

## Massachusetts Appeals Court Denies Developers Claims that Town's Decisions Amounted to a Regulatory Taking

*Beach v. Town of Norfolk*, 93 Mass. App. Ct. 1104, 103 N.E.3d 768 (2018)

John J. Cloherty successfully represented the Town of Norfolk and its Conservation Commission in claims involving a parcel of land that the owners were trying to develop. The developers claimed delays and unfair and capricious application of the wetlands regulations amounted to an unconstitutional taking of the property. After a Superior Court ruled in favor of the Town on summary judgement, the Appeal Court affirmed the decision ruling against the developers.

### Background

The plaintiff purchased approximately thirty-eight acres of land in Norfolk with the understanding that it might not be possible to develop the property. The plaintiff made significant investments in the permitting process and ultimately defaulted on their loans and entered bankruptcy. They claimed the delays and the conditions imposed by the commission, including imposing a waiting period of two full growing season before construction could begin, constituted a regulatory taking of their property. Remarkably, Plaintiffs' development was actually approved by the Conservation Commission ("ConCom") in a Final Order of Conditions. The Plaintiffs, after an initial appeal, withdrew their challenge to this Order of Conditions. Thus, they were free to build their development (in conformance to the final Order of Conditions). Instead, Plaintiff's claimed the conditions order by the ConCom were too onerous, and due to the economic downturn in the real estate market, the project was not economically feasible.

### Massachusetts Appeals Court Ruling

As a threshold matter, the Appeal Court's addressed the Town's argument that Plaintiff failed to exhaust administrative remedies. The Appeals Court ruled that Plaintiff could indeed proceed with the takings claim after withdrawing the direct appeal, however when so doing, "the plaintiff must accept the validity of the 2007 final decision, including the conditions imposed. To the extent the plaintiff relies on the argument that the conditions imposed were arbitrary and capricious, that argument was waived when the plaintiff dismissed that appeal."

Addressing the Regulatory Taking claim on the merits, the Appeals Court opined that "The plaintiff simply asserts but does not offer evidence of any diminution in value of the property. The locus when purchased was limited by the presence of wetlands and...Development remains limited by the presence of wetlands today." Appropriately the Appeals Court remarked that "a takings claim is not insurance for economic downturns or business decisions, wise or unwise." The Appeals Court undertook the well-known three-part analysis under Penn Central to conclude no regulatory taking occurred. The Appeals Court found the economic impact of the regulations was not actionable where a single-family home could be constructed on the property, and Plaintiff didn't show there was a negative economic impact as a direct consequence of the government's action, rather than as a product of the owner's own activities or decisions. The Appeals Court ruled there was no interference with distinct investment-backed expectations because, in part, Plaintiff's speculation that there would be a reduction in the pool of prospective purchasers or delayed sales was unsupported by credible evidence. Lastly, the Appeals Court found the character of the governmental action to be appropriate in furthering legitimate interests in protecting wetlands.