

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-470

ARTHUR PERRY, JR. & another<sup>1</sup>

vs.

CONSERVATION COMMISSION OF BARNSTABLE & another.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from a Superior Court judgment dismissing their complaint for relief in the nature of certiorari from an order of conditions issued by the defendant Conservation Commission of Barnstable (commission), authorizing certain construction on and in the waters adjacent to property owned by the defendant Cotuit Oyster Company, Inc. (Cotuit).<sup>3</sup>

In light of the substantial deference afforded the exercise of discretion by the commission in reviewing applications for an order of conditions, see FIC Homes of Blackstone, Inc. v. Conservation Commn. of Blackstone, 41 Mass. App. Ct. 681, 684-685 (1996), and Dubuque v. Conservation Commn. of Barnstable, 58 Mass. App. Ct. 824, 829 (2003), we conclude that the commission

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<sup>1</sup> Judith Kozlowski.

<sup>2</sup> Cotuit Oyster Company, Inc.

<sup>3</sup> The present case concerns the commission's issuance of an order of conditions under the Barnstable nonzoning wetlands by-law. See Lovequist v. Conservation Commn. of Dennis, 379 Mass. 7, 12-15 (1979). The parties advise that the plaintiffs are pursuing a separate appeal from the commission's order, under G. L. c. 131, § 40, approving Cotuit's proposed project.

acted within its authority in approving Cotuit's proposed project, including its associated waiver of the applicable pier regulations. The administrative record contains substantial evidence from which the commission properly could conclude that approval of the project would foster Cotuit's aquaculture operation; though the aquaculture itself occurs below the waters offshore, the commission could reasonably have concluded that the ability to bring aquaculture produce to shore, and to handle the produce once ashore, are necessary incidents to the commercially viable operation of the aquaculture activities.<sup>4</sup> The plaintiffs do not challenge the authority of the commission to waive the pier regulations, instead claiming that the commission's waiver in this instance was arbitrary. However, the question of the size and configuration of the pier (and for that matter the size and location of the associated building within the buffer zone) are for the discretion of the commission, and we do not substitute our judgment for theirs. See Dubuque v. Conservation Commn. of Barnstable, supra. The fact that Cotuit previously used a smaller pier for its operation does not mean that the commission could not reasonably conclude that a larger pier would

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<sup>4</sup> Because we conclude that the record supports the commission's decision with reference to the interests of aquaculture alone, we pass the question whether the commission's evident desire to foster the continued operation of a shorefront commercial shellfish business furthers "historical values" as that term is defined in the by-law.

not unduly adversely affect the other interests protected by the by-law.<sup>5</sup>

There is likewise no merit in the plaintiffs' contention that the order of conditions is invalid by reason of reference in "Special Condition 37" to the operation of Cotuit "as we know it." Though the reference is not as precisely phrased as it might be, it does not leave for future discretionary determination a matter of substance, as in Weld v. Board of Appeals of Gloucester, 345 Mass. 376, 378 (1963), or depend on matters beyond the grantee's control, as in V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth, 30 Mass. App. Ct. 530, 534 (1991). The mere potential for future interpretive difficulties does not constitute grounds to invalidate a permit containing a vague condition. See Planning Bd. of Falmouth v. Board of Appeals of Falmouth, 5 Mass. App. Ct. 324, 326-327 (1977). See also Zartarian v. Minkin, 357 Mass. 14, 18 (1970) (condition allowing future determination even of matter of substance not

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<sup>5</sup> To the extent that the plaintiffs contend that the commission's approval of Cotuit's application was arbitrary, by reason of the previous denials of other pier applications, the plaintiffs have not carried their burden of proof. The cases cited by the plaintiffs are distinguishable in that they involved residential uses rather than shellfishing operations. In any event, they are not sufficiently numerous and do not sufficiently demonstrate the absence of competing approvals to warrant a conclusion that the commission's approval of Cotuit's proposal was arbitrary. See Lakeside Builders, Inc. v. Planning Bd. of Franklin, 56 Mass. App. Ct. 842, 846-848 (2002). Compare Colangelo v. Board of Appeals of Lexington, 407 Mass. 242, 246 (1990).

invalid where effect of determination is to terminate rather than to grant the applicable permit).

Judgment affirmed.

By the Court (Rapoza,  
Kantrowitz & Green, JJ.),

*Ashley Green*  
Clerk

Entered: April 5, 2006