

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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1710

THEODORE ROOSEVELT IV, trustee,¹

vs.

CONSERVATION COMMISSION OF EDGARTOWN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from a decision of the Superior Court, affirming² a decision by the defendant conservation commission of Edgartown (commission) denying the plaintiff's application for an order of conditions authorizing certain construction within a resource area. Though we reject the plaintiff's contention that the local wetlands by-law adopted by Edgartown does not impose more stringent requirements than the Wetlands Protection Act, G. L. c. 131, § 40, we agree that the

¹ Of the Theodore Roosevelt IV Qualified Personal Residence Trust.

² Despite the absence of specific language affirming the commission's decision, in his written memorandum of decision the judge expressly declined to overturn it, which is equivalent in effect. Additionally, we note that no judgment entered on the docket. However, neither party contends that this appeal is interlocutory; because the case has been fully briefed and argued, we address the issues in exercise of our discretion. See, e.g., GTE Prods. Corp. v. Stewart, 421 Mass. 22, 24 n.3 (1995); Scannell v. Attorney Gen., 70 Mass. App. Ct. 46, 47 n.2 (2007).

commission's decision is arbitrary and unsupported by substantial evidence.

1. Jurisdiction. As the plaintiff acknowledges, a local by-law may impose more stringent requirements than the Wetlands Protection Act regarding proposed work within or potentially affecting a wetlands resource area. To the extent a municipal conservation commission's decision concerns only matters that are regulated by the Wetlands Protection Act, its decision is subject to the superseding authority of the Department of Environmental Protection (department); conversely, to the extent a commission's decision is based on provisions of the local by-law that are more stringent than the Wetlands Protection Act, the decision of the commission is eligible for review in the nature of certiorari under G. L. c. 249, § 4. See FIC Homes of Blackstone, Inc. v. Conservation Commn. of Blackstone, 41 Mass. App. Ct. 681, 686-687 (1996).

In the present case, the commission's decision relied on two interests specified by the local by-law (recreation and preservation of historic or natural views and vistas), which are not identified in the Wetlands Protection Act. The commission accordingly operated outside the superseding authority of the department to the extent it based its decision on those interests, and review of the commission's decision in a certiorari action was appropriate. See Hobbs Brook Farm

Property Co. Ltd. Partnership v. Conservation Commn. of Lincoln,
65 Mass. App. Ct. 142, 149-150 (2005).³

2. Substantial evidence. Having concluded that the commission's decision relied on two interests identified by the local by-law beyond those identified in the Wetlands Protection Act, we turn to the plaintiff's contention that the decision in respect of those interests is not supported by substantial evidence. As a threshold matter, the question whether the proposed walkway would be visible from nearby conservation lands, or from the water, was not a topic of inquiry at the time of the site visit upon which the commission's conclusion to that effect ostensibly relies. In addition, we observe that even the commission did not express the prospect of off-site visibility of the walkway as a finding, but merely speculated that it would be "likely."⁴ Our review of the record reveals no evidence to support a conclusion that the walkway would be visible beyond the boundaries of the plaintiff's property; such evidence as is in the record is simply unilluminating on the question. In any

³ As discussed infra, the absence of implementing regulations or detailed performance standards goes not to the question whether the local by-law imposes broader or more stringent regulations than the Wetlands Protection Act, but whether the commission's decision based on those broad interests may survive a claim that it is arbitrary, or lacking support by substantial evidence.

⁴ For present purposes we need not consider whether the mere visibility of a walkway beyond the property limits, standing alone, would furnish a permissible basis to prohibit it on grounds of the local by-law's stated interest in protecting natural views and vistas.

event, the record suggests that there are no adjacent conservation lands. Simply put, even assuming that visibility of the walkway from publicly accessible lands would be a valid basis to deny the plaintiff's application, the commission's decision does not include a finding that the walkway would be visible from any such lands, or (if so) from what vantage points on such lands, and the record contains no evidence to support any such finding. The commission's decision likewise contains no finding, explanation, or reasoned discussion of the adverse effects such visibility would have on the additional interests identified for protection under the local by-law.⁵ "Although the commission is entitled to all rational presumptions in favor of its interpretation of its own by-law, there must be a rational relation between its decision and the purpose of the regulations it is charged with enforcing." Fafard v. Conservation Commn. of Reading, 41 Mass. App. Ct. 565, 572 (1996). See Fieldstone Meadows Dev. Corp. v. Conservation Commn. of Andover, 62 Mass. App. Ct. 265, 269-270 (2004).

Read as a whole, the commission's findings (as supplemented by its further findings) are expressed in such broad and sweeping terms, in ostensible protection of such broad and

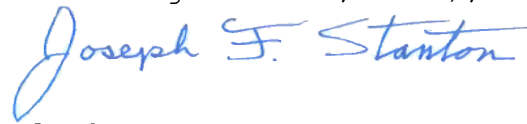
⁵ By way of illustrative example, but not limitation, the commission has offered no explanation for how seeing the walkway would adversely affect the recreational experience of a boater on Cape Poge Bay, even assuming the walkway would be visible from that vantage.

amorphous (but otherwise undefined) interests under the local by-law, and with such a startling absence of evidentiary support, that they smack of precisely the sort of arbitrary and capricious determinations that even our traditionally deferential posture toward administrative bodies will not leave intact. Cf. Crawford v. Cambridge, 25 Mass. App. Ct. 47, 49 (1987).

Thus, we vacate the decision of the Superior Court.⁶ A judgment shall enter annulling the commission's decision and remanding the matter to the commission for further proceedings consistent with this decision. See McDonald's Corp. v. Selectmen of Randolph, 9 Mass. App. Ct. 830, 832 (1980).

So ordered.

By the Court (Green,
Massing & Sacks, JJ.⁷),



Clerk

Entered: December 5, 2016.

⁶ See note 2, supra.

⁷ The panelists are listed in order of seniority.