

Squam Partners, LLC vs. Conservation Commission of Nantucket.

16-P-1046

APPEALS COURT OF MASSACHUSETTS

91 Mass. App. Ct. 1118; 2017 Mass. App. Unpub. LEXIS 434

April 26, 2017, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *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 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, 881 N.E.2d 792 (2008).

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JUDGES: Maldonado, Massing & Henry, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Squam Partners, LLC, appeals from a judgment affirming the decision of the defendant, Conservation Commission of Nantucket (commission), which had denied Squam a permit to construct an elevated walkway through a bordering vegetated wetland (BVW). We affirm.

Background. Squam sought to build an elevated walkway through a BVW that bisects its property on Nantucket, with a path to the walkway to be located within the surrounding buffer zone. The proposed walkway -- three feet wide, thirty inches off the ground, supported by forty-five helical piers, and constructed of porous fibergrate decking, which would allow seventy percent light and rain water transmission to the ground and any vegetation below -- would traverse 135 feet of BVW. To construct the walkway, Squam proposed to cut to "near ground level" a nine foot wide corridor through the BVW. The three feet on either side of the walkway would be allowed to regenerate after the construction was complete.

The BVW is protected under the Wetlands Protection Act, see *G. L. c. 131, § 40*; the Massachusetts wetlands protection regulations, see *310 Code Mass. Regs. § 10.00* (2015); Nantucket's wetlands protection by-law, see town of Nantucket by-law § 136 (2015) (by-law);¹ and the commission's regulations, promulgated under the by-law,² see town of Nantucket Conservation Commission Wetland Protection Regulations (2015) (regulations). The purpose of Nantucket's wetlands by-law is to protect its wetlands "by controlling activities deemed to have a significant or cumulative effect upon wetland values, including but not limited to the following: . . . wildlife, rare species, including rare, threatened or endangered plant species and animals and habitats, . . . and wetland scenic views." By-law § 136-2.

1 The by-law enunciates standards for the alteration of wetlands that are "in addition to those [standards] of the Wetlands Protection Act, *G. L. c. 131, § 40*, and the regulations thereunder, *310 Code Mass. Regs. § 10.00*." See by-law § 136-2.

2 "[T]he [c]ommission may promulgate rules and regulations to effectuate the purpose[]" of the by-law. By-law § 136-7.

To protect those values, § 3.02(B)(1) of the regulations requires that (1) proposed projects that are not water dependent leave a twenty-five foot undisturbed area, or buffer zone, adjacent to the vegetative wetland and (2) that any

structures must be at least fifty feet from a BVW. As the proposed walkway violated both provisions, Squam sought a waiver from their operation. Specifically, Squam looked to β 1.03(F)(3)(a) of the regulations, which allows the commission to grant a waiver so long as "the proposed project will [1] not adversely impact the interests identified in the [b]y-law and [2] there are no reasonable conditions or alternatives that would allow that project to proceed in compliance with the regulations" (emphasis supplied).³ An adverse impact is defined as "a greater than negligible change in the resource area or one of its characteristics."⁴ Regulations β 1.02.

3 At oral argument, counsel for the commission conceded that there were no reasonable alternatives to the design of the walkway as proposed.

4 "Negligible means small enough to be disregarded and shall be defined in relation to the wetland resource areas impacted." Regulations β 1.02.

After a hearing and review of the notice of intent and other documents, the commission denied Squam's proposed walkway under the by-law,⁵ finding that the walkway "will have a greater than negligible effect on the interests protected [under the by-law] specifically wildlife and wetland scenic views." Squam filed an action in Superior Court for a review of the commission's denial of its application. See *G. L. c. 249, β 4*. A Superior Court judge affirmed the commission's decision, "entirely satisfied" with the commission's findings that the walkway would have an adverse impact on both wildlife and scenic views.

5 The commission also denied Squam's request for a permit under the Wetlands Protection Act, but the Massachusetts Department of Environmental Protection issued a superseding order of conditions approving the project under the act.

Discussion. Squam claims that the commission's finding that the proposed walkway would have an adverse impact on wildlife and scenic views was not supported by substantial evidence. "In reviewing the decision of a local conservation commission, we must consider whether it was legally tenable and supported by substantial evidence on the record as a whole." *Pollard v. Conservation Commn. of Norfolk*, 73 Mass. App. Ct. 340, 348, 897 N.E.2d 1242 (2008). Under the substantial evidence test, a commission's findings "must be set aside if 'the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.'" *Rodgers v. Conservation Commn. of Barnstable*, 67 Mass. App. Ct. 200, 205, 853 N.E.2d 199 (2006), quoting from *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466, 420 N.E.2d 298 (1981). "A finding is based upon substantial evidence if 'experience permits the reasoning mind to make the finding; [i.e.,] whether the finding could have been made by reference to the logic of experience.'" *Id.* at 205-206, quoting from *New Boston Garden Corp., supra*. "[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253, 214 N.E.2d 63 (1966), quoting from *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951), but if a commission makes a "choice between two fairly conflicting views,' and its selection reflects reasonable evidence, '[a] court may not displace [the commission's] choice.'" *Conservation Commn. of Falmouth v. Pacheco*, 49 Mass. App. Ct. 737, 739 n.3, 733 N.E.2d 127 (2000), quoting from *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257, 670 N.E.2d 392 (1996).

We are satisfied that the commission had enough evidence from which it could find that Squam's proposed walkway would have an adverse impact on the interests protected by the by-law, particularly wildlife.⁶ Squam submitted a report by Michael Howard of Epsilon Associates, Inc. (Epsilon report), which acknowledged that the affected BVW provided "wildlife forage," and "nesting habitat and cover for song birds[,] . . . small mammals[,] . . . amphibians[,] . . . and snakes." In addition, "[d]owned woody debris [in the affected area] can provide cover and perching for small mammals, birds, amphibians, and reptiles." The Epsilon report also noted evidence of the presence of white-tailed deer in the BVW. The report concluded that "[n]one of the referenced habitat features will be lost as a result of the project," nor would the proposed project "reduce the BVW's capacity to support wildlife." According to the report, wildlife could walk around, go over, or go under the proposed walkway.⁷

6 Wildlife is defined in β 1.02 of the regulations as "all non-domesticated mammals, birds, reptiles, amphibians, fishes, or invertebrates, which are dependent upon a wetland resource . . . for any part of their life cycle."

7 Squam also submitted a letter from Thomas W. French, Ph.D., assistant director of the Massachusetts Division of Fisheries & Wildlife, expressing his opinion that the project "will not adversely affect the actual [r]esource [a]rea [h]abitat of [S]tate-protected rare wildlife species . . . [and] will not result in a prohibited 'take' of [S]tate-listed rare species." However, French's determination was explicitly made only as to *rare* wildlife

habitat and species. See *310 Code Mass. Regs. § 10.59*. The by-law and regulations, by contrast, do not limit their protections to rare wildlife.

Bruce Perry of Laurentide Environmental, LLC, submitted a report to the commission containing opinions contrary to those in the Epsilon report. Perry was of the opinion that the Epsilon report and other documents submitted by Squam "down play[ed] the permanent wetland alterations of the project in both the vegetative changes and [in the adverse impacts on] the wildlife and wildlife habitat."⁸ The photographs of the BVW submitted by Squam showing "a mature shrub swamp (ten to twelve feet high)," approximately 1,215 square feet of which Squam proposed to cut to "near ground level," support this assertion.

8 Emily MacKinnon, a resource ecologist with the Nantucket Land Council, Inc., agreed, and concluded in her report that Squam's proposed project "will have a definitive impact on wetland vegetation and the wildlife it supports."

The Epsilon report "assume[d] that the mature shrubs cut as part of the initial clearing and that are outside the walkway footprint will grow back to their pre-cut condition." Perry was skeptical of this assumption, and the commission could have reasonably rejected it. See *Pollard, 73 Mass. App. Ct. at 349 n.10* ("[A]n agency may reasonably reject an expert's opinion . . . where there are flaws in the . . . assumptions upon which the opinion depends"). The commission could reasonably determine that such an alteration, even considering the remaining undisturbed BVW on the property, is not "small enough to be disregarded." See regulations § 1.02; *Pollard, supra* ("An agency may justifiably reject an expert's opinion on the basis of facts in the record that make the rejection of the expert evidence reasonable, including facts of a nontechnical nature"). Accordingly, although the commission was presented with "conflicting views" on the walkway's adverse impact on wildlife, its decision not to grant Squam a permit to construct the walkway was "supported by substantial evidence." *Lisbon, 41 Mass. App. Ct. at 257*.

The commission's findings with respect to the walkway's impact on scenic views are more questionable than its findings with respect to wildlife; nonetheless, the findings as a whole are sufficient to support the commission's conclusion that the proposed project would adversely impact an interest identified in the by-law. Accordingly, the judge did not err in entering judgment on the pleadings for the commission.

Judgment affirmed.

By the Court (Maldonado, Massing & Henry, JJ.⁹),

9 The panelists are listed in order of seniority.

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