

86 Mass.App.Ct. 1108

Unpublished Disposition

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Appeals Court of Massachusetts.

Therese M. **HALL**<sup>1</sup> & others<sup>2</sup>

v.

**MARTHA'S VINEYARD COMMISSION** & another.<sup>3</sup>

No. 13-P-626.

|  
August 21, 2014.

By the Court (KAFKER, BROWN &amp; SIKORA, JJ.).

*MEMORANDUM AND ORDER  
PURSUANT TO RULE 1:28*

\*1 The Martha's Vineyard Commission (MVC or commission) and the town of **Edgartown** (town) appeal from a judgment of the Superior Court vacating the designation of five "Special Ways" by the MVC. That designation authorized restrictions of access to, and restrictions of development of, land located along the special ways by the MVC and by the town. The appellees, four members of the **Hall** family (**Halls**), either individually or as trustees of realty trusts, own substantial lands bordering the five special ways. For the following reasons, we reverse a portion of the judgment of the Superior Court.

*Background.* The parties do not dispute the material facts presented by the extensive administrative record submitted to the Superior Court.

1. **Halls'** *land holdings*. In the 1960's the **Hall** family acquired approximately 125 acres of undeveloped land in close proximity to five ancient paths or ways within **Edgartown** and West Tisbury. The paths and ways are known as Ben Tom's Road, Middle Line Path, Pennywise Path, Tar Kiln Road, and Watcha Path. The **Halls'** aggregate ownership constitutes approximately sixty-eight percent of the area adjoining the paths and ways. The land remains mostly undeveloped.

2. *MVC Act*. By St.1977, c. 831(Act), the Legislature empowered the MVC as a regional commission with authority to regulate the lands and waters of Martha's Vineyard so as to preserve its "unique natural, historical, ecological, scientific, cultural, and other values." *Id.* § 1. The purpose of the MVC was to "ensure ... land usages ... which will not be unduly detrimental to those values or to the economy of the island." *Ibid.* That purpose required "the designation of districts of critical planning concern [DCPC] and the recognition of developments of regional impact [DRIs], and the review [of them by the MVC]." *Ibid.*

The Act authorizes DCPC status, inter alia, for "an area which possesses unique natural, historical, ecological, scientific, or cultural resources of regional ... significance." St.1977, c. 831, § 8. Preliminarily the MVC must submit for approval "standards and criteria," also called "qualifications" by the MVC, for definition of a DCPC to the Secretary of the Executive Office of Environmental Affairs.<sup>4</sup> St.1977, c. 831, § 7. Creation of a DCPC consists of three procedures: (1) *nomination* by the MVC, by an agency of one or more of the island's six municipalities, or by seventy-five taxpayers of a municipality; (2) *consideration* of the nomination on a vote of the majority of the MVC's twenty-one members; and (3) *designation* of the DCPC. St.1977, c. 831, § 8.

Importantly, the MVC may designate a DCPC only after notice to all municipalities containing any part of a proposed DCPC and only "after notice and a public hearing pursuant to section two of chapter thirty A," the provision of the Administrative Procedure Act prescribing the rulemaking process for State agencies. *Ibid.*

\*2 The Act requires the MVC to accompany any designation with "guidelines" assuring that any "development of the district" would not (i) cause undue water, air, land, or noise pollution; (ii) unreasonably burden existing water supply; (iii) increase beach erosion or damage to littoral or wetlands;

or (iv) cause undue harm to cultural, economic, or historic values. *Ibid.*

Upon designation, a municipality containing all or part of the DCPC may adopt “regulations in conformance to the guidelines” and in conformance with “all of the powers it otherwise had under the General Laws.” St.1977, c. 831, § 10. Town boards must submit all proposed regulations to the MVC for approval of conformance to the guidelines. *Ibid.* Upon approval, the town may adopt the regulation, “by a two-thirds vote on a town ballot, with discussion of the question on the town meeting floor at the discretion of the moderator.” *Ibid.* All such adopted regulations “shall be incorporated ... into the official ordinances [and] by-laws ... of the municipality.” *Ibid.*

A final pertinent feature of the Act is its provision for projects of significant development of land within a DCPC, known as developments of regional impact (DRIs). St.1977, c. 831, §§ 12–16. The MVC has adopted standards and criteria for definition of a DRI (again with approval of the Secretary of the Executive Office of Environmental Affairs). St.1977, c. 831, § 12. A municipal body receiving an application for a development permit proposing a DRI must refer it to the MVC. St.1977, c. 831, § 13. The MVC must conduct a public hearing on the application, determine its compliance with both commission standards and municipal regulations, and measure the benefits and detriments of the DRI. St.1977, c. 831, §§ 14, 15. “Whenever the commission is required to find whether the probable benefit from a proposed development of regional impact will exceed the probable detriment, it shall prepare a written opinion setting forth the grounds of its findings.” St.1977, c. 831, § 15. Finally, “[n]o referring [municipal] agency shall grant a development permit ... except with the permission of the commission.” St.1977, c. 831, § 16.

3. *Designation of the special ways adjoining Halls' properties.* Under earlier legislation, the MVC had designated an “Island Road” DCPC consisting of two “zones,” a “Major Road Zone” and a “Special Ways Zone.”<sup>5</sup> In order to preserve ancient pathways or “proprietary” ways for their cultural, recreational, and historical significance, the commission had periodically enlarged the special ways zone by addition of ways located in the several island towns. In its original designation of the special ways zone in 1975, the commission stated as its objectives

“[t]o protect historic places, to retain these ways open primarily for uses such as walking and horseback riding, but not developed as a primary vehicle route except for access to properties where no alternative access exists.”

\*3 The MVC adopted guidelines for regulations which municipalities might wish to adopt pursuant to the Act to control development within the special ways zone, including provisions (1) that no way or road shall be constructed which exceeds a width of twelve feet; (2) that no fences, walls, or structures shall be erected, placed, or constructed within twenty feet of the centerline of the special way; and (3) that no special way shall be paved with any impervious material.

Between May of 2007 and April of 2008, the MVC and the town carried out the statutory sequence of nomination, consideration, designation, commission guidelines, municipal regulations, and commission approval of the municipal regulations, for application to all five special ways bordering the **Halls'** acreage.<sup>6</sup> In the course of the process, the MVC conducted a duly noticed public hearing, received written and oral opposition from the **Halls**, met in open session to discuss the nomination, and granted designation. The town's special town meeting adopted a zoning by-law (art. 14.2.2) to conform with the commission guidelines. The commission approved the by-law.

In particular, the guidelines and by-law recognized the historic and tribal origins of the ways as cart paths and walkways and their current recreational use and availability for walking, bicycling, or horseback riding. The by-law created a protected zone lying within twenty feet of the centerline of each way; prohibited enlargement or paving of the way, the removal of vegetation, and the creation of fences, walls, obstructions, or excavations within the way; and limited motor vehicles to specific segments. The by-law authorized exceptions from those restrictions by special permit, including as a categorical subject:

“Development, uses, or structures for which the imposition of these regulations would otherwise deprive a landowner of all economically viable use and value of the parcel of land owned or controlled by the applicant, considered as a whole.”

The by-law permitted continued motor vehicle use of “special vehicular ways” routinely used in the past; and allowed motor

vehicle access by special permit to properties lacking any alternative access.

4. *Litigation.* In October of 2007, the **Halls** brought suit in the Superior Court challenging the special ways designation by the MVC and the zoning by-law restrictions by the town. By successive amended complaints, they distilled their claims to three counts: (1) a general declaratory judgment cause of action against the validity of the designation and of the conforming zoning restrictions; (2) a claim that the commission had acted beyond the authority of the Act and the town beyond the authority of the zoning enabling act, G.L. c. 40A; and (3) a claim for certiorari review under G.L. c. 249, § 4, against both defendants for acting in violation of constitutional, statutory, and common law.

In late 2010, the parties argued dispositive motions to a judge of the Superior Court. On February 11, 2011, the judge allowed the **Halls'** motion for judgment on the pleadings on their certiorari claim (count three). He vacated the designation of the five special ways and remanded the case to the MVC for two specific findings (for each respective special way) which he construed as prerequisite for DCPC designation: (1) prior public access to the ways; and (2) sufficient motorized vehicle access to their properties for the **Halls**. At the same time, he allowed the governmental defendants' *Mass.R.Civ.P. 12(b)(6)*, 365 Mass. 754 (1974), motion to dismiss the **Halls'** remaining claims (count one for declaratory judgment; count two for statutory violations).<sup>7</sup>

\*4 The MVC appealed to this court from the February 11, 2011, judgment of vacatur and remand. In July of 2012, we dismissed the appeal as interlocutory and premature. In December of 2012, the judge (after additional motion practice immaterial to the present appeal) granted the parties' assented-to motion for entry of the February 11, 2011, disposition of all three counts as an amended *final* judgment.

A final procedural point is significant. In the first appeal to this court, all three parties (**Halls**, MVC, and the town) submitted briefs and argument. In the present or second appeal, the MVC and the town have submitted updated briefs; the **Halls** have not submitted an updated brief or participated in the current oral argument. However, we have retained their extensive earlier brief and, in light of the identity of the earlier and present main issues, treated it as their continuing position. The **Halls** noticed their appeal from the final amended judgment dismissing their counts one (declaratory judgment) and two (statutory violations), but have briefed only the issue

of count three (the judgment in their favor on the certiorari claim) by way of their earlier brief.

*Analysis.* 1. *Certiorari review.* The MVC and the town argue that the creation of a DCPC and its concomitant land use restrictions constitute quasi legislative action beyond the reach of certiorari review. Such review of an administrative decision requires “(1) a judicial or quasi judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review.” *Indeck v. Clients' Security Bd.*, 450 Mass. 379, 385 (2008). See *State Bd. of Retirement v. Woodward*, 446 Mass. 698, 703–704 (2006); *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 576 (2007). See Cella, *Administrative Law & Practice* § 1917 (1986), and cases collected.

For multiple reasons the DCPC process has a quasi legislative, rather than quasi judicial, character. The Act requires the designation proceeding to include a noticed public hearing in accordance with G.L. c. 30A, § 2, a prerequisite for administrative rulemaking to be contrasted with the requirements of G.L. c. 30A, § 11, governing administrative adjudication. The DCPC process involves no sworn testimony by, or interrogation of, contributors of information and opinion, another indicator of quasi legislative activity. See *School Comm. of Hudson v. Board of Educ.*, *supra*; *Boston Med. Center Corp. v. Secretary of Executive Office of Health & Human Servs.*, 463 Mass. 447, 469 (2012). The town's adoption of a local regulation in mandatory accordance with the commission's DCPC guidelines takes the character of ordinances or by-laws. The Act makes separate, explicit provision for decision of particular landowners' rights of use and development by the DRI process, and its adjudicatory feature of “a written opinion setting forth the grounds of [the commission's] findings.” St.1977, c. 831, § 15. The presence of an adjudicatory process in the permit granting provisions of the statute supports the intention of its absence from the DCPC provisions of the legislation.

\*5 The comparative specificity of a DCPC designation does not negate its quasi legislative nature. A local rule or standard serving a public health, safety, or welfare purpose may operate practicably on only a small or identifiable number of regulatees, but nonetheless retain its character of general application and prospective effect. See *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 542–544 (1985) (municipal regulation prohibiting testing, storage, transportation, and disposal of toxic chemical

agents and foreseeably affecting only one company remains nonetheless regulatory and not adjudicatory). While a DCPC nomination operates on specified lands, the land use criteria for designation remain generic and grounded in land use standards of general public benefit.

Finally, the closest fitting precedent strongly supports the characterization of DCPC creation as quasi legislative. “[T]he plaintiffs fail fully to appreciate the comprehensive process established by the Legislature for the nomination and designation of a DCPC. Significant in this process is the fact that both [participating governmental bodies], acting in a legislative capacity, approved the ... DCPC.”<sup>8</sup> *Home Builders Assn. of Cape Cod, Inc. v. Cape Cod Commn.*, 441 Mass. 724, 735 (2004).

2. *Noncertiorari claims.* In *Home Builders Assn. of Cape Cod, Inc. v. Cape Cod Commn.*, *supra* at 735–736, the court recognized the availability of an action challenging the validity of a DCPC. A plaintiff may attempt to demonstrate that a designation, as a quasi legislative determination, “is contrary to the Constitution, the enabling act, or a statute.” *Id.* at 736. The burden of the challenge, as either a demonstration of law or of the absence of a rational factual basis, is considerable in the face of the usual presumptive validity of legislative decision making. *Id.* at 735–739.

Counts one (declaratory judgment) and two (statutory violations) allowed for such a challenge. However, the judge

entered judgments of dismissal of both claims prior to both appeals. Although the **Halls** noticed their appeal from all of the judgments, they have not briefed or presented any appellate argument regarding counts one and two in either the first or current appeal. Consequently we treat any issues latent in those counts as waived. *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975).

3. *Alternate remedies.* Finally we observe that the Act and the DCPC process do not leave the **Halls** and similarly situated landowners deprived of legal remedies. As we have discussed, the Legislature has included in the Act the DRI administrative permit process as a quasi adjudicatory mechanism for authorization of land development within a DCPC. St.1977, c. 831, § 15. That process would support at least certiorari review.<sup>9</sup>

*Conclusion.*<sup>10</sup> For these reasons, we reverse so much of the amended final judgment as pertains to count three of the **Halls'** fourth amended complaint. The amended final judgment shall be modified to effect a dismissal in favor of both defendants on that count. As so modified, the amended final judgment is affirmed.

\*6 *So ordered.*

#### All Citations

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#### Footnotes

- 1 Individually and as trustee of Forsythia Trust.
- 2 Benjamin L. **Hall**, individually and as trustee of Ben Tom Realty Trust and Starbuck's Hill Trust; Brian M. **Hall**, as trustee of Baron's Land Trust and Dukes Wood Realty Trust; and Benjamin L. **Hall**, Jr., as trustee of Haute Montagne Trust.
- 3 Town of **Edgartown**.
- 4 Now called the Secretary of the Executive Office of Energy and Environmental Affairs. See St.2007, c. 19, § 12, amending G.L. c. 21A, § 1.
- 5 The concept of a DCPC is amorphous. As the Act permits and as the MVC applies the concept, it can comprise a coherent physical “district” or location, or multiple separate locations sharing statutorily approved “values” and administratively approved “qualifications.”
- 6 The **Edgartown** planning board made the nomination.
- 7 The judge reasoned that the certiorari claim constituted the *only* permissible cause of action available to the **Halls** against the MVC, in light of *Kitras v. Zoning Administrator of Aquinnah*, 453 Mass. 245, 256 (2009).
- 8 In the determination of suitability of certiorari review of a DCPC designation, the judge relied on language in *Kitras v. Zoning Administrator of Aquinnah*, 453 Mass. at 256, where the court first observed that § 18 of the Act authorized to a landowner “the right to appeal from a determination [concerning] ‘developments of regional impact,’ not ... DCPCs.” It opened the next paragraph with the following words:

*"In the alternative*, an action in the nature of certiorari may be brought pursuant to [G.L. c. 249, § 4](#), to 'correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal' " (emphasis supplied).

*Ibid.*

The court does not state that certiorari is available to review the correctness of a DCPC creation. However, the location of the sentence and the use of the word "alternative" tend unfortunately to mislead the reader to the impression of such availability.

9 We express no view whether the **Halls** may pursue alternative or additional judicial claims.

10 As the defendants argue, they did not have a duty to establish public access to the special ways as a prerequisite for their inclusion in the DCPC. The specific qualifications governing cultural or historic districts made public access one of three alternative criteria and not a mandatory criterion for cultural or historic eligibility status.