

Appeals Court Affirms Dennis Conservation Commission's Denial of Order of Conditions

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On March 1, 2017, the Massachusetts Appeals Court affirmed a Barnstable Superior Court ruling in favor of a Dennis Conservation Commission denial of an Order of Conditions made under the local wetland bylaw. Importantly, the Appeals Court upheld the commission's determination that a new dock project would adversely impact the interests in public recreation and wildlife habitat protected by the Dennis Wetlands Protection Bylaw ("Bylaw") and the commission's accompanying rules and regulations ("Regulations"). The Court also affirmed the commission's determination that the applicants failed to meet their burden of proof for a variance required for proposed dredging for the project.

The public's recreational interest in boating is a resource area value specifically protected by the Bylaw and Regulations. The commission determined that based on the location of two existing docks licensed under G.L. c. 91, the proposed project would create boating safety issues that would adversely impact public recreation by creating unsafe boating conditions in the narrow lagoon channel. The Court determined that the commission's determination regarding these impacts was based on substantial evidence in the form of two letters from the Harbormaster concluding that the dock would create boating safety issues. The Court also held that Chapter 91 licensing of the preexisting docks "did not preclude the commission from determining that the interest of the public under the by-law would be adversely affected, nor did it prevent the commission from denying the project under the by-law and accompanying regulations."

The Court also upheld the commission's finding that the project would adversely impact shellfish habitat. The commission was presented with conflicting evidence regarding shellfish habitat impacts, including a Department of Marine Fisheries report identifying the project locus as significant to the interests of the Wetland Protection Act and marine fisheries, as well as a shellfish survey submitted by the applicants' expert opining that the project would not have adverse impacts on shellfish habitat.

The Court granted deference to the commission's reasoned choice weighing the conflicting evidence.

The Court also affirmed the commission's denial of a variance required for dredging the channel leading up to the proposed dock location. The commission has the discretion to grant variances for projects that would otherwise be prohibited in limited instances where the applicant proves that given existing conditions the project will serve to lessen the impacts to and/or substantially enhance the interests identified in the Bylaw and there are no other reasonable conditions or alternatives that would allow the project to proceed in compliance with the commission's rules and regulations. Based on this standard, the Court upheld the commission's determination under the Bylaw that the project would not lessen impacts to the resource area values of public recreation and wildlife habitat but rather, the project would adversely impact such interests.

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This Appeals Court decision, Robin Downs v. Conservation Commission of Dennis, 91 Mass. App. Ct. 1108 (2017)(Rule 1:28 Decision) is an unpublished decision under Rule 1:28. That means the decision is binding on the parties to the case and may be cited for its persuasive value but does not constitute binding precedent.