

DOCKET NO. UWY-CV-23-6070997	:	SUPERIOR COURT
	:	
MIDDLEBURY SMALL TOWN ALLIANCE LLC, ET AL	:	JUDICIAL DISTRICT
	:	
VS.	:	OF WATERBURY
	:	
MIDDLEBURY CONSERVATION COMMISSION, ET AL	:	JUNE 7, 2024

**SUPERIOR COURT
WATERBURY, J.D.
JUN 07 2024
CLERK'S OFFICE**

INTRODUCTION:

This matter is an administrative appeal pursuant to General Statute § 8-8 of a final decision of the Middlebury Conservation Commission (Commission) concerning an application for an inland wetlands permit filed by Drubner Equities LLC (Drubner) for certain construction on, and use of, 112 acres of land in the vicinity of Christian Road and Southford Road in Middlebury (Property). The application was opposed at the agency level by Middlebury Small Town Alliance LLC (MSTA), Avalon Farms Homeowners Association Inc (Avalon Farms) and Gary Kline (Kline).

FACTS AND PROCEDURAL HISTORY:

The following facts are relevant to a decision in this appeal and are uncontested. On November 28, 2022, Drubner filed an application with the Commission seeking permission to conduct certain construction and use activities on the Property. In particular, Drubner sought to

construct a 720,000 square foot warehousing and distribution facility with associated access, parking and loading areas. The application proposed filling in about 15,608 square feet of isolated wetlands, activities on 7 acres of upland review area and the creation of 32,000 square feet of new wetlands. MSTA filed for intervenor status under General Statute § 22a-19 and sought to oppose the application. Avalon Farms and Kline participated in the administrative hearings below and also opposed the application.¹ The plaintiffs were represented by common counsel throughout the proceedings. On May 10, 2023, the Commission (i) denied MSTA intervenor status finding that the application, if granted, was not likely to cause unreasonable pollution, impairment or destruction of the public trust in natural resources of the state, and (ii) approved the application with certain changes and conditions.² The plaintiffs appealed the Commission's decisions to this court.

¹ MSTA, Avalon Farms and Kline are referred to herein as the plaintiffs.

² As approved the application provided for 670,000 square feet of buildings, direct impact on 16,335 square feet of wetlands (about 0.37 acres), impervious coverage of 29.9 acres, creation of 32,740 square feet of new wetlands, removal of invasive species and the granting of a conservation easement which would prevent building on 35.5 specified acres.

STANDARD OF REVIEW:

This matter is an appeal from a town inland wetlands commission pursuant to the provisions of § 8-8 of the Connecticut General Statutes. Upon appeal, the court is to review the record to determine whether the board acted fairly, with proper motives and upon valid reasons as supported by substantial evidence in the record. Courts are not to substitute their judgment for that of the board unless the board's decision is unreasonable in view of the applicable law and the substantial evidence in the record. On appeal, the burden of proof is upon the plaintiff to establish that the board acted improperly in view of the applicable law and the substantial evidence in the record. *Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 658 A. 2d 559 (1995).

When a board states its reasons for action, the question for the court is whether the reasons are reasonably supported by the record and whether they are pertinent to the appropriate considerations which the board is required to apply under the regulations. *Chevron Oil Co. v. Zoning Board of Appeals*, 170 Conn. 146, 152-153, 365 A. 2d 387 (1976). If the board does not state the reasons for their action, the court is to review the record to discover whether a sufficient reason to support the board's decision exists. *Manchester v. Zoning Board of Appeals of Weston*, 18 Conn. App. 69, 71 (1989).

ANALYSIS:

The plaintiffs are each classically aggrieved by the decision being appealed. Kline and Avalon Farms each own real estate within 90 feet of the Property at issue. MSTA has at least one member who owns real estate within 90 feet of the Property at issue. The Commission found that MSTA was not statutorily aggrieved under General Statute § 22a-19 because granting the application was not likely to cause unreasonable pollution, impairment or destruction of the public trust in the state's natural resources. The record contains substantial evidence to support the foregoing conclusion and court finds that the Commission's conclusion is not unreasonable. Accordingly, the court finds that each of the plaintiffs is classically aggrieved.

It is clear that the record contains substantial evidence in support of the Commission's decision. Even the plaintiffs do not meaningfully argue otherwise. The Commission held multiple hearing over several months and collected volumes of evidence from all interested parties.³ The Commission acquired its own expert and an attorney to advise them. The Commission engaged in substantial debate prior to making their decision and entered a detailed decision which is annotated with supportive evidence from record. The Commission's debate and detailed decision weighs evidence, testimony and various factors, and provides a clear

³ It appears that the Commission held four public hearings, three regular meetings and two special meetings over a period of about six months.

picture of the Commission's reasoning behind its decision. The Commission's decision is consistent with the findings and recommendations of its own independent expert and is supported by substantial evidence in the record.

In reaching their decision the Commission considered several alternative proposals, two of which were proposed by the plaintiffs. The Commission explicitly found that Drubner's proposal, as approved, was the most feasible and prudent alternative and that there were no other feasible and prudent alternatives. Although the Commission's decision allowed the disturbance of more wetlands than other proposals, the Commission properly weighed this against (i) the functionality and utility of the proposed use, (ii) the quality of the wetlands being disturbed including a finding that the foregoing wetlands were isolated and low functioning, (iii) the recreation of new, more functional, wetlands on a two to one basis, (iv) the removal of invasive species, (v) the value of a conservation easement, (vi) the consistency with applicable zoning, (vii) its finding that offsite wetlands would not be affected, and (viii) the protection of a wildlife corridor. The foregoing factual findings and analysis were made by the Commission and are supported in the record by substantial evidence as cited in the Commission's decision.

The court notes that the Commission heard the actual testimony and weighed the evidence submitted. As the finder of fact, it was the Commission's prerogative to credit or not credit, and to weigh, testimony and other evidence. The Commission here made explicit findings

concerning which testimony and other evidence that it credited.⁴ The court cannot substitute its judgement for the Commission's findings in this regard because the Commission's findings are reasonable in view of substantial evidence in the record and the underlying factual findings were reasonably drawn from the evidence.

The Commission's decision was rational and reasonable in view of the facts they found.⁵ Although the Commission's decision allowed the destruction of some existing wetlands, the Commission explicitly found, based on substantial evidence in the record, that those wetlands were isolated, low functioning and their destruction would not negatively impact other wetlands in the area. The Commission weighed the foregoing against the creation of new higher functioning wetlands on a two to one basis, the removal of invasive species, the conservation easement and the protection of a wildlife corridor, and found the later to be preferable in connection with the proposed use of the Property. Finding facts and weighing factors, as was done by the Commission here, are consistent with, and in fulfillment of, the Commission's authority and obligations.⁶

⁴ The Commission explicitly credited the evidence and testimony of their own expert, Logan, and that of Sanford, one of the Drubner's experts.

⁵ The fact that the Commission was assisted by their own independent expert and an attorney further bolsters this conclusion.

⁶ The court notes that the process induced Drubner to change their application in ways favorable to wetlands' protection for instance by decreasing the size of the buildings as compared to the original proposal and by agreeing to a conservation easement over a large portion of the Property.

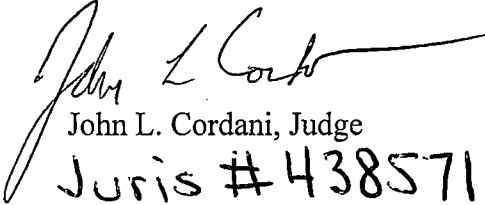
The Commission required that the conservation easement be in a form acceptable to the town attorney. The plaintiffs took the position that this was an improper delegation of authority. However, the size and location of the easement was precisely defined by the Commission, and the requirement that there be no construction activities within the easement was specified by the Commission. Taken in context, the Commission's instruction that the easement be in a form acceptable to the town attorney was merely directed to the legal formalities of the document to be recorded. The material operative terms of the easement had already been specified.

The Commission's finding that the granting of the application would not result in unreasonable pollution, impairment or destruction of the state's natural resources was also supported by substantial evidence in the record. The Commission specifically cited portions of testimony and evidence provided by experts Sanford, McEvoy, Quinn, Logan and Calabrese. The Commission's conclusion in this regard was reasonable in view of the facts they found.

The court finds that the Commission's decision is supported by substantial evidence in the record, that the Commission made reasonable factual findings based upon the evidence before them, and that the Commission's conclusions are consistent with the foregoing and with applicable law. The process deployed by the Commission in making their decision was fulsome and consistent with applicable law. The court further finds that the plaintiffs have failed to establish on appeal that the challenged Commission decision was not supported by substantial evidence or was unreasonable in view of the facts found and applicable law. Accordingly, the court must dismiss the appeal.

ORDER:

The appeal is dismissed.


John L. Cordani, Judge
Juris # 438571

A JDNO was sent on June 7, 2024
notifying all counsel of record of
the availability of this Memorandum
of Decision in the electronic file
and sent by electronic means to
RJD.

By the Clerk,
Matthew P. Stevens,
TAC,
6/7/2024