

Term 

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

WILLIAM **←CARNEY→** vs. TOWN OF FRAMINGHAM.

10-P-1676

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

William Carney appeals from a judgment dismissing his petition for certiorari pursuant to G. L. c. 249, § 4 and granting summary judgment to the Town of Framingham on its counterclaim. On appeal, Carney alleges that the Superior Court judge erred in dismissing his action as untimely and that the enforcement orders were unenforceable in any event because he was not properly served in his capacity as trustee. We affirm.

1. *Background.* Carney is a resident of property located at 32 Parker Road in Framingham and a trustee of the realty trust that is record owner of the property. [FN1] In 2008, Carney's neighbor complained to the Framingham Conservation Commission that Carney had been illegally cutting down trees in a wetland area. A notice of violation issued. After hearing on April 2, 2008, the Commission found that Carney had violated certain provisions of the Wetlands Protection Act and the local wetlands bylaw and voted to issue an enforcement order that, *inter alia*, required Carney to submit a restoration plan by April 15, 2008, to remove all brush piles and branches by May 1, 2008, and to complete the restoration plan by May 30, 2008. The enforcement order required the restoration plan to include the planting of at least twenty-eight saplings and noted that the area would be monitored for four growing seasons. R. A. 17.

On April 3, 2008, the Commission followed up its vote with a written enforcement order. [FN2] R.A. 18-21. Carney filed a restoration plan on May 16, 2008, two days beyond the extended date for doing so. R.A. 63. On June 4, 2008, the Commission reviewed Carney's plan at a hearing and voted to amend its April 2,

2008, enforcement order. The amended order (1) extended the previous deadline for removing brush and debris from May 1 to June 30, 2008, (2) extended the deadline for completion of the restoration plan from May 30 to September 30, 2008, (3) reduced the monitoring period at the site from four growing seasons to two growing seasons, (4) reduced the number of saplings to be planted from twenty-eight saplings two inches or greater in diameter with a minimum height of six feet to a number and size proposed by Carney in his restoration plan (nineteen saplings of approximately three inches in diameter with no height minimum), and (5) conditionally approved Carney's restoration plan. [FN3] R.A. 68-69. On June 6, 2008, the Commission followed up its vote with a written amended enforcement order. R.A.71-74.

On August 5, 2008, Carney filed a complaint in the nature of certiorari pursuant to G. L. c. 249, § 4 in the Superior Court. The Town moved to dismiss Carney's complaint as untimely and filed a counterclaim seeking an order requiring Carney's compliance with the enforcement order. On summary judgment, a judge of the Superior Court dismissed Carney's complaint as untimely and entered judgment in favor of the Town on its counterclaim.

2. *Discussion.* a. *Timeliness of the certiorari action.* General Laws c. 249, § 4 provides that a petition for certiorari 'shall be commenced within sixty days next after the proceeding complained of.' 'The term 'proceeding complained of' refers to 'the last administrative action' taken by an agency.' *Committee for Pub. Counsel Servs. v. Lookner*, 47 Mass. App. Ct. 833, 835 (1999) (internal citation omitted). The last administrative action occurs when the administrative agency makes a final decision on the issue at hand, not when it later memorializes that determination in written form. See *Pidge v. Superintendent, Mass. Correctional Inst., Cedar Junction*, 32 Mass. App. Ct. 14, 18 (1992); *Balcam v. Town of Hingham*, 41 Mass. App. Ct. 260, 263 (1996); *Committee for Pub. Counsel Servs. v. Lookner, supra* at 836. Whether the last agency action is measured from the April 2, 2008, hearing at which the original enforcement order was issued or from the June 4, 2008, hearing at which the amended order was issued, the judge did not err in concluding that Carney's complaint for certiorari, filed on August 5, 2008, was filed more than sixty days from the 'last proceeding complained of.' [FN4] See *Pidge v. Superintendent, Mass. Correctional Inst., Cedar Junction, supra* (failure to file within sixty days a serious misstep requiring dismissal). Because he failed to file a complaint for certiorari timely, there is also no merit to Carney's contention that his due process right to an appeal was denied.

b. *Propriety of service.* The judge did not err in concluding that there was no error in serving the notice of a violation on Carney individually rather than as trustee. The governing statute speaks to 'any person' who violates its provisions and does not exclude the possibility that the person in violation might not be the property owner. See G. L. c. 131, § 40, para. 30. As Carney is the one charged with violating the statute, he was properly served in his individual capacity, rather than as the trustee of the trust that owns the property.

Judgments affirmed.

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

Entered: July 11, 2011.

FN1. Parker Realty Trust.

FN2. The written order specified that the twenty-eight saplings to be planted 'shall have a diameter of 2 inches or greater and be at least 6 feet tall.' R.A. 20.

FN3. The Commission also imposed a fine of \$10,200 under the local by-law based on Carney's failure to remove dumped brush, leaves, and cut branches by May 1, 2008, with the understanding that it may waive the fine upon Carney's successful compliance with the revised deadline in its amended enforcement order. R. A. 69, 76.

FN4. Because Carney's complaint is untimely however measured, we need not address the extent, if any, to which the amended enforcement order amounted to such a substantial revision of the original enforcement order as to commence running of the certiorari period anew. Carney cannot resuscitate his already-lapsed challenge to the original enforcement order without a substantial change in the terms of that order. See *Malone v. Civil Serv. Commn.*, 38 Mass. App. Ct. 147, 151 (1995) (motion for reconsideration of administrative decision does not toll statute of limitations for filing of certiorari petition when motion is denied and no change is made to original decision).

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