

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

SJC-10596

CAPE COD COMMISSION,)
Petitioner,)
v.)
ENERGY FACILITIES SITING BOARD, ET AL.,)
Respondents.)

ALLIANCE TO PROTECT NANTUCKET SOUND,)
INC., ET AL.,)
Petitioners,)
v.)
ENERGY FACILITIES SITING BOARD,)
DEPARTMENT OF ENVIRONMENTAL PROTECTION)
and CAPE WIND ASSOCIATES, LLC,)
Respondents.)

TOWN OF BARNSTABLE,)
Petitioner,)
v.)
ENERGY FACILITIES SITING BOARD, ET AL.,)
Respondents.)

ON APPEAL FROM A DECISION OF THE
ENERGY FACILITIES SITING BOARD

BRIEF OF THE TOWNS OF AQUINNAH, CHILMARK
AND EDGARTOWN AS AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Towns of Aquinnah, Chilmark and Edgartown (the "Island Towns") are members of the Martha's Vineyard Commission ("MVC"), a regional planning body created by a special act of the Legislature in 1974. See St. 1974, c. 637, as amended through St. 1992, c. 97 (the "MVC Act"). The MVC Act is similar in many respects to, and the model for, the 1989 enabling legislation for the appellant Cape Cod Commission ("CCC") (St. 1989, c. 716) (the "CCC Act").

In addition to being proximately located to the proposed wind farm project under review, the Island Towns submit this amicus brief because they concur with the CCC that The Energy Facilities Siting Board's ("EFSB") statutory powers do not confer it with the authority to override the CCC - or the MVC - in derogation of their special statutory mandate to protect the land and waters of Cape Cod and Martha's Vineyard.

An applicant for an electrical power generating facility aggrieved by a decision of either the CCC or MVC (such as the appellee Cape Wind Associates, LLC ("Cape Wind")) has the right to pursue a statutory appeal to Court - not administrative review before the

EFSB. A review of the governing statutory texts and the applicable case law, set out in the body of this Brief, warrants this conclusion. Accordingly, the ESBS's decision to allow the installation of the submarine cable through the Town of Barnstable, without the approval of the CCC, must be vacated.

STATEMENT OF THE CASE AND FACTS

To the extent necessary, the Island Towns adopt the statement of the case and statement of facts set forth in the brief of the CCC.

STATEMENT OF ISSUE

The sole issue addressed by the Island Towns is whether the EFSB lacks the statutory authority to override a decision of the CCC. The Island Towns will focus on the analogous MVC Act, and will demonstrate, under established principles of statutory interpretation, that the Legislature did not vest the ESFB with the authority to override decisions of the MVC or the CCC.

ARGUMENT

A. The Legislature Established the MVC With Broad Powers To Protect the Unique Land and Waters Of Dukes County Without Providing that the More Narrowly Focused EFSB May Override MVC Decisions.

1. The Legislature Created the EFSB in 1973 With a Narrow Set of Review Standards.

The legislature created the ESFB in 1973 with the mission "to provide a reliable energy supply for the commonwealth with minimum impact on the environment at the lowest possible cost." G. L. c. 164, § 69H. The members of the ESFB are appointed by the governor. Id.

The EFSB had the power to issue a Certificate if a utility is prevented from building a facility "by disapprovals, conditions or denials by local governments." G. L. c. 164, § 69K, as inserted by St. 1973, c. 1232, § 1. A 1976 amendment substituted the phrase "local agency or body" in the above cited sentence for the term "local governments". See St. 1976, c. 468, § 6.¹

In acting on a petition for a Certificate under G.

¹ That amendment is significant because, as the CCC points out in its brief, the MVC, under G. L. c. 164, § 69G, is a "local government" - not a "local agency or body" - and, consequently, the legislature eliminated the MVC and the CCC as a permitting body from which an aggrieved applicant could mount an appeal to the EFSB.

L. c. 164, § 69K, the focus of the EFSB is, by statute, narrow. Under § 69O, the EFSB must act on a petition for a Certificate within six (6) months of filing and, in rendering a decision, must consider four (4) factors: 1.) "the need for the facility to meet the energy requirements of the applicant's marketplace"; 2.) "the compatibility of the facility with considerations of environmental protection, public health and public safety"; 3.) whether "the [proposed] facility . . . fail[s] to conform with existing state and local law . . . [does it] provide a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost"; and 4.) whether "public interest . . . require[e] construction . . . of the facility." As set forth below, these narrow criteria stand in contrast to the broad mandate with which the legislature imbued the MVC (and the CCC).

2. The Legislature Established the MVC in 1974 With a Broad Mandate to Protect the Land and Waters of the Island Beyond the Protections Afforded by Local By-laws with Narrow Orientation.

In 1974 - one year after the EFSB came into existence - the legislature created the MVC. See St.

1974, c. 637. The legislature superseded the initial legislation in 1977 (St. 1977, c. 831), and again in 1992 (St. 1992, c. 97). The MVC has twenty-one members: one resident of each town appointed by its selectmen; nine members elected at large by Island voters (with no more than two from any one town); one county commissioner or their designee; one cabinet member appointed by the governor; and four Island residents, also appointed by the governor. See St. 1977, c. 831, § 2, par. 2.

Section 1 of the 1977 MVC legislation sets out the rationale for establishing the MVC:

"The island of Martha's Vineyard possesses unique, natural, historical, ecological, scientific, cultural, and other values and there is a regional and statewide interest in preserving and enhancing these values. . . .

The preserving and enhancing of these values requires the designation of districts of critical planning concern and the recognition of developments of regional impact, and the review thereof by the regional commission.

The purposes of the commission created by this act shall be to further protect the health, safety, and general welfare of island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies."

Section 2 of the MVC Act provides that the MVC has jurisdiction over all the lands and waters of Dukes County, with three enumerated exceptions: a.) the Elizabeth Islands; b.) certain tribal lands held for the benefit of the Wampanoag Tribe of Aquinnah; and c.) lands owned by the Commonwealth (or its agencies).² As amended in 1977, that jurisdictional language reads as follows:

"[T]he [MVC] . . . shall have the responsibilities, duties, and powers established herein over the lands and waters in the county of Dukes County [excepting the Elizabeth Islands, the Tribal Lands], and to the extent they are excluded from the responsibilities, duties and powers of the towns, all land owned by the commonwealth or any of its constituent agencies" (emphasis added).

The MVC Act itself contains no other exceptions, and does not "carve out" from the MVC's jurisdiction projects (or aspects thereof) which, in other areas of

² Section 2 of the original 1974 legislation established the basic jurisdictional mandate of the MVC as follows:

"There is hereby created the [MVC] . . . which shall have the responsibilities, duties, and powers herein over the lands and inland waters in Dukes county, with the exception of the Elizabeth Islands[,] [the Wampanoag Tribal Lands in the Town of Aquinnah], and all lands owned by the commonwealth or any of its constituent agencies, boards, departments, commissions, or offices."

the Commonwealth, may fall under the ultimate authority of the EFSB.

Section 18 of the MVC Act - similar to the cognate provision in the CCC Act - provides that "[a]ny party aggrieved by a determination of the [MVC] may appeal to the superior court" ³ Given the limited authority of the EFSB under G. L. c. 164, § 69K to issue a certificate of environmental impact and public interest (a "Certificate") to override a decision issued by a "state or local agency" (which by definition the MVC is not) - and given the limited scope of review that the EFSB applies "on appeal" - that agency had no power to render the decision under appeal.

This Court has consistently recognized the importance of the legislature's decision to protect the unique land and waters of the Vineyard. The leading case on the MVC's powers remains Island Properties,

³ The Land Court has repeatedly refused to hear appeals from the MVC because § 18 grants exclusive jurisdiction to the Superior Court: "In its wisdom, the General Court has never amended Section 18 to expand the right of appeal to any court beyond the superior court. Such legislative history does not suggest any intent on the part of the General Court to confer jurisdiction on this court in dealing with matters pertaining to the MVC act." Nab's Corner Realty Trust v. Martha's Vineyard Commission, 9 LCR 444, 445 (2001).

Inc. v. Martha's Vineyard Commission, 372 Mass. 216 (1977), where this Court summarized the two regulatory functions of the MVC: a.) the power to review developments of regional impact (so-called "DRI's"); and b.) the authority to promulgate and impose upon the six towns on Martha's Vineyard regulations for districts of critical planning concern ("DCPC's"). See id. at 220-22.⁴

In Island Properties, this Court held that DCPC regulations are not subject to the grandfather protections of G. L. c. 40A, § 6 (then Section 7A). Indeed, this Court held that it would be a "perverse anomaly" if the regional purposes sought to be protected by MVC regulations in sensitive areas could be superceded by the provisions of Section 6 - leaving in place local by-laws with narrow orientation. Id. at 229.

Sections 12-16 of the MVC Act govern DRI's. If a development project triggers MVC review as a DRI, then

⁴ The legislature provided for state input into the MVC's regional planning. Under § 7 of the MVC Act, the MVC is required to submit to the secretary of executive office of environmental affairs, for approval, its standards and criteria both for designating DCPC's and reviewing DRI's. The secretary "and such other cabinet members designated by the governor" shall "approve, disapprove, or amend" the standards submitted by the MVC.

no town or municipal board "shall grant a development permit . . . except with the permission of the [MVC]." St. 1977, c. 831, § 16. Section 12 lays out an array of "considerations" the MVC must examine in adopting standards and criteria for DRI's, including: the extent to which a project would create or alleviate pollution; its size; the traffic generated; the number of residents or employees; what market the project intends to serve; its location vis a vis public facilities; and the manner in which the development would tax public services. See MVC Act § 12.

In acting on projects deemed to be DRI's, the MVC is mandated, after public hearing, to weigh the "probable benefit" of a proposal against its "probable detriment". Id. at § 14. The MVC Act requires the MVC to consider, at a minimum, eight statutory factors in its deliberations including, among others, whether the proposed project "is or is not essential or especially appropriate in the view of the alternatives on the island" and "because of circumstances peculiar to the location, the effect is likely to be greater than is ordinarily associated with the development of the types proposed" Id. at 15. Perhaps most importantly to the Island Towns - and a key reason for their

submission of this amicus brief - is that the MVC is bound to consider whether a DRI proposal "will aid or interfere with the ability of a municipality to achieve the objectives set forth in the municipal general plan" (§ 15(g)).

In the cases following Island Properties, this Court has been called upon to reconcile the reach of the MVC Act with the authority of other state-created entities and rights established by state law. In Woods Hole, Martha's Vineyard and Nantucket S.S. Auth. v. Martha's Vineyard Commission, 380 Mass. 785 (1980) ("Steamship Authority"), the question presented was whether the MVC had the authority to regulate land under the control of a separately created State authority - the Steamship Authority - to run a boat line. This Court ruled that the Steamship Authority had complete control over the operations of the boat line, but that the MVC had the power to regulate land use: the Steamship Authority's construction of an additional slip in Vineyard Haven harbor was, therefore, subject to MVC review. That ruling prompted a 1981 special act exempting the Steamship Authority from MVC control or review. See St. 1981, c. 223, and discussion of the Steamship legislation infra at 13-14.

Most recently, in Kitras v. Zoning Administrator of Aquinnah, 453 Mass. 245 (2009), this Court reiterated that the holding of Island Properties "remains applicable to the present proceedings." Id. at 258 n.20. In further recognition of the MVC's unique statutory powers and function, this Court held that "G. L. c. 40A, § 14A, enables a property owner to challenge the validity of a municipal ordinance, bylaw, or regulation [but] does not serve as a mechanism by which a landowner can challenge the designation of a [MVC created] DCPC." Id. at 258.

3. Basic Tenets of Statutory Construction Compel the Conclusion that the EFSB Does Not Have the Power to Override Decisions of the MVC.

Against that backdrop, the following principles of statutory interpretation guide the analysis that the Island Towns suggest this Court should adopt to reconcile the network of statutes implicated by a project, such as the one sponsored by Cape Wind. First, "where two or more statutes relate[d] to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, 382 Mass. 580, 585 (1981). Second, "if a

general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute." Saccone v. State Ethics Comm'n, 395 Mass. 326, 332 (1985). And, finally, "where two statutes are inconsistent, the later statute governs." Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 819 (1984).

Given that the legislature created the EFSB before it established the MVC, the Court must presume that legislature intended to harmonize the two statutory schemes. The MVC Act does not except from that planning body's reach projects which fall within the review powers of the EFSB - something the legislature knows how to do when it intends that result. As noted, the legislature initially removed from MVC review the Elizabeth Islands, Tribal Lands, property controlled by the Commonwealth and, after the Steamship Authority case, specifically eliminated that entity from the MVC's purview. That special legislation (St. 1981, c. 223) provides, in its entirety, as follows:

"Notwithstanding any general or special law to the contrary, the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, established by chapter seven hundred and one of the acts of nineteen hundred and sixty, its operation, management, any water under its care, control or custody, and all property real and personal shall be exempt from any control or regulation by the

Martha's Vineyard Commission established by chapter eight hundred and thirty-one of the acts of nineteen hundred and seventy-seven."

Further, and in contrast to its sister agency, the legislature explicitly elected to grant the Housing Appeals Committee the power to review CCC decisions for c. 40B projects. Section 11(k) of the CCC Act states:

"For purposes of sections twenty to twenty-three, inclusive, of chapter forty B of the General Laws, the [CCC] shall be considered a local board."

The legislature took no similar action with the MVC, however.

In CKA, LLC Assoc. et al v. Board of Appeals of Oak Bluffs, DUCV2001-00068 (May 29, 2002), Judge Kilborn (the former Chief Justice of the Land Court, sitting as a Superior Court judge by designation) recognized that the legislature had not defined the MVC as a "local board" for purposes of c. 40B, and therefore ruled that MVC does have jurisdiction over 40B projects. Accordingly, an applicant may not bypass MVC review by going directly to the HAC. Judge Kilborn ruled:

"The project proponents stress the clear legislative concern for affordable housing embodied in Chapter 40B and referenced in appellate case law; they then point to the undoubted fact that referral of a project to the MVC will slow down, or perhaps even prevent, Chapter 40B approval. All that is true, but it is equally true that the General Court, and the

appellate courts, have shown clear concern for the unique status of the Vineyard. The project proponents advance arguments supporting their contention that the General Court favors the interests served by Chapter 40B more than those served by the MVC Act. Indeed, the General Court has made that choice once, with respect to the Cape Cod Commission, but it has not done so as to the MVC". (Slip Op. at 16-17).

While we recognize that a decision of the Land Court carries no precedential weight in this Court, we urge the Court to reach a similar conclusion as to the breadth of the EFSB's claimed jurisdiction over matters within the purview of the CCC.

That the legislature intended projects such as the one proposed by Cape Wind to be within the primary jurisdiction of the CCC - reviewable by the Superior Court and not the EFSB - is further confirmed by the 2008 amendments to the Ocean Sanctuaries Act. See G. L. c. 132A, § 12A-18, as amended through St. 2008, c. 114, § 3-4 (the "Oceans Act"). The Oceans Act establishes various ocean sanctuaries within Massachusetts waters, including the Cape and Islands Ocean Sanctuary (G. L. c. 132A, § 13(c)),⁵ and regulates certain activities within the territorial

⁵ The Island Waters under the jurisdiction of the MVC fall within this sanctuary, but there are two other sanctuaries bearing the name of Cape Cod: "The Cape Cod Ocean Sanctuary" and "The Cape Cod Bay Ocean Sanctuary". See G. L. c. 132A, § 13.

limits of those areas. In 2008, the legislature amended § 15 of the Oceans Act, by adding the following language:

"Except as otherwise provided in this section, the following activities shall be prohibited in an ocean sanctuary . . . (2) the construction of offshore . . . electric generating stations, except . . . (b) for appropriate-scale renewable energy facilities . . . in areas other than the Cape Cod Ocean Sanctuary; provided, however, that . . . (iii) in regions where regional planning bodies have regulatory authority, a regional planning agency may review the appropriate-scale offshore renewable energy facilities as developments of regional impact and the applicant [may seek review pursuant to the authority of the energy facilities siting board] to issue certificates of environmental impact and public interest pursuant to sections 69K through 69O of chapter 164."⁶

The 2008 amendment to the Oceans Act confirms that the legislature knows how to place review of MVC and CCC decisions within the jurisdiction of the EFSB when it chooses to do so, but that it did not divest the MVC or the CCC of oversight in the matter under review.

"A statute should be construed so as to give effect to each word, and no word shall be regarded as

⁶ While the Project is not subject to the Oceans Act because it is located in federal rather than state waters, the 2008 amendment to the Oceans Act confirms that the legislature presumed its prior enactments had squarely established that offshore renewable energy projects within state waters were subject to MVC and CCC review, with judicial review.

supplusage." Ropes & Gray, LLP v. Jalbert, 454 Mass. 407, 412 (2009). Had the legislature presumed that the EFSB had authority to review developments of regional impact within the MVC's jurisdiction, then it would have been unnecessary for it explicitly to say so by amending § 15 of the Oceans Act through St. 2008, c. 114, § 7. That amendment is not "supplusage".

D. The Construction Advanced by the Towns Is Corroborated By the Purposes of the Two Separate Bodies.

The correct reading of the intersection between the MVC Act and the EFSB's enabling legislation establishes that the EFSB does not have the power to override MVC decisions. As set out in this brief, the EFSB - in both its mission and in the criteria it applies when reviewing an application for a Certificate - focuses on providing energy to a specific market area, at the lowest costs, and with minimal environmental impact. Notable goals, to be sure, but goals which can directly conflict with the mission of the MVC to evaluate large-scale development projects under a benefit-detriment test, with an eye toward consistency with local and Island-wide planning goals. To hold that the EFSB - applying its mandate - has the power to override an MVC DRI decision would eviscerate

the MVC's statutory mandate to protect the land and waters of the Vineyard. While a court exercising its power of judicial review would pay appropriate deference to the MVC's standards and criteria for DRI's - which have been approved at the state level - the EFSB has no corresponding statutory obligation to honor those goals.⁷

While the 2008 amendment to the Oceans Act changes that balance for limited types of power generating projects located in certain areas, it establishes a specific exception, and not the rule. The MVC and the CCC, absent legislative direction to the contrary, have jurisdiction to review development projects within the land and waters of Dukes County and Cape Cod triggering DRI review. Project proponents, if aggrieved by a decision of either of these two unique agencies, have a right to judicial review - not an appeal to the EFSB.

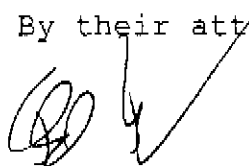
⁷ The Island Towns also reiterate, as noted at the outset, that their citizens rely heavily on regional assets - the fisheries and tourism, for example - "considerations which . . . the towns themselves [could not] severally bring to bear." Island Properties, 372 Mass. at 229. As the MVC (and the CCC) are made up of locally elected and locally/state appointed members, those planning entities provide a comprehensive, regional approach to planning - particularly developments that affect more than one town - whereas the EFSB has no authority, or duty, to function in that

CONCLUSION

The Court should reverse the decision of the EFSB under review, and require Cape Wind to seek judicial review under the applicable provisions of the CCC Act.

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CHILMARK and EDGARTOWN,

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