

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPT.
CIVIL NO. 2372CV00398

CAPE CLUB BUILDING, INC. and
MEGANSETT BY THE BAY, LLC,

Plaintiffs,

v.

TOWN OF BOURNE CONSERVATION
COMMISSION,

Defendant.

SUPERIOR COURT
BARNSTABLE, SS

MAR 22 2024

FILED
Scott W. Nickerson, Clerk

BOURNE CONSERVATION COMMISSION'S ANSWER

NOW COMES the defendant, the Town of Bourne Conservation Commission (the "Commission"), and hereby answers the numbered allegation in the plaintiffs' Petition for Certiorari Pursuant to G. L. c. 249, § 4; and for Declaratory Judgment, Pursuant to G. L. c. 231A, § 1, dated October 30, 2023. Notwithstanding the specific responses, below, the Commission will further answer the Complaint in accord with the provisions of Standing Order No. 1-96 by filing the certified record of its proceedings at issue, and the following responses shall be construed in accord with the same, and all allegations contrary to the materials contained in that record are hereby denied.

INTRODUCTORY STATEMENT

1. Plaintiffs' para. 1 is a general description of their causes of action to which no response is required. To the extent a response is required, the Commission denies the same.

2. Plaintiffs' para. 2 is a general description of their causes of action to which no response is required. To the extent a response is required, the Commission denies the same.
3. The OOC speaks for itself and the Commission denies plaintiffs' characterization of the same.
4. Denied.
5. Plaintiffs' para. 5 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.
6. Plaintiffs' para. 6 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.
7. The Bylaw, M.G.L. c. 91, and 310 CMR 9.00 speak for themselves and the Commission denies plaintiffs' characterization of the same.
8. Plaintiffs' para. 8 is a general description of their causes of action to which no response is required. To the extent a response is required, the Commission denies the same.
9. Plaintiffs' para. 9 is a general description of their causes of action to which no response is required. To the extent a response is required, the Commission denies the same.

PARTIES

10. Admitted.
11. Admitted.
12. Admitted.

JURISDICTION

13. Plaintiffs' para. 13 states legal conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

14. Plaintiffs' para. 14 states legal conclusions to which no response is required. To the extend a response is required, the Commission denies the same.

15. Plaintiffs' para. 9 is a general description of the relief they seek to which no response is required. To the extend a response is required, the Commission denies the same.

16. Plaintiffs' para. 16 provides legal arguments and conclusions to which no response is required. To the extend a response is required, the Commission denies the same.

FACTUAL ALLEGATIONS

17. Admitted.

18. Admitted.

19. The NOI application speaks for itself and the Commission denies plaintiffs' characterization of the same.

20. Admitted.

21. The Project proposal speaks for itself and the Commission denies plaintiffs' characterization of the same.

22. The Commission is without knowledge or information sufficient to form a belief about the truth of the allegation in para. 22 and therefore denies the same.

23. Admitted that the Commission opened its review of the NOI on October 7, 2021. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.

24. Admitted.

25. Admitted.

26. The submissions for the November 4, 2021 hearing speak for themselves and the Commission denies plaintiffs' characterization of the same.

27. The peer review comments speak for themselves and the Commission denies plaintiffs' characterization of the same.
28. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.
29. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.
30. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.
31. Admitted.
32. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing. The documents relative to Mean Low to Mean Low water width speak for themselves and the Commission denies plaintiffs' characterization of the same.
33. Admitted.
34. Admitted.
35. Admitted that the Applicant re-presented the NOI at the July 20, 2023 meeting. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.
36. Admitted.
37. The meeting minutes speaks for itself and the Commission denies plaintiffs' characterization of the discussion at the hearing.
38. Admitted.

39. The OOC speaks for itself and the Commission denies plaintiffs' characterization of the same.
40. The OOC speaks for itself and the Commission denies plaintiffs' characterization of the same.
41. The OOC speaks for itself and the Commission denies plaintiffs' characterization of the same.
42. The OOC speaks for itself and the Commission denies plaintiffs' characterization of the same.
43. Plaintiffs' para. 43 is a general description of their cause of action to which no response is required. To the extent a response is required, the Commission denies the same.
44. Plaintiffs' para. 44 is a general description of the relief they seek to which no response is required. To the extent a response is required, the Commission denies the same.
45. Admitted.

COUNT I (Certiorari, M.G.L. c. 249, § 4)

**The Commission's Decision is Ultra Vires, Exceeding Its Authority, Not Supported By
Substantial Evidence in the Record, and is Arbitrary, Capricious, and an Abuse of
Discretion**

46. The Commission repeats the answers provided in paragraphs 1 through 45, above, as if expressly stated herein.
47. Denied.
48. Bylaw Section 3.7.4 speaks for itself and the Commission denies plaintiffs' characterization of the same.

49. The Commission's decision speaks for itself and the Commission denies plaintiffs' characterization of the same.
50. BWR Section 1.16(e)16.b speaks for itself and the Commission denies plaintiffs' characterization of the same.
51. The Commission's decision speaks for itself and the Commission denies plaintiffs' characterization of the same.
52. Plaintiffs' para. 52 provides legal arguments and conclusions to which no response is required. To the extend a response is required, the Commission denies the same.
53. BWR Section 1.16(1)(e)2 speaks for itself and the Commission denies plaintiffs' characterization of the same.
54. The Commission's decision speaks for itself and the Commission denies plaintiffs' characterization of the same.
55. Denied.
56. Denied.
57. Plaintiffs' para. 57 provides legal arguments and conclusions to which no response is required. To the extend a response is required, the Commission denies the same.
58. Denied.
59. Plaintiffs' para. 59 provides legal arguments and conclusions to which no response is required. To the extend a response is required, the Commission denies the same.
60. Denied.
61. Denied.
62. Plaintiffs' para. 62 provides legal arguments and conclusions to which no response is required. To the extend a response is required, the Commission denies the same.

63. Plaintiffs' para. 63 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

64. Plaintiffs' para. 64 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

65. Plaintiffs' para. 65 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

66. Plaintiffs' para. 66 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

COUNT II (Declaratory Judgement, M.G.L. c. 231A, § 1)

Where the Bylaw Purports to Protect the Recreational and/or Commercial Uses, Including Navigation, the Provisions of the Bylaw are Inconsistent With the Governing State Statutes

and are Preempted by Such Statutes

67. The Commission repeats the answers provided in paragraphs 1 through 45, above, as if expressly stated herein.

68. Plaintiffs' para. 68 is a general description of their cause of action to which no response is required. To the extent a response is required, the Commission denies the same.

69. Denied.

70. Plaintiffs' para. 70 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

71. G. L. c. 43B, § 13 speaks for itself and the Commission denies plaintiffs' characterization of the same.

72. Plaintiffs' para. 72 provides legal arguments and conclusions to which no response is required. To the extent a response is required, the Commission denies the same.

ADDITIONAL DEFENSES

1. The Commission's Decision was not arbitrary and capricious and was supported by substantial evidence in the administrative record.
2. Bourne's Wetlands Protection Bylaw, and accompanying Regulations, are valid as they substantially advance a legitimate state interest.
3. Local bylaws and pier regulations are not preempted by G.L. c. 91.
4. The Commission hereby gives notice that it intends to rely upon such other and further defenses as may become available or apparent during this action and hereby reserves the right to amend its Answer and to assert any such defense by appropriate motion.

WHEREFORE the Commission respectfully requests that this honorable Court grant the following relief:

1. Enter FINAL judgment in the Commission's favor, and against the plaintiffs, on plaintiffs' Counts I & II;
2. Affirm the Commission's decision to approve the plaintiffs' OOC application under the Wetlands Protection Act and deny the application under Bourne's Wetlands Protection Bylaw and accompanying Regulations;
3. Declare that Bourne's Wetlands Protection Bylaw and accompanying Regulations are valid and enforceable; and
4. Grant other such relief that this Court deems just.

Date: March 22, 2024

Respectfully submitted,
Bourne Conservation Commission
By its attorneys,

/s/ Anthony Riley

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CERTIFICATE OF SERVICE

I, Anthony J. Riley, hereby certify that on this 22d day of March 2024, I served a copy of the forgoing document on the plaintiffs' counsel by email.

Matthew Watsky, Esq.
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Date: March 22, 2024

/s/ Anthony Riley

Anthony J. Riley