

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1313

ROBERT DOBINSKI

vs.

CONSERVATION COMMISSION OF EASTHAM & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Robert Dobinski, appeals from a Superior Court judgment upholding the decision of the conservation commission of Eastham (commission) to deny his application to construct a boardwalk over dunes on his beachfront property. Dobinski contends that (1) the approval by the Department of Environmental Protection (DEP) of the project preempts the commission's denial and (2) to the extent the commission's denial was not preempted, it was arbitrary and capricious. We affirm.

Background. In July of 2016, Dobinski filed a notice of intent (NOI) with the commission, seeking approval to construct, inter alia, an elevated boardwalk and platform over the dunes on his vacant beachfront lot (the lot). Dobinski's NOI identified

¹ Town of Eastham.

three "Coastal Wetland Resource Areas" -- subject to protection under the Wetlands Protection Act (WPA) and the Eastham Wetlands Bylaw (Eastham bylaw) -- encompassed within the lot, requiring him to obtain an order of conditions from a permit granting authority before commencing construction.² See G. L. c. 131, § 40, first par.; Eastham bylaw § 2. The commission denied Dobinski's application. Dobinski then sought approval from the DEP, the granting of which may supersede the commission's denial under the WPA.³ The DEP issued a superseding order of conditions approving the project subject to certain conditions and revisions. With the DEP's approval in hand, Dobinski filed a revised NOI with the commission seeking approval of the project pursuant to the Eastham bylaw. In its revised form, the project included, in pertinent part, a 105-foot-long raised boardwalk spanning the dunes and an attached twelve feet by twelve feet platform.⁴ The commission again denied the project. It found

² Dobinski's NOI provides that the lot contains the following three protected "Coastal Resource Areas": "Barrier Beach," "Coastal Dunes," and "Land Subject to Coastal Storm Flowage."

³ Applicants receiving a conservation commission denial under the WPA are entitled to seek a subsequent determination from the DEP as to "whether the area on which the proposed work is to be done" is subject to protection under the WPA and an order imposing "conditions as will contribute to the protection of the interests" protected by the WPA. G. L. c. 131, § 40, nineteenth par. Such an order from the DEP "shall supersede the prior order of the conservation commission." Id.

⁴ Dobinski's revised NOI also proposed the use of hardening fill in a parking area on the lot. However, because Dobinski orally agreed to withdraw that component of the project when appearing

that the lot was situated within a State designated Area of Critical Environmental Concern (ACEC),⁵ subjecting the project to further protections under Eastham's "Regulations Pursuant to the Wetland Bylaw ACEC (Area of Critical Environmental Concern)" (ACEC regulations).⁶ The commission concluded that -- despite compliance with the WPA -- the project contravened provisions of the Eastham bylaw and the ACEC regulations. Dobinski sought certiorari review in the Barnstable Superior Court under G. L. c. 249, § 4. Ruling on cross motions for judgment on the pleadings, the judge affirmed the commission's decision. This appeal followed.

Discussion. 1. Standard of review. When considering an appeal under G. L. c. 249, § 4, "the court is limited to correcting 'substantial errors of law apparent on the record adversely affecting material rights.'" FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 684 (1996), quoting Commissioner of Revenue v. Lawrence, 379 Mass. 205, 208 (1979). "[W]here the action sought to be

before the commission, we consider the project without that element.

⁵ It is uncontested that the lot is located within the Wellfleet Bay ACEC. The Commonwealth designates ACECs pursuant to G. L. c. 21A, § 2 (7), and that subsection's implementing regulations, 301 Code Mass. Regs. §§ 12.01-12.15 (2016).

⁶ The ACEC regulations were adopted pursuant to the Eastham bylaw, which provides that the commission "may, from time to time, adopt such definitions, regulations and performance standards, as they [sic] may deem necessary to protect the interests of this [b]ylaw." Eastham bylaw § 9.

reviewed [is] the proper exercise of [a conservation] commission's discretion in the imposition of conditions for the protection of wetlands, an arbitrary and capricious standard should be applied" (quotation and citation omitted). T.D.J. Dev. Corp. v. Conservation Comm'n of N. Andover, 36 Mass. App. Ct. 124, 128 (1994). "A decision is not arbitrary and capricious unless there is no ground which 'reasonable [persons] might deem proper' to support it" (citation omitted). FIC Homes of Blackstone, Inc., supra at 684-685.

2. The stringency of the municipal wetland protections.

Dobinski argues that the bylaw and the ACEC regulations are no more protective than the WPA, and therefore the DEP's superseding order of conditions controls.⁷ The argument is unavailing.

A local conservation commission decision based on municipal bylaws and regulations that are less stringent than or consistent with the WPA is preempted by a DEP superseding order issued under the WPA; the DEP has the final say on the proposed project in this situation. See DeGrace v. Conservation Comm'n of Harwich, 31 Mass. App. Ct. 132, 135 (1991). However, the WPA "establishes minimum Statewide standards leaving local communities free to adopt more stringent controls." T.D.J. Dev.

⁷ We emphasize that Dobinski challenges only the commission's application of the Eastham bylaw and the ACEC regulations, expressly disclaiming any challenge to their validity.

Corp., 36 Mass. App. Ct. at 125-126, quoting Golden v. Selectmen of Falmouth, 358 Mass. 519, 526 (1970). A decision rendered by a conservation commission pursuant to more stringent local bylaws or regulations is not preempted by the WPA and trumps DEP approval under the WPA. Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. 859, 865 (2007). Thus, we must first determine whether it was arbitrary and capricious for the commission to read the ACEC regulations as more stringent than the WPA. We conclude it was not.

The WPA and its implementing regulations only prohibit projects that will have specific adverse effects on the protected area. The WPA provides, in pertinent part:

"No person shall remove, fill, dredge or alter any . . . coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean . . . or any land subject to tidal action, coastal storm flowage, or flooding . . . without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and complying with an order of conditions."

G. L. c. 131, § 40. When such a notice of intent is filed, the WPA's wetlands protection regulations (WPA regulations), prohibit any alterations of, or structure on, protected areas that will have one or more specifically enumerated "adverse

effect[s]" on that protected area. See, e.g., 310 Code Mass. Regs. § 10.28(3) (2014).⁸

Like the WPA, the Eastham bylaw requires the receipt of, and compliance with, an order of conditions before construction can begin in certain protected wetland areas.⁹ Eastham bylaw § 2. However, unlike the WPA, the Eastham bylaw also protects areas designated by the Commonwealth as ACECs under G. L. c.

⁸ The coastal dunes regulation, 310 Code Mass. Regs. § 10.28(3) (2014), one of the WPA regulations applicable to the instant project, provides that:

"Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

- (a) affecting the ability of waves to remove sand from the dune;
- (b) disturbing the vegetative cover so as to destabilize the dune;
- (c) causing any modification of the dune form that would increase the potential for storm or flood damage;
- (d) interfering with the landward or lateral movement of the dune;
- (e) causing removal of sand from the dune artificially; or
- (f) interfering with mapped or otherwise identified bird nesting habitat."

⁹ In pertinent part, section 2 of the Eastham bylaw provides that:

"No person shall remove, fill, dredge, alter or build upon or within 100 feet of . . . any seasonal wetland, beach, dune, . . . or . . . any land subject to tidal action, coastal storm flowage, or flooding or any land designated by the Commonwealth or [F]ederal government as an [ACEC] and/or wild life refuge . . . without first filing written [a NOI with the commission] . . . and without receiving and complying with an [o]rder of [c]onditions."

21A, § 2 (7). Eastham bylaw § 2. Eastham's ACEC regulations, adopted pursuant to the Eastham bylaw, see note 6 supra, provide additional restrictions on projects within ACECs. ACEC regulations § 3. Section 3(A) of the ACEC regulations provides that "[t]here will be no brushing or clear cutting of existing vegetation or alteration of wildlife habitats except that selective pruning or the clearing of foot paths may be authorized by the [commission] after the filing of a [NOI]."
Section 5(A) of the ACEC regulations imposes further "performance standards" under which, among other things, the commission "may authorize foot paths two feet wide for the private use of a single-family dwelling and five feet wide for common uses" and may permit "[s]elective pruning and clearing of foot paths."¹⁰

The commission interprets section 3(A) of the ACEC regulations as an outright prohibition against any "brushing or

¹⁰ Section 5(A) of the ACEC regulations provides in full:

- "1. The [commission] may authorize foot paths two feet wide for the private use of a single-family dwelling and five feet wide for common uses. The slope shall be less than one in three, or steps shall be installed. The area shall be stabilized with indigenous grasses or wood chips.
2. No pesticides, herbicides, or insecticides shall be allowed.
3. Selective pruning and clearing of foot paths may be permitted by the [commission] provided that no more than [sic] 30% of crown cover is lost and provided that the viability of the pruned vegetation is not impaired."

clear cutting of existing vegetation," except for the specific activities permitted under section 5's performance standards. Whether the provision is an outright prohibition or, in light of section 5, a prohibition which can only be overcome in very limited circumstances, it is in either event unlike the WPA regulations, which only prohibit projects that are deemed to have certain specific adverse effects on the protected area. Read as such, section 3(A) is more protective than the WPA regarding ACECs. Accordingly, the commission's interpretation of section 3(A) was not arbitrary or capricious.¹¹

3. Applicability of the ACEC regulations to the instant project. Dobinski also contends that, to the extent the ACEC regulations are more protective than the WPA, those provisions are not applicable to his project. Specifically, he argues that it was arbitrary and capricious for the commission to conclude that his project involved "clearing and removal of vegetation" prohibited under section 3(A) of the ACEC regulations. We disagree.

¹¹ The commission argues that section 3(B) of the ACEC regulations provides greater protection than the WPA, and that its denial may rest on that provision. Dobinski claims, with some measure of persuasiveness, that section 3(B) is no more protective than the WPA. Because we find that the commission's denial is supported by section 3(A) of the ACEC regulations, we decline to address whether the commission's denial was also supported by section 3(B).

The commission found that Dobinski's project contravened the ACEC regulations because, among other things, it called for "the clearing and removal of vegetation for construction of a permanent boardwalk that includes the excavation of [twenty-eight] 4" by 4" posts by excavating 1' by 4' depth holes in the dune." The commission concluded that such activity was governed by section 3(A) of the ACEC regulations and was not otherwise permitted by the limited exceptions found in section 5(A). It is undisputed that the project included the construction of a permanent boardwalk and platform over vegetated dunes, requiring excavation of holes in the dune for the placement of numerous support posts. Thus, the commission did not act arbitrarily or capriciously in concluding that the project would require the "clear cutting of vegetation" prohibited by section 3(A) of the ACEC regulations.¹²

To the extent Dobinski relies on Fieldstone Meadows Dev. Corp. v. Conservation Comm'n of Andover, 62 Mass. App. Ct. 265 (2004), and Fafard v. Conservation Comm'n of Reading, 41 Mass. App. Ct. 565 (1996), for his contention that application of the

¹² Even under the substantial evidence standard advanced by Dobinski, the commission's conclusion would survive scrutiny given the extensive evidence of the nature of the project contained in the administrative record. See New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981) (decision is based on "substantial evidence" where administrative record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion" [citation omitted]).

ACEC regulations was arbitrary and capricious, those cases are distinguishable. In Fieldstone Meadows Dev. Corp., the court found that a conservation commission's denial was "improperly based on a policy existing outside of the regulatory framework." Fieldstone Meadows, supra at 267. Here, the commission relied on a reasonable interpretation of published municipal bylaws and regulations, the validity of which are not challenged here. See note 7, supra. In Fafard, the court found that a conservation commission's application of its regulations violated principles of "uniformity of standards and enforcement" where a regulation governing activity in protected areas was applied to a project in a buffer zone to which the regulations did not directly apply. Fafard, supra at 569-570. The court distinguished the situation from one where the regulation "directly regulated activity" in the zone where the project was to take place. Id. at 570. Here, it is undisputed that the project is within a State designated ACEC, an area directly regulated by the ACEC regulations. Thus, Fieldstone Meadows and Fafard are inapposite.

4. Past application of the bylaws and regulations.

Finally, Dobinski argues that the commission's 2007 approval of a boardwalk over a purportedly similar property shows that the commission's application of the ACEC regulations to his project was arbitrary. He contends that a "history and practice" of

approving "substantially similar" projects can support an arbitrary and capricious finding. See Lakeside Builders, Inc. v. Planning Bd. of Franklin, 56 Mass. App. Ct. 842, 847 n.6 (2002). However, where the full administrative record of the prior approval is not contained in the present administrative record, we are unable to assess the similarity of the projects. See generally id. at 846-848. Accordingly, we cannot say on the present record that the commission's denial of Dobinski's project was arbitrary or capricious.¹³

Judgment affirmed.

By the Court (Rubin, Neyman & Englander, JJ.¹⁴),


Clerk

Entered: January 13, 2022.

¹³ We have considered Dobinski's other arguments, but find "nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

¹⁴ The panelists are listed in order of seniority.