

**Commonwealth of Massachusetts
County of Plymouth
The Superior Court**

CIVIL DOCKET#: **PLCV2009-00763-B**

RE: Garrity v Town of Hingham Conservation Commission

TO: Matthew Watsky, Esquire
30 Eastbrook Road
Suite 301
Dedham, MA 02026

NOTICE OF DOCKET ENTRY

You are hereby notified that on **12/13/2010** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER on Plaintiff's Motion for Judgment on the Pleadings and Defendant's Cross-Motion for Judgment on the Pleadings (Richard J. Chin, Justice) Dated 12/10/10, Entered and Copies mailed 12/13/10
Dated at Plymouth, Massachusetts this 13th day of December, 2010.

Robert S. Creedon, Jr.,
Clerk of the Courts

BY: Adam Baler
Assistant Clerk

Telephone: (508) 747-8565

Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET# PLCV2009-00763B

(SEAL)

Michael Garrity,
Plaintiff,

vs.

Town of Hingham Conservation Commission,
Defendant.

JUDGMENT

This action came on before the Court, Richard J. Chin, Justice, presiding, upon cross-motions of the parties for judgment on the pleadings, and the court after hearing and upon consideration thereof, issued a Memorandum of Decision and Order, therefore,

It is **ORDERED** and **ADJUDGED**:

That judgment enter for the plaintiff, Michael Garrity, that the Decision of the Hingham Conservation Commission denying Garrity's requested March 2009 Order of Conditions be and hereby is **REVERSED** and that the Hingham Conservation Commissions's June 2009 Enforcement Order be and hereby is **REVERSED**.

Dated at Plymouth, Massachusetts this 10th day of December, 2010.

Robert S. Creedon, Jr.,
Clerk of the Courts

By:.....



Assistant Clerk

*Entered and
Copies mailed 12-13-10*

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2009-00763-B

MICHAEL GARRITY

vs.

TOWN OF HINGHAM CONSERVATION COMMISSION

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND
DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

On June 24, 2009, the plaintiff, Michael Garrity, filed this certiorari action under G.L. c. 249, § 4, against the defendant, the Town of Hingham Conservation Commission (the "Commission"). Garrity's First Amended Complaint contains five counts, all of which seek relief in the nature of certiorari. On June 1, 2010, Garrity filed a motion for judgment on the pleadings. The Commission has filed a written opposition and a cross-motion for judgment on the pleadings. Also, the Commission filed a motion to strike the plaintiff's motion for judgment on the pleadings.¹ For the following reasons, Garrity's motion for judgment on the pleadings is **ALLOWED** and the Commission's cross-motion for judgment on the pleadings is **DENIED**.

BACKGROUND

On March 9, 2009, Garrity filed a Notice of Intent (NOI) with the Commission under the State Wetlands Protection Act and the Hingham Wetlands Protection By-Law, requesting an

¹ The Commission's motion to strike is allowed to the extent that the plaintiff improperly attached documents to his written memorandum in support of his motion for judgment on the pleadings that are not part of the administrative record in this case. This court will not consider these documents.

Order of Conditions allowing the construction of a residential pile-supported pier, ramp, pile-held floating dock, and platform in front of his single-family home at 7 Howard Road in Hingham, Massachusetts.

As part of the March 9, 2009 NOI, Garrity or his representative completed a form entitled, "Hingham Conservation Commission Waiver of 21-Day Deadline: MGL Chapter 131 Section 40 and The Town of Hingham Wetland Protection Bylaw." The form notes that the Hingham Conservation Commission "request the below listed applicant to waive the mandated twenty-one (21) day decision deadline in order that each project receive a fair and thorough review." The completed form states that "Michael Garrity (applicant) hereby waives the mandated twenty-one (21) day decision deadline for the project entitled Residential Pier & Float at 7 Howard Road (address). A complete application for this project was submitted on March 9, 2009" There is no specified area on the waiver form for a signature.

The NOI includes a checklist created by the Commission. The checklist notifies the applicant at the top of the form that "THE HINGHAM CONSERVATION COMMISSION WILL NOT ACCEPT INCOMPLETE FILINGS. You must check off all items applicable to your project, sign & return to the HCC with the completed Notice of Intent."² Administrative Record at 353 (emphasis in original). In the checklist under the "Submit to Hingham Conservation Commission" category is item "f" which states the following: "I have read and signed the Hingham Conservation Commission's **Waiver of 21-Day Deadline**." Item "f" is checked off and the checklist is signed by Bryan Natale, Garrity's representative. The checklist

² At the bottom of the checklist in bold print is the following statement: "Please note that unless all required components are included, your application *will not be considered complete*." Administrative Record at 353 (emphasis in original).

is dated March 11, 2009.

Garrity's representative later filed a written request to continue the NOI public hearing to April 6, 2009. Subsequently, at the April 6, 2009 Commission meeting, a hearing was held on Garrity's application. The meeting minutes indicate that the Conservation Officer advised that unlike the previous NOI for a pier at this property, this proposal addresses public access, sunlight through decking, and the mass of the pier. Several abutters were present and offered their comments. One abutter asserted that a small boat regatta was held off the adjacent North Beach every year and that "this dock would make that regatta impossible." Garrity's representative stated that he did not feel that the regatta would be unable to continue. Another abutter noted for the record that Garrity was not physically present at the hearing. The hearing was then closed.

Following the hearing, the Commission received numerous form letters from Hingham residents who were not abutters to the project. The Commission never reopened the hearing on Garrity's application to formally accept these items. The form letters oppose Garrity's proposed dock and assert, inter alia, that the proposed project would impact recreation on North Beach, a small residential beach located in close proximity to Garrity's residence. Moreover, the form letters contend that the project would interfere with kayaks and small sail boats.

On April 27, 2009, twenty-one days after the April 6, 2009 hearing, the Commission voted unanimously to deny the Order of Conditions for the proposal. The Commission issued the denial the following day on April 28, 2009, twenty-two days after the hearing. By letter dated April 29, 2009, Garrity appealed to Massachusetts Department of Environmental Protection (DEP) for a Superseding Order of Conditions based on the Commission's failure to act within the statutory time period. The Commission sent DEP a letter dated May 5, 2009, citing Garrity's

written waiver of the twenty-one day deadline. On July 30, 2009, DEP issued a Superseding Order of Conditions approving the proposed work.

On June 22, 2009, the Commission issued an Enforcement Order for work conducted by Garrity without an Order of Conditions or a building permit regarding the following: construction of a wide stairway on a coastal bank; construction of an approximately 38' x 16' deck on a coastal bank and within a velocity zone VE (30) storm surge area; covering and crushing intertidal saltmarsh vegetation with stepping stones; and installation of granite steps on the coastal bank. Garrity also challenges the Enforcement Order in this action.

On June 24, 2009, Garrity filed this certiorari action under G.L. c. 249, § 4 in the Superior Court. On November 4, 2010, this court held a hearing on Garrity's motion for judgment on the pleadings and the Commission's cross-motion for judgment on the pleadings.

DISCUSSION

This Court's review of an agency decision in the nature of certiorari is limited to correcting substantial errors of law, apparent on the record, which adversely affect material rights. G. L. c. 249, §4; Carney v. Springfield, 403 Mass. 604, 605 (1995). In its review, this Court "may rectify only those errors of law 'which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public.'" Carney v. Springfield, 403 Mass. at 605 (citation omitted).

The nature of the action in question determines the standard of review. Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). Where there is a claim that the administrative agency issued its decision contrary to the evidence appearing in the administrative record, such as factual findings, this Court may apply the substantial evidence

test. New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466-67 (1981).

Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion after taking into consideration the entire record. G.L. c. 30A, §§ 1(6), 14(7). Yet, where there is a claim that an agency abused its discretion when making its decision, the court will apply the “arbitrary and capricious” standard. T.D.J. Dev. Corp. v. Conservation Comm’n of North Andover, 36 Mass. App. Ct. 124, 128 (1994) (recognizing that “where the action sought to be reviewed was the proper exercise of the commission’s discretion in the imposition of conditions for the protection of wetlands, an ‘arbitrary and capricious’ standard should be applied”). An agency’s decision will satisfy the “arbitrary and capricious” standard “unless there is no ground which ‘reasonable men might deem proper’ to support it.” Id. (citation omitted).

Additionally, “[i]f the agency has, in the discretionary exercise of its expertise, made a choice between two fairly conflicting views, and its selection reflects reasonable evidence, a court may not displace [the agency’s] choice.” Conservation Comm’n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 739-740 n.3 (2000) (citations omitted). This court gives substantial deference to the agency’s findings of fact and interpretation of its regulations. Id.

Order of Conditions

Timing Provisions of G.L. c. 131, § 40

Garrity argues that the Commission failed to issue its Order of Conditions within the twenty-one day time period pursuant to G.L. c. 131, § 40 and therefore, the Commission’s decision was superseded by DEP’s Superseding Order of Conditions. This court agrees. Here, the checklist associated with Garrity’s March 9, 2009 NOI essentially requires the applicant to

complete the deadline waiver form. As discussed above, the checklist reminds the applicant at the top of the form that “THE HINGHAM CONSERVATION COMMISSION WILL NOT ACCEPT INCOMPLETE FILINGS. You must check off all items applicable to your project, sign & return to the HCC with the complete Notice of Intent.” Administrative Record at 353 (emphasis in original). In the checklist under the “Submit to Hingham Conservation Commission” category is item “f” which states the following: “I have read and signed the Hingham Conservation Commission’s **Waiver of 21-Day Deadline**.” Based on the instructions contained in the Commission’s checklist, Garry’s representative was required to check off item “f” and complete the waiver form before the Commission would consider the NOI. Nothing in the checklist indicates that the waiver form was optional. Hence, as discussed below, the waiver was involuntary and unenforceable in the instant case.

General Laws c. 131, § 40 states in pertinent part that:

[I]f a [local conservation] commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order . . . any person aggrieved by said commission’s . . . failure to act . . . may, . . . within ten days from said commission’s . . . failure to act, request the [DEP] to determine whether the area on which the proposed work is to be done is significant [to interests protected by the act] . . . Upon receipt of such request the [DEP] shall make the determination requested and shall by written order . . . impose such conditions as will contribute to the protection of the interests described herein . . . Such order shall supersede the prior order of the conservation commission . . . and all work shall be done in accordance therewith

G.L. c. 131, § 40. “[T]he timing provisions in the act are obligatory, and a local community is not free to expand or ignore them. Thus, where a conservation commission issues its decision after the statutory deadline, it is appropriate that it should lose the right to insist on the provisions of its local bylaw, and that any superseding order issued by the DEP should apply in its stead.”

Oyster Creek Preservation, Inc. v. Conservation Comm’n of Harwich, 449 Mass. 859, 866 (2007)

(emphasis added).

On April 27, 2009, twenty-one days after the April 6, 2009 hearing, the Commission voted unanimously to deny the Order of Conditions for the proposal. The Commission issued the denial on April 28, 2009, twenty-two days after the hearing. By letter dated April 29, 2009, Garrity appealed to Massachusetts Department of Environmental Protection (DEP) for a Superseding Order of Conditions based on the Commission's failure to act within the statutory time period. On July 30, 2009, DEP issued a Superseding Order of Conditions approving the proposed work.

In this case, through its NOI checklist, the Commission improperly attempted to expand and ignore the timing provisions of G.L. c. 131, § 40 by requiring all NOI applicants to complete the waiver form before it would accept the applicant's filings. The waiver form itself does not give the applicant the option of not completing the form. In Oyster Creek Preservation, Inc., the Supreme Judicial Court explicitly stated that a local community is not free to expand or ignore the timing provisions of G.L. c. 131, § 40 and by requiring NOI applicants, such as Garrity, to sign and complete the checklist and waiver form, the Commission impermissibly tried to circumvent the timing provisions imposed by statute. See Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. at 866. See also Regan v. Conservation Comm'n of Falmouth, 77 Mass. App. Ct. 485, 489 (2010).

Thus, Garrity's waiver of the statutory timing provisions of G.L. c. 131, § 40 is ineffective because he was required to complete the waiver by the Commission. Since Garrity's waiver does not apply, the Commission's decision is superseded by DEP's July 2009 Superseding Order because the Commission failed to issue its decision within twenty-one days as

required under G.L. c. 131, § 40.³ Consequently, the Commission's denial of Garrity's requested March 2009 Order of Conditions must be reversed.

Enforcement Order

As to the June 2009 Enforcement Order, this court is satisfied that the Enforcement Order must be reversed because the alleged violations are not supported by substantial evidence in the administrative record. On June 22, 2009, the Commission issued an Enforcement Order for work allegedly conducted by Garrity without an Order of Conditions or a building permit regarding the following: construction of a wide stairway on a coastal bank; construction of an approximately 38' x 16' deck on a coastal bank and within a velocity zone VE (30) storm surge area; covering and crushing intertidal saltmarsh vegetation with stepping stones; installation of granite steps on the coastal bank.⁴

The Commission references photographs in the administrative record at 118, 119, 120, and 121. Based on these photographs, this court is unable to determine whether the stairway was actually widened, or whether the stairway was rebuilt using pre-existing footings which caused

³ The "Supreme Judicial Court has recognized that:

The failure of a conservation commission to issue a timely decision presents a different case than one in which the commission is timely with its decision but rests its determination on provisions of a local bylaw that are more protective than the act. In the latter case, a superseding order of conditions issued by the DEP cannot preempt the conservation commission's bylaw-based determination . . . where a conservation commission issues its decision after the statutory deadline, it is appropriate that it should lose the right to insist on the provisions of its local bylaw, and that any superseding order issued by the DEP should apply in its stead.


Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich, 449 Mass. at 865-866.

⁴ This court acknowledges that the Commission also sent DEP a letter dated May 5, 2009 in response to Garrity's request for a Superseding Order of Conditions from DEP.

no alteration to the coastal bank. As to the deck, stepping stones, and granite steps, the Commission did not issue any findings of fact in support of its Enforcement Order, and the Commission is unable to point to evidence in the administrative record which would suggest that the Enforcement Order was based on substantial evidence. Under the facts and circumstances of this case, the June 2009 Enforcement Order is reversed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that plaintiff Michael Garrity's Motion for Judgment on the Pleadings is **ALLOWED** and defendant Town of Hingham Conservation Commission's Cross-Motion for Judgment on the Pleadings is **DENIED**. The Commission's denial of Garrity's requested March 2009 Order of Conditions is **REVERSED** and the Commission's June 2009 Enforcement Order is **REVERSED**. Accordingly, judgment shall enter for Garrity.


Richard J. Chin
Justice of the Superior Court

Dated: December 10, 2010