



**Buzzards Bay Project
National Estuary Program**

Dr. Linda Deegan
The Ecosystems Center
Marine Biological Laboratory
Woods Hole, MA 02543

October 5, 2004

Dear Dr. Deegan,

You have asked for clarification of when a quorum is established for Conservation Commissions, and for an evaluation of specific statements you sent me that relate to quorums and voting procedures applicable to the Falmouth Conservation Commission. Your assertions relating to quorums and voting, and my evaluation of your assertions, are summarized at the end of this letter. As a way of explaining and justifying my analysis, I first provide you with background information on the applicable laws and regulations relating to procedures by Conservation Commissions in the following paragraphs.

The state Wetland Protection Act law establishes definitions of quorums for Conservation Commissions. However, local bylaws have implications for the definition of a quorum, particularly for towns like Falmouth that have a local wetlands bylaw, as well as those towns that have had a Special Acts of the state legislature allowing for alternate members on the Conservation Commission. Theoretically local regulations could allow for a more stringent definition of quorums, but it is highly unlikely a town would adopt a more stringent definition under a local bylaw because it would create a separate quorum standard for decisions under the state Wetlands Protection Act.

There are a number of fine points that remain unsettled on the matter of quorums for Conservation Commissions, but most of the larger issues have been resolved based on case law. Interpretation of wetland regulations is somewhat complicated by the fact that appeals under the state Wetlands Protection Act are handled by the DEP adjudicatory hearing process, but appeals under local bylaws are heard by Superior Court. Thus, there are two separate bodies of legal precedents in wetland cases.

However, on the matter of quorums, there is a general legal consensus on the matter. Below is a summary of the relevant state and Falmouth laws and regulations.

State Law

Massachusetts General Law Chapter 131 Section 40, the Wetlands Protection Act, is quite explicit that notification of determinations and orders of conditions must be signed by a



“majority of the conservation commission.” Because Falmouth has seven members, this means that four members must sign the RDA or Order of Conditions.

State Regulations

The supporting regulations for the Wetlands Protection Act are 310 CMR 10.00. They amplify and expand upon the language in GL Chapter 131 Section 40, particularly 310 CMR 10.05 (2). The portion of the regulations reads:

Where M.G.L. c. 131, § 40 states that a particular action (except receipt of a request or notice) is to be taken by the conservation commission, that action is to be taken by more than half the members present at a meeting of at least a quorum. A quorum is defined as a majority of the members then in office.

Upon reading this sentence, the reader may initially believe that all that is need to make a decision is to have a quorum present, and a majority present of that quorum makes the decision. This is an incorrect conclusion, because the next sentence reads:

Where M.G.L. c. 131, § 40 states that an order or notification shall be signed by a majority of the conservation commission, that action is to be taken by a majority of the members then in office, who need not convene as a body in order to sign, provided they met pursuant to the open meeting law, M.G.L. c. 39, §§ 23A through 23C, when voting on the matter.

This somewhat convoluted sentence emphatically affirms that the Wetland Protection Act language states that a majority of Conservation Commission members in office must sign Orders of Conditions and Determinations¹. This is further affirmed under 10.05 (3)(b) and 10.05 (6)(e), the sections that identify who must sign Requests for Determination of Applicability and Notices of Intent, respectively, also state a majority of Conservation Commission members must sign it.

Other actions also require a majority of commission members (in office) including the issuance of Certificates of Compliance [q.v. 10.05 (9)(a)], extension of Orders of Conditions [q.v. 10.05 (8)(c)], and Enforcement Orders [q.v. 10.08 (3)]. However, certain other decisions and “actions” by the Conservation Commission need only a majority of the quorum present. These actions include approving minutes, scheduling meetings, accepting gifts of land, buying land, and all the other activities designated to Conservation Commissions.² Like all town boards, Conservation Commissions can take no action without a quorum.

Thus, it should be readily apparent that four persons must be in agreement (for a seven-member board) to sign a Determination or Order of Conditions. If four members only are present for a

¹ They need not sign it together at that meeting, but those signing it must be at the hearings (relevant only for appeals under the bylaw).

² An interesting exception is: 10.08 (3) “An Enforcement Order issued by a conservation commission shall be signed by a majority of the commission. In a situation requiring immediate action, an Enforcement Order may be signed by a single member or agent of the commission, if said Order is ratified by a majority of the members at the next scheduled meeting of the commission.”

hearing, the vote, by definition, must be unanimous³. If the vote is three to one, the dissenting voter cannot be compelled to sign a Determination or Order they disagree with.

Separate from the Wetlands Protection Act, there have been legal cases involving various municipal boards and the application of town bylaws and regulations, where a Judge has ruled that board members voting on a decision must have been present at the hearing or hearings (for continuances) on the case. If a case is appealed to Superior Court based on the failure to adhere to this requirement, the usual remedy is for the judge to remand the permit application back to the board in question to rehear the case.

Although this attendance and voting rule should always be adhered to, it has no relevance under the state Wetlands Protection Act because appeals to DEP are heard *de novo* on the applicability of the interests of the law, and not on procedural matters. This is explained in greater detail below.

Falmouth Bylaw Regulations

The Falmouth Regulations are a little more explicit in a few areas, but are completely consistent with and mirror the state regulations with respect to the matter of quorums. Thus, the Falmouth regulations explicitly state that a majority of commission members must sign all the major decisions (cease and desists, orders of conditions, determinations, etc). By default, a majority of the quorum can decide lesser matters, like continuances, procedural matters, and so forth.

Definition of Conservation Commissioners and role of Alternates

Under the state's Wetland Protection Act law and supporting regulations, there is no provision for alternate Conservation Commission members to vote. Instead, the Wetlands Protection Act and supporting regulations only refer to "Conservation Commission Members." However, the state legislature has expanded the definition of a Conservation Commission in some towns by the passage of laws allowing for the designation of "alternates." The existence of alternate members and their ability to vote was conveyed to the Town of Falmouth by a Special Act of the state legislature in 1998.

The language of these enabling acts differs among towns. Many of these special acts read like one of the two following examples.

Example 1. Chapter 132 of the Acts of 2002, AN ACT RELATIVE TO THE APPOINTING OF ALTERNATE MEMBERS TO THE CONSERVATION COMMISSION OF THE TOWN OF NORTH ANDOVER: "Notwithstanding the provisions of section 8C of chapter 40 of the General Laws, the board of selectmen of the town of North Andover may appoint not more than 2 alternate members of the conservation commission for a term of 1 year. In the absence of a quorum for reasons of the absence,

³ This appears to be affirmed in the Massachusetts SJC decision *McElderry v. Planning Board of Nantucket*. As noted in a 2001 MACC newsletter article (attached) written by MACC Legal Affairs Director Alexandra D. Dawson J.D., "the Court said that since the subdivision statute (like the Wetlands Protection Act) requires that a majority of the board sign an approval, then the legislature must have intended a majority of the board to vote in favor, not merely a majority of a quorum of the board." The article goes on to say "we assume (the court did not rule on this) that this term refers to a majority of Commissioners sworn in and serving" in the event of vacancies.

inability to act or a conflict of interest of a member, the chairperson of the commission may designate an alternate member to sit on the commission.”

Notice the statement “in the absence of a quorum.” This means the Conservation Commission Chairman can only appoint an alternate if a quorum is not met. If, for example, four members are present (a quorum) on a seven member Commission, the Chairman cannot appoint two alternates in an effort to change the vote if he believes the alternates would vote in a different way. On the other hand, if only three regular members are present, the chairman could elect to designate either one or both alternates at his discretion. Contrast this language to the language below.

Example 2. Chapter 41 of the Acts of 2001, AN ACT RELATIVE TO THE MEMBERSHIP OF THE CONSERVATION COMMISSION OF THE TOWN OF SWANSEA: Notwithstanding section 8C of chapter 40 of the General Laws, the board of selectmen of the town of Swansea may appoint 3 alternate members to the conservation commission of the town for terms not to exceed 3 years. The chairman of the conservation commission may designate any of the alternate members to sit on the commission in the case of absence, inability to act or conflict of interest on the part of a member of the commission or, in the event of a vacancy on the conservation commission, until the vacancy is filled in accordance with said section 8C of said chapter 40.

In this example of legislation, the Chairman has considerably more power to appoint alternates if he chooses to maintain the maximum number allowed to sit on the Commission to make a decision. However, if all the regular members are present, no alternate can be designated to vote. In the case of absences of regular members, the chair “may designate” alternates, or he may choose not to. An advantage of this type of law is that a full compliment of board members can hear a case so that if a case is continued, it will be less difficult to have a quorum in the case of future absences.

What did the Massachusetts Legislature pass for the Town of Falmouth? In 1998, the state legislature passed this law:

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.

Thus, in the case of Falmouth, the Chairman may appoint an alternate 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.

Relevance of Procedural Errors by Conservation Commissions

If a Conservation Commission makes a procedural error, issues a non-valid decision, or if alternates were not legally designated according to state law, do these actions have any relevance to the appeal process? Under the State regulations, the answer is no. If you are a party that is eligible to appeal, procedural errors are irrelevant because each case is considered by DEP *de novo*. The DEP appeals and adjudicatory process looks solely at whether the resource areas are protected in accordance with the regulations. Thus, they will look at whether the decision was correct with respect to protecting the interests of the Act (wetlands protection), not whether the vote was “legal.” However, if an invalid Order of Conditions were issued (e.g. only three signatures appear on the order), theoretically the ten-day appeal period for an aggrieved party would never commence, and technically the appeal period would not close.⁴ Of course, the Conservation Commission members take an oath to uphold the law, so they should never knowingly disregard the law.

The implications of failure to adhere to appropriate procedures has more significance under a town bylaw because wetland appeals under the town bylaw are brought to Superior Court. If only three members sign a Notice of Intent, or if alternates were appointed when not allowed, the order of conditions would not be valid. This alone could be basis of a challenge in Superior Court by an abutter or aggrieved party, and the judge could issue an injunction until a valid Order of Conditions is awarded. The resulting delays could be very costly for the applicant, and could be costly to the town as well if they have to mount a legal defense.

Evaluation of your Assertions

- 1) Alternate/Associate members do not vote unless a quorum of regular members is not present.
- 2) Only regular members vote, unless there is less than a quorum of regular members.

Response: Statements 1 and 2 are true pursuant to Chapter 134 of the Acts of 1998, which establishes alternate members for the Falmouth Conservation Commission, and when they are appointed to fill a vacancy by the Conservation Commission Chairman.

- 3) If 3 regular members and an alternate are there at the start of the meeting, the alternate is designated to vote. If a 4th regular member arrives, the alternate steps down from voting since a quorum of regular members is there.

Response: This seems to be a reasonable conclusion. However, if a hearing on a case has already begun, and a regular member misses testimony, it would be appropriate for the alternate to vote on that particular case.

⁴ This would be somewhat comparable to an abutter never being notified of a hearing. If the ten day period closed, and the applicant began work, an abutter has 10 days from the date they first saw the work to initiate an appeal to DEP, even if it is months after the permit was issued. This is why it is in the interest of the applicant to send and receive registered return receipts of abutter permit notification.

4) A vote of greater than 1/2 of the members of a quorum is needed for an action. From the bylaw: "if a particular action (except receipt of a request or notice) 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. A quorum is defined as a majority of the members then in office." Thus, votes needed if 4 or 5 are present $n=3$; votes needed if 6 or 7 are present $=4$.

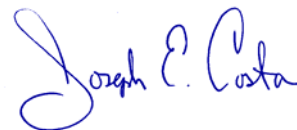
Response: The Town bylaw is identical to the state law and regulations. As noted in detail above, the majority of the quorum rule is only true for routine procedural decisions and certain other actions. All the permit related decisions, such as Requests for Determination of Applicability, the issuance of Orders of Conditions, Extensions, and other decisions cited above, unequivocally require a majority of Commission members in office to sign the decision for it to be valid. 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.

Disclaimer

The comments provided in this letter are based on the experience and knowledge of the Buzzards Bay Project staff working with the state regulations, municipal boards, including Conservation Commissions, over many years. However, you should not consider our opinions legal advice, and the Falmouth Conservation Commission should always consult with Town Counsel whenever difficult legal matters need to be decided.

I hope this information answers your questions.

Sincerely,

A handwritten signature in blue ink that reads "Joseph E. Costa". The signature is written in a cursive style and is positioned to the left of a vertical red line.

Joseph E. Costa, PhD
Executive Director

Attachment: MACC newsletter excerpt

MACC web.org

Newsletter



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Quorum of Commission Should Approve Orders of Conditions SJC Rules in Nantucket Case

The whole subject of voting by town boards has been, and remains, unsettled. This is because it is governed entirely by case law – judges' decisions on one issue or another – not comprehensive statutes. In June of 2000, however, the Supreme Judicial Court (SJC) issued a decision in a subdivision case that helps answer a burning question: How many members of a Conservation Commission must vote in favor of issuing an Order of Conditions for the vote to be valid?

McElderry v. Planning Board of Nantucket is not a Conservation Commission decision, but the reasoning applies quite well to the Wetlands Protection Act. The Court said that since the subdivision statute (like the Wetlands Protection Act) requires that a majority of the board sign an approval, then the legislature must have intended a majority of the board to vote in favor, not merely a majority of a quorum of the board.

The statutes are distinguishable, but unless and until the Appeals Court or the SJC rule otherwise, MACC advises that a valid vote must be carried by a majority of the Commission. We assume (the court did not rule on this) that this term refers to a majority of Commissioners sworn in and serving.

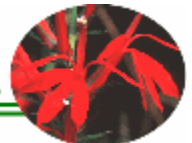
This changes the advice we have previously given about the number of Commissioners needed. We note, however, that the Court acknowledged that, in the absence of wording in the governing statute, a majority of a quorum would have been adequate.

Most disputes will ultimately be handled by an appeal to DEP, which hears appeals "de novo", thus sweeping away any procedural defects. When in doubt, therefore, MACC recommends that Commissions go ahead and vote to make their views known.

Alexandra D. Dawson J.D.
MACC Legal Affairs Director

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