

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, SS,

LAND COURT DEPARTMENT
CASE NO. 13 MISC 478175

CHARLES PARKER and VIRGINIA)
P. DAWSON, RICHARD W. REGAN,)
MANAGER OF THE REGEN FAMILY)
STORKS NEST LLC, DOUGLAS and)
ELIZABETH LIMAN, BARBARA)
GOLDMUNTZ (LIFE ESTATE), and)
BARBARA HUNTER FOSTER,)
TRUSTEE OF PACER II NOMINEE)
TRUST,)

Plaintiffs,)

vs.)

CHRIS MURPHY, FRANK LORUSSO,)
WENDY WELDON, RUSSELL MALONEY,)
ALLISON BURGER, TODD CHRISTY)
and ALLEN HEALY, as they are)
members of the Town of)
Chilmark Zoning Board of)
Appeals and the TOWN OF)
CHILMARK, acting by and)
through its Board of)
Selectmen,)

Defendants.)

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

I. Introduction.

The defendants, Chris Murphy, Frank Lorusso, Wendy Weldon, Russell Maloney, Allison Burger, Todd Christy and Allen Healy, as they are members of the Town of Chilmark Zoning Board of Appeals (the "ZBA"), and the Town of Chilmark (the "Town"), acting by and through its Board of Selectmen (collectively, with the ZBA, the "municipal parties"), submit this memorandum in

opposition to the plaintiffs' motion for summary judgment. Under Mass. R. Civ. P. 56(c), the Court should enter a judgment declaring that Section 12.6(H)(1) of the Chilmark Zoning By-laws ("ZBL") - which prohibits the use of pesticides¹ in a limited overlay district encompassing the area within 500' of Squibnocket Pond (the "Pond") - is a valid and a permissible exercise of local authority under the Massachusetts Pesticide Control Act (G. L. c. 132B, §§ 1-16) (the "Act") and dismiss all related claims.

The Legislature, through a 1994 amendment to the Act, clarified the reach of the Supreme Judicial Court's (SJC) decision in Town of Wendell v. The Attorney General, 394 Mass. 518 (1985) ("Wendell"). The 1994 amendment - St. 1994, c. 264, § 1 - made clear that, after the Wendell decision, the Act's purpose is to "conform the laws of the Commonwealth to the Federal Insecticide, Fungicide, and Rodenticide Act, Public Law 92-516" ("FIFRA"). Three years before the 1994 amendment, the United States Supreme Court ruled, in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991)² ("Mortier"),³

¹ We generally use the term "pesticide" throughout this brief, although the plaintiffs propose to use Rodeo, which is technically an "herbicide". Under § 2 of c. 132B, a "pesticide" is a substance used to eradicate any "pest", which includes a "weed".

² In Mortier, the Supreme Court reversed the Wisconsin Supreme Court and rejected the approach of two Federal Courts

that FIFRA does not preempt municipal regulation of pesticide use, despite its broad and comprehensive sweep. Since the Legislature explicitly and intentionally aligned the Act with FIFRA shortly after the Supreme Court's Mortier decision in 1991 - and elected not to add express provisions prohibiting local permitting review to c. 132B - the Wendell case cannot be read as standing for the proposition that all local regulation of pesticide use is preempted by the Act. That conclusion is inescapable based on a review of the Act's amended text and the timing of the 1994 insertion to § 1 in relationship to the Supreme Court's Mortier ruling and the language of Wendell.

Even if this Court were to conclude that the 1994 amendment to the Act did not limit Wendell's scope consistent with the Supreme Court's interpretation of FIFRA, § 12.6(H)(1) is still a valid land use regulation under Wendell. The by-law at issue in Wendell granted Wendell's board of health almost unfettered authority to place additional limits on any pesticide on a town-wide basis. Conversely, § 12.6(H)(1), which regulates the use of pesticides in a finite area of town, is a land-use regulation

which had issued decisions to the contrary. Id. at 604. See Professional Lawn Care Assoc. v. Milford, 909 F.2d 929 (6th Cir. 1990); Maryland Pest Control Assoc. v. Montgomery Cty. Maryland Pest Control Assoc. v. Montgomery Cty., 646 F. Supp. 109 (D. Md.), affirmed without opinion, 822 F.2d 55 (4th Cir. 1986).

³ We have produced a copy as Exhibit "A" in the Town's Addendum of Authorities.

of limited scope based on particular local factors - a by-law not barred by Wendell.

In California Coastal Commission v. Granite Rock Company, 480 U.S. 572 (1987),⁴ the Supreme Court recognized that "[t]he line between environmental regulation and land use planning will not always be bright", and that state and local authorities retain authority to enact regulations that have a collateral impact on fields which are seemingly occupied by comprehensive federal law. Accordingly, given the entirely local, limited, and scientifically based underpinnings of § 12.6(H)(1) (as set out in the Affidavits of Dr. Arthur S. Gaines, Matthew Poole, and Dr. Charles Benbrook), this Court should rule that the Chilmark zoning provision does not frustrate the purpose of the Act or the roles of the Pesticide Board and Pesticide Subcommittee created by c. 132B, and constitutes the type of "local by-law" that the SJC in Wendell contemplated.⁵

⁴ Attached as Exhibit "B" in the Town's Addendum of Authorities.

⁵ Whatever the Court's ruling on the first two questions of law advanced by the municipal parties', the plaintiffs are not entitled to a use variance, as set forth infra in Section V(E), as established law affords discretion to boards of appeal to reject use variance applications. Accordingly, the ZBA properly denied the plaintiffs' application.

Finally, the Court should uphold the ZBA's decision that the Zoning Officer properly took steps to stop the plaintiffs from violating Section 12.6(H)(1) which, until a court rules otherwise, is a presumptively valid enactment.⁶

II. Issues presented.

A. Whether G. L. c. 132B preempts § 12.6(H)(1), a local zoning regulation prohibiting the use of pesticides in a limited geographic area, in light of a 1994 amendment to the Act and the Supreme Court's decision in Mortier?

B. Whether § 12.6(H)(1) is consistent with the Act, as interpreted in the Wendell decision, as a limited, local land use regulation which does not frustrate the purposes of the Act or the roles of the Pesticide Board and the Pesticide Subcommittee?

C. Whether the ZBA properly denied the plaintiffs a "use" variance to apply Rodeo in the Squibnocket Pond District, which are not allowed by the Chilmark Zoning by-law and, nonetheless, was in the ZBA's discretion to deny?

D. Whether the Zoning Officer properly issued the plaintiffs a cease and desist order under § 12.6(H)(1), which is a presumptively valid zoning by-law?

⁶ The plaintiffs fail to show, on this record, that their protocol for administering "Rodeo" on land bordering on, and under the fringes of, an intertidal, coastal pond complies with the provisions of c. 132B and its regulations. There are approximately 74 wells within a half mile radius of the plaintiffs' proposed application sites, and the plaintiffs have produced no evidence demonstrating that those wells are not upstream from the areas where the pesticide will be applied, a use which is strictly prohibited by Rodeo's own manufacturer's instructions. Further, the plaintiffs have adduced no evidence to show that they will refrain from applying Rodeo to submerged plants, a limitation which similarly governs the product's use. Accordingly, on this record, the plaintiffs have not advanced facts at summary judgment showing they are in compliance with the Act.

III. Statement of Legal Elements.

A. Summary judgment is appropriately entered when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c); see Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976).

B. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. See Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982).

C. Rule 56 specifically permits the rendering of summary judgment against the moving party, where appropriate. Nagel v. Provident Mut. Life. Ins. Co. of Philadelphia, 51 Mass. App. Ct. 763, 768 (2001).

D. The plaintiffs have a "heavy burden of showing that the by-law is in conflict with (a) the enabling act, G.L. c. 40A, or (b) applicable constitutional provisions." Turnpike Realty Co. v. Dedham, 362 Mass. 221, 233 (1972); see also Sturges v. Chilmark, 380 Mass. 246, 256 (1980).

E. "Every presumption is to be afforded in favor of the validity of ... [a by-law] and if its reasonableness is fairly debatable the judgment of the local authorities who gave it its being will prevail." Turnpike Realty Co., supra at 233 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

F. To sustain a by-law, there need only be a showing in the record that there was "any possible permissible legislative goal which may rationally be furthered by the regulation...." Sturges, 380 Mass. at 257. It is not the municipal defendants' "burden to come forward with proof of those very circumstances" and they are "restricted neither to the reasons expressed by its planning board ... nor to arguments which were advanced on the town meeting floor." Id. at 257-58.

G. "A use variance granted after January 1, 1976, is authorized only if expressly permitted by local ordinances or by-laws." Maurice Callahan & Sons, Inc. v. Board of Appeals of

Lenox, 30 Mass. App. Ct. 36, 40 n. 4, rev. denied, 409 Mass. 1104 (1991).

H. "[N]o person has a legal right to a variance and they are to be granted sparingly." Kirkwood v. Board of Appeals of Rockwood, 17 Mass. App. Ct. 423 (1984) (quoting from Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 61 (1971)).

IV. Facts.

The facts are fully developed in the parties' Land Court Rule 4 Statements of Material Facts, and we do not repeat them again in detail. As noted in the introduction, the Town contends that no material facts are in dispute concerning the pure questions of law governing all claims in this case and the case is in a posture to rule on the validity of § 12.6(H)(1) of the ZBL, which is a presumptively valid zoning by-law, enacted by the Town and approved by the Attorney General in 1990, five years after the Wendell case was decided. The Town proposed the provision after hiring scientists from the Marine Policy Center at the Woods Hole Oceanographic Institute to study the Pond's ecology, who recommended more restrictive zoning measures to protect the resource.

Should the Court reject the Town's claim that the current version of c. 132B does not preempt § 12.6(H)(1), the municipal parties contend, nonetheless, that the plaintiffs have failed to submit sufficient evidence at summary judgment, to support a reversal of the Zoning Officer's Cease and Desist order.

V. Argument.

A. The Legislature's 1994 Amendment Establishes that
c. 132B does not prohibit the type of local
regulation enacted by the Town.

Section 12.H(6)(1) is a valid exercise of local regulatory authority under the Legislature's 1994 amendments to c. 132B. The general by-law at issue in the Wendell case delegated broad powers to the board of health concerning the use of pesticides throughout the town. The text of that by-law is set out in full in the Wendell decision, 394 Mass. at 520 n. 4. The penultimate paragraph of Article 4 of the Wendell by-law provided, in pertinent part (id. at 522 n. 4), that:

"[I]f the Board determines that the pesticide presented to the Board by the applicant is unsafe and presents a danger or a possible danger to the health, environment, or safety of the citizens of the Town . . . the Board may formulate and prescribe condition(s) for the application of said pesticide. Said condition(s) . . . shall be consistent with but not limited to those restrictions put forth in the Massachusetts Pesticide Control Act. . . ."

In considering the town's appeal from the Attorney General's disapproval of the by-law under G. L. c. 40, § 32, the SJC identified the question before it as "whether the Legislature intended to deny [cites and towns] the right to legislate on the subject of pesticides" Wendell, 394 Mass. 524. The SJC affirmed the Attorney General's disapproval because "[a]n additional layer of regulation at the local level, in effect second-guessing the subcommittee, and 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. (Emphasis supplied). The SJC noted, however, that "[t]here is no procedure by which the Attorney General may properly approve only a portion of a by-law," and therefore affirmed the Attorney General's disapproval of the By-law in its entirety.⁷

The SJC specifically determined that the version of the Act, in effect at the time, did not preclude all local involvement, as follows:

"[T]here is nothing in the act concerning the role of municipalities in pesticide control or in the stated purpose of the act that expressly bars all local regulation."

Id. at 523.

In analyzing whether the Act preempted the Wendell by-law, the SJC stated that, under the Home Rule Amendment (see Bloom v. Worcester, 363 Mass. 136, 155 (1973)), "the legislative intent to preclude local action must be clear." Id. at 524. Further, "[i]f . . . the State legislative purpose can be achieved in the

⁷ We believe the posture of the case as an appeal from the Attorney General's disapproval limited the SJC's scope of review to sustain the legality of independent sections of the by-law.

face of a local by-law on the same subject, the local by-law is not inconsistent with the State regulation, unless that legislation expressly forbids the adoption of such a by-law."

Id. (citation omitted). On this point the SJC observed:

"We find nothing in the act that explicitly authorizes local legislation of pesticide applications, and, more importantly . . . we find nothing in the act that expressly forbids local regulation. References in the act to municipal involvement in the process are few, and they provide nothing of significance warranting an inference that local regulation was intended to be forbidden. . . .

The question . . . is whether the local enactment will clearly frustrate a statutory purpose."

Id. at 526-28.

The SJC concluded that the Wendell by-law "frustrated" the purposes of the Act because the by-law "contemplates the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act." Id. at 528. The Wendell court plainly saw a role for local regulation - as long as that local regulation did not undermine the uniformity requirements of the State Pesticide Control Board. The flaw of Wendell's by-law was that it authorized the imposition of local conditions beyond the requirements imposed by the State Pesticide Control Board. It is significant to point out that the SJC specifically found that "[t]he stated purpose of the 1978 act, set forth in its emergency preamble, 'is to conform the laws of the commonwealth

with federal requirements on registration and certification of pesticides," (id. at 527), and then stated:

"If there were some indication in the act that the Legislature believed, even erroneously, that Federal requirements compelled all regulation to be at the State level to the total exclusion of local regulation, that declaration of purpose might be well dispositive of the issue before us."

Id. (Emphasis supplied).

In 1991, the Supreme Court decided Mortier, which "require[d] [it] to consider whether [FIFRA] pre-empts the regulation of pesticides by local governments." Mortier, 501 U.S. at 601.⁸ As noted, the Court held that it did not. Id.

The facts of Mortier are instructive. A small town in Wisconsin, Casey, adopted an ordinance requiring a permit for the application of any pesticide, with various requirements. Id. at 603. "Mortier applied for a permit for aerial spraying of a portion of his land. The town granted him a permit, but precluded any aerial spraying and restricted the lands on which ground spraying would be allowed." Id. In response, Mortier brought an action in state court, claiming Casey's ordinance was preempted by both state and federal law. Id. The Circuit Court, at summary judgment, agreed, relying on both a Wisconsin statute and FIFRA. Id. at 603-04. The Wisconsin Supreme Court affirmed by a vote of 4-3. Id. at 604. The majority declined to

⁸ This is the precise issue which the SJC in Wendell said needed clarification.

address state law preemption, but concluded that FIFRA preempted Casey's ordinance. Id.

The Supreme Court applied traditional federal preemption principles on review, and, concluded that:

"[T]he statutory language . . . is wholly inadequate to convey an express preemptive intent on its own. Section 136v plainly authorizes the 'States' to regulate pesticides and just as plainly is silent with reference to local governments. Mere silence, in this context, cannot suffice to establish a clear and manifest purpose to pre-empt local authority. Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities, it would not follow that municipalities were left with no regulatory authority. Rather, it would mean that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law. At a minimum, localities would still be free to regulate subject to the usual principles of pre-emption. . . .

Properly read, [FIFRA] tilts in favor of local regulation."

Id. at 607-08. The Supreme Court further held that FIFRA does not preempt local regulation of pesticide use because it: a.)

"nowhere expressly supersedes local regulation of pesticide use"

(id. at 606); b.) "fails to provide any clear and manifest

indication that Congress sought to supplant local authority"

(id. at 611)"; and, finally, c.) did not actually conflict with

"the ordinance . . . and local regulation generally." Id. at

614.

Following Mortier, the Legislature, through St. 1994, c. 264, § 1, amended c. 132B, § 1, by adding the following paragraph:

"The purpose of this chapter is to conform the laws of the commonwealth to the Federal Insecticide, Fungicide, and Rodenticide Act, Public Law 92-516, as amended, and the regulations promulgated thereunder, and to establish a regulatory process in the commonwealth. The exclusive authority in regulating and labeling distribution, sale, storage, transportation, use and application, and disposal of pesticides in the commonwealth shall be determined by this chapter."

As noted, the emergency preamble to the 1978 version of the Act stated that its purpose was to conform Massachusetts law to federal law with respect to "registration and certification of pesticides", but that statement appeared nowhere in the text of the c. 132B.

"Statements regarding the scope or purpose of an act that appear in its preamble may aid in the construction of doubtful clauses, but they cannot control the plain provisions of the statute." Brennan v. the Governor, 405 Mass. 390, 395-96 (1989). The Legislature's decision to insert the second paragraph directly into § 1 of the Act - and its decision to broaden the scope of its purpose to include regulating the "use and application" of pesticides consistent with existing federal law - is conclusive. Given that the Supreme Court had ruled that FIFRA's comprehensive labeling, registration, and certification statutory scheme does not preempt local

regulation, there can be little doubt that the purpose of the 1994 amendment was to clarify that the Act did not preempt local regulation of certain aspects of pesticide use and application.

To be sure, the 1994 amendment reserved to State authority, should it choose to exercise it, the power to regulate the use and application of pesticides. However, the Legislature's decision not to establish a comprehensive permitting scheme, either concomitantly with or subsequently to the 1994 Amendment, or to bar any local rules, confirms that local regulation in that area is permissible. The 1994 amendment is an expression of legislative intent that Federal law does not require all regulation to occur at the state level, as the Supreme Court in Mortier held and as the Wendell court queried. See 394 Mass. at 527 & supra n.7.

In Mortier, in assessing whether FIFRA preempted local regulation, observed that:

"FIFRA addresses numerous aspects of pesticide control in considerable detail, in particular: registration and classification; § 136a; applicator certification, § 136b; inspection of pesticide production facilities, §§ 136e and 135g; and the possible ban and seizure of pesticides that are misbranded or otherwise fail to meet federal requirements, § 136k. . . . FIFIRA nonetheless leaves substantial portions of the field vacant, including the area at issue in this case. FIFIRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, and water

supply. Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular."

501 U.S. at 613-14. (Emphasis supplied).

Summing up its analysis, the Supreme Court concluded that "FIFRA implies a regulatory partnership between federal, state, and local governments. . . . As we have also made plain, local use permit regulations - unlike labeling or certification - do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." Id. at 615 (emphasis in original).

Similar to FIFRA, the Act does not establish an affirmative and comprehensive permitting scheme. The Act does provide, for example, that: "[n]o person shall . . . use a pesticide that is not registered by the department" (§ 6); "[n]o person shall use a registered pesticide in a manner that is inconsistent with its labeling or other restrictions imposed by the department: (§ 6A); notice of 21 days must be given to a town and its conservation commission before application of a pesticide (§ 6B); and more restrictive criteria apply to any use of pesticides within schools and on school grounds (§§ 6F- 6I).⁹ However, no section precludes local determinations limiting or conditioning the use of registered pesticides on account of local conditions.

⁹ These sections explicitly contemplate a measure of local involvement.

The 1994 Amendment also added the term "the exclusive authority" to § 1 of c. 132B. The language, quoted in full, states that "the exclusive authority in regulating the labeling, distribution, sales, storage, transportation, use and application and disposal of pesticides in the Commonwealth shall be determined by this chapter." The phrase "exclusive authority" clearly refers to the Massachusetts Pesticide Board established within the Department of Food and Agriculture by § 3 of the Act. In light of the stated purpose of the Act to make State law conform to Federal law, the reference to the Pesticides Board's exclusive authority is plainly meant to preclude any other State entity from regulating pesticides use. This legislative intent is reinforced by the composition of the Pesticide Board, which includes the heads, or designees, of the many State departments and divisions, which are divested by c. 132B of independent authority to regulate pesticide use.

This "exclusive authority" language is plainly not intended to divest municipal and local agencies of the powers that they have under Home Rule and other enabling acts, as outlined both in the Mortier decision and in the 1985 Wendell decision. Had the Legislature wished to oust local boards from having any role

or authority to regulate pesticide use, it would have been easy for it to say so explicitly - which it did not.¹⁰

The only reasonable interpretation of the 1994 Amendment, and the absence of subsequent amendments that explicitly deprive local bodies of regulatory power over pesticide use, is that the Legislature intended to align the Act with the Supreme Court's interpretation of FIFRA, and to permit local regulation of pesticide use that does not actually conflict with the Act's provisions. As the SJC stated in Commonwealth v. Kenney, 449 Mass. 840, 852 (2007): "We presume that the Legislature, at the time of the statute's enactment in 1997, knew of preexisting law and of the decisions of our court and the United States Supreme Court, and intended the statutory language to be interpreted consistent with those statutes and decisions." See also Weber v. Appeals Court, 457 Mass. 407, 409 (2010) ("[W]e presume [the Legislature] was aware of case law construing the cognate Federal statute, and that it intended the Massachusetts statute

¹⁰ See, by contrast, Chapter 182 of the Acts of 2012, whereby the legislature plainly made any local regulations adopted before specified dates invalid. See Appendix of Authorities, Exhibit "D". There is no parallel provision here, nor did the legislature seek to limit the holding of the Mortier decision by expanding the jurisdiction of the State Pesticide Board in Massachusetts or specifically precluding municipalities from exercising any oversight role over the use of pesticides and herbicides. Thus the appropriate question is not whether municipalities can regulate pesticide use at all, but rather whether any given local regulation is consistent with or interferes with the purposes of the Pesticide Control Act.

to be interpreted in a manner consistent with then-existing Federal jurisprudence.").

B. Chilmark's Zoning Provision is Consistent with the Wendell case as a limited, land-use control.

As noted in the beginning of the prior section of this brief, the general by-law at issue in the Wendell case applied town-wide and granted the board of health the power to "impose conditions for the application of the pesticide in addition to those established by the State agency in certifying the pesticide," (394 Mass. at 528), a result which would "frustrate the purpose of the act" because it would "permit a local board to second-guess the determination of the State board". Id. at 529. The Wendell decision did not address local land-use regulations of more limited scope - such as § 12.6(H)(1) - which do not give local boards the power to second-guess the governing state agencies but rather restrict pesticide application to a limited geographic area based on particular local factors.¹¹

The Supreme Court's decision in California Coastal Commission took up the question whether various federal statutes

¹¹ We point out that the plaintiffs applied to the Chilmark Conservation Commission under both the State Wetlands Protection Act and Chilmark's local wetlands by-law permission to cut the phragmites and to apply Rodeo in a wetland resource area. See Exhibit "D" in the plaintiffs' appendix to their statement of material facts. The plaintiffs were obviously of the mindset that the Wendell case did not preempt the Conservation Commission's authority to condition application of a pesticide under a local regulation, which it did. See Special Conditions to the Order of Conditions 1, 5, 6, 13, 17-21.

and regulations preempted the "California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a federal forest." 480 U.S. at 575. After examining three distinct areas of federal law that regulate mining claims, the Supreme Court concluded that none, on their face, actually conflicted with California's permit requirement requiring preemption. See id. at 594.

The Supreme Court reached its conclusion, in part, based on the notion that:

"[T]he line between environmental regulation and land use planning will not always be bright Land use planning in essence chooses particular uses for land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."

Id. at 587. That rubric applies to the intersection of § 12.6(H)(1) and the Act.

Section 12.6(H)(1) limits the use of pesticides only in a discrete area of Town. As set out in the Affidavit of Arthur S. Gaines, the Town engaged the Woods Hole Oceanographic Institution ("WHOI") to study the ecosystem of Squibnocket Pond before it proposed language regulating pesticides in the overlay district. While the Act, as interpreted in Wendell, preempts local regulation which "frustrates its purposes" (394 Mass. at 529), the Act does not override a community's parallel authority, under G. L. c. 40A, to create overlay zoning

districts which limit or prohibit specific uses. Put simply, § 12.H(6)(1) is not a pesticide regulation, per se, under c. 132B, but rather is a zoning regulation that only governs use of a specific area of land based on its unique characteristics.

Section 1A of the Zoning Act defines "zoning" as follows:

"[O]rdinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants."

"The zoning laws of Massachusetts (and forty-six other States) are based primarily upon the Standard Zoning Enabling Act, which was drawn up under the auspices of the United States Department of Commerce in the 1920's. See 1 Williams, American Land Planning Law § 18.01 (1974). . . . The system of zoning codified by the standard act is often referred to as "Euclidean" zoning based upon the seminal Supreme Court case which upheld the lawfulness of dividing a municipality into districts for the purpose of imposing land-use restrictions. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See 1 Anderson, American Law of Zoning § 3.09 2nd ed. 1976)." Scit, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 103 n. 6 (1984).¹²

¹² Overlay districts are similarly an accepted municipal regulatory tool under zoning. "In addition to [the] traditional Euclidean classification scheme that divides [a municipality] into residential, business, industrial, and other uniform districts, . . . [o]verlay districts typically achieve their

With those governing precepts in mind, there can be no doubt that that the Town, under zoning, has the authority to prohibit the "distribution, sale, [and] storage" of pesticides in residential districts, for example, no matter that the Act explicitly states that it governs those areas and functions. If a town can regulate the "sale" of a pesticide in a residential zone, it follows that it can similarly regulate the "use" of a pesticide in limited overlay district, enacted by the Town to protect the health and safety of a public resource such as Squibnocket Pond -- particularly where it is based on a specific scientific study. Towns have the power under zoning and Home Rule to regulate the "sale", "distribution", and "use" equally if the regulation does frustrate the Act's purpose.

- C. The Town invoked well-established local powers in enacting special protection for Squibnocket Pond under zoning.

The SJC's holding in Johnson v. Edgartown, 425 Mass. 117 (1997), further supports the conclusion that stringent regulations protecting fragile coastal great ponds on Martha's Vineyard are not only permissible but also promote a legitimate public purpose within a town's local powers under c. 40A.

Johnson involved a landowner's challenge to three acre zoning in

objectives without amending the underlying zoning by employing a technique in which new, more restrictive zoning is laid over an existing zone in order to further regulate or restrict certain permitted uses" KCI Management, Inc. v. Board of Appeal of Boston, 54 Mass. App. Ct. 254, 258-59 (2002).

a portion of Edgartown where coastal great ponds, including the Edgartown Great Pond, are prevalent. This Court had upheld the validity of three acre zoning in this coastal area of Edgartown and the SJC noted:

"The [Land Court] judge credited the testimony of the Town's expert, a marine ecologist specializing in coastal areas, to conclude that the effect of nitrate loading on drinking water and on Edgartown Great Pond justified three acre zoning in the [zoning] district to protect the health, water, water supply, and water resources. He also concluded that the three acre requirement allowed a reasonable margin to provide for future problems. The judge identified an independent justification in the 'unique ecological integrity of the area including coastal waters, embayments, plant and animal life.'"

Id. at 119.

In upholding this Court's decision, the SJC noted that "insular thinking is appropriate here. . . . The fact that Edgartown is on an island is important" Id. at 120. The SJC also reiterated that a party challenging a zoning enactment had the burden to prove "by a preponderance of the evidence that the zoning regulations are arbitrary and unreasonable and substantially unrelated to the public health, safety, morals, or general welfare." Id. at 121.

The SJC accepted the trial judge's finding that Edgartown Great Pond was vulnerable to nutrient pollution from excess nitrogen (id. at 123-24), and that the Town's evidence concerning the need for pollution control established that three acre zoning was both rational and related to the public welfare,

and that these interests justified conservative assumptions about the consequences of nearby land use. Id. at 124. The SJC, in upholding three acre zoning in Edgartown, relied, in part, on "the proximity of the restricted land to a coastal great pond, " (id. at 125), and concluded that:

"We are confident in the special circumstances of this case that the three acre zoning provision has not been shown to be arbitrary and unreasonable, or substantially unrelated to the public health, safety and general welfare."

Id.

The Town's decision to impose a pesticide (and herbicide, etc.) ban on the 500 feet surrounding Squibnocket Pond was based on and informed by a sixty-two (62) page study done by WHOI prior to the by-law's 1990 adoption. That report, which is appended to the Affidavit of one of its authors,¹³ Arthur S. Gaines, demonstrates that the Town carefully tailored the zoning regulation in issue to protect the Pond, which represents approximately only one percent (1%) of the Town's total land area. There are no other zoning regulations in the Town which contain similar restrictions. We suggest that land-use regulations barring the use of pesticides in a finite area of town, enacted to protect a documented environmental resource, cannot be deemed, as a matter of law, to frustrate the goal of

¹³ The other author was the former Director of the Woods Hole Oceanographic Institute.

the State Pesticide Control Board and the Act to create uniform regulations Statewide.

Section 12.6(H)(1) is precisely the type of local regulation that the SJC contemplated in Wendell would be an acceptable local regulation under the Act. Moreover, § 12.6(H)(1) is precisely the type of regulation which is consistent with the Supreme Court's decision in Mortier, and the integrated, cohesive regulatory scheme involving Federal, State, and local agencies envisioned by Congress through FIFRA.

As noted above, preemption is a concept which is disfavored - the legislative intent to override a local enactment must be clear. See Wendell, 394 Mass. at 525. Since, as the Wendell Court concluded, there is nothing in the Act which explicitly bars all local regulation, the type of targeted enactment passed by the Chilmark voters, and approved by the Attorney General, should withstand judicial scrutiny. Section 12.6(H)(1) does not frustrate the purposes of the Act.

Courts in other states have reached a similar result. In Central Maine Power Company v. Town of Lebanon, 571 A.2d 1189 (1990),¹⁴ the Maine Supreme Judicial Court concluded that a town's ordinance requiring Town Meeting approval for non-agricultural spraying of herbicides was not preempted by either

¹⁴ A copy of this decision is in the Town's Appendix of Authorities as Exhibit "E".

FIFRA or the Maine Pesticide Control Act. The land at issue lay "in close proximity to . . . wells . . . as well as environmentally sensitive areas such as ponds, streams, wetlands, and aquifers." Id. at 1191. Maine has two statutes - the Pesticide Control Act and the Pesticide Board Act - both of which, like the Massachusetts statute, expressly contemplated some municipal action concerning pesticides. See id. at 1194. The Maine Supreme court concluded that the Maine acts neither expressly nor implicitly (by "occupying the field") preempted local regulation. See id. Most importantly, the Court ruled that the local use prohibition enacted by the Town of Lebanon did not "frustrate the purposes of the two Maine pesticide acts" because, "[b]y requiring a more stringent review process for certain types of pesticide use than that found in the two Maine pesticide acts, the [town] ordinance shares and advances these same purposes." Id. at 1195. The Maine acts had nearly identical language to c. 132B: "[t]he purpose of the Pesticide Control Act is to protect public health by regulating 'the labeling, distribution, storage, transportation, use and disposal of pesticides" Id.¹⁵

¹⁵ The purpose of the Maine Pesticide Board Act is to assure "to the public the benefits to be derived from the safe, scientific and proper use of chemical pesticides while safeguarding the public health, safety and welfare, and . . . [to protect the] nature resources of the State" Id.

Previously, in 1984, the California Supreme Court, in People Ex. Rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476 (1984), similarly held neither FIFRA nor the California Food and Agriculture Code preempted a county ordinance prohibiting aerial spraying of pesticides.¹⁶ Even though the state director had "adopted numerous and detailed regulations governing the use of pesticides" (id. at 483) under the Food and Agriculture Code, the Court concluded that the county commissioners' authority to regulate pesticides under air and water pollution statutes was not preempted because "there [was] no direct conflict between the statutes . . . [and] that harmonization is accomplished by permitting regulations to preserve and protect public health under either the Food and Agriculture Code or under the air and water pollution statutes." Id. at 488.

These decisions, when viewed in light of Mortier and the 1994 Amendment to the Act, suggest that Wendell is limited to its facts and does not lead to the conclusion that § 12.6(H)(1) is preempted by the Act as a matter of state law.¹⁷

¹⁶ A copy of this decision is in the Town's Appendix of Authorities as Exhibit "F".

¹⁷ The plaintiffs' argument that the Act implicitly preempts § 12.6(H)(1) because the by-law frustrates the "uniformity" objective of c. 132B is simply wrong. The Chilmark By-law does not frustrate the uniformity goal because it is a limited, location-specific land use regulation, not a wholesale, second guessing of the statewide determination of the safety of a particular pesticide.

D. The Zoning Board's Denial of a Use Variance Was Proper.

The plaintiffs incorrectly contend that the introduction to Article IV of the ZBL authorizes use variances. Section 4.0 states in full:

"Except as the Board of Appeals may grant a variance from the provisions of this zoning by-law, no building or structure shall be constructed and no building, structure or land or part thereof shall be used for any purpose or in any manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located, or set forth as permissible by special permit in its district and so authorized. All uses not specifically permitted shall be considered to be prohibited."

There is nothing in the above-quoted language which authorizes the ZBA to grant use variances. Section 9.8 of the ZBL, entitled "Criteria for Special Permit or Variance", provides that:

"A variance from any requirement of this by-law shall be granted only in accordance with the criteria set forth in Section 10 of the Zoning Enabling Act."

Section 10 provides that:

"Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize the use or activity not otherwise permitted in the district in which the land or structure is located. . . ."

The above-quoted language in § 4 of the ZBL does not "expressly permit variances for use." "A use variance granted after January 1, 1976, is authorized only if expressly permitted by local ordinances or by-laws." Maurice Callahan & Sons, Inc.

v. Board of Appeals of Lenox, 30 Mass. App. Ct. 36, 40 n. 4, rev. denied, 409 Mass. 1104 (1991). The generic language in the introduction to § 4.0 of the ZBL is trumped by the more specific reference in § 9.8, and the specific limitations supplied by § 10 of the Zoning Act. The introductory language relied on by the plaintiffs falls short of "expressly" authorizing use variances.

Moreover, even if the ZBL did authorize use variances in the Town, the law in Massachusetts is clear that "no person has a legal right to a variance and they are to be granted sparingly." Kirkwood v. Board of Appeals of Rockwood, 17 Mass. App. Ct. 423 (1984) (quoting from Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 61 (1971)). An appeal would lie if the ZBA granted a use variance, not denied one, as here. This claim lacks any merit.

E. The Zoning Board of Appeals and the Zoning Officer Were Correct and Their Decision Should Be Affirmed.

The Zoning Officer issued the cease and desist order because the plaintiffs asserted that they intended to apply Rodeo in an area prohibited by the ZBL. The ZBA upheld the Zoning Officer's decision because § 12.6(H) (1) is a presumptively valid zoning by-law. It is fundamental that neither the Zoning Officer nor a Board of Appeals has the discretion to determine that a zoning by-law, enacted by the

voters, and approved by the Attorney General, (here, five years after the Wendell decision), is invalid until a court rules otherwise. While both the ZBA and the Zoning Officer may have the discretion not to enforce (or require enforcement of) a validly enacted and approved by-law of the Town, their decisions here cannot be deemed improper or an abuse of discretion.¹⁸

Further, the Affidavit of Matthew Poole establishes that there are approximately 74 private drinking wells within the Squibnocket Pond District and that, given the proximity of the phragmites the plaintiffs intend to treat to the edge of the Pond, a portion of the targeted phragmites unquestionably lie below the water surface and, therefore, are "submerged". The clear directions from Rodeo's manufacturer - which are incorporated into the Act's scheme¹⁹ - preclude the use of Rodeo within half a mile upstream of an "active potable water intake" drinking water sources. There is nothing in the plaintiffs' filings establishing that they will satisfy the specifications, which is unquestionably their burden.

¹⁸ The plaintiffs suggestion that the Zoning Officer should have waited until they started to apply herbicides before issuing a cease and desist order is frivolous. The issuance of the cease and desist order was both timely and appropriate.

¹⁹ Section 6A of c. 132B provides that "[n]o person shall use a registered pesticide in a manner that is inconsistent with its labeling or other restrictions imposed by the department."

Finally, as the Affidavit of Dr. Benbrook makes clear, the use of the chemical Rodeo is potentially dangerous to the ecology of the Pond and its shellfish, finfish, and other vegetation. Under these additional circumstances, the Zoning Officer was well within his power to issue, and the Zoning Board of Appeals was well within its discretionary authority to affirm, the Cease and Desist order. On this record, given the plaintiffs' failure to sustain their burden of proof, the Court should uphold that order.

F. Claim under G. L. c. 240, § 14A.

Count II of the Complaint seeks a declaration that § 12.6(H)(1) is invalid. Section 14A of G. L. c. 240 provides a mechanism for an owner of land to bring a prophylactic action in the land court for a "determination as to the validity of a municipal . . . by-law . . . passed or adopted under the provisions of chapter forty A" The plaintiffs are technically in the correct posture here, as they seek an order that the by-law does not apply to their intended use of Rodeo.²⁰

VI. Conclusion.

For all of the reasons stated above, the plaintiffs' motion should be denied, and summary judgment in the municipal parties'

²⁰ However, we respectfully suggest that the Legislature did not contemplate that it was granting exclusive jurisdiction to the Land Court to adjudicate the scope of the Act and whether it preempts a particular zoning provision.

favor should be granted, with a corresponding judgment entered declaring that Section 12.6(H)(1) is a valid exercise of local authority under G. L. c. 40A and G. L. c. 132B; that the ZBA properly denied the plaintiffs' request for a use variance; and that the ZBA properly upheld the Zoning Officer's Cease and Desist order barring the plaintiffs' from using Rodeo in the Squibnocket Overlay Zoning District.

CHRIS MURPHY, ET AL.

By their attorneys,



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Dated: November 21, 2013

CERTIFICATE OF SERVICE

I, Michael A. Goldsmith, hereby certify that I have this 21st day of November, 2013, caused a copy of the within Defendants' Opposition to the Plaintiffs' Motion for Summary Judgment, to be served on the plaintiffs, by mailing a copy of the same, first class mail, postage pre-paid, to:

Amy E. Kwesell, Esq.
Rubin & Rudman, LLP
50 Rowes Wharf
Boston, MA 02110



Michael A. Goldsmith