

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss

MISCELLANEOUS CASE
NO. 21 MISC 000401 (RBF)

WALSH BROTHERS BUILDING)
COMPANY, INC.,)
)
Plaintiff,)
)
v.)
)
JOHN LEE, SUSANNE MURPHY,)
ROBERT FITZGERALD, MARY JANE)
COFFEY, and DREW DELANEY as they)
are members of the TOWN OF WALPOLE)
ZONING BOARD OF APPEALS,)
)
Defendants.)

DECISION

Introduction

Walsh Brothers Building Company, Inc. (Walsh Brothers) wishes to build a single-family house on its property in Walpole. The single-family house is an as-of-right use under the Town of Walpole Zoning By-laws (bylaw), but lies within the Flood Plain Protection Overlay District, thus requiring a flood plain overlay district special permit. The Town of Walpole Zoning Board of Appeals (ZBA) denied the special permit, and Walsh Brothers brought this appeal under G.L. c. 40A, § 17. The case was presented as a case stated. Because the ZBA incorrectly applied the standard for a general special permit, not a flood plain special permit, and relied on the purposes of the flood plain overlay district set forth in the bylaw rather than the specific criteria for the

special permit, the decision denying the special permit was in error. It will be annulled and the matter remanded to the ZBA.

Procedural History

Plaintiff Walsh Brothers filed the complaint in case no. 21 MISC 000023 on January 15, 2021, naming as defendants the members of the ZBA. The parties' Joint Motion to Remand was allowed and the Order of Remand was issued on March 24, 2021, remanding the matter to the ZBA and retaining jurisdiction in this court. Walsh Brothers filed the Complaint in this action on August 6, 2021 (Complaint or Compl.). A case management conference in this action and case no. 21 MISC 000023 was held on September 1, 2021, at which the parties agreed that case no. 21 MISC 000023 was moot. Case no. 21 MISC 000023 was dismissed without prejudice.

The Complaint is an appeal under G.L. c. 40A, § 17, of the ZBA's decision after remand. At a status conference on December 8, 2021, the parties agreed to present this action as a case stated. The Statement of Material Facts for Case Stated, with attached exhibits (Facts), and Walsh Brothers Building Company, Inc.'s Brief in Support of Case Stated were filed on March 2, 2023. Defendant's Case-Stated Trial Brief was filed on March 22, 2023. Walsh Brothers Building Company, Inc.'s Reply Brief in Support of Case Stated, along with the bylaw, were filed on March 23, 2023. A view was taken on March 23, 2023, and the case stated hearing was held on even date. The case was taken under advisement. This decision follows.

Findings of Fact

Based on the submissions of the parties and the view¹, I find the following facts as stated, after drawing appropriate inferences.

¹ A view "inevitably has the effect of evidence, and information properly acquired upon a view may properly be treated as evidence in the case." *Talmo v. Zoning Bd. of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 n.5 (2018) (internal citations and quotations omitted); see also *Martha's Vineyard Land Bank Comm'n v. Taylor*, No. 17-P-1277 (Mass. App. Ct. June 22, 2018) (unpublished decision).

Parties:

1. The property that is the subject of this matter is located at 300 Stone Street (Lot 2), Walpole, Norfolk County, Massachusetts (property). The property had a single-family home built on it as early as 1900 (the house). Facts ¶ 1; view.

2. The property lies on the northeastern side of Stone Street. On the other side of Stone Street is Clarks Pond. About 2,000 feet upstream from the property is the Allen Site Dam (dam), built in 1981 by the Army Corps of Engineers. The dam holds up to 83 million gallons of water upstream. At the Stone Street end of Clarks Pond is a culvert with an outflow from the pond, running under Stone Street and leading to a perennial stream located on the northeastern side of the property, known as Spring Brook. Facts ¶¶ 4, 9, Exhs. A, F; view.

3. The property currently receives street stormwater through a bituminous swale coming from the adjacent driveway and continuing to a proposed swale on the northerly portion of the property. Facts ¶ 3, Exhs. C, F; view.

4. In 1955, sixteen inches of rain fell on Walpole as a result of Hurricane Diana. Clark's Pond flooded all the way down to Walpole Center, which had up to four feet of water. Neither the property nor the former house on the property suffered any damage as a result of this flood. Facts ¶¶ 5-6.

5. The former house never suffered any flood damage and there were never any issues with water in the house's basement. The house was demolished in 1972 for reasons unrelated to flooding. Facts ¶¶ 7-8.

6. Despite the addition of the dam in 1981, the existing flood plain downstream was never adjusted. Facts ¶ 10.

7. The property is located in the Flood Plain Protection Overlay District (flood plain overlay district) as described in § 11 of the bylaw. Section 11 of the bylaw requires that no structure may be built in the flood plain overlay district without a flood plain special permit from the ZBA, and sets forth five requirements for a flood plain special permit. Facts ¶ 2; Bylaw § 11.3.B.

8. In 2020, Walsh Brothers applied to the ZBA for a special permit under § 11 to allow for the construction of a single-family dwelling on the property (the project). Facts ¶ 11, Exh. B.

9. The project received the approval of the Town of Walpole Conservation Commission (ConCom). The ConCom considered the project's impact on flooding with respect to the surrounding environment, and issued an order of conditions approving the project under both the Massachusetts Wetlands Protection Act (jurisdictional areas were Bordering Land Subject to Flooding and Riverfront Area) and the Walpole Wetlands Protection Bylaw (100-foot Buffer to Bordering Vegetated Wetlands and 25-foot No Alteration Boundary). Facts ¶¶ 12-14, Exh. D.

10. The project was reviewed by the Town Engineer, who commented that the project met the requirements of the bylaw with respect to the flood plain overlay district. The Town Engineer recommended that the ZBA impose certain conditions on the property. Facts ¶¶ 16-17, Exh. C.

11. The project was brought before the ZBA for a public hearing on December 21, 2020. Facts ¶ 18.

12. After the public hearing was closed, the ZBA voted 3-2 to deny the flood plain special permit, and issued a written decision filed with the Town Clerk on January 4, 2021 (the first decision). Facts ¶ 19, Exh. B.

13. The first decision found that “the proposed single-family dwelling within the [flood plain overlay district] was not in harmony with the purpose and intent of the Bylaw,” because “the proposed project did not adequately protect adjacent and downstream properties from the hazards of periodic flooding, among other things.” The ZBA then made findings on the criteria for special permits generally that are set forth in § 2.2.B of the bylaw. The ZBA found that three of the eight specific special permit criteria under the bylaw had been met, but that five had not been satisfied. The first decision cited the Town Board of Health’s (BOH) lack of support for the project as a factor in finding that one of the criteria had not been satisfied. Facts ¶¶ 20-21, Exhs. B, E.

14. Walsh Brothers appealed the first decision to this court. Pursuant to an agreement between Walsh Brothers and the ZBA, the appeal was remanded to the ZBA in order to obtain a peer review of the project. Facts ¶¶ 22-23.

15. The ZBA opened the public hearing on the remand on May 5, 2021, where it was agreed that the ZBA and Walsh Brothers would procure the assistance of an outside independent peer reviewer for Walsh Brothers’ application, GZA GeoEnvironmental (GZA). Facts ¶ 23, Exh. I.

16. GZA reviewed the project and issued a written report to the ZBA dated July 15, 2021 (GZA report). Facts ¶ 24, Exh. F.

17. Walsh Brothers’ engineer, GLM Engineering Consultants, Inc. (GLM), replied to the GZA report in a report dated December 16, 2021 (GLM report). Facts ¶ 26, Exh. G.

18. The GZA report stated that the property “is fully encompassed within the 100-year floodplain as published in the latest Flood Insurance Rate Map (FIRM) by FEMA (effective date July 17, 2012).” The GLM report noted that a 7,010 square-foot portion of the property is not within the 100-year floodplain. Facts Exhs. F, G.

19. Section 11.3.B.2 of the bylaw requires that all new construction is “prohibited unless certification by a registered professional engineer is provided by the applicant demonstrating that compensatory storage is provided for the one hundred (100) year flood.” The GZA report’s first conclusion was that the “compensatory storage calculation fulfills the requirement in” § 11.3.B.2. The report went on to state:

However, in GZA’s opinion, reliance solely upon the compensatory storage is an oversimplified mitigation technique given the [property’s] extremely sensitive location immediately north of Clarks Pond, in close proximity to Spring Brook, as well as the property being fully within the 100-year floodplain. The compensatory volume technique is static and does not properly address the potential changes in actual flow dynamics at and near the brook as a result of encroachment of the [property’s] flood overbank areas due to filling and other land disturbances. Potential changes in flood flow conveyance, due to the proposed filling, may alter flow velocities resulting in increases in water surface elevations. The proposed construction seems to be constricting the flow area downstream of the Stone Street culverts so that depths may increase at the [property] and vicinity. This may exacerbate flooding on and off the [property] as well as alter the tailwater characteristics at the downstream end of the dam’s outlet culverts at Stone Street. At a minimum, GZA recommends that [Walsh Brothers] commission the performance of a detailed backwater computer simulation to estimate the 100-year water surface profile under both pre- and post-development conditions. The analysis, using HEC-RAS or other comparable hydraulic program, should be done from a point downstream of the [property] and up through the Stone Street culverts up to Clarks Pond.

Bylaw § 11.3.B.2; Facts Exh. F.

20. In response, the GLM report noted that Walsh Brothers’ proposed house “is located primarily” within the portion of the property that is not within the 100-year floodplain and that “the grading as shown will continue to convey surface flows around the proposed dwelling.” Facts Exh. G.

21. In its second conclusion, GZA noted the ZBA's findings in the first decision, and then stated:

Regardless of the proposed filling to raise the finished ground floor above the base flood level, GZA's current opinion based on information provided to us and our engineering experience with similar projects is that the dwelling residence would likely remain at risk during base flood conditions, as the floodplain will otherwise encircle the dwelling, which could be subject to flowing water when potential overtopping of the road from the Pond occurs.

Facts Exh. F.

22. In response, the GLM report stated:

The proposed project provides channelized flow along the northerly property boundary where the street drainage from Stone Street is directed to the property. As stated above the proposed dwelling and related grading have been designed to utilize the existing Zone X areas and provide grading with compensation that will render the dwelling outside the Zone AE, Special Flood Hazard area. In the event the flood waters were to breach the roadway/dam the area adjacent to the proposed dwelling will be above the flood elevations and the grading conveys surface flow to the down gradient area.

Facts Exh. G.

23. In its third conclusion, GZA stated, in relevant part:

It should also be noted that the property's location immediately downstream from a regulated dam also has potential consequences for the dam's owner and possibly the Town (in the event of dam failure). A dwelling will most likely be within the inundation area of a dam breach. This could trigger reclassification of the dam to Significant or perhaps High Hazard, where dam failure may or would likely cause loss of life, respectively.

Facts Exh. F.

24. In response, the GLM report stated:

As stated above the proposed dwelling will not be within the Zone AE, 100 year floodplain. The existing dam is classified as "Low Hazard Potential (Class III). Dams located where failure may cause minimal property damage to others. Loss of life is not expected." Future development down gradient of a dam will not result in exacerbating the overtopping potential of the dam. In our opinion it would require that the flood storage capacity and/or additional flood waters are introduced up gradient of the dam to result in exacerbating the overtopping potential of the dam.

Facts Exh. G.

25. In its fourth and final conclusion, GZA stated:

Additional hydrologic and hydraulic engineering information should be provided related to the design of the Sediment Basin. Specifically, an inflow/outflow storage routing computation should be provided that quantifies the contributory rate of runoff to the basin emanating from the roadway and from the [property]. How accumulated sediment will be removed and other maintenance/performance of the basin under the 100-year flood should be included.

Facts Exh. F.

26. In response, the GLM report stated:

The proposed sediment basin was provided at the request of town officials through the conservation approval process. The location and size of the basin was reviewed by the Walpole Town Engineer and [ConCom] and subsequently approved as shown on the site plan.

Facts Exh. G.

27. At the July 21, 2021, public hearing, GZA presented its findings. Walsh Brothers was invited to undertake the additional study recommended in the GZA report, but declined.

Facts Exh. I.

28. On July 28, 2021, the ZBA voted 5-0 to deny the flood plain special permit. The ZBA issued a decision, filed with the Town Clerk on August 2, 2021 (final decision). The ZBA relied on the GZA report in the final decision. As the GLM report was not prepared until December 2021, the ZBA did not refer to or rely on it. Facts ¶ 27, Exhs. H, I.

29. In the final decision, the ZBA found that “the proposed single-family dwelling within the [flood plain overlay district] was not in harmony with the purpose and intent of the [b]ylaw.” The ZBA quoted § 11.1 and found that

the proposed project did not adequately show how it would protect adjacent and downstream properties from the hazards of seasonal or periodic flooding. While compensatory storage was provided as necessary in Section 11.3.B.2, it cannot be the sole determining factor in granting of this Special Permit. Given the [property’s] proximity to the floodplain, Spring Brook, and being immediately downstream from the dam at Clark’s Pond; the potential risk of public health, safety, and general welfare

outweigh the benefits of this project. The Board finds that [Walsh Brothers] did not adequately meet the requirements for the granting of the requested Special Permit.

Facts Exh. I.

30. The ZBA made further findings in the final decision. These findings follow the general special permit criteria laid out in §§ 2.2.A and 2.2.B.1 of the bylaw. The ZBA applied the provision of § 2.2.A that provides that special permits may be granted “only for uses which are in harmony with the purposes and intent of this [b]ylaw and which shall be subject to any general or specific rules prescribed herein and to any appropriate conditions, safeguards, and limitations on time and use.” The ZBA referred to § 11.1 of the bylaw which sets out the purposes of the flood plain overlay district, and then found

that the proposed project, including the proposed alterations to the flood plain, did not protect the public health, safety and general welfare from the hazards of seasonal or periodic flooding to the rear of and downstream of the property. The findings from [GZA] also highlight the potential risk of this sort of development within such an environmentally sensitive location.

Bylaw § 2.2.A; Facts Exh. I.

31. The ZBA then made findings on the specific criteria set forth in § 2.2.B.1. The ZBA found that the project satisfied criteria (b), (c), and (d). With respect to criteria (e), (f), and (g), the ZBA found that the project met these criteria in part, but that it could not determine and rule out things like whether the proposal would “pose danger to the future inhabitants of the premises, immediate neighborhood of the premises, and downstream properties from the location of the premises” because the “proposal did not properly address the potential changes to the flood flow conveyance from the proposed filling which may result in an increase in water surface elevations and exacerbate flooding on and off the site;” whether it would cause “nuisance, or serious hazards as to adversely affect the immediate neighborhood;” and whether the proposal would “adversely impact the character of the immediate neighborhood due to the possibility of

flooding on the property itself, the abutting properties, properties downstream from the adjacent Spring Brook, and Stone Street itself.” Therefore, the ZBA found, these conditions had not been satisfied. Facts Exh. I; Bylaw § 2.2.B.1.

32. With respect to criterion (a), the ZBA found:

The specific criteria for the grant of the requested special permit are set forth in [bylaw § 11.3.B]. This section provides that the Board *may* grant a special permit if such criteria are satisfied. The Board, as noted above, found that the proposed single-family dwelling and associated filling and excavation within the [flood plain overlay district] was not adequately protective of the public health, safety and general welfare—particularly with respect to properties to the rear and downstream of the property.

Facts Exh. I.

33. Criterion (h) requires that the project “shall not be incompatible with the purpose of the [bylaw] or the purpose of the zoning district in which the [property] is located.” With respect to criterion (h), the ZBA found:

Due to a lack of information regarding the potential impacts to the flood control characteristics of the [property] from filling and construction and those impacts downstream from the [property] and surrounding area, vulnerability of the [property] due to being immediately downstream from the dam at Clark’s pond, and location within the 100-year floodplain, the Board has determined that the proposed project was not compatible with the purpose of the [bylaw] or the purpose of the [flood plain overlay district] in which the [property] is located.

Bylaw § 2.2.B.1.h; Facts Exh. I.

34. The final decision is the subject of this appeal under G.L. c. 40A, § 17. Facts ¶ 27, Exh. I.

Discussion

With the assent of the parties, this case was presented as a case-stated, with the court allowed to draw appropriate factual inferences from the available evidence and then make appropriate rulings of law. See *W. Mass. Theatres, Inc. v. Liberty Mut. Ins. Co.*, 354 Mass. 655, 657 (1968); *Town of Ware v. Town of Hardwick*, 67 Mass. App. Ct. 325, 326 (2006). A case-

stated arises when the parties agree on all the “material ultimate facts, on which the rights of the parties are to be determined by the law.” *Pequod Realty Corp. v. Jeffries*, 314 Mass. 713, 715 (1943); see also *Frati v. Jannini*, 226 Mass. 430, 431 (1917). A case-stated presents all pertinent facts from which the judge might draw inferences. *Reilly v. Local 589, Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 568 (1986). Once the parties have submitted a case stated, it is up to the judge to apply the law to the facts stated. *Caissie v. City of Cambridge*, 317 Mass. 346, 347 (1944). Decisions, therefore, are made upon the stated facts, all inferences warranted by the facts, and the applicable law as applied to the stated facts and inferences. See *Godfrey v. Mutual Fin. Corp.*, 242 Mass. 197, 199 (1922); see also *Town of Ware*, 67 Mass. App. Ct. at 326 (quoting Nolan & Henry, Civil Practice § 33.7 (3d ed. 2004) (“any court before which the case [or a case-stated] may come, either in the first instance or upon review, is at liberty to draw from the facts and documents stated in the case any inferences of fact which might have been drawn therefrom at a trial, unless the parties expressly agree that no inferences shall be drawn”).

This is an appeal of the final decision pursuant to G.L. c. 40A, § 17. Under the prevailing standard of review under § 17, the ZBA’s decision cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary. *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). My review of the final decision involves a combination of de novo and deferential analyses. Fact finding is conducted de novo; no evidentiary weight is given to the facts the ZBA relied upon to reach its decisions. *Wendy’s Old Fashioned Hamburgers of New York, Inc. v. Board of Appeals of Billerica*, 454 Mass. 372, 381 (2009). Here, however, my de novo fact finding will look at what was before the ZBA, because the evidence is before me on a case stated and I must rely on what the parties have submitted as the facts and exhibits—in particular, the evidence of the history of the property, the

various permits and communications with the ZBA, the GZA report, and the final decision. I will also look to the GLM report and the view. A board is entitled to deny a special permit “even ‘if the facts found by the court would support its issuance,’” but the denial may be overturned if I find that no rational view of the facts supports the board’s conclusion. *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 475 (2012), quoting *Wendy’s*, 454 Mass. at 383. I review legal conclusions within the authority of the ZBA with deference; I will only disturb the final decision if I find it is based on a legally untenable ground, or based on an unreasonable, whimsical, capricious, or arbitrary exercise of the ZBA’s judgment. *Wendy’s*, 454 Mass. at 381–382. I accord deference to the ZBA’s reasonable interpretation of the bylaw, but an incorrect interpretation of the bylaw is not entitled to deference. *Shirley Wayside Ltd. Partnership*, 461 Mass. at 475.

With this standard, I look to the final decision and Walsh Brothers’ arguments on why the final decision should be annulled. Several of these arguments are easily addressed. Walsh Brothers refers to the first decision at times in its brief, but that decision is not relevant here—the relevant decision is the final decision. Walsh Brothers critiques the ZBA for relying on the GZA report on the grounds that (a) the GZA report analyzed the wrong dam and (b) the GZA report and the ZBA ignored the history of flooding in the area in favor of an engineering analysis. GZA did analyze the correct dam, and it was within the ZBA’s reasonable discretion to rely on the GZA report rather than what happened during a hurricane in 1955, especially given that the dam was constructed in 1981. Walsh Brothers points to the letter from the Town Engineer and the Order of Conditions from the ConCom as evidence that the ZBA erred in relying on the GZA report, Facts Exhs. C and D, but neither of these explicitly contradicts the GZA report. Moreover, that they both refer to the drainage swale and the sediment basin does not mean that

those should not have been considered by the ZBA. The Order of Conditions issued by the ConCom concerns compliance with the Town's wetlands protection bylaw. The bylaw's flood plain overlay district requirements are separate, and the board was entitled to apply the bylaw criteria without being bound by the Order of Conditions.

The other arguments raised by Walsh Brothers require deeper analysis. I begin with the standard that the ZBA applied in the final decision. As discussed, Walsh Brothers proposes to build a single-family dwelling on the property. The property lies within the flood plain overlay district, and was therefore required to obtain a flood plain special permit. The criteria for a flood plain special permit under the flood plain overlay district provision are set forth in § 11.3.B.

In the final decision, the ZBA did not expressly apply the flood plain special permit standards. Rather, it applied the criteria for a special permit generally that are found in § 2.2.B of the bylaw. Facts Exh. I. According to the final decision, the property lies in the RB district. *Id.* This is a single-family zone in which single-family uses are allowed as of right. Bylaw §§ 5-A.1.A, 5-B.1. Because the project is for a use allowed as of right, it did not need a general special permit. A "use allowed as of right cannot be made subject to the grant of a special permit." *Prudential Ins. Co. of Am. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278, 281 (1986). Here, the special permit requirement arises from an overlay district. Overlay districts are a valid zoning mechanism. Overlay districts do not amend the underlying zoning but rather supplement the underlying zoning regulations, subjecting property to two sets of zoning regulations: the underlying and the overlay zoning requirements. *KCI Mgmt., Inc. v. Board of Appeals of Boston*, 54 Mass. App. Ct. 254, 259 (2002). The question is how the regulations of the flood plain overlay district interact with the as of right residential use of the underlying zoning district.

This is the precise question addressed in *KCI Management*. In that case, the plaintiff wished to construct twenty-three single-family homes in a section of Hyde Park where that use was allowed as of right. *Id.* at 255, 258. A part of the property was also within the Greenbelt Protection Overlay District (GPOD). The GPOD required a conditional use permit (the equivalent of a special permit under the Boston Zoning Code) for the plaintiff’s development. *Id.* at 255. The plaintiff’s building permit application was denied, and on appeal, the Board of Appeal upheld the building permit denial and denied the conditional use permit. The Superior Court reversed the Board of Appeal, and the matter was brought to the Appeals Court. *Id.* at 255–257.

Given that the use was allowed as of right in the underlying zoning district and required a conditional use permit under the GPOD, the Appeals Court saw its task as to “look to the entire GPOD regulatory scheme to determine whether apparently conflicting provisions may be harmonized or whether . . . the provisions incorporating conditional use procedures must be invalidated.” *Id.* at 259. Reviewing the conditional use permit procedures and requirements incorporated into the GPOD, the Appeals Court focused on the GPOD’s requirement that the project be subject to site plan review. *Id.* at 261–263. The court held that a regulatory regime subjecting the as-of-right use to site plan review was permissible because site plan review would “regulate the use but . . . not prohibit it.” *Id.* at 263. The GPOD “warrant[ed] no more than the imposition of reasonable conditions in connection with the approval of a site plan.” *Id.*, quoting *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 375 Mass. 25, 31 (1970).

Applying *KCI Management*, this court looks to whether the as of right use of the project can be harmonized with the special permit requirement of the flood plain overlay district. The floodplain overlay district serves important goals: “to protect the public health, safety, and

general welfare from the hazards of seasonal or periodic flooding of land, to protect human life and property, to preserve the natural flood control characteristics, and the flood storage capacity of the flood plain, and to preserve and maintain the ground water table recharge areas within the flood plain.” Bylaw § 11.1. It applies even to as-of-right uses within the overlay district that risk increasing flood risks, including the project. The project was therefore required to obtain a flood plain special permit under the floodplain overlay district. But the ZBA did not expressly the requirements for a flood plain special permit set forth in bylaw § 11.3.B. Rather, it applied the general requirements for a special permit under bylaw § 2.2.B.1 to the amended application. Doing so was exactly what is not permitted: subjecting an as-of-right use to a discretionary permit. *Prudential Ins. Co. of Am.*, 23 Mass. App. Ct. at 281. The ZBA was entitled only to apply the five conditions or limitations of § 11.3.B, and to deny the special permit only for a failure to meet the five conditions.

The ZBA’s application of the general special permit requirements would be sufficient reason to annul the final decision and remand the matter, except for one consideration. In the final decision, the ZBA does seem to have incorporated some discussion of the flood plain overlay district conditions in its application of the general special permit requirements. The ZBA found that the project complied with condition (1), and referred to the GZA report’s statement that the project complied with conditions (2) and (3). Facts Exhs. F, I. The final decision did not discuss conditions (4) or (5). While the final decision referred to these conditions, the ZBA did not base its denial of the flood plain special permit on a failure to satisfy the floodplain overlay district conditions. Rather, in addition to applying the general special permit conditions, the ZBA found “that the proposed single-family dwelling within the Flood Plain Protection Overlay District was not in harmony with the purpose and intent of” the flood plain overlay district

bylaw. Facts Exh. I. The ZBA quoted the purposes of the flood plain overlay district and “found that the proposed project, including the proposed alterations to the flood plain, did not protect the public health, safety and general welfare from the hazards of seasonal or periodic flooding to the rear of and downstream of the property.” *Id.* The ZBA denied the flood plain special permit on this basis.

In other words, in the final decision the ZBA denied the flood plain special permit not on a failure to satisfy the conditions of the flood plain overlay district set forth in § 11.3.B of the bylaw, but rather on a failure to meet the purposes of the district as set forth in § 11.1. This was in error. While the ZBA in general has broad discretion to deny a special permit, *Shirley Wayside Ltd. Partnership*, 461 Mass. at 475, *KCI Management* teaches that this discretion is tempered where an overlay district imposes a special permit requirement on an as-of-right use. In deciding an application for an overlay special permit like this, the ZBA could not rely on the general purposes to deny an as-of-right use. Rather, given its more limited scope of discretion as set forth in *KCI Management*, the ZBA was obligated to grant or deny the flood plain special permit based only on whether the project satisfied the specific criteria for the flood plain special permit set forth in § 11.3.B.

Because the ZBA decided Walsh Brothers’ special permit application on erroneous criteria, the final decision was based on a legally untenable ground. *Wendy’s*, 454 Mass. at 381–382. The final decision will be annulled and the matter remanded to the ZBA. On remand, the ZBA shall evaluate the project solely under the criteria of § 11.3.B of the bylaw. In doing so, the ZBA should consider with the proposed house for the project is really within the 100 year floodplain. The ZBA must also bear in mind that flood plain special permit condition (5) does not constitute a basis for denial of the application. Rather, it is triggered only when the ZBA

issues the special permit, and allows the ZBA to “specify such additional requirements and conditions it finds necessary to protect the health, safety, and welfare of the public and the occupants of the proposed use.” Bylaw § 11.3.B.(5).

Conclusion

For the foregoing reasons, judgment shall enter declaring that the final decision is annulled, and the matter is remanded to the ZBA for further proceedings consistent with this decision. This decision and the ensuing judgment are final and appealable.

Judgment accordingly.

/s/ Robert B. Foster
Robert B. Foster
Justice

Dated: January 9, 2024