

Commonwealth of Massachusetts  
County of Norfolk  
The Superior Court

Civil Docket **NOCV2011-00648**

RE: Pine Creek Development Corporation et al v Norfolk et al

TO: I. Aaron Cohen, Esquire  
Zimble & Brettler  
21 Custom House Street  
Boston, MA 02110

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**CLERK'S NOTICE**

This is to notify you that in the above referenced case the Court's action on **07/10/2012**:

*RE: Defendant Marie Simpson's MOTION to Dismiss (MRCP 12b)  
Complaint of Pine Creek Development Corporation*

**is as follows:**

**Motion (P#13.0) After hearing, motions of the defendants are ALLOWED to the extent stated herein as they relate to Count I as against the Town of Norfolk and the Conservation Commission of the Town of Norfolk, Count II, Count V, Count VI and Count VIII. The motions are denied as to Count I as against Jeffrey Kane, Marie Simpson and Jason R. Talerma, Count III, Count IV and Count VII. See Memorandum of Decision and Order. (Barbara Dortch-Okara, Associate Justice) dated July 9, 2012 Notices mailed 7/10/2012**

Dated at Dedham, Massachusetts this 10th day of July,  
2012.

Walter F. Timilty,  
Clerk of the Courts

BY:

Assistant Clerk

Telephone:

Copies mailed 07/10/2012

Commonwealth of Massachusetts  
County of Norfolk  
The Superior Court

Civil Docket NOCV2011-00648

RE: Pine Creek Development Corporation et al v Norfolk et al

TO: I. Aaron Cohen, Esquire  
Zimble & Brettler  
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Boston, MA 02110

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**CLERK'S NOTICE**

This is to notify you that in the above referenced case the Court's action on **07/10/2012**:

*RE: Defendant Graves Engineering Inc's MOTION to Dismiss*

is as follows:

**Motion (P#14.0) After hearing, motions of defendants are ALLOWED to the extent stated herein as they relate to Count I as against the Town of Norfolk and the Conservation Commission of the Town of Norfolk, Count II, Count V, Count VI and Count VIII. The motions are DENIED as to Count I as against Jeffrey Kane, Marie Simpson and Jason R. Taleran, Count III, Count IV and Count VII. See Memorandum of Decision and Order. (Barbara Dortch-Okara, Associate Justice) dated July 9, 2012 Notices mailed 7/10/2012**

Dated at Dedham, Massachusetts this 10th day of July,  
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Commonwealth of Massachusetts  
County of Norfolk  
The Superior Court

Civil Docket **NOCV2011-00648**

RE: Pine Creek Development Corporation et al v Norfolk et al

TO: I. Aaron Cohen, Esquire  
Zimble & Brettler  
21 Custom House Street  
Boston, MA 02110

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**CLERK'S NOTICE**

This is to notify you that in the above referenced case the Court's action on **07/10/2012**:

*RE: Town of Norfolk and Norfolk Conservation Commission's motion to dismiss*

is as follows:

**Motion (P#15.1) After hearing, motions of the defendants are ALLOWED to the extent stated herein as they relate to Count I as against the Town of Norfolk and the Conservation Commission of the Town of Norfolk, Count II, Count V, Count VI and Count VIII. The motions are DENIED as to Count I as against Jeffrey Kane, Marie Simpson and Jason R. Talerma, Count III, Count IV and Count VII. See Memorandum of Decision and Order. (Barbara Dortch-Okara, Associate Justice) dated July 9, 2012 Notices mailed 7/10/2012**

Dated at Dedham, Massachusetts this 10th day of July, 2012.

Walter F. Timilty,  
Clerk of the Courts

BY:

Assistant Clerk

Telephone:

Copies mailed 07/10/2012

Commonwealth of Massachusetts  
County of Norfolk  
The Superior Court

Civil Docket NOCV2011-00648

RE: Pine Creek Development Corporation et al v Norfolk et al

TO: I. Aaron Cohen, Esquire  
Zimble & Brettler  
21 Custom House Street  
Boston, MA 02110

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**CLERK'S NOTICE**

This is to notify you that in the above referenced case the Court's action on **07/10/2012**:

*RE: Defendant Jason R Talerma's MOTION to Dismiss (MRCP 12b)*

is as follows:

**Motion (P#17.2) After hearing, motions of the defendants are ALLOWED as to the extent stated herein as they relate to Count I as against the Town of Norfolk and the Conservation Commission of the Town of Norfolk, Count II, Count V, Count VI and Count VIII. The motions are DENIED as to Count I as against Jeffrey Kane, Marie Simpson and Jason R. Talerma, Count III, Count IV and Count VII. See Memorandum of Decision and Order. (Barbara Dortch-Okara, Associate Justice) dated July 9, 2012 Notices mailed 7/10/2012**

Dated at Dedham, Massachusetts this 10th day of July,  
2012.

Walter F. Timilty,  
Clerk of the Courts

BY:

Assistant Clerk

Telephone:

Copies mailed 07/10/2012

Draft  
7/9/12

23.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT  
NOCV 11-00648

PINE CREEK DEVELOPMENT CORPORATION, et als.<sup>1</sup>

vs.

THE TOWN OF NORFOLK, et als.<sup>2</sup>

RECEIVED & FILED  
CLERK OF THE COURTS  
NORFOLK COUNTY

7/10/12

MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANTS' MOTIONS TO DISMISS

By this action, Pine Creek Development Corporation ("Pine Creek"), John F. Scott ("Scott"), and Robert J. Brown ("Brown") (collectively, "the plaintiffs"), seek damages in eight counts asserting claims for: violation of the Massachusetts Civil Rights Act ("MCRA") (Count I), employment of a *de facto* policy to prevent development (Count II), intentional infliction of emotional distress (Count III), taking of property without just compensation (Count IV), interference with contractual relations (Count V), interference with prospective advantageous relations (Count VI), breach of fiduciary duties and obligations of confidentiality (Count VII), and conspiracy (Count VIII).<sup>3</sup> Now before the court are the motions to dismiss of the defendants Town of Norfolk ("Norfolk"), the Conservation Commission of the Town of Norfolk ("the

<sup>1</sup> John F. Scott and Robert J. Brown

<sup>2</sup> The Conservation Commission of the Town of Norfolk, MA, Jeffrey Kane, Marie Simpson, Jason R. Talerman and Graves Engineering, Inc.

<sup>3</sup> A complaint was originally filed in the United States District Court for the District of Massachusetts on March 2, 2010. Final judgment dismissing all federal claims contained in that complaint issued on April 4, 2011. The District Court declined to exercise jurisdiction over the state law claims which were dismissed without prejudice.

Commission”), Jeffrey Kane (“Kane”), Marie Simpson (“Simpson”), Jason R. Talerma (“Talerma”), and Graves Engineering, Inc. (“Graves”) (collectively, “the defendants”). Moving pursuant to Mass. R. Civ. P. 12(b)(6), they assert that the plaintiffs have failed to allege facts that could plausibly support their claims.

### **BACKGROUND**

The following facts are drawn from the plaintiffs’ complaint and are accepted as true for the purposes of these motions only.

Pine Creek is a Massachusetts corporation with a principal place of business in Yarmouth, Massachusetts. Scott and Brown are principals of Pine Creek. In 2000, Pine Creek acquired 34 acres of undeveloped land in Norfolk, Massachusetts formerly owned by a nominee trust acting for the benefit of the Boy Scouts (the “Boy Scout Land”). Also in 2000, Pine Creek acquired adjacent property to be used for access to the Boy Scout Land. These parcels of land will be referred to collectively as “the property.”

Shortly after acquiring the property, Pine Creek filed a Notice of Intent with the Commission under the Massachusetts Wetlands Protection Act, G. L. c. 131, § 40 *et seq.* (“the Wetlands Act”) and under the Norfolk Wetlands Protection Bylaw (“the “Wetlands Bylaw”). The Notice of Intent proposed a through roadway crossing over an intermittent stream that would allow for two points of entrance to the planned subdivision. In order to mitigate the resulting impact, Pine Creek proposed to create a new wetland that was larger in area than the wetland area proposed to be filled. During the review process, Pine Creek amended the Notice of Intent to substitute the construction of a bridge over the intermittent stream in connection with the construction of the through road, and to include a storm-water management system and utilities

for a 17-lot residential subdivision. The amendment also reduced the amount of wetlands to be filled.

In 2000, during an initial meeting, Simpson, who was administrative assistant to the Commission, told Scott, "You'll never be permitted to develop the Boy Scout Land." Simpson also made a substantially identical statement to Scott on a subsequent occasion. Simpson made a similar statement to a prior prospective purchaser of the Boy Scout Land, who then decided not to purchase the property.

On October 3, 2002, the Commission denied the plaintiffs' first application under the Wetlands Act and the Wetlands Bylaw based on the Commission's objection to the planned crossing. The Commission issued the denial more than 50 days after the close of the public hearing. Pine Creek appealed the denial to the Department of Environmental Protection ("DEP") and to the Superior Court. In 2003, after reviewing a requested plan revision, the DEP issued a Superseding Order of Conditions that overturned the Commission's denial. The Superseding Order was appealed.

Because the plan approved by the DEP differed from the one previously filed under the Wetlands Bylaw, Pine Creek returned to the Commission and filed a revised plan. During hearings regarding the revised plan, the Commission instructed Simpson to contact third parties to perform a peer review of Pine Creek's project. However, Simpson did not do so. Simpson also failed properly to facilitate communications among Pine Creek, the Commission, and other parties on numerous occasions during the permitting process.

On July 15, 2004, during the hearing process, the Commission informed the plaintiffs that all communications between Pine Creek and the Commission's wetland consultant, Nover-

Armstrong, must go through the Commission. This slowed communications between Pine Creek and Nover-Armstrong. Although Nover-Armstrong eventually approved Pine Creek's plan, the Commission denied the requested Order of Conditions in November 2004. The Commission issued its denial more than 70 days after the close of the public hearing. The plaintiffs appealed that decision to the Superior Court, and the court affirmed the denial in September 2005.

In June 2006, Pine Creek filed a new Notice of Intent with the Commission with a revised replication plan. The Commission retained Graves to perform a peer review of the Notice of Intent, even though Graves was not the lowest bidder. Although the Wetlands Bylaw requires an applicant's approval before any contract can be signed for more than \$10,000, the Commission did not obtain Pine Creek's approval before agreeing to Graves' bid of \$24,000. Graves had previously served as a peer review consultant on a project for which Kane, the Commission's chairman, had prepared plans. Kane did not reveal this prior relationship to the plaintiffs. Graves' proposal stated that it would prepare a written report within 28 days; however, Graves was still providing new comments to the plaintiffs on March 26, 2007.

Throughout the hearings in 2006 and 2007, Pine Creek's plans showed 15 house lots and an infiltration basin located within a 100-foot buffer zone. Graves did not recommend any changes to the basin or the number of houses. Nevertheless, at the last meeting of the Commission, Kane requested that the basin be moved outside the 100-foot buffer zone and the number of lots be reduced to 14.

In April 2007, the Commission voted to issue a Final Order of Conditions under the Wetlands Bylaw (the "Final Order") approving the project. The Final Order, which was written by Talerman, stated that the plaintiffs could not begin construction until their revised plan had



been submitted and approved, and the final issues raised by Graves addressed. Talerman had allegedly remarked to other members of the Commission that he would draft the Final Order to prevent Pine Creek from ever successfully completing its project. The Final Order stipulates that Pine Creek must replace wetlands that will be disturbed by the construction of the bridge. However, the bridge could not be built until the replaced wetlands have been created and stabilized for two growing seasons. This prevented Pine Creek from proceeding with its project for at least two years. The Final Order also required work to be completed within three years. The plaintiffs contend that was impossible given the two-year waiting period for wetlands stabilization.

Pursuant to the Final Order, Pine Creek revised its plan to remove the infiltration basin and reduce the subdivision to 14 lots. The revised plan was submitted to the Commission for review and approval. The Final Order also required Pine Creek to address certain issues raised by Graves. Pine Creek's consultant provided its initial response to Graves' issues in September 2007. The plaintiffs then requested approval of their plan from Graves and the Commission, but received no response. Meanwhile, on November 13, 2007, Pine Creek received a special permit from the Norfolk Zoning Board of Appeals allowing it to construct its bridge across the intermittent stream. The special permit would lapse if construction did not begin within one year. In May 2008, the plaintiffs learned that Graves had not responded to their request for approval because the Commission had never authorized Graves to review Pine Creek's submission.

The plaintiffs entered into a mortgage loan transaction (the "New Loan") with 54, LLC (the "Lender"), in order to refinance an existing loan (the "Original Loan"). The plaintiffs had hoped to pay off the Original Loan with proceeds from the sale of lots, but the Original Loan came

due before sales could take place. Delays in the permitting process caused the plaintiffs to default on the New Loan.

On August 18, 2008, Kane sent a letter to the DEP in connection with the appeal of its Superseding Order. The letter stated that Graves had reviewed the plans submitted by Pine Creek and had concluded that the drainage system would not function as designed. This letter was written during the period when, according to the Commission, Graves was not authorized to perform the final review.

Finally, the Commission informed the plaintiffs on October 8, 2008 that Graves was authorized to perform the review. The plaintiffs received further comments from Graves on December 23, 2008. As of the date of filing this complaint, Pine Creek had received no additional comment on its revised plans.

Pine Creek appealed the Final Order to the Superior Court. On April 10, 2008, the plaintiffs were informed that a settlement offer had been authorized, but they did not receive the offer until July 28, 2008, more than three months later.

## DISCUSSION

### **I. Standard of Review**

When evaluating the legal sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court accepts as true all of the well-pled factual allegations of the complaint, and draws all reasonable inferences in favor of the plaintiff. Eyal v. Helen Broad. Corp., 411 Mass. 426, 429 (1991), and cases cited. To survive a motion to dismiss, the complaint must set forth the basis of the plaintiff's entitlement to relief with "more than labels and conclusions." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atlantic Corporation v.

Twombly, 550 U.S. 544, 555 (2007). Factual allegations need not be detailed, but “must be enough to raise a right to relief above the speculative level.” Id., quoting Bell Atlantic Corporation, 550 U.S. at 555. The complaint must set forth “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.” Id., quoting Bell Atlantic Corporation, 550 U.S. at 557.

## **II. The Plaintiffs’ Claims**

### **A. Violation of the Massachusetts Civil Rights Act**

The plaintiffs allege that Norfolk, the Commission, Kane, Simpson, and Talerma violated the MCRA, G. L. c. 12, §§ 11H and 11I, in their dealings with the plaintiffs.

- 1. Norfolk and the Commission are not subject to suit under the MCRA as they are not “persons” under the statute.*

Norfolk and the Commission maintain that they are not “persons” subject to suit under the MCRA. While the Supreme Judicial Court has held that “[i]t is not resolved whether the Civil Rights Act applies to municipalities,” an examination of relevant statutory and case law suggests that municipalities and their political subdivisions are not “persons” under the statute. American Lithuanian Naturalization Club, Athol, Mass. Inc. v. Board of Health of Athol, 446 Mass. 310, 325 (2006).

First, the Appeals Court concluded that a municipality is not a “person” under the MCRA in Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 592-593 (2001). G. L.c. 4, § 7, defines “person” to “include corporations, societies, associations and partnerships,” but makes no mention of municipalities, even though other terms within that section are defined to include cities and towns. Nothing in the MCRA suggests “that the Legislature did not intend the term ‘person’ to

take on the statutory definition appearing in G. L. c. 4, § 7.” Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 96 (1999). Moreover, “it is a widely accepted rule of statutory construction that general words in a statute such as ‘persons’ will not ordinarily be construed to include the State or political subdivisions thereof.” Hansen v. Commonwealth, 344 Mass. 214, 219 (1962). Because there appears to be no evidence that the Legislature intended municipalities and their subdivisions to be subject to suit under the MCRA, the plaintiffs cannot maintain this claim against Norfolk and the Commission.

2. *Kane and Talerman may be liable under the MCRA as governmental officers.*

Kane and Talerman argue that they are shielded from liability by the doctrine of qualified immunity. This doctrine protects government officers who hold discretionary power “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The plaintiffs contend that Kane and Talerman do not perform discretionary functions, and that their actions violated “clearly established statutory or constitutional rights.” Id.

To determine whether Kane and Talerman perform discretionary functions, the court must first determine “whether the actor had any discretion to do or not to do what the plaintiff claims caused him harm.” Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992). Of course, any substantive decisions made by Kane and Talerman were discretionary. However, the plaintiffs claim that Kane and Talerman caused them harm by failing to issue a decision regarding their application within twenty-one days of the close of the public hearing, as mandated by G. L. c. 131,

§ 40. While the substance of this decision was clearly within their discretion, Kane and Talerman were bound by statute to issue the decision within twenty-one days. This action was not discretionary. As a result, the doctrine of qualified immunity would not bar the plaintiffs' claims against Kane and Talerman for delay in filing the decision.

3. *Plaintiffs have alleged a prima facie case against Kane, Talerman, and Simpson.*

“In order for the plaintiffs to recover under the provisions of G. L. c. 12, §§ 11H and 11I, they [are] required to prove that: (1) their exercise or enjoyment of rights secured by the Constitution or the laws of either the United States or the Commonwealth, (2) were interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by “threats, intimidation or coercion.” Freeman v. Planning Bd. of West Boylston, 419 Mass. 548, 564 (1995), quoting Bally v. Northeastern Univ. 403 Mass. 713, 717 (1989).

First, it is important to note that “[a] Plaintiff does have the constitutional right to own land and to use and improve it according to [his] conceptions of pleasure, comfort or profit, and the exercise of liberty and the pursuit of happiness.” Bell v. Mazza, 396 Mass. 176, 178 (1985), quoting Brett v. Building Comm’r of Brookline, 250 Mass. 73, 77 (1924). However, these rights are not unfettered. Swanset v. City of Taunton, 423 Mass. 390, 396 (1996). At this stage of the proceedings, the court cannot say that the plaintiffs will not be able to prove that these defendants have acted beyond their regulatory authority.

Secondly, the Legislature explicitly limited the remedies contained in the MCRA to situations where the derogation of secured rights occurs by “threats, intimidation or coercion.” Bell at 182-183 (1985). While the defendants argue that the actions of Simpson, Talerman, and

Kane cannot be seen as threatening or coercive, an objective reading of the complaint leads to a different conclusion. The plaintiffs say Simpson delayed the progress of developing the Boy Scout Land by failing to forward the communications from Pine Creek and its representatives to the members of the Commission. In addition, she told Scott on numerous occasions that Pine Creek would never be able to build on the Boy Scout Land. Talerman delayed the construction of the project through errors in his drafting of the Final Order. Kane added to the delay by retaining Graves, a company with whom he had a previous professional relationship, and allegedly persuading Graves to slow down the review process. The complaint recites additional acts which may have been targeted to stall the plaintiffs' development of the property.

What is zealous enforcement of the Wetlands Bylaw to the defendants' eyes, may be shown to be actionable "threats, intimidation, or coercion" within the meaning of the MCRA. While our courts have established that adverse administrative action does not rise to the level of "threats, intimidation or coercion," an exception is made where a plaintiff is able to demonstrate a "scheme of harassment." Smith v. Longmeadow, 29 Mass. 599, 603 (1990), quoting Pheasant Ridge Associates Limited Partnership v. Burlington, 399 Mass. 771, 781 (1987). In order to establish a "scheme of harassment," there must be some evidence of animus against the plaintiffs or their project and an attempt to thwart the project through adverse administrative action unrelated to the Commission's legitimate concerns. Freeman, at 565 n.17. Here, the plaintiffs' allegations are sufficient to state a claim under the MCRA based on an alleged scheme of harassment unrelated to the municipal regulatory interests of these town officials.

Therefore, the claims under the MCRA as set forth in Count I survive as to the individual defendants, but fail as to Norfolk and the Commission.

B. De Facto Policy to Prevent Development

The plaintiffs claim that Norfolk, the Commission, Kane, and Talerman's actions amounted to a *de facto* policy to prevent development of the property. This claim must fail as the cause of action does not exist. Based on the cases cited by the plaintiffs in opposition to the dismissal of this claim, the court assumes that plaintiffs intended to state a claim under civil rights law. Without reference to the particular statute under which the plaintiffs are seeking relief, the court cannot assume that the complaint is adequate to support the claim.

Hence, Count II is dismissed.

C. Intentional Infliction of Emotional Distress

A viable claim of intentional infliction of emotional distress requires a plaintiff to establish "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." Howell v. Enterprise Publishing Co., 455 Mass. 641, 672 (2010), quoting Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976). The plaintiffs allege that the individual defendants engaged in extreme and outrageous conduct that caused them to suffer emotional distress.

Based on the plaintiffs' complaint, one could conclude that Simpson, Kane, and Talerman willfully and maliciously interfered with Pine Creek's ability to obtain the required permits to develop the property. The allegations could support Scott and Brown's assertions that they suffered emotional distress caused by this egregious conduct, as well. Thus, the plaintiffs' claims

against Simpson, Kane and Talerman for intentional infliction of emotional distress may not be dismissed at this time.

D. Taking of Property Without Just Compensation

The plaintiffs' claim that Norfolk and the Commissions' actions amounted to a taking of property without just compensation. They first raised this taking claim in the federal court action where it was dismissed without prejudice. The District Court held that, because the plaintiffs had not availed themselves of inverse condemnation proceedings under G. L. c. 79, § 10, they had failed to exhaust their state remedies. Because an inverse condemnation proceeding would take the same form as the present claim for a regulatory taking, the plaintiffs are pursuing their available state remedies here. Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 724 (2006).

The plaintiffs allege that Norfolk and the Commission's refusal to allow them to develop the property amounted to a taking without just compensation. The United States Supreme Court has held that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992). A regulation becomes a taking when the government requires an owner to suffer a permanent physical invasion of property, or when it completely deprives an owner of all economically beneficial use of the property. Id. at 1028-1029. If the alleged taking does not fall into one of these categories, it is governed by the standards in Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 (1978).

The taking alleged in this case does not involve a permanent physical invasion of property. Moreover, it does not deprive the plaintiffs of all economically beneficial uses of their property.



“A government entity is not required to permit a landowner to develop property to the full extent he might desire or be charged with an unconstitutional taking of the property.” Daddario v. Cape Cod Comm’n, 425 Mass. 411, 417 (1997), quoting Mac-Donald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 347 (1986) (brackets omitted). Although Norfolk and the Commission have restricted the plaintiffs’ ability to use their property, the Final Order does not completely prevent the plaintiffs from developing and marketing their land. Thus, the regulation in the present case does not fall into one of the categories discussed in Lucas. 505 U.S. at 1028-1029. As a result, the court must look to the standards outlined in Penn Central Transportation Company 438 U.S. at 124.

In determining whether a compensable taking has occurred, courts should consider “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.” Leonard v. Town of Brimfield, 423 Mass. 152, 154 (1996), quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986). In the present case, it appears that the defendants’ actions may have had a significant economic impact on the plaintiffs. The Final Order issued by the Commission prevented the plaintiffs from developing the property for at least two years because of the wetlands stabilization requirement. Moreover, the Commission’s refusal to allow Graves to review the plaintiffs’ submission further delayed the process and did not allow the plaintiffs to begin construction within the one-year period allowed by their special permit.

The economic impact on the plaintiffs in this case could be far more significant than the impact on the developer in FIC Homes of Blackstone, Inc. v. Conservation Comm’n of Blackstone, 41 Mass. App. Ct. 681 (1996). In that case, a commission’s decision prevented the

developer from building on one lot, but allowed construction on more than thirty different lots. Id. at 694. In the present case, the plaintiffs say they are prevented from developing the entire subdivision for an indefinite period of time, if they are able to pursue the project at all. Such a delay could have a significant economic impact on the plaintiffs.

In addition, the defendants' actions may have interfered with the plaintiffs' reasonable investment-backed expectations. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984). The plaintiffs have alleged that the Commission refused to allow Graves to review their submission and drafted the Final Order so as to prevent the plaintiffs from developing the property until the special permit expired. While a plaintiff's investment-backed expectations could not be frustrated by the mere application of the relevant bylaw, the allegations against these defendants go far beyond the routine application of the Wetlands Bylaw. See FIC Homes of Blackstone, Inc., 41 Mass. App. Ct. at 693. For example, the plaintiffs could not have expected that the Commission would refuse to allow Graves to review their submission for more than one year. Accepting the allegations of the complaint as true, the defendants may have interfered with the plaintiffs' investment-backed expectations so that the claim of taking without just compensation survives.

E. Interference with Contractual Relations

The plaintiffs assert that Kane, Simpson, Talerman, and Graves interfered with their contractual relationship with the Lender. In an action for interference with contractual relations, the plaintiff must prove that: "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." GS Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272 (1991), citing United

Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812-817 (1990).

The defendants maintain that this claim is deficient in that the complaint fails to allege that they knew of the New Loan between the plaintiffs and the Lender. As a result, they could not have knowingly induced anyone to breach the contract. In response, the plaintiffs argue that knowledge of a specific contract is not necessary because the defendants are familiar with similar development projects and should have known that the plaintiffs would finance the project with a mortgage loan.

Constructive knowledge of a contract is not sufficient. To maintain a cause of action for interference with contractual relations, the plaintiffs must allege that Kane, Simpson, Talerman, and Graves had actual knowledge of the New Loan. McGurk v. Cronenwett, 199 Mass. 457, 461 (1908) (“it is essential both to aver and prove the defendant's knowledge of the contract in question.”). As the complaint makes no such assertion, the plaintiffs have failed to allege an essential element of interference with contractual relations and the claim must be dismissed.

F. Interference with Prospective Advantageous Relations

The plaintiffs aver that Kane, Simpson, Talerman, and Graves interfered with the plaintiffs’ prospective advantageous relations by preventing them from developing and marketing the property. A claim for interference with prospective advantageous relations requires a plaintiff to show: “(1) a business relationship or contemplated contract of economic benefit; (2) the defendant's knowledge of such relationship; (3) the defendant's intentional and malicious interference with it; [and] (4) the plaintiff's loss of advantage directly resulting from the defendant's conduct.” Comey v. Hill, 387 Mass. 11, 19 (1982), and cases cited.

According to the plaintiffs, Kane, Simpson, Talerman, and Graves interfered with their

probable future business relationship with prospective buyers by unreasonably obstructing their attempts to develop and market the property. In seeking the dismissal of this claim, these defendants argue that the plaintiffs have failed to allege that a “business relationship or contemplated contract of economic benefit” ever existed. Id.

While the plaintiffs undoubtedly planned to sell the lots, their complaint never suggests that they actually engaged a prospective buyer. The mere fact that they intended to sell the lots at some point in the future is far too attenuated to support a claim of interference with prospective advantageous relations. Although the plaintiffs do not need to allege the existence of a contract, they must at least suggest that there existed an actual third party with whom they expected to transact business. Cases in which courts have found a “business relationship or contemplated contract of economic benefit” have all involved actual prospective business partners, not merely the hope that one would arrive in the future. See Comey, 387 Mass. at 19; Kurker v. Hill, 44 Mass. App. Ct. 184, 191 (1998); Powers v. Leno, 24 Mass. App. Ct. 381, 384-385 (1987). The plaintiffs’ failure to allege that any prospective contract or business partner actually existed requires the dismissal of this cause of action.

G. Breach of Fiduciary Duties and Obligations of Confidentiality

The plaintiffs allege that Talerman breached his fiduciary duties and obligations of confidentiality by serving on the Commission after previously representing Scott in various legal matters. An attorney-client relationship may be implied “when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” DeVaux v. American Home Assurance Co., 387

Mass. 814, 817-818 (1983). The attorney-client relationship may be established through preliminary consultations, even though the attorney is never formally retained and the client pays no fee. Bays v. Theran, 418 Mass. 685, 690 (1994). Thus, establishing an attorney-client relationship requires little effort on the part of the attorney and client.

Here, Scott and the other plaintiffs contend that Talerman represented Scott and entities in which Scott was the principal, in various legal matters. Assuming the allegations are true, Scott and Talerman did have an attorney-client relationship. If, in the course of the representation, Talerman obtained confidential information<sup>4</sup> concerning Scott, then it is possible that Talerman acted improperly by participating in the Commission's review of the plaintiffs' project. The Massachusetts Rules of Professional Conduct defines all information gained in the course of representation, whether from the client or otherwise, as confidential information. The plaintiffs contend that prior to the events described in the complaint, Talerman became acquainted with Scott's confidential information, including his business practices and financial condition. They assert, therefore, that by participating in the review of the applications filed by Scott and Pine Creek, Talerman placed himself in the position to interfere with the plaintiffs' efforts to obtain the relief that they sought from the Commission. Although the plaintiffs have not fully fleshed out the factual allegations of this claim, they are sufficient to show a plausible entitlement to relief.

#### H.. Conspiracy

In Count VIII, the plaintiffs assert that Kane, Simpson, Talerman, and Graves conspired to interfere with the plaintiffs' contractual relations and prospective advantageous relations, and

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<sup>4</sup> Confidential information, as defined by the Massachusetts Rules of Professional Conduct, includes information described as "confidences" and "secrets," unlike the limitation in the prior rule that the information be "embarrassing" or "detrimental" to the client. Mass. R. Prof. C., Rule 1.6 cmt. 5.

conspired to violate their civil rights. To support a conspiracy claim, the plaintiff must allege facts sufficient to show a common design or agreement, between two or more people, to commit a wrongful act, and some tortious act in furtherance of the agreement. Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 131 (1st Cir. 2006), quoting Aetna Cas. Sur. Co. v. P&B Autobody, 43 F.3d 1546, 1564 (1st Cir. 1994). Here, the complaint simply states “[e]ach Defendant knew of the actions of the other Defendants, as above, described. By failing to object to such action, each Defendant tacitly approved, agreed to and joined in the action of the other Defendants.” Complaint, ¶ 180.

A viable claim for conspiracy requires more. Civil conspiracy “appears to be reserved for application to facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result.” Stock v. Fife, 13 Mass. App. Ct. 75, 82 n.10 (1982). While the plaintiffs detail the individual acts of each of the alleged conspirators, they fail to reveal the facts that show the common design or agreement that the participants entered into in order to commit the wrongful acts.


**ORDER**<sup>5</sup>

For the foregoing reasons, it is hereby **ORDERED** that the Mass. R. Civ. P. 12(b)(6) motions to dismiss of the defendants are **ALLOWED** to the extent stated herein as they relate to Count I as against the Town of Norfolk and the Conservation Commission of the Town of Norfolk, Count II, Count V, Count VI, and Count VIII. The motions are **DENIED** as to Count I as against Jeffery Kane, Marie Simpson and Jason R. Talerman, Count III, Count IV, and Count VII.



Barbara A. Dortch-Okara  
Justice of the Superior Court

DATED: July 6, 2012

A TRUE COPY  
Attest:   
Deputy Assistant Clerk  
7/10/12

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<sup>5</sup> Some or all of the defendants have urged the court to dismiss various claims as barred by the applicable statutes of limitation. While it is likely that certain acts within some claims are time-barred, many of the allegations of the complaint concern acts by the defendants that do not appear to be time-barred. After discovery is completed and the remaining claims are more fully developed, the parties may be better able to address this issue.