

**COMMONWEALTH OF MASSACHUSETTS**  
**BERKSHIRE, ss.** **SUPERIOR COURT**  
**DOC. NO. 19-0032**

**STOCKBRIDGE BOWL ASSOCIATION, INC.**

v.

**TOWN OF STOCKBRIDGE CONSERVATION COMMISSION & others<sup>1</sup>**

**MEMORANDUM OF DECISION AND ORDER  
ON PLAINTIFF'S COMPLAINT FOR CIVIL CONTEMPT**

**INTRODUCTION**

The plaintiff, Stockbridge Bowl Association, Inc., ("SBA") filed a Verified Complaint for Contempt pursuant to Mass. R. Civ. P. 65.3. The Verified Complaint was filed on September 24, 2020, asserting that the defendant, Town of Stockbridge Conservation Commission ("Commission") violated orders issued by the Berkshire Superior Court. Specifically, the Contempt Complaint asks the court to hold Commission in contempt for disobeying the Court's Order on the parties' Cross Motion for Judgment on the Pleadings (Order) entered on December 3, 2019. The Summons on Complaint for Contempt was issued October 5, 2020. The hearing on the Contempt Complaint was held on October 29, 2020.

**STATEMENT OF FACTS**

The facts of this dispute are not in serious dispute. In fact, the following facts asserted in the Complaint were admitted in the defendant's answer and a hearing was held regarding the legal issues.<sup>2</sup>

By way of background, on November 4, 2018, the SBA filed with the Commission a Notice of Intent ("NOI") for an Ecological Restoration Limited Project under 310 CMR 10.53(4), pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40. The NOI sought approval to initiate an aquatic vegetation management program to apply the herbicide fluridone to the Stockbridge Bowl to control Eurasian Milfoil.

<sup>1</sup> Ron Broucker, Joseph H. DeGiorgis, Louise Gachet, John Hart, Patrick White, Tom Labelle, Jay Rhind, and Charlotte Underwood-Miller, as members of the Stockbridge Conservation Commission.

<sup>2</sup> The Court reserves its rights to make additional findings of fact in the Discussion section of this Decision.

On December 7, 2018, NHESP, a part of the Division of Fisheries and Wildlife, approved the SBA's NOI to the extent it proposed a whole-lake fluridone treatment for the first year, subject to specific conditions.<sup>3</sup> The Commission convened three public hearings on the SBA's NOI on December 11, 2018,<sup>4</sup> January 8, 2019, and January 22, 2019.

Dr. Robert Kortmann, an expert retained by the Commission, submitted a memorandum to the Commission regarding the SBA's NOI on January 4, 2019, and appeared before the Commission on January 8, 2019. Dr. Kortmann "opined that fluridone treatment should be a component of a management plan for the lake, but believed that the herbicide should first only be applied to a 'large block' section of the lake... This would allow the town to monitor the effect the herbicide had on calcite formation in a smaller portion of the lake."

Dr. Kortmann further "stated that if the application did not affect calcite formation, he did not see any problem with applying fluridone to the entire lake. Dr. Kortmann did not believe that it was necessary to delay any fluridone treatment to first conduct a study, as in his opinion the only way to determine whether fluridone treatment would lead to a cyanobacteria bloom was to apply the treatment and monitor the lake closely." Dr. Kortmann did "not recommend additional routine annual monitoring as a condition of permit approval..."

On February 5, 2019, the Commission issued an Order of Conditions denying the SBA's request under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, the Massachusetts Department of Environmental Protection Wetlands Protection Regulations, 310 CMR 10.00, and the Town of Stockbridge Wetlands Protection Bylaw. The appellate rights of SBA diverge at this point with the appeal of the decision under the Wetland Protection Act proceeding administratively to the DEP, while the Commission's decision under the Town's Bylaw proceeding directly to the Superior Court. The Commission's reasons were the same in each appeal.

On February 11, 2019, the SBA filed a Complaint with the Superior Court to appeal the Commission's denial of the SBA's NOI under the Town's Bylaw (the "Superior Court Appeal"). On December 3, 2019, in a lengthy decision, I ordered that the case be remanded to the Commission for approval of the project "under the [T]own's [B]ylaw subject to the conditions required by the Division of Fisheries and Wildlife and those recommended by Dr. Kortmann in his report and presentation." See Memorandum and Order dated, December 3, 2019.

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<sup>3</sup> The specific conditions required by NHESP are as follows: (a) Treatment or booster concentration, as applied, may not exceed 20 ppb (liquid or pellets); (b) Total lake-wide concentration shall not exceed 12 ppb; (c) One additional FasTest location shall be added around the mid-point of the outlet channel; and (d) This authorization is for a single season of full-basin application of fluridone (Sonar) during the 2019 calendar year, as described in the Notice of Intent and supporting materials. Should the 2019 fluridone application not occur, this treatment may be conducted in any one of years 2019, 2020, 2021, 2022, 2023, with prior written approval by the Division.

<sup>4</sup> At the opening of this hearing, the SBA modified its application to include a single-year, whole-lake fluridone treatment in compliance with NHESP's conditions.

On February 7, 2019, the SBA filed a separate appeal with DEP under the Massachusetts Wetlands Protection Act (“State Appeal”). In connection with the State Appeal, the SBA, DEP, and the Town engaged in extensive settlement discussions resulting in a Settlement Agreement and a *Proposed* Final Order of Conditions with corresponding Special Conditions (“*Proposed* FOC”) approved by each party.

The *Proposed* FOC permits a whole-lake treatment with fluridone following these steps: (1) a vegetative assessment of two test plots and one control plot in year one; (2) treatment of the two test plots with fluridone in year two; (3) a second vegetative assessment of the two test plots and control plot in year three; and (4) a whole-lake application of fluridone in year four, provided that the Project Goal is achieved to the satisfaction of NHESP and DEP. As part of the State Appeal, the Town has explicitly agreed to whole-lake treatment of the Stockbridge Bowl with fluridone.

On July 2, 2020, the written Settlement Agreement, Joint Motion to Approve the Parties’ Settlement Agreement and Issue a Final Order of Conditions, and the *Proposed* FOC were filed with the Massachusetts Department of Environmental Protection Office of Appeals and Dispute Resolution (“OADR”) in anticipation of a complete resolution of the State Appeal. The Joint Motion to Approve the Parties’ Settlement Agreement and Issue a Final Order of Conditions is still pending before the OADR.

On January 14, 2020, the matter now returned to the Commission for a public hearing on the remand Bylaw permit. After multiple continuances, at the SBA’s request pending resolution of the State Appeal, the public hearing resumed on May 26, 2020. At this point, pursuant to my Order, the Commission was expected to issue a Bylaw permit in compliance the *Proposed* FOC.

Rather than issue the Bylaw permit as required by the Order, during a public hearing held on June 23, 2020, the Commission presented a draft list of 20 new permit conditions to the SBA. For reasons that are not clear, the Commission presented the new conditions to SBA at the hearing without giving prior notice. The Commission then voted to an Amended Order of Conditions that added the 20 additional special condition. This list included new conditions that were not in the SBA’s NOI, Dr. Kortmann’s recommendations, or NHESP’s approval letter. My review of this list compels the conclusion that, again, the Commission’s intent was simply to derail the application of the herbicide fluridone to the Stockbridge Bowl to control Eurasian Milfoil.

The SBA was still willing to work with the Commission and, by letter dated June 25, 2020, readily agreed to some ministerial changes but refused to comply with the items that would disrupt the plan as ordered by the Court and modified by DEP and the Division of Fisheries & Wildlife. Specifically, the SBA objected to all substantive conditions that went beyond the conditions imposed by NHESP and the recommendations of Dr. Kortmann as a violation of the Court’s Order.

During a public hearing held on July 14, 2020, the Commission presented revised conditions to the SBA. The SBA objected to the revised permit conditions on the grounds

that (1) the conditions imposed lake monitoring not contemplated by NHESP or Dr. Kortmann in violation of the Court's Order; and (2) the conditions did not authorize a whole-lake treatment of the Stockbridge Bowl with fluridone as agreed upon by the Town in the settlement of the State Appeal and in compliance with the Court's Order.

On July 28, 2020, the Commission further modified the permit conditions, but did not remove the additional lake monitoring or authorize the whole-lake treatment. The Commission once again presented the revised permit conditions to the SBA for the first time during a public hearing. The SBA objected to the proposed permit conditions.

The Commission issued its written Amended Order of Conditions under the Stockbridge Wetlands Protection Bylaw on August 19, 2020. There are 20 conditions.

### LEGAL REQUIREMENTS

Proceedings for civil contempt are governed by Mass.R.Civ.P. 65.3. Until recently, the burden of proof in a contempt action was on the complainant to prove its case by a preponderance of the evidence. *Judge Rotenburg Educ. Ctr. v. Comm'r of Dept. of Mental Retardation*, 424 Mass. 430, 443 (1997). Beginning with the issuance of the rescript in *In re Birchall*, 454 Mass. 837 (2009), the Supreme Judicial Court now requires a civil contempt finding be supported by "clear and convincing evidence of disobedience of a clear and unequivocal command." *Id.* at 852-53. The order must be sufficiently clear to provide the party with unequivocal notice of the conduct that is required or prohibited. *Demoulas v. Demoulas Supermarkets, Inc.*, 424 Mass. 501, 565 (1997). Where the order is ambiguous or the disobedience is doubtful, there cannot be a finding of contempt. *Pedersen v. Klare*, 74 Mass. App. Ct. 692, 697 (2009).

"[T]he purpose of civil contempt is "to secure to the aggrieved party the benefit of the decree, either by means of a fine payable to the aggrieved party as a recompense for his loss through disobedience to the decree, or by means of imprisonment terminable upon compliance with the decree." *Warren Gardens Hous. Coop. v. Clark*, 420 Mass. 699, 701 (1995), quoting *Godard v. Babson-Dow Mfg. Co.*, 319 Mass. 345, 347 (1946). Good faith, absence of willful disobedience, and lack of intent to violate an injunction are not valid defenses. *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 37 (1972).

Unlike its criminal counterpart, civil contempt is not punitive but intended to achieve compliance with the court's order for the benefit of the complainant. *Commonwealth v. Rape Crisis Services of Greater Lowell, Inc.*, 416 Mass. 190, 193 (1993). Consequently, "[c]ivil contempt will not be decreed if a defendant is unable to comply with a court's order ..." *Milano v. Hingham Sportswear Co., Inc.*, 366 Mass. 376, 378 (1974). Civil contempt has as its purpose not punishment but rather achieving compliance with the court's orders for the benefit of the complainant. The purpose being remedial, the formation of a remedy is within the discretion of the court. *Eldim, Inc. v. Mullen*, 47 Mass. App. Ct. 125, 129 (1999). The burden of proof in a contempt action is on the complainant to prove her case by a preponderance of the evidence. *The Judge Rotenberg Educ. Ctr.* supra at 443.

Since the purpose of civil contempt is primarily remedial, there is no requirement that the complainant show an intention to defy the court or to degrade its process. It is enough if it shows the defendant violating the terms of an unambiguous decree. The absence of willfulness will not purge civil contempt; it is enough to establish that the individual defendant was responsible for acts constituting a violation. *O'Connell v. Greenwood*, 59 Mass. App. Ct. 147, 150 n. 3 (2003). In a civil contempt proceeding in Massachusetts, the alleged contemnor's good faith and/or reliance on advice of legal counsel is irrelevant; all that must be proved is that the alleged contemnor violated the order. *Judge Rotenberg*, 424 Mass. at 453.

Finally, attorney's fees and costs are an appropriate element of a successful civil contempt proceeding. They are the court's means of compensating the contempt plaintiff for costs incurred as a consequence of the defendant's violation of the court order. Such awards are proper whether or not the underlying violation is found to have been willful, and are within the court's remedial discretion. *The Judge Rotenberg Educ. Ctr*, 424 Mass. at 468,

## DISCUSSION

After the hearing, on November 10, I received an unsolicited document from the defendant entitled "Status Report of the Stockbridge Conservation Commission." The missive indicated that on November 5, the Commission voted unanimously to issue a Second Amended Order of Conditions as requested by the SBA. The Amended Order was signed and issued by the Commission on November 10, 2020. The plaintiff responded to this information on November 11 by acknowledging that the Commission has complied with the original Court Order. However, the SBA asserts that the Complaint for Contempt must be resolved and appropriate relief ordered for the delay in issuing the Order.

Accordingly, I am required to address the merits of the Contempt Complaint, but limited to damages, if any, incurred by the actions of the defendant.

In this case, the defendants may be held liable for contempt if it is found by clear and convincing evidence that: (1) they had actual notice of the Order; (2) the Order was a clear and unequivocal command; and (3) their actions constituted a clear and undoubted disobedience of that clear and unequivocal command. *Demoulas*, 424 Mass. at 565-70.

I find that the plaintiff has established all three conditions by clear and convincing evidence. First, the defendants had actual notice of my order; this is no dispute about this element. The plaintiff's relentlessness in quoting the Court's Order in opposing the changes is overwhelming evidence of such knowledge.

The Order was a clear and unequivocal command to the Conservation Commission. There is nothing ambiguous in the language, "the Conservation Commission will approve the project under the town's bylaw subject to the conditions required by the Division of Fisheries and Wildlife and those recommended by Dr. Kortmann in his report and presentation." In addition to the rather straightforward command, the parties had the benefit of a very lengthy decision discussing the background, the issues involved and the

reasons for the decision. Both the language and the context of the decision made the Order clear and unequivocal. I find that the Court Order dated December 3, 2019, contain the requisite clarity and constitute “clear and unequivocal command[s].” *O’Connell v. Greenwood*, 59 Mass. Appt. Ct. 147, 149–50 (2003).

Finally, there was a clear and undoubted disobedience of the command. What is striking is the fact that the Commission, rather than slipping a new condition or two into its approval, took an axe to the Court’s Order. Having failed the first time, the Commission apparently viewed this as a “second bite of the apple;” an opportunity to make it as challenging as possible for the herbicide fluridone to be employed in the Stockbridge Bowl.

The Board does not contest the fact it was aware and clearly understood the terms of the Order. Instead, it asserts procedural and substantive defenses; (1) “contempt is not an appropriate remedy when another statutory remedy is available” and (2) the Commission did not engage in contemptuous behavior.

#### *A. Plaintiff’s Ability to Proceed with Contempt Complaint*

In a passing argument, the defendants assert that the SBA should not have brought this action “because a more appropriate remedy is available.” Instead, the plaintiff should have filed “a certiorari appeal of the Amended OOC [Order of Conditions].” The Commission claims that “[c]ontempt is not an appropriate remedy when another statutory remedy is available.” The defendant cites three cases for this position. I disagree.

First, the cases cited by the defendants do not stand for the propositions cited, not even close. No authority has been cited, or argument advanced that would allow this court to conclude that a contempt action can be annulled by further contemptuous behavior by the defendant.

The defendant is before the Court by refusing to sign the OOC as required by the Court Order; conditions that were established based on the hearings that were held in 2019. These hearings were pursuant to Stockbridge’s zoning bylaw. The evidentiary hearings were completed on January 22, 2019 and the Commission issued its decision denying the project. By way of *certiorari*, the SBA challenged the decision in Superior Court claiming that it was not supported by substantial evidence. The Court agreed and by Decision of December 3, 2019, remanded the case back to the Commission and ORDERED the defendants to “approve the project under the town’s bylaw subject to the conditions required by the Division of Fisheries and Wildlife and those recommendation by Dr. Kortmann in his report ant presentation.” The role of the Commission had ended except to “approve” the project under the town’s bylaw.”

The matter was delayed to allow the DEP and Division of Fish and Wildlife to review the wetland issues within their jurisdiction. The Commission was not involved in these wetlands issues. Once the matter was resolved with a Settlement Agreement, the path was clear to approve the project from all regulatory involvement. The Commission cannot

contravene the Court Order by scheduling another hearing, amending the OOC by adding more conditions and forcing the plaintiff to appeal from this decision. If that were the case, a board could avoid any court decision by simply scheduling hearings and adding conditions.

The plaintiff was well within its rights, prophylactically, to file a complaint in *certiorari* challenging the new conditions, and it does not lose its rights to claim that the actions of the Commission in imposing 20 new conditions violated the previous Court Order.<sup>5</sup> In other words, a party in such a circumstance does not waive its right to test the propriety of the Commission's actions or, at least, to preserve its right to appeal. The contempt action is to address the failure of the Commission to obey the Court's Order of December 3, 2019. The new *certiorari* action is to adjudicate the legality of the 20 new conditions imposed by the Commission with its Amended COO. It should be noted that the initial hearing on this matter had been officially closed after receiving considerable testimony, evidence and argument. To unilaterally revive the hearing and arbitrarily impose 20 conditions after losing in court bespeaks of retaliation.

The plaintiff did not forfeit its right to pursue its remedies by way of a Complaint for Contempt by filing an action in *certiorari* to challenge the added conditions in the Amended COO.

### ***B. Contemptable Behavior***

The Commission argues that the plaintiff "alleges no facts sufficient to provide 'clear and convincing evidence of disobedience of a clear and unequivocal command.'" Specifically, it asserts that the Commission granted a permit with the issuance of the Amended Order of Conditions."

As noted by the plaintiff, the permit that the Commission granted is significantly different than the permit that was before the Court and ordered to be approved. In addition to changing the nature of the project, the Commission's actions threaten the very existence of the project by arrogating to itself the decision whether whole-lake treatment will be authorized contrary to the NOI, requirements of the Fisheries and Wildlife and Dr. Kortmann. It has also placed financial impediments to deter the SBA from any further engagement; conditions that were not even discussed at its initial hearings. Finally, the Commission has cleverly given itself absolute authority to control and terminate the project at any time.

The only leeway to change this project would be found in the events that postdate the Court's order. The Order specifically gave the DEP and the Division of Fisheries and Wildlife the ability to alter or deny the proposal through the Wetland Protection Act.<sup>6</sup> The Commission was given no authority to intervene in the wetland issues that fall within the

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<sup>5</sup> Enforcement of the Court Order would avoid the necessity of another *certiorari* hearing in the Superior Court.

<sup>6</sup> The DEP and Division of Fisheries and Wildlife were also permitted to use the recommendations of Dr. Kortmann.

jurisdiction of the DEP. The Commission's work regarding the bylaw was done; the only duty left was to approve the permit.

In the face of an adverse court order, a litigant has three options. It can seek a clarification, move the court to reconsider its decision or appeal the order to the appellate courts; it cannot ignore or, in this case, defiantly, engage in actions contrary to the Order. As I noted in the Decision and Order, the Board acted in an arbitrary and disingenuous manner in its initial review of this matter and it has continued such behavior when the SBA returned to the Board after securing authorization from the DEP, Division of Fisheries and Wildlife and the Town of Stockbridge. The Board's confrontational actions, although possibly imbedded with good intentions, is contrary to the letter and spirit of the Order. It was done intentionally to obstruct the SBA, without any pretense of lawful authority.

The defendants were aware of and intentionally violated the terms of the Court Order by refusing to approve the project and, instead, "doubling down" and imposing additional conditions to the permit that would derail it. Conditions that were foisted on the plaintiff without even the benefit of due process. I find that the plaintiff has proved these actions were done by "clear and undoubted disobedience of a clear and unequivocal command." *Warren Gardens Hous. Coop. v. Clark*, 420 Mass. 699, 700 (1995).

Other than additional attorney's fees, the plaintiff has not incurred any harm or damages in the delay in issuing the Order.

### ORDER FOR JUDGMENT

1. The defendants are in violation and in contempt of the Court Order, entered December 3, 2019;
2. The plaintiff shall submit to the defendant, within 10 days of receipt of this decision, a Request for Attorney's Fees and Costs for all time and expenses in seeking relief from the defendant's failure to sign the proposed Final Order of Conditions, with an affidavit identifying and itemizing the specific relief requested. The defendants shall have 10 days from receipt of the Request to file an opposition, if any. The plaintiff will file the documents with the court and a hearing on the Request will be scheduled if an opposition is filed.

SO ORDERED

<p><b>ENTERED</b> THE COMMONWEALTH OF MASSACHUSETTS BERKSHIRE S.S. SUPERIOR COURT DEC 01 2020 <i>James Sturgeon</i></p>
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*J. A. A. A.*  
Associate Justice Superior Court