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Alaska Ctr. for the Env't v. Alaska, 80 P.3d 231 (Alaska 2003)

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STATE COURTS

ALASKA

Alaska Ctr. for the Env't v. Alaska, 80 P.3d 231 (Alaska 2003)

(affirming state agency's consistency review approving an airport expansion proposal that included filling 240 acres of coastal wetlands).

The Alaska Center for the Environment ("ACE") challenged the Alaska Division of Governmental Coordination's ("Division") consistency review approving the expansion of the Ted Stevens Anchorage International Airport ("AIA"). ACE challenged the Division's determination, contending that the AIA's proposal lacked the specificity required for a thorough consistency review under standards imposed by state and municipal coastal management programs. The Superior Court of the State of Alaska, Third Judicial District upheld the Division's determination, and ACE appealed to the Alaska Supreme Court. On appeal, ACE again contested the Division's review and proposal's lack of specificity, asserting that both failed to comply with the Alaska Coastal Management Program's ("Alaska CMP") consistency review requirements.

AIA's expansion proposal entailed several types of construction projects that would require filling 240 acres of wetlands in Turnagain Bog and Postmark Bog over a period of ten years. ACE claimed that the Division failed to evaluate all the probable and cumulative effects that might occur in developing the bogs because it evaluated effects based on a model of probable uses rather than actual and specific projects. Additionally, ACE argued the proposal failed to focus or identify types of construction permits other than the long-term wetlands fill permit for specific facilities located within the coastal bogs.

Applying the substitution of judgment standard of review for the agency's decision, the court did not review the trial court's decision, but evaluated the Division's consistency review directly and affirmed the trial court's finding of consistency with state and municipal standards. The court held that proposals including broad and conceptual plans are acceptable when the submitting party provides lists of all permitted uses and activities. Even though the AIA's proposal lacked detailed plans, the provided descriptions of projects, locations, facilities, and prohibited uses and the maps of typical project layouts were sufficient for the Division to conduct an adequate review.

The court also held AIA's project did not need to be phased, which would allow several consistency reviews of smaller portions of the project throughout stages of construction. ACE claimed that phasing was important to fully evaluate the impact on sensitive coastal areas as the project plans developed. The court, however, affirmed the

Division's position that segmenting a project potentially impaired a comprehensive evaluation of environment risks, and imposing the degree of specificity claimed by ACE was a false presumption within the requirements of the Alaska CMP.

Determining that AIA's proposal was sufficient for a comprehensive consistency review, the court upheld the prior ruling that the Division correctly applied the standards of the Alaska CMP and the Anchorage Coastal Management Plan ("Anchorage CMP") when it approved the expansion project as consistent with state and municipal standards. ACE's claims specifically contested the Division's evaluation of state standards for a major energy facility, coastal development and habitats, and geophysical hazards. Additionally, ACE claimed that the Division's approval failed to comply with Anchorage's local geophysical hazards standard, hazardous lands policy, and transportation and utilities standard.

Under the state definition, a major energy facility includes a development of more than local concern carried out in close proximity to the coastal area and is subject to siting and other criteria under the Alaska CMP. ACE asserted that fuel storage, transportation, and dispensing on or near the runway for in-state energy use constituted a major energy facility. The Division disagreed, contending that there was a distinction in the standard between energy-related facilities and the use of fuel by businesses for daily operations. The court affirmed the Division's interpretation that the proposed uses in the expansion project constituted the latter. The court deferred to the Division's assessment that the "major energy facility" regulation instead applied to energy-related activities that affected shipping routes, potential spills, and airborne emissions. Thus, the various siting controls for a major energy facility were inapplicable to the airport expansion project.

Next, ACE challenged the Division's interpretation of the coastal development and habitats standards. Under the Alaska CMP, the habitats standard requires stricter protection of coastal areas, but both establish criteria that must be satisfied to justify development of coastal habitats for purposes other than water-dependent and water-related uses. The court held that the Division did not act arbitrarily or unreasonably when establishing a public need for the loss of coastal habitat to the airport expansion. ACE argued that the Division needed to assess the public need with greater specificity for the different types of proposed projects, rather than the expansion as a whole. ACE also argued the Division did not define the potential revenue generated by the proposed expansion, nor offer proof that it appropriately evaluated the more strict habitats standard. The court concluded that the Division had met the significant public need factor under the habitats standard to justify development because the expansion of the AIA was essential to the commercial viability of the entire state.

Further, the coastal development and habitats standards also required the Division to assess feasible alternatives for the project and approve the proposed development if no other alternatives are

available or cost-effective. In its review, the Division discussed several other alternate sites for airport expansion, but found them also in the coastal zone and even more costly to develop. It also found no other feasible alternatives for providing float or ski-based plane facilities. ACE argued that the Division's treatment of all uses and activities as functionally equivalent allowed the Division to determine that the wetlands were the only feasible location for every single use listed. Instead, ACE contended, the Division should have assessed feasible alternatives for the different uses and activities. Again, the court ruled against specificity, allowing the Division to consider "the likely mix of future uses" rather than possible alternatives for individual uses.

Under the habitats standard of maximum conformance, development of wetlands must not interfere with natural drainage patterns, destroy critical habitat, or discharge toxic substances. ACE asserted that AIA's hydrologic analysis, storm/runoff water collection and treatment system design plan, which included offsite wetland mitigation, failed to satisfy the maximum conformance standard. Despite ACE's concerns, the Division found, and the court affirmed, that AIA's proposal maximized conformance with the habitats standard. In fact, the court cited as evidence the FAA's guidance that offsite wetland mitigation is valuable in airport development to discourage wildlife hazards.

Third, ACE argued that the Division lacked sufficient information to evaluate siting, design, and construction measures in areas of high geophysical hazards because AIA did not conduct appropriately detailed studies. The Division contended that studies were unnecessary since the uses authorized in the permit were low-density human uses and utilized construction standards in compliance with the Uniform Building Code. Thus, the proposal effectively minimized property damage and loss of life and conformed to both state and local requirements. Because geophysical hazards on and around the airport were general knowledge, the Division allowed the AIA to defer detailed studies to later stages of the development process.

ACE further challenged the finding of consistency with the Anchorage CMP policy of discouraging development in high hazard areas while encouraging use of the lands for open space, recreation, parks, greenbelts, and aesthetic purposes. ACE contended that the location of the project in high hazard areas was inconsistent with the purpose of the local policy. The court held that the Division's consistency determination need only conform with local policy, not with stated values or purposes. Regardless, the consistency review included several value assessments of the land. For example, AIA's proposal to build a 300-foot buffer along a portion of the airport's boundary was evaluated by the Division against competing local interests to maintain the natural aesthetic of the open space.

Finally, ACE contended that transportation routes and utilities failed to comply with the local municipality's standard for review of transportation and utility routes because the local coastal management program requires avoidance or minimization of adverse impacts to

coastal or freshwater marshes and wetlands due to public works activities. Here, the court found that ACE was correct regarding the standard of review, but the Division satisfied the requirement through its discussion of other standards. Nonetheless, the court held that the Division took a hard look at the local coastal management program policies, even though it failed to mention them explicitly.

Therefore, the Alaska Supreme Court determined that AIA's proposal contained sufficient information for the Division to conduct a satisfactory consistency review. Further, the court affirmed the Division's determination that AIA's proposed airport expansion project satisfied all requirements for development of coastal areas under the state and local coastal management programs.

Dara Lum

ARKANSAS

Ark. River Rights v. Echubby Lake Hunting Club, No. CA03-389, 2003 Ark. App. LEXIS 786 (Ark. Ct. App. Oct. 29, 2003) (holding summary judgment improper when questions of material fact remained regarding public prescriptive easement and navigability of the waters over Echubby Area).

Echubby Lake Hunting Club ("Club") purchased the Echubby Areas (the Echubby chute, Echubby Lake, a ditch connecting the chute to the Echubby Lake, and a small lake in the Coal Pile area) from the Chicago Mill and Lumber Company in 2001 as part of a 2400-acre land acquisition. Although the Echubby Area is currently covered by water, until the United States Army Corps of Engineers ("Corps") constructed the Lock and Dam No. 2 ("Dam") on the Arkansas River in the 1960s, the Echubby Area was not accessible from the Arkansas River. Shortly after its acquisition, the Club applied to the Corps for permission to construct a crossing over part of the Echubby Area. Because the proposed crossing would block public access to parts of water within the Echubby Area, Arkansas River Rights Committee ("Group") adamantly opposed the crossing and claimed the public had acquired a prescriptive right to use the water. As a result of the Group's opposition, the Club filed a complaint in Lincoln County Circuit Court ("trial court"), seeking a declaration indicating its ownership of Echubby Areas was free and clear without any right of access by the Group. The Group claimed that because the Echubby Area waters were navigable and the public had been exercising open and notorious control over the waters for the past seven years, the Group had acquired a public prescriptive easement over the water. Arguing that hunting and fishing rights cannot be acquired by prescription and that navigability of the waters should be determined by their natural state (thus before the dam), the Club filed a motion