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Commonwealth of Massachusetts
Superior Court

CA 05-2145

FRIENDS OF THE BLUE HILLS, INC. et al.

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION et al.

MEMORANDUM OF DECISION AND ORDER ON
MOTION FOR PRELIMINARY INJUNCTION

A. Introduction

On the plaintiffs' motion for a preliminary injunction the court has considered the administrative record materials, the affidavits and the memoranda submitted by counsel. The motion for a preliminary injunction is denied.

To succeed in an action for a preliminary injunction, a plaintiff must show: "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219, 741 N.E.2d 37 (2001).

When a "party seeks to enjoin governmental action, the judge must also consider whether the grant of an injunction would adversely affect the public interest." *Student No. 9 v. Board of Education*, 440 Mass. 752, 762 (2004); see *Landry v. Attorney General.*, 429 Mass. 336, 343 (1999), cert. denied, 528 U.S. 1073 (2000). The significant remedy of a preliminary injunction

should not be granted unless the plaintiffs have “made a clear showing of entitlement thereto.”

Student No. 9, supra.

In cases where a citizen acting as a private attorney general demonstrates a violation of a statute or a declared policy of the Legislature irreparable harm is not required. *LeClair v. Norwell*, 430 Mass. 328, 331 (1999). If violation of a statute is shown, the court must consider “whether the public interest would support entering an injunction or, in the alternative, whether an injunction would adversely affect the public interests.” *Id.*, 430 Mass. at 337.

B. Likelihood of Success

The plaintiffs have not demonstrated a likelihood of success on any claim that would entitle them to a preliminary injunction.

The damage to the environment from the construction of the underground water storage facility has not been shown to “constitute a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.” G.L. c. 214, § 7A. The plaintiff’s have not shown that the Commissioner’s Final Decision of September 20, 2005, is based on a violation of a statute, ordinance, by-law or regulation.

The plaintiffs also seek judicial review under the Administrative Procedure Act. In a Chapter 30A review, the court must give “due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G.L. c. 30A, § 14; *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 233 (1982). An administrative agency has considerable leeway in interpreting a statute it is charged with enforcing. *Student No. 9, supra.* The court may not substitute its own judgment for that of the

Commissioner on matters within the Commissioner's statutory responsibilities. *Massachusetts Oilheat Council v. Department of Public Utilities*, 418 Mass. 798, 805 (1994).

The plaintiffs have not shown under the judicial review standards of G.L. c. 30A, § 14 (7), that the agency action was "[i]n excess of the statutory authority or jurisdiction of the agency," "[b]ased upon an error of law" or "unlawful procedure," or "[u]nsupported by substantial evidence." The plaintiffs have not demonstrated that the agency action was arbitrary, capricious or an abuse of discretion. *Id.* Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6); *Fox Ridge Associates & Co. v. Board of Assessors of Marshfield*, 392 Mass. 652, 653 (1984). The evidence before the court meets this standard.

The Commissioner's Final Decision on the variance complies with the statutory requirements of the Wetlands Protection Act. G.L. c. 131, § 40. There is substantial evidence to support the Commissioner's findings that the variance is necessary to accommodate the overriding public interest in maintaining and supplementing the public water supply for Quincy and parts of Boston and Milton. Substantial evidence supports the conclusion that there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with the performance standards of the regulations. There is also substantial evidence supporting the Commissioner's findings that the MWRA has no space within or adjacent to the reservoir site for creating equivalent mitigation wetlands. The Commissioner is legally correct in the conclusion that the loss of wetlands at this site is attributable to new legal requirements for the protection of public water supplies.

There is no likelihood of success in the plaintiffs' argument that the Commissioner has abused his discretion or erred as a matter of law in not requiring the creation of mitigating wetlands at some other site.

The plaintiffs have not shown a violation of G.L. c. 30, § 61, the Massachusetts Environmental Policy Act. The materials do not demonstrate that the agencies involved have not used "all practicable means and measures to minimize damage to the environment." *Id.* The applicable statutes appear to have been "interpreted and administered so as to minimize and prevent damage to the environment." *Id.*

Similarly, the plaintiffs have not shown a failure by the Department of Environmental Protection to "impose such conditions as will contribute to the protection of the interests" described in the Wetlands Protection Act. G.L. c. 131, § 40, par. 18. The interests protected by the Wetlands Protection Act include the public interest "to protect the . . . public water supply." *Id.*

D. Appeal Period

G.L. c. 131, § 40, prohibits removal or alteration of a wetland without receiving and complying with an order of conditions and "provided all appeal periods have elapsed." There are several ways in which this provision may be interpreted. The plaintiffs contend that this provision prevents the MWRA from beginning work on the project until the completion of the entire judicial review process under G.L. c. 30A, § 14.

The court does not construe the reference to "appeal periods" in G.L. c. 131, § 40, as a prohibition on construction until a judgment has entered in a judicial review proceeding. Two

more reasonable interpretations are that “appeal periods” refers to either: (1) appeal periods within the administrative appeal process prior to any judicial review proceedings; or (2) the administrative appeal process plus the thirty day period in which an appellant may file a judicial review action in the Superior Court under G.L. c. 30A, § 14 (1).

In contrast with the plaintiffs’ interpretation, neither of the two alternative interpretations conflicts with the discretionary stay provision in G.L. c. 30A, § 14 (3) (“The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper”).

Under interpretation (2) above, the thirty day period for filing a judicial review appeal began to run upon “receipt of notice of agency denial of . . . [the plaintiffs’] petition for rehearing.” G.L. c. 30A, § 14 (1). According to the verified complaint, the Commissioner denied the Friends of the Blue Hills’ motion for reconsideration on November 10, 2005. It is unclear when the plaintiffs received notice of the denial of the motion for reconsideration.

Mr. Palmer’s affidavit states that on December 7, 2005, there were pumps draining the reservoir. The MWRA thus began the alteration project three days before the end of thirty days after the denial of the reconsideration motion and an unknown number of days before the Friends received notice of the denial.

The start of the draining before the end of the appeal period under interpretation (2) above does not warrant the issuance of a preliminary injunction to halt the project. The purpose of the no-work-in-appeal-periods provision is to permit an appealing party to complete the entire administrative appeal process first or to allow it the additional protection of preventing work

until it has had the opportunity to file a complaint for judicial review and to seek a preliminary injunction or a discretionary stay order under G.L. c. 30A, § 14 (3).

This purpose has now been fully served. The plaintiffs have fully briefed the issues and have been fully heard on their application for a preliminary injunction. Neither a preliminary injunction nor a discretionary stay is warranted on the facts of this case. An error in starting the draining several days early does not justify a preliminary injunction to stop the project until a final judgment enters at the conclusion of the entire judicial review proceeding.

E. Irreparable Harm and the Public Interest

Considering all the materials and arguments submitted, the court concludes that the requested preliminary injunction is likely to cause substantial harm the public interest. There is a substantial public interest in creating, without further unwarranted delays, a safe emergency public water supply. The record also supports a pressing public interest in maintaining and repairing the existing regular public water supply to a significantly large population of citizens in the metropolitan Boston area. Pre-Filed Testimony of Michael J. McBride, Deputy Chief Operating Officer of the MWRA.

The expedited “design-build” contract authorization for the Blue Hills and Spot Pond covered water storage projects was enacted by the General Court in 2002 as “an emergency law, necessary for the immediate preservation of the public convenience.” St. 2002, c. 324 . Quincy and parts of Boston and Milton remain without an emergency source of potable water that should be available in the event of a security threat to the water supply or an ordinary waterline break in a system that is badly in need of repairs and upgrading. Pre-Filed McBride Testimony.

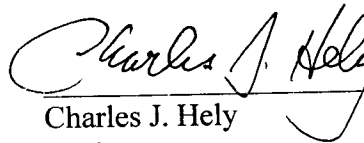
As stated earlier, the plaintiffs have not demonstrated a violation of the applicable statutes. The harms asserted by the plaintiffs if no *preliminary* injunction is granted have not been shown to be irreparable. Although this is not the plaintiffs' only harm argument, it should be noted that even if the plaintiffs are correct in their claim that off-site mitigating wetlands are required, such wetlands could be ordered as part of a final judgment without irreparable harm to the environment.

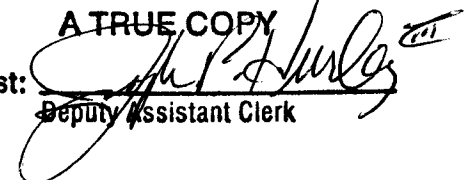
On the whole, based on the record, the specific harms asserted by the plaintiffs and the risk of those harms are substantially outweighed. They are outweighed by the likelihood that a preliminary injunction would cause substantial harm to overriding public interests, the public interests in creating and maintaining safe emergency and regular public water supplies in the Boston area.

F. Order

The plaintiffs' motion for a preliminary injunction is denied.

December 16, 2005


Charles J. Hely
Justice

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Attest: 
Deputy Assistant Clerk