



**Buzzards Bay Project
National Estuary Program**

Dr. Linda Deegan
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December 3, 2004

Dr. Deegan:

Thank you for your follow-up email regarding quorums and voting procedures by Conservation Commissions. You noted that you discussed the matter with Falmouth Town Counsel, and you presented what you believe was your understanding of the process. The Buzzards Bay Project has reviewed your comments, and we offer few additional thoughts for you to consider.

Item 1) “... voting and signing are not the same.”

Comment: True. For example, the act of voting at a hearing to take a certain action (vote on a Determination of Applicability or an Order of Conditions), is the intent to have four persons of a seven member Commission sign the Order of Conditions or Determination of Applicability. The act of voting in a public meeting is to comply with the Massachusetts Open Meeting Law, the act of signing an Order of Conditions or Determination of Applicability is to comply with the state’s Wetland Protection Act or local wetlands bylaw. Thus, such a vote is to approve a permit and an expression of the intent to issue a permit under the Wetlands Protection Act or Town bylaw. Signing an Order of Conditions is the actual issuance of a permit.

Item 2) “It is the 'vote' in open meeting that counts; the signing is just to ratify the vote.”

Comment: Not precisely. The vote is an Open Meeting Law process¹. When a vote is taken to approve a certain action (for example, agreement to issue an Order of Conditions), under both the state and local regulations, the Order of Conditions is valid only if four members of a seven-member board sign the Order. Orders of Conditions are recorded with the County Deeds office. An applicant cannot bring the minutes of a Conservation Commission meeting to the County Deeds office showing that their project was voted approved. They must bring in a valid Order of

¹ The word “vote” does not appear in the state Wetland Protection Act. The WPA regulations specify only that meetings be held in accordance with the Massachusetts Open Meeting Law, that a majority of Commissioners sign certain forms, and that decisions can only be made if a quorum is present. All appeal deadlines in the WPA reflect the date of issuance of a permit, not the date of a vote. Theoretically a Chairman could circulate at a public meeting a Determination or Order to sign and announce and record that result and decision without a “vote.”



Conditions; that is, one signed by a majority of members in office. The need to have a majority sign is also true for Determinations of Applicability.

Item 3) “Because they are simply ratifying the actual vote, Commissioners can sign even if they voted against the action, although they cannot be compelled to do so.”

Comment: True. Without accepting the concept of “ratifying,” a Commissioner can sign an order that they voted against to enable the board to conduct business when several members are absent², but they cannot be compelled to sign.

Item 4) “The Falmouth Town Wetland regulations state: ‘Where ... a particular action ... is to be taken by the Commission, that action is to be taken by more than half the members present at a meeting of at least a quorum.’ This is perhaps different from the interpretation for the State Regulations (see below). Thus a vote of 3 out of 4 (the minimum for a quorum in Falmouth) is sufficient under the Town Regulations and Bylaw to take an action.”

Comment: Actually both the Town and State regulations appear consistent. Moreover, it would be undesirable for the Town of Falmouth to have a separate standard for quorums than defined under the state regulations. In my letter to you dated October 5, 2004 I wrote: “If four members only are present for a hearing, the vote, by definition, must be unanimous. If the vote is three to one, the dissenting voter cannot be compelled to sign a Determination or Order they disagree with.” Also, “For a seven-member board, at least four signatures are always required on these documents to be valid. Because Commission members must be at the hearing to take part in a decision, and because a dissenting voter cannot be compelled to sign a decision they disagree with, if only four members are present during a hearing, all four must be in agreement, or at least sign the Determination or Order for the decision to be valid decision.”

However, as you correctly point out in Item 3) above, a Commissioner can sign an order even if they voted against the decision, so my statement that the vote must be unanimous when only four members are present, is only true if the dissenting voter does not intend to sign. Moreover, it appears there is another possible situation where a 3-1 vote of a seven-member commission could result in the issuance of a valid permit. Suppose 7 members hear a case, close a hearing, and schedule a vote at the next meeting. Suppose only 4 members are present at the meeting with the final vote, and the vote is 3-1. If the dissenting voter refuses to sign, it seems conceivable that the Commission need only obtain the signature of one of the three absent members (if they heard the case) to sign and issue a valid Order of Conditions. The only limitation for local bylaws, is that those deciding the case are supposed to have been present at all hearings where the case is discussed and testimony is heard³.

² This is particularly true if they know that at least one absent commission member (who attended the hearing) will agree with the majority, and likely sign the permit. In that case, failure to sign will only delay the issuance of the permit, not prevent its issuance. However, if none of the absent members will likely agree with the majority of a quorum, it seems that a motion to reconsider or take a new action (e.g., a different Order of Conditions) would be inevitable because it would be impossible for the town to issue a valid permit, despite the vote.

³ Determinations of Applicability are decided at public meetings, not public hearings, but the signing Commission members should be present at the public meetings when the Determination was discussed.

Another issue to consider is the implications of the decision of the Massachusetts Supreme Court in the case of *McElderry v. Planning Board of Nantucket*. The SJC stated “a majority of Planning Board members in office must actually vote in the affirmative” (discussed further in Item 6 below). Legal counsel for the Massachusetts Association of Conservation Commissions has advised Conservation Commissions that this ruling likely applies to the state Wetlands Protection Act as well.

Item 5) “According to Town Counsel, failure to achieve the 4 signatures does not invalidate the vote in open meeting, although this is not something that has ever been tested to his knowledge. He felt that the act of 'not signing' did not give veto power over a properly held open meeting vote.”

Comment: Town counsel is correct that the failure to obtain 4 signatures does not invalidate a vote at the public meeting. The vote at the public meeting is what it is. On the other hand, the legal definition of a valid Order of Conditions (or a Determination) is that four of the seven members must sign it for a seven-member board. While no member has “veto power,” an Order of Conditions is still only valid only when it has four valid signatures of Falmouth Conservation Commission members. Failure to obtain four signatures on an Order or Determination could result in an action to reconsider or a new action by the Commission.

Item 6) “Under the State regulations, there is ambiguity. It MAY BE that a majority of the Commissioners in Office is needed (4 out of the 7) to take an action under the State Regulations. But there is also something in the regs that implies that a majority of the Commissioners present (assuming a quorum) is sufficient. This has not been explicitly ruled upon by the courts for Conservation Commissions, although a ruling for Planning Boards makes it seem as though 4 of the 7 are needed. And then of course, at least 4 must sign.”

Comment: In the end, your last point is the most important. Four of the seven commission members must sign Orders of Conditions and Determinations of Applicability for them to be valid. Rarely are appeals made to DEP based on shortcomings of the process, nor are we aware of DEP Administrative Law Judges overturning local decisions on the state regulations based on failures of the process. Cases under the state regulations are heard *de novo*, which sweeps aside procedural issues. If a case makes its way to an Administrative Law Judge, most likely they will focus exclusively on whether the wetland protection interests of the Wetland Protection Act are upheld. If an Order of Conditions has insufficient signatures, the remedy may be for DEP to ask for an additional signature. If a county deeds office receives an order with an inadequate number of signatures, they can refuse to record the Order of Conditions.⁴

In contrast to the state regulations, town bylaws are heard in Superior Court, and Superior Court judges more frequently rule on failures of the permitting process. Equally important, other Superior Court decisions have affirmed that members of municipal boards must be present at the hearings where projects are discussed and testimony taken if they are to vote on a case. This is why, as a result of the Massachusetts Supreme Judicial Court decision *McElderry v. Planning Board*, MACC advised “that a valid vote must be carried by a majority of the Commission.” This

⁴ An Order of Conditions must also be notarized.

also seems applicable to decisions under town bylaws and regulations, because these decisions are appealed to Superior Court, not to DEP, or DEP Administrative Law Judges.

Item 7) The role of alternates

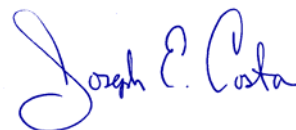
Comment: As I noted in my October 5, 2004 correspondence, according to state law⁵, Falmouth's Chairman of the Conservation Commission may appoint an alternate (associate) in only two cases: 1) if there is an unfilled vacancy, or 2) if the Commission lacks a quorum. Because the absence of a quorum means only three regular Commissioners are present, and because there are only three alternates, the most members the Commission may have in the absence of a quorum, if all alternates are designated, are six. The law does not preclude the chairman from choosing to appoint one or all the alternates as he sees fit when there is no quorum.

Given these limitations, can an alternate member sign a permit? If they attended the hearing and were appointed by the Chairman in order to make a quorum, this seems reasonable. Can they sign if they were not appointed to make a quorum? We do not know the answer to that question.

In the experience of Buzzards Bay Project staff working with Conservation Commissions, it is not often that these procedural matters become contentious among Conservation Commissions. While I have provided you with our opinions based on our experiences, and provided references to legal opinions, you should consult with Town Counsel. If these matters remain a point of contention with Conservation Commission members, we strongly urge the Falmouth Conservation Commission to ask the Town Administrator to ask Town Counsel to provide them with written guidelines and policies for the Commission to follow in these matters.

I hope this information helpful. Please feel free to circulate this letter.

Sincerely,



Joseph E. Costa, PhD
Executive Director

⁵ Chapter 134 of the Acts of 1998, AN ACT RELATIVE TO THE MEMBERSHIP OF THE CONSERVATION COMMISSION OF THE TOWN OF FALMOUTH. Notwithstanding the provisions of section 8C of chapter 40 of the General Laws, the board of selectmen of the town of Falmouth may appoint not more than three associate members of the conservation commission of said town for terms not to exceed two years. The chairman of said commission may designate any such associate member to sit on the commission in the absence of a quorum for any reason including a conflict of interest, or the existence of a vacancy until said vacancy is filled in the manner provided in said section 8C of said chapter 40. Approved May 28, 1998.