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## LAW OF THE LAND

### CONSERVATION CONCERNS

# Wetlands Violation Trips Up New Owner

Buyer Ordered to Restore Property

BY CHRISTOPHER R. VACCARO

SPECIAL TO BANKER & TRADESMAN



Christopher Vaccaro

Last August in Conservation Commission of *Norton v. Pesa*, the Supreme Judicial Court put buyers on notice of the risk of ignoring unresolved wetlands orders of conditions.

The Massachusetts Wetlands Protection Act generally prohibits removing, filling, dredging and altering wetlands without orders of conditions issued by local conservation commissions. Property owners must record these orders with the registry of deeds to put future buyers and lenders on notice of wetlands issues. After the work is done, owners must obtain and record certificates of compliance, showing that the work was properly completed.

In 1979, John Teixeira proposed to build a store with a sanitation system and parking lot in Norton. Teixeira's project impacted protected wetlands. The Norton Conservation Commission issued an order of conditions allowing Teixeira's project, but limiting fill near the wetlands. In 1984 and 1987, the commission sent letters to Teixeira, expressing concerns that he had exceeded the fill limits under the order of conditions.



In a dispute centering on a Norton property, the Supreme Judicial Court ruled that Massachusetts property owners are responsible for wetlands violations committed under previous ownership.

Teixeira apparently disregarded those letters. He transferred the property to himself and his wife Ann in 1996, then died in 2006, leaving Ann as the sole owner.

### 13K SF of Fill

Ann agreed to sell the property to Robert and Annabella Pesa in 2014. Before the closing, an attorney discovered the order of conditions, and asked the Norton Conservation Commission to issue a certificate of compliance. The commission refused,

claiming that Teixeira had deposited 11,000 more square feet of fill than allowed under the order of conditions. The Pesas proceeded with the closing anyway in 2014. After the Pesas bought the property, the commission sent them an enforcement order asserting that 13,000 square feet of fill had been installed illegally and demanding that they restore the affected areas to their "original condition." The Pesas did not comply with or contest the order.

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In 2016, the Conservation Commission sued the Pesas in Superior Court for the violation, seeking injunctive relief and civil penalties. The Superior Court judge ruled against the commission, citing a statute of repose in the Wetlands Protection Act, which provides: “Any person who . . . acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.”

The judge determined that this statute of repose barred the commission from enforcement actions three years after Teixeira transferred the property to himself and Ann in 1996.

The commission appealed, and the Supreme Judicial Court took up the case. The commission argued that the statute of repose only bars enforcement actions against a particular buyer after the three-year pe-

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**The statute does not bar enforcement actions against subsequent buyers of the land, even if no enforcement action was brought against any prior buyer within the 3-year period.**

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riod expires, but it does not bar enforcement against a subsequent buyer until another three years expire after the subsequent buyer acquired the property. In other words, they argued the Wetlands Protection Act’s three-year statute of repose resets at zero and begins to run again and again for each subsequent buyer ad infinitum.

### **Statute of Repose ‘Does Not Run With The Land’**

The SJC agreed with the commission’s argument, noting that the statute allows enforcement actions against “any person” who acquires land that violates the statute within three years after “such person” acquires the

land. Therefore, according to the SJC, the statute does not bar enforcement actions against subsequent buyers of the land, even if no enforcement action was brought against any prior buyer within the three-year period. The SJC ruled that the statute of repose does not “run with the land,” but is instead “personal” as to each buyer. It set aside the judgment in favor of the Pesas and remanded the case to the Superior Court for further proceedings.

Given this decision, buyers must take care when purchasing land subject to wetlands orders of conditions, even if the orders were issued decades ago for work long since completed and there have been numerous intervening owners since. When recorded orders of conditions are discovered during routine title searches, buyers should make sure that certificates of compliance are obtained and recorded prior to closing.

Buyers who fail to do this assume the risk, as the Pesas did, that they will be saddled with the responsibility and cost of fixing wetlands messes caused by prior owners. ◀

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