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SJC-13244

CITY OF BOSTON vs. CONSERVATION COMMISSION OF QUINCY
& another.¹

Suffolk. May 2, 2022. - July 25, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Wetlands Protection Act. Municipal Corporations, Conservation
commission, By-laws and ordinances. Department of
Environmental Protection. Statute, Supersedure.

Civil action commenced in the Superior Court Department on
November 2, 2018.

The case was heard by Gregg J. Pasquale, J., on motions for
judgment on the pleadings, and entry of separate and final
judgment was ordered by Heidi E. Brieger, J.

The Supreme Judicial Court on its own initiative
transferred the case from the Appeals Court.

James S. Timmins, City Solicitor, for the defendants.
Sammy S. Nabulsi for the plaintiff.

Richard Lyman, Michael Parker, & Ryan Grondahl, for NAIOP
Massachusetts, Inc., amicus curiae, submitted a brief.

¹ Jay Duca, in his capacity as agent for the conservation
commission of Quincy.

LOWY, J. The city of Boston (Boston) petitioned the conservation commission of Quincy (commission) for permission to build a bridge to Long Island in Boston (bridge), as the bridge would have an impact on wetlands in Quincy. The commission denied Boston's application pursuant to the State Wetlands Protection Act (act) and Quincy's local wetlands ordinance (local ordinance), the latter of which is concerned almost exclusively with permitting procedures. After Boston applied to the Department of Environmental Protection (DEP) for a superseding order of conditions, the DEP allowed the project to proceed.

Pursuant to the act and its accompanying regulations, G. L. c. 131, § 40; 310 Code Mass. Regs. §§ 10.00 (2014), the DEP's interpretation of the act supersedes that of a local conservation commission. However, a conservation commission's decision regarding wetlands may stand, despite a superseding order by the DEP, if the conservation commission relied on provisions in a local ordinance that are more stringent than the provisions in the act. See Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. 859, 865 (2007).

The issue here is whether the DEP's order supersedes the commission's decision. The commission claims it relied on the local ordinance's reference to "cumulatively adverse effect[s] upon wetland values," and that this language is more stringent

than the language in the act. However, we conclude that the DEP order supersedes that of the commission because the commission did not rest its determination on more stringent local provisions.²

Background. Boston closed the bridge in 2014 for safety reasons and removed the original bridge superstructure in 2015, leaving only the bridge's piers.³ In 2018, Boston submitted a notice of intent to the commission, requesting permission to rebuild the bridge's superstructure so Boston could reopen the bridge and restore access to rehabilitation facilities on Long Island. The project's purpose was "to support [Boston's] goal of providing [opioid] addiction treatment services to the public." Before the bridge closed, Long Island had housed a multi-bed homeless shelter, drug treatment programs, and transitional housing programs. According to the notice of intent, Boston would conduct work in Quincy to rebuild the

² We acknowledge the amicus brief submitted by NAIOP Massachusetts, Inc.

³ In this context, the "superstructure" is "the part of a bridge that rests on the piers and abutments." Dictionary.com, <https://www.dictionary.com/browse/superstructure> [<https://perma.cc/22WQ-C74W>]. A pier, in turn, is "an intermediate support for the adjacent ends of two bridge spans." Webster's Third New International Dictionary 1712 (2002).

bridge on the existing piers. Boston submitted the notice of intent pursuant to the act and the local ordinance.⁴

The commission denied Boston's application after holding public hearings on the matter. The commission reasoned in a written decision that Boston had not provided sufficient information about how Boston would mitigate the environmental impact of (1) repairing and replacing the piers, and (2) repairing a road that would provide access to the bridge (access road).

Boston sought a superseding order of conditions from the DEP pursuant to the act. See G. L. c. 131, § 40, nineteenth par. See also Parkview Elecs. Trust, LLC v. Conservation Comm'n of Winchester, 88 Mass. App. Ct. 833, 837 (2016) ("Insofar as a commission's decision is based on local law and State law, [the] DEP has jurisdiction to review it and supersede that portion of the commission's decision that is based on State law"). The DEP issued a superseding order of conditions.⁵

Boston also sought certiorari review in the Superior Court as to the commission's application of the local ordinance. See G. L. c. 249, § 4. See also Friedman v. Conservation Comm'n of

⁴ Relevant portions of the local ordinance, which is in the record, are set out in the Appendix.

⁵ The DEP's office of appeals and dispute resolution upheld the superseding order of conditions, as did a Superior Court judge.

Edgartown, 62 Mass. App. Ct. 539, 542 (2004) ("an action in the nature of certiorari is the appropriate means of review by applicants dissatisfied with a local conservation commission's order, under a local wetlands by-law, that prevents or restricts building on the applicants' land"). A Superior Court judge ordered the commission to consider additional materials. The commission held another hearing, considered the materials, and again denied Boston's application, noting in its supplemental decision the same issues with the piers and the access road that it had noted in its initial decision.

Back in the Superior Court, Boston moved for partial judgment on the pleadings regarding its claims about the commission's decision, and the commission cross-moved for judgment on the pleadings. The judge allowed Boston's motion and denied the commission's motion, concluding that the project would be governed by the DEP's superseding order of conditions. A different Superior Court judge entered a separate and final judgment on the issues that had been resolved, and the commission appealed.⁶ We transferred the case to this court on our own motion.

⁶ The judge had not resolved Boston's request for a declaratory judgment that the commission's determination was a constitutional taking of property and conflicted with the home rule amendment.

Discussion. "We review the allowance of a motion for judgment on the pleadings de novo" Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013).

The act "was created to protect wetlands from destructive intrusion" (citation omitted). Miramar Park Ass'n, Inc. v. Dennis, 480 Mass. 366, 368 (2018). A person seeking to undertake activity that the act governs must file a notice of intent with the local conservation commission. G. L. c. 131, § 40, first par. The local conservation commission must then determine whether the act applies to the proposed work, G. L. c. 131, § 40, third par., and, if necessary, impose conditions on the project, G. L. c. 131, § 40, eighteenth par. A local conservation commission also will consider any applicable local ordinances. See DeGrace v. Conservation Comm'n of Harwich, 31 Mass. App. Ct. 132, 135-136 (1991).

An applicant "aggrieved by" the order of a local conservation commission may ask the DEP to issue its own order, which will "supersede the prior order of the conservation commission." G. L. c. 131, § 40, nineteenth par. See DeGrace, 31 Mass. App. Ct. at 135. Nevertheless, where a conservation commission "rests its determination on provisions of a local bylaw that are more protective than the act[,] . . . a superseding order of conditions issued by the DEP cannot preempt the conservation commission's bylaw-based determination."

Oyster Creek Preservation, Inc., 449 Mass. at 865. "This rule is [premised] on the recognition that the act establishes Statewide minimum wetlands protection standards, and local communities are free to impose more stringent requirements." Id. at 866.

Importantly, "[t]he simple fact[] . . . that a local by-law provides a more rigorous regulatory scheme does not [prohibit] a redetermination of the local authority's decision by the DEP except to the extent that the local decision was based exclusively on those provisions of its by-law that are more stringent and, therefore, independent of the act." Healer v. Department of Env'tl. Protection, 73 Mass. App. Ct. 714, 718-719 (2009). See id. at 719 (DEP's order superseded that of conservation commission where, "although provisions of the town's wetlands by-law are in fact more stringent than the act, the commission's decision to allow the project had nothing to do with the specifics of the more rigorous provisions of its regulatory scheme").

A local conservation commission that wishes to rely on a more stringent local bylaw or ordinance must explain how the bylaw or ordinance applies to the facts presented. "[I]f a town conservation commission simply refers to a by-law without providing any indication that it actually relied on it or how it did so, any comparison of the statute and the by-law to

determine which is more protective is rendered difficult or impossible. A town's by-law may contain some exceptionally protective provisions, and a commission's general reference to the by-law in its decision, without elaboration, would allow it to insulate the decision from scrutiny" (citation omitted). Oyster Creek Preservation, Inc., 449 Mass. at 866 n.12.

Here, the commission claims it relied on the local ordinance's reference to "cumulatively adverse effect[s] upon wetland values," and that this language is more stringent than the language in the act.⁷ According to the commission, it did not have enough information to determine the cumulative effects of the work that would occur on the piers and the access road.

The commission does not explain in its brief, and did not explain in its decisions denying Boston's application, how its own analysis differs from the analysis that the DEP was authorized to perform. Accordingly, and as discussed further infra, we conclude that the DEP's superseding order of conditions preempts the commission's determination.

1. The piers. The commission's initial decision stated that Boston "did not fully quantify adverse impacts" to land

⁷ The commission also argues in passing that the local ordinance's definition of "alter" is broader than that term's definition in the act. However, the commission does not argue that it relied on the definition of "alter" in reaching its determination, and there is no indication in its written decisions that it did so.

under the ocean or to wetlands interests, "or propose sufficient mitigation to meet performance standards that will result from the repair and replacement of some or all of the concrete piers." The commission also decided that the proposed work on the piers would involve a greater impact on land containing shellfish than Boston acknowledged and that, "[a]s a result, interests of protection of fisheries, land containing shellfish, and of wildlife habitat and prevention of pollution are not adequately assessed and no mitigation measures are proposed to provide adequate protection of the resource areas and interests." The commission concluded by stating that the project "could not be conditioned to meet the performance standards at 310 [Code Mass. Regs. §] 10.25(6), 310 [Code Mass. Regs. §] 10.34(4) and [310 Code Mass. Regs. §] 10.35(3)." The supplemental decision included these same findings with the one exception that, instead of referencing specific regulations, it determined that the project "could not be conditioned to meet performance standards and to protect wetland resource areas and interests."⁸

⁸ One of the commission's main concerns was that Boston would need to use cofferdams to repair and replace the piers. A cofferdam is "a temporary watertight enclosure . . . from which the water is pumped to expose the bottom of a body of water and permit construction (as of foundations or piers)." Webster's Third New International Dictionary 439 (2002).

The regulations that the commission cited in its initial decision exclusively were DEP regulations supplementing the act. See 310 Code Mass. Regs. §§ 10.00. Therefore, the commission did not rely on the local ordinance for its decision on the piers. As such, the DEP's analysis regarding the piers controls because the DEP's interpretation of the act supersedes that of the commission. See Parkview Elecs. Trust, LLC, 88 Mass. App. Ct. at 837.

Moreover, even if the commission also applied the local ordinance to the piers, its analysis cannot stand because the ordinance does not treat more stringently than the act the factors that the commission considered.

As just discussed, the commission was concerned in its decisions with the impact that the piers would have on fisheries, wildlife habitat, pollution, land under the ocean, and land containing shellfish.⁹ The act addresses these factors.

⁹ Although the decisions also reference "wetland interests," that is too "vague and general" a factor to be considered separately. See Oyster Creek Preservation, Inc., 449 Mass. at 866 n.12. Additionally, the commission appears to suggest in its appellate brief that it was concerned with future impacts from the piers, which it purports may be considered under the local ordinance but not under the act. At least where a local bylaw does not allow expressly for consideration of future impacts, however, "prospective violations of a town by-law are not a legally tenable ground for denial of a submission that on its face complies with applicable law." Fafard v. Conservation Comm'n of Reading, 41 Mass. App. Ct. 565, 571 (1996). And, in any event, the commission's written decisions do not clearly express a concern with future impacts.

G. L. c. 131, § 40, first par. (addressing "land under . . . waters"), eighteenth par. (addressing "prevention of pollution," "protection of land containing shellfish," "protection of wildlife habitat," and "protection of fisheries"). The regulations do as well. See, e.g., 310 Code Mass. Regs. § 10.25 (land under ocean); 310 Code Mass. Regs. § 10.34 (land containing shellfish). The local ordinance also references these factors, but does not provide rules or definitions more stringent than those found in the act and the regulations. Rather, the local ordinance is concerned almost entirely with the procedure for permit applications. Its substantive provisions are limited to broad "[p]urpose" and "[s]cope" sections, which merely prohibit several activities in protected areas without the commission's approval. These sections do not give the commission additional authority over fisheries, wildlife habitats, pollution, land under the ocean, or land containing shellfish that the DEP does not also have. Contrast Cave Corp. v. Conservation Comm'n of Attleboro, 91 Mass. App. Ct. 767, 771-772 (2017) ("It is plain that the ordinance here imposes more stringent controls than the act as to matters regulated under the order of conditions issued by the commission for the roadway extension project. . . . [T]he ordinance includes vernal pools . . . as resource areas entitled to

protection. By contrast, the act makes no mention of vernal pools . . .").

Because the commission did not base its decision on factors other than those that the DEP was authorized to consider, its ruling on the piers is preempted by the superseding order of conditions.

The case of Cave Corp., which the commission relies on in its argument about the piers, is not to the contrary. See Cave Corp., 91 Mass. App. Ct. at 773. There, the local conservation commission concluded that "any disturbance to the 125-foot area on the subject parcels of land will result in cumulative adverse impacts upon the resource area values" (alteration omitted). Id. at 769. The Appeals Court reasoned that this conclusion was appropriate despite a superseding order of conditions "[i]n light of the commission's mandate to consider the cumulative effects of the proposed subdivision with regard to the purpose and the objectives of the ordinance, and the evidence before it." Id. at 771-772, 774. Here, in contrast, the commission did not rely on cumulative effects when analyzing the piers. The commission relied on distinct factors that the DEP also could consider pursuant to the act and the regulations.

Additionally, the ordinance at issue in Cave Corp., unlike the local ordinance here, specified the cumulative impacts that the commission should consider. Id. at 773 (ordinance directed

commission to "take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities").

Finally, in Cave Corp., the court considered the "cumulative adverse effects" language when analyzing whether the conservation commission's decision was arbitrary or capricious, not when deciding whether the ordinance at issue was more stringent than the act. Id. at 773-774. According to the court, the ordinance was more stringent because, unlike the act, it addressed "vernal pools" and "prohibit[ed] entirely any disturbance within the additional wetland protection zone established by the ordinance." Id. at 771-772. As mentioned above, the court then held that the commission's decision was not arbitrary or capricious considering, among other factors, "the commission's mandate to consider the cumulative effects of the proposed subdivision." Id. at 774.

2. The access road. The commission stated in its decisions that it had insufficient information "on the wetland impacts from the needed repairs to [the access road]" and, therefore, was "unable to assess the cumulative wetlands impacts as it is required to do under the [o]rdinance." The initial decision cited a memorandum from the commission's consulting

engineers that "identified needed repairs to the [access road] . . . with wetland impacts." That memorandum observed that the access road "is the only access road to the proposed . . . [b]ridge. It is showing significant signs of slope failure at multiple locations and within the wetlands buffer zone. Additionally, an abandoned sewer tunnel under the causeway may impact the roadway loading." The consultants asked the commission to "[i]ndicate whether the applicant has considered additional improvements needed on roadways leading up to the bridge to handle the anticipated traffic," and to describe, for "any additional improvements, . . . all potential wetland resource area impacts associated with those improvements." The consultants further stated that the commission "should evaluate cumulative wetland impacts from the bridge and roadway construction, and not allow segmentation of work within its jurisdiction."

The impacts with which the commission's consultants and the commission were concerned were within the DEP's purview. The DEP addressed the access road in its superseding order of conditions, stating that, according to the notice of intent, "[a]pproximately 126 [square feet] of [b]uffer [z]one will be permanently altered as a result of roadway and lighting improvements." The DEP also cited the assertion in Boston's notice of intent that "5,218 [square feet] of [b]uffer [z]one

associated with [c]oastal [b]lank . . . will be temporarily disturbed." According to the notice of intent, this temporary impact would "occur due to work within the existing roadway."

If the DEP thought that there were other road-related impacts affecting wetlands, it was required to address them -- even if they concerned parts of the access road outside the areas addressed by the act. See 310 Code Mass. Regs.

§ 10.05(6)(b) ("when the issuing authority has determined that an [a]ctivity outside the [a]reas [s]ubject to [p]rotection under [G. L. c.] 131, § 40[,] and outside the [b]uffer [z]one has in fact altered an [a]rea [s]ubject to [p]rotection under [G. L. c.] 131, § 40, it shall impose such conditions on any portion of the activity as are necessary to contribute to the protection of the interests identified in [G. L. c.] 131, § 40").¹⁰ To the extent the commission considered impacts related to the access road other than those that the DEP found meaningful, the different analyses are not due to the local ordinance being more stringent than the act. And certainly, the commission did not indicate in its decision that it was relying exclusively on any particular cumulative impacts regarding the access road.

¹⁰ The regulations define "[i]ssuing [a]uthority" as "a conservation commission, mayor, the selectmen or the [DEP], whichever is applicable." 310 Code Mass. Regs. § 10.04.

Additionally, if the DEP agreed with the commission that Boston had presented insufficient information about impacts related to the access road, it would have denied Boston's application on that basis. See 310 Code Mass. Regs.

§ 10.05(7)(h) ("If the [DEP] determines that insufficient information was submitted, it shall affirm the denial and instruct the applicant to refile with the conservation commission and include the appropriate information").

Accordingly, the superseding order of conditions preempts the commission's decision to the extent that the commission's decision was premised on impacts related to the access road.

Conclusion. Because the DEP's superseding order of conditions preempts the commission's denial of Boston's application, the Superior Court judgment is affirmed.

So ordered.

Appendix.

The relevant portions of the local ordinance are as follows:

"Purpose. The purpose of this chapter is to protect the wetlands, related water resources, and adjoining land areas in the city by prior review and control of activities deemed by the Quincy conservation commission likely to have a significant or cumulatively adverse effect upon wetland values; including, but not limited to, the following: Public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution, fisheries, shellfish, wildlife habitat, recreation, aesthetics (the visual quality and appearance of a project and/or quiet enjoyment of undisturbed resource areas), and aquaculture values (collectively, the 'wetland values protected by this chapter').

"Scope. Except as permitted by the conservation commission or as provided in this chapter, no person shall remove, fill, dredge, build upon or alter the following resources or land under said resources or land within one hundred feet of said resources: Any freshwater wetland including any marsh, wet meadow, bog or swamp; any saltwater wetland; any lake, river, pond, stream, drainageway, canal, estuary or the ocean; any bank, beach, dune or flat bordering on said water or wetlands; or any land subject to flooding or inundation by groundwater, surface water, tidal action or coastal storm flowage."