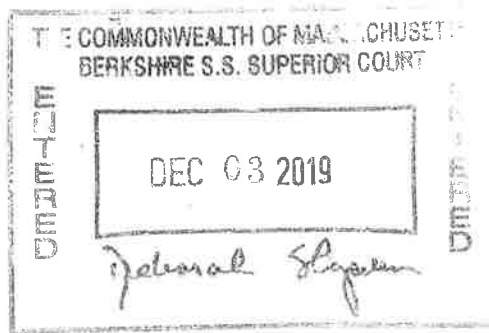
All parties involved clearly have the best interest of the Stockbridge Bowl in mind. However, based on the evidence presented to the Commission, the reasons for denying the project—as modified after Dr. Kortmann's suggestions—were not supported by substantial evidence.

For these reasons, it is hereby *ORDERED* that this case be remanded to the Town of Stockbridge's Conservation Commission, and that the Conservation Commission will approve the project under the town's bylaw subject to the conditions required by the Division of Fisheries and Wildlife and those recommended by Dr. Kortmann in his report and presentation.<sup>13</sup>

*SO ORDERED.*

  
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John A. Agostini  
Associate Justice, Superior Court

*DATED:* December 3<sup>rd</sup>, 2019



A True Copy  
Attest:   
Clerk

<sup>13</sup> The appeal to the DEP may yield a different conclusion after an analysis under the Wetlands Protection Act. If so, the project will not proceed.