

Appeal board's authority at stake in windmill fight

Seeking new trial after judge backs local panel

By Brandon Gee

brandon.gee@lawyersweekly.com

The standard of review used to evaluate challenges of approved projects in an 80-square-mile historic district on Cape Cod — and the future of renewable energy projects there — are at stake in a case that was scheduled to go before Orleans District Court Judge Brian R. Merrick on April 22.

The Old King's Highway Regional Historic District Commission filed motions for a new trial and to alter or amend Merrick's February decision in favor of Aquacultural Research Corp.

ARC had appealed the commission's 2010 decision to deny a proposed 242-foot-tall wind turbine on ARC's property near Chapin Memorial Beach after the local historic district committee in Dennis had approved it.

"[T]he success of ARC's operations is of great import to the shellfish farming and fishing industries and thereby to the interests protected by the [Old King's Highway Historic District] Act," Merrick wrote in his 24-page opinion. "Of course the preservation of places and settings from 'incongruous' construction is also an interest protected by the Act."

When interests protected by the act are in conflict, it is the function of the town committee, not the regional commission or the court, to balance those interests and resolve the conflict, the judge found.

"The Regional Commission may annul the Town Committee's decision only if it is unreasonable or in violation of statute. ... [T]he



Michael P. Sams

Court finds and rules that the Town Committee's decision was not unreasonable or otherwise in violation of the standard in the Act. The Regional Commission therefore exceeded its authority by annulling that decision," Merrick said.

The ruling, *Aquacultural Research Corporation v. Old King's Highway Regional Historic District Commission, et al.*, Lawyers Weekly No. 16-001-13, can be ordered at masslawyersweekly.com.

EMOTIONAL CASE

While some praise Merrick for clarifying and limiting the role of the regional commission when local decisions are appealed, others say his decision threatens to upend the structure of the Old King's Highway Regional Historic District if it is allowed to stand.

The district stretches from Sandwich to Orleans between the Mid-Cape Highway and Cape Cod Bay and includes parts of six towns, each of which has its own committee to review proposed development projects.

Appeals are heard by the regional commission, made up of the six chairpersons from

the town committees, which also has "the duty and responsibility to interpret the Act ... and to coordinate the overall efficient operation of the district," according to the act.

The fight over ARC's proposal is just one of several renewable energy controversies on Cape Cod, where residents' love-or-hate relationship with windmills is illustrated by the fact that officials in Falmouth — after erecting the first municipal utility-scale turbine in the state — recently considered spending \$14 million to become the first town in the United States to tear down its wind turbines.

Southborough lawyer Michael P. Sams, who represents ARC, said while the case is a difficult one "emotionally," the judge applied the law correctly.

"This case wasn't about whether you like turbines or don't like turbines. It was a case about whether the Dennis committee had a reasonable basis for their decision," Sams said, crediting the judge for "intimating exactly what the standard is supposed to be."

Unless there is no valid basis for a town committee's decision, the regional commission is not permitted to substitute its own judgment for that of the local board, Sams said.

'PYRAMID OF AUTHORITY'

ARC argues that it needs to construct a turbine to combat rising energy costs and ensure its survival.

The historic district committee in Dennis approved the project, 3-2. That decision was appealed to the regional commission, which may overrule a town committee if it finds the committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious or erroneous in its action."

The regional commission reversed the Dennis committee, 3-1-1. The chairman of

the Dennis committee abstained and another chairperson was absent.

In finding for ARC, Merrick said that it was “for the Town Committee to weigh the cultural, economic and aesthetic benefits to the inhabitants of the towns in the Historic District of preventing the erection of the proposed wind turbine against the cultural and economic benefits to the same persons of ensuring the continued operations of ARC, as well as the ‘energy advantage’ of the proposed wind turbine. While the cases do not use the phrase, the [Supreme Judicial Court’s] description of the standard of review by the Regional Commission suggests something very much like review for abuse of discretion.”

Regional commission administrative counsel James R. Wilson said that, by giving so much deference to the decision of the town committee, Merrick misconstrued the relationship between the local committees and the regional commission.

“When you turn around and suggest the town committee is in a higher place in determining appropriateness, it sort of reverses the pyramid of authority,” Wilson said. “The decision basically suggests that the commission is without authority to annul a decision unless

it’s totally arbitrary and capricious and exceeds authority, and the Legislature doesn’t seem to be saying that.”

In reversing the decision, the regional commission determined that the Dennis committee had exercised “poor judgment,” Yarmouth Port lawyer Peter L. Freeman said. And while that admittedly is not the most common standard for appellate review, he said, it certainly is a lower bar to clear than abuse of discretion.

“Maybe the committee didn’t exceed its authority, but the issue is whether they were clearly erroneous or exercised poor judgment,” said Freeman, formerly a chairman of both a town committee in Barnstable and the regional commission. “If it’s completely incongruous and out of keeping so much with the act, was it erroneous or poor judgment to allow it regardless?”

Merrick agreed in his ruling that the wind turbine would “certainly” be incongruous to its surroundings, but wrote at length about the shellfish industry’s importance to Massachusetts, the virtues of ARC, and even the fact that windmills were used to power a 19th century saltworks in Dennis.

“I thought his ruling was very helpful in defining what the role of the regional com-

mission is,” Dennis attorney E. James “Jamie” Veara said. “Your appearance at the local committee is not a dress rehearsal. I think the judge’s decision was correct; they seemed to have a redo of the proceedings before the regional commission. That’s not what they’re charged to do.”

Merrick also noted that the historic district regulations obligate officials to consider the energy advantage of development proposals. The regional commission’s approach to the project “would effectively bar any modern wind turbine which could not be concealed behind a building or sand dune,” he said.

But Freeman said Merrick’s ruling could create the opposite problem by mandating blanket approval of any solar or wind device, no matter how incongruous it may be.

Energy advantages receive “no more weight than any other consideration in the act,” Freeman said. “I think the judge has given undue weight that’s not in the act to solar and wind devices.”

If, as expected, Merrick denies the motions to change his decision or grant a new trial, Wilson said the commission has given him permission to appeal the ruling to the District Court’s Appellate Division. **MLW**



Kenney & Sams, P.C.

TRIAL LAWYERS AND
COUNSELLORS AT LAW