TOWN OF CONCORD VS. WATER DEPARTMENT OF LITTLETON & ANOTHER[1]

Docket:	SJC-12947
Dates:	December 2, 2020 - March 11, 2021
Present:	Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.
County:	Suffolk
Keywords:	Water. Municipal Corporations, Water supply, Special act. Statute, Construction, Repeal, Special law.

Civil action commenced in the Land Court Department on November 8, 2018.

The case was heard by Jennifer S.D. Roberts, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Bryan F. Bertram for the defendant.

Jeffrey L. Roelofs for the intervener.

Peter F. Durning for the plaintiff.

CYPHER, J. The Legislature passed the Water Management Act (WMA), G. L. c. 21G, in 1985, establishing a Statewide regulatory program for water withdrawals, prohibiting withdrawal of more than 100,000 gallons per day from any water source without a registration or permit. See G. L. c. 21G, §§ 2, 4, 5, 7. Under the WMA, an existing user of a water source could register their previous usage, and a new user had to apply for a permit. G. L. c. 21G, §§ 2, 5, 7. This case concerns whether the WMA impliedly repealed the special act, passed by the Legislature in 1884, that granted Concord the right to use Nagog Pond, located in Littleton and Acton, as a public water supply. St. 1884, c. 201 (1884 act). The 1884 act not only granted Concord the right to "take and hold" the waters of Nagog Pond for water supply purposes, but it also provided that Littleton, Acton, or both towns could take the waters of the pond if needed and that in the case of such taking, the water supply needs of Littleton and Acton "shall be first supplied" if "the supply of water in [Nagog Pond] shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton." St. 1884, c. 201, §§ 2, 10. In 1909,

Concord exercised its rights under the 1884 act to take the waters of Nagog Pond, and it still uses the pond as a public water supply. Littleton and Acton have not exercised their rights under the 1884 act, and the issue before us is whether those rights still exist after the passage of the WMA.

Concord commenced this action against the Littleton water department (Littleton), seeking declaratory relief in the Land Court, and Acton's motion to intervene was allowed. A judge concluded that the 1884 act was impliedly repealed by the WMA, thereby extinguishing Littleton and Acton's rights under the 1884 act. Our holding narrows the judge's decision, as we conclude that the WMA impliedly repealed the provision of the 1884 act that provided that the needs of the inhabitants of Littleton and Acton "shall be first supplied." See St. 1884, c. 201, § 10. We further determine that the WMA did not impliedly repeal the provisions of the 1884 act that granted Concord the right to "take and hold" the Nagog Pond waters, St. 1884, c. 201, § 2, and that provided Littleton and Acton with the right to take the water if needed, St. 1884, c. 201, § 10.

Background. 1. Concord's use of Nagog Pond. In the late Nineteenth Century, Concord, a neighboring town of Acton, petitioned the Legislature to authorize Concord to withdraw water from Nagog Pond. In 1884 the Legislature passed "An Act to authorize the town of Concord to increase its water supply." St. 1884, c. 201. The 1884 act allowed Concord to "take and hold" the waters of Nagog Pond and adjacent land necessary for "raising, holding, diverting, purifying and preserving such waters, and conveying the same." St. 1884, c. 201, § 2.

A provision of the 1884 act related to the reservation of rights of Littleton and Acton, providing that nothing in the 1884 act prevented the towns from taking the waters of Nagog Pond "whenever said towns or either of them may require" for water supply purposes. St. 1884, c. 201, § 10. It further provided that "if from any reason the supply of water in [Nagog Pond] shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton, then the needs of the inhabitants of said towns shall be first supplied" (priority provision). Id.

In 1909, Concord exercised its rights under the 1884 act. It registered an instrument of taking in the Middlesex registry of deeds for all the waters of Nagog Pond, all the land beneath it, and certain plots and rights of way around the pond. Concord since has obtained more land in Acton and Littleton in connection with its water supply needs.

2. Water Management Act. The Legislature passed the WMA in 1985, in "direct response to calls for action issued by two separate studies, one commissioned by the executive branch and the other by the Legislature, that reviewed the Commonwealth's water supply and related

policies in the late 1970's and early 1980's." Water Dep't of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 745 (2010) (Fairhaven). The studies identified the need for an improved legal framework and management of demand to accommodate users and protect water conservation. See id., quoting Massachusetts Water Supply Policy Statement: Summary Report 2 (1978) ("if all reasonable uses are to be accommodated, if resource and environmental values are to be protected, a new response in the form of managing demand will be required"), and 1983 Senate Doc. No. 1826. The Legislature established a special commission, which hired an independent law firm, to research the existing groundwater legal structure and identify areas for improvement. Fairhaven, supra at 745. The Legislature adopted the commission's proposed legislation "essentially as proposed" as the WMA. Id. at 746. See G. L. c. 21G.

The WMA established a Statewide regulatory program with a registration and permitting framework, with registration reserved for users with existing[2] water usage and permits for new users. See G. L. c. 21G, §§ 2, 5, 7; Fairhaven, supra at 747. Pursuant to the WMA, Concord submitted a registration for its historic water withdrawal from Nagog Pond, and the Department of Environmental Protection (department) issued Concord a registration in 1991.

3. Present proceedings. Littleton commissioned a report on its water needs, completed in 2017, which concluded that "to meet future water demands, additional withdrawals at existing well facilities or permitting of withdrawals at new facilities will be necessary." Littleton identified Nagog Pond as a potential new source of water and notified Concord that it intended to exercise its rights under St. 1884, c. 201, § 10.

Concord objected and, after negotiations did not resolve the issue, commenced this action in the Land Court for declaratory judgment. Concord sought a "judicial determination on the extent to which the WMA repealed and superseded the 1884 [a]ct and the extent to which Concord's [r]egistration pursuant to the WMA is superior to any assertion by Littleton that it has rights to Nagog Pond."

The parties filed cross motions for summary judgment, and the judge granted Concord's motion and denied Littleton and Acton's motions. The judge concluded that "the 1884 [a]ct was impliedly repealed by the WMA, as a result of which any rights granted to [Littleton] and Acton under the 1884 [a]ct were extinguished." She further determined that to the extent that the holders of water withdrawal rights under special acts[3] preceding the WMA, including the 1884 act, "were actually using [those rights] and, upon enactment of the WMA, registered their water withdrawals pursuant to them, the special acts and the WMA are consistent." Littleton and Acton timely appealed, and we granted the parties' joint application for direct appellate review.

Discussion. "As the case was decided below on motions for summary judgment on an undisputed record, one of the moving parties is entitled to judgment as a matter of law" (quotation and citation omitted).[4] Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 627 (2019). "The single issue raised is one of statutory interpretation, and we review the motion judge's decision de novo" (citation omitted). Id.

In addition, "[q]uestions of statutory construction are questions of law, to be reviewed de novo." Meyer v. Veolia Energy N. Am., 482 Mass. 208, 211 (2019), quoting Bridgewater State Univ. Found. v. Assessors of Bridgewater, 463 Mass. 154, 156 (2012). "We interpret a statute according to the intent of the Legislature, which we ascertain from all the statute's words, 'construed by the ordinary and approved usage of the language' and 'considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished.'" Meyer, supra, quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). "Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Meyer, supra at 211-212, quoting Cianci v. MacGrath, 481 Mass. 174, 178 (2019).

1. Implied repeal. "[T]he provisions of a special act generally prevail over conflicting provisions of a subsequently enacted general law, absent a clear legislative intent to the contrary." Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist., 461 Mass. 366, 374 (2012), quoting Boston Teachers Union, Local 66 v. Boston, 382 Mass. 553, 564 (1981). The WMA does not contain an express provision repealing the 1884 act, and therefore we must look to whether the WMA impliedly repealed the 1884 act.

Repeal of a statutory enactment by implication is disfavored under our jurisprudence. See Dartmouth, 461 Mass. at 374, and cases cited. See also George v. National Water Main Cleaning Co., 477 Mass. 371, 378 (2017), quoting Commonwealth v. Harris, 443 Mass. 714, 725 (2005) ("Where two statutes appear to be in conflict, . . . we 'endeavor to harmonize the two statutes so that the policies underlying both may be honored'").

"This strong presumption against implied repeal of a prior law is overcome only when the earlier statute 'is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand.'" Dartmouth, 461 Mass. at 374-375, quoting Doherty v. Commissioner of Admin., 349 Mass. 687, 690 (1965). Implied repeal may also exist "where the subsequent legislation comprehensively addresses a particular subject and impliedly supersedes related statutes and common law that might frustrate the legislative purpose" (citation omitted). Skawski v. Greenfield Investors Prop. Dev. LLC, 473 Mass. 580, 586 (2016). See

Dartmouth, supra at 375, quoting Doherty, supra ("[r]epugnancy and inconsistency may exist when the Legislature enacts a law covering a particular field but leaves conflicting prior prescriptions unrepealed"). However, the comprehensive nature of a statute alone does not automatically result in implied repeal; "[i]n the absence of irreconcilable conflict between an earlier special statute and a later general one the earlier statute will be construed as remaining in effect as an exception to the general statute." Dartmouth, supra at 375, quoting North Shore Vocational Regional Sch. Dist. v. Salem, 393 Mass. 354, 359 (1984).

2. Scope of the WMA. It is clear from the statutory text that the WMA is comprehensive as it relates to the regulation of water withdrawals. As discussed supra, the Legislature passed the WMA in 1985 to address the framework for management of the demand for the Commonwealth's water resources. Fairhaven, 455 Mass. at 745. At the time of the WMA's passage, there was no Statewide regulatory system to coordinate water withdrawals. 1983 Senate Doc. No. 1826. The Legislature therefore created a program to regulate water withdrawals, which was to be overseen by the department and the Water Resources Commission.[5] Id. at 7-8. See G. L. c. 21G, § 3.

Through the WMA's regulatory system, private and public water suppliers could withdraw water by registration or by permit.[6] See G. L. c. 21G, §§ 2, 5, 7; Fairhaven, 455 Mass. at 747. Users who had taken from a water supply before the WMA's passage went through the registration process, whereas new users went through the permitting process. G. L. c. 21G, §§ 2, 5, 7. If a registrant timely filed a registration statement and renewals, the registrant was entitled to existing withdrawals. Fairhaven, supra ("registrant is not required to obtain permission to continue existing withdrawals"). See G. L. c. 21G, §§ 2, 5. By registering and timely renewing, a registrant "may continue forever to withdraw water at the rate of its existing withdrawal," except in the case of a declared water emergency. Fairhaven, supra at 742 & n.4. See G. L. c. 21G, §§ 5, 15, 17.

Unlike the process established for withdrawal by registration, potential users who previously had not established water usage needed a permit from the department, which required the applicant, among other things, "to detail the anticipated environmental impact of the proposed withdrawal and to consider alternatives to lessen that impact." Fairhaven, 455 Mass. at 748. See G. L. c. 21G, §§ 2, 7, 8; Fairhaven, supra at 747 ("Withdrawal by registration is treated very differently from withdrawal by permit").

3. Repugnancy and inconsistency. We next look to whether the 1884 act is within the comprehensive nature of the WMA described above, and if so, whether any part of it is

"repugnant to and inconsistent with the [WMA]." Dartmouth, 461 Mass. at 374-375, quoting Doherty, 349 Mass. at 690. The parties make various arguments in support of their positions, which can be distilled to the following. Littleton argues that the two acts can be harmonized, and specifically that the priority provision is not in conflict with the WMA because the priority provision relates to Littleton's and Acton's power to take ownership rights and interest in Nagog Pond, and not to administrative regulation of withdrawals. Acton similarly contends that there is not an implied repeal and that the "statutory rights established in the 1884 [a]ct . . . are separate and distinct from the [WMA's] regulatory rights and requirements." Concord disagrees, arguing that the WMA impliedly repealed Littleton's and Acton's unexercised withdrawal rights and the priority provision in the 1884 act. We conclude that the priority provision is inconsistent with and repugnant to the WMA, and therefore that the WMA resulted in a partial repeal of the 1884 act.

The priority provision provides that "in case of such taking by [Acton or Littleton], if from any reason the supply of water in [Nagog Pond] shall not be more than sufficient for the needs of the inhabitants of the towns of Acton and Littleton, then the needs of the inhabitants of said towns shall be first supplied." St. 1884, c. 201, § 10. By providing that Littleton and Acton "shall be first supplied," this provision falls within the WMA's comprehensive regulatory scheme.

Littleton argues that this priority provision provides it and Acton with a reserved property right, and because the WMA concerns regulatory registration and permitting -- not property rights -- harmony between the acts is straightforward. The priority provision, however, is repugnant to the WMA because it directly interferes with the WMA's comprehensive regulatory provisions. See Dartmouth, 461 Mass. at 374-375. Rather than the department following the WMA's provisions to allocate water withdrawals through the registration and permitting process, the priority provision would in effect require the department to allow Littleton and Acton to begin withdrawals based on the towns' needs. Depending on the water needs of Acton, Littleton, or both, their prioritization could require the department to displace partially or completely Concord's water usage, overriding the procedures put in place by the WMA. See G. L. c. 21G, §§ 5, 7.

On the other hand, the 1884 act's provisions providing Concord the right to "take and hold" Nagog Pond, St. 1884, c. 201, § 2, and of Littleton and Acton to take the waters of Nagog Pond when they may require them for water supply purposes, St. 1884, c. 201, § 10, are not repugnant to the WMA. Unlike the priority provision, these rights differ from the allocation of water withdrawals and can be handled by the department through the WMA's registration and

permitting process. The 1884 act's provision allowing Littleton and Acton to take the waters of Nagog Pond if they so require just puts Littleton and Acton into the WMA's regulatory process -- it does not force the department's hand to prioritize water withdrawal rights in contravention of the WMA. Similarly, the continued validity of the provision allowing Concord to "take and hold" the waters of Nagog Pond does not interfere with the WMA's regulatory scheme, as it also simply resulted in Concord taking part in the WMA's regulatory process. Therefore, these provisions are not within the comprehensive scope of the WMA and are consistent with it.

Conclusion. For the foregoing reasons, we conclude that the WMA impliedly repealed the priority provision in St. 1884, c. 201, § 10, but that it did not impliedly repeal the provisions of the 1884 act that granted Concord the right to "take and hold" the Nagog Pond waters, St. 1884, c. 201, § 2, and that provided Littleton and Acton the right to take the water if needed, St. 1884, c. 201, § 10. Therefore, should Littleton, Acton, or both, choose to exercise their rights to take the waters of Nagog Pond and apply for a permit under the WMA, the 1884 act will not provide it with a priority right over Concord's registration.

So ordered.

footnotes

[1]Town of Acton, intervener.

[2]"Existing withdrawals" are those that were in place and registered with the predecessor to the Department of Environmental Protection on or before January 1, 1988. G. L. c. 21G, §§ 2, 5. See note 5, infra.

[3]A special act usually refers to "legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual or a number of them." Commissioner of Pub. Health v. Bessie M. Burke Memorial Hosp., 366 Mass. 734, 740 (1975). In the memorandum of decision, the judge noted that "[r]esearch has revealed approximately 650 special acts enacted between 1840 and 1984 granting the right to take and hold waters in the Commonwealth. The subjects of these acts are various: permitting municipalities to take waters within their own borders; permitting one municipality to take waters situated within another municipality's borders; permitting one or more municipalities to take water from a particularly identified body of water; and acts incorporating water companies so that they might do the same."

[4]The judge noted that Littleton and Acton objected to certain statements in Concord's statement of undisputed material facts but did not seek relief pursuant to Mass. R. Civ. P. 56 (f), 365 Mass. 824 (1974), and did not file a motion to strike those statements.

[5]At the time of the WMA's passage, the department was known as the Department of Environmental Quality Engineering.

[6]The act only regulates water withdrawals of 100,000 gallons per day or more. G. L. c. 21G, § 4.