



NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

PETER HUIE & another [FN1] vs. CONSERVATION COMMISSION OF SCITUATE &  
another. [FN2]

10-P-1887

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiffs appeal from a judgment dismissing their complaint in the nature of certiorari seeking review of a decision of the conservation commission of Scituate. We affirm the judgment of dismissal, albeit on grounds different from those relied on by the Superior Court judge. Because the written decision of the commission issued after the expiration of the twenty-one day period mandated by the Wetlands Protection Act (Act) and the town by-law, the decision is without effect, and the Department of Environmental Protection's (DEP) superseding determination controls. [FN3] See *Oyster Creek Preservation, Inc. v. Conservation Commn. of Harwich*, 449 Mass. 859, 860 (2007).

*Background.* On July 6, 2009, George Smith filed a request for a determination of applicability with the commission. On July 27, 2009, the commission voted three to two in favor of a positive determination of applicability. On August 3, the commission mailed to Smith its written determination, dated July 28, 2009. [FN4]

*Discussion.* General Laws c. 131, § 40, third par., as amended through St. 1975, c. 363, § 1, provides that '[w]ithin twenty-one days of the receipt by a conservation commission of a written request made by any person and sent by certified mail, said commission shall make a written determination as to whether this section is applicable to any land or work thereon.' Because the local by-law does not specify when the written determination called for by the statute is deemed to be made, the regulations set forth by the DEP govern. See by-law § 30770(3)(a) (by-law incorporates DEP regulations unless stated otherwise). According to those regulations, the date of the written determination is determined by 'the date an [o]rder is mailed, as evidenced by a postmark.' *Oyster Creek Preservation, Inc. v. Conservation Commn. of Harwich*, 449 Mass. at 864, citing 310 Code Mass. Regs. § 10.04 (1997). Here, the commission received Smith's written request for a determination on July 6, 2009, and, as evidenced by its postmark, the commission's written determination was not issued until August 3, 2009. Accordingly, the written determination of applicability, which issued more than twenty-one days after Smith's request for a determination, was untimely and without effect. See *id.* at 865 ('any late-issued decision of the commission is without effect,' and superseding determination of applicability of the DEP controls).

A petition for certiorari review of the commission's action does not lie because the commission's action is a nullity. Rather, as occurred in this case, anyone aggrieved by the commission's failure to make a written determination of applicability was entitled to appeal to the DEP for a superseding determination as to which any further review is pursuant to G. L. c. 30A, § 14. See *Oyster Creek*

*Preservation, Inc. v. Conservation Commn. of Harwich, supra* at 865; G. L. c. 131, § 40, nineteenth par.

*Judgment affirmed.*

By the Court (Rapoza, C.J., Grasso & Berry, JJ.),

Entered: June 27, 2011.

FN1. Anne Marie Huie.

FN2. George Smith.

FN3. The DEP determination has not been reproduced in the record on appeal.

The plaintiffs do not contest that the area is a coastal dune within the meaning of the Act and the local by-law, and take issue only with the language in the commission's written determination that there has been an '[a]lleged alteration of a coastal dune.' Our determination that the commission's written determination is a nullity renders this concern moot.

FN4. The Superior Court judge dismissed the plaintiffs' complaint, filed on September 28, 2009, because it was filed more than sixty days after the July 27, 2009, hearing at which the vote was taken.

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